

PRIMER ON Social Welfare Organizations

USING 501(c)(4) ORGANIZATIONS FOR GOOD



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ALLIANCE FOR JUSTICE (AFJ) is a national association of more than 100 organizations united by a commitment to a fair, just, and free America, where everyone has equal access to justice and can fully participate in our democracy. Learn more at www.AFJ.org.

For over 25 years, AFJ has promoted active engagement in the democratic process, by giving nonprofits and foundations the confidence to advocate effectively. Within AFJ, Bolder Advocacy helps foundations and their nonprofit grantees understand the complex rules governing advocacy and advance their mission. Bolder Advocacy offers resources, best practices, tools, coaching, and the Technical Assistance Hotline (866-NP-LOBBY). Bolder Advocacy also works to protect and expand the right of nonprofits and foundations to advocate. Learn more at www.bolderadvocacy.org.

THE ALLIANCE FOR JUSTICE ACTION CAMPAIGN (AFJAC) serves as the nation's leading resource on the legal framework for 501(c)(4) nonprofit advocacy efforts. AFJAC provides invaluable resources, training, and technical assistance to help nonprofit organizations and their donors advocate more efficiently and effectively.

Through the expertise of its knowledgeable team of attorneys, AFJAC contributes respected insight to policy debates on campaign finance, advocacy, and nonprofit tax law issues. AFJAC also promotes a national conversation about the importance of the courts with a goal of advancing core constitutional values, preserving human rights, securing unfettered access to the judicial system, and guaranteeing the even-handed administration of justice for all Americans.

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Introduction

There are more than 35 different types of nonprofit organizations in the United States that have been granted special status under the Internal Revenue Code. Their exemption from federal income taxes serves as an acknowledgment of the important role they play in American life and the enormous value that accrues to the nation from collective, coordinated action by individuals who share interests, values, and aspirations.

The different types of nonprofit organizations are often referred to by the section of the tax code that describes their roles, capabilities, fundraising rules, and limitations on policy and electoral activity.

The most common type of tax-exempt nonprofit organization is the 501(c)(3) group that is required to engage in charitable, religious, scientific, literary, or educational work. (c)(3)s pay no federal taxes on income, and contributions they receive may be tax-deductible by

the donor. The two basic types of (c)(3) groups are public charities (public foundations) and private foundations, each subject to somewhat different rules. Importantly, these groups are allowed to engage in a broad range of advocacy activities, although they are subject to limits on lobbying, which, in the case of public charities, are quite generous. At the same time, though, they are prohibited from engaging in any political activity on behalf of or in opposition to a candidate running for public office.

On the other hand, groups characterized as 501(c)(4)s operate under different rules permitting much more extensive policy and overtly political work, although unlike charities, donations to them are not tax-deductible. The law says eligible groups must be “operated exclusively for the promotion of social welfare.” Over time, the meaning of this term came to include nonprofits “operated primarily for the purpose of bringing about civic betterments and social

Recent 501(c)(4) Rulemaking

On May 10, 2013, Lois Lerner, then Director of Exempt Organizations for the Internal Revenue Service, took a planted question from the audience at a meeting of the American Bar Association. She revealed that an audit of IRS practices showed that since 2010 some nonprofit organizations applying for tax-exempt status had been singled out for scrutiny based on their names and apparent political orientation. The revelation set off a firestorm of controversy in the media, Congress, and particularly among conservative organizations (even though groups of all ideologies faced the same improper analyses). Lerner's statement focused an intense amount of attention on the IRS policies, but also on the broader issue of the legitimacy and behavior of the whole category of nonprofit organizations known as social welfare organizations, or 501(c)(4)s. At the end of 2013, the IRS proposed changes to the rules that govern (c)(4)s, which would have dramatically expanded the definition of what

would count as candidate-related spending and therefore be limited under the "primary purpose" standard. To the chagrin of many observers, including Alliance for Justice and Alliance for Justice Action Campaign, the IRS sought to include long-accepted non-partisan activities like get-out-the-vote drives and candidate scorecards, along with voter-registration work. The proposed rules also would have made it much more difficult for policy-oriented nonprofits to engage in issue advocacy during election seasons. Along with some other elements, the aggregate effect of the IRS approach was clearly designed to make the (c)(4) category largely inhospitable for electoral activity of any kind, even civic engagement efforts long the province of social welfare groups of all stripes. This blunderbuss approach proved extremely unpopular with those who believe the social welfare groups' traditional role in the political process is essential in our democratic system. The net effect of the IRS's proposed rules would have

been to significantly curtail the ability of traditional social welfare groups to operate, while not tackling issues of disclosure that have spurred many calls for reform. Although (c)(4)s must publicly disclose donors who give explicitly for political purposes, some refer to them as "dark money" groups since they do not need to disclose all donors.

The outcry over the IRS scheme was so overwhelming (there were over 147,000 mostly negative comments submitted), that by early 2014 the Service pulled the proposed regulations off the table. Yet, the controversy continued, with debate about whether (c)(4)s should be allowed to engage in partisan political activity and if so, how much, and Congress investigating whether the IRS acted for political purposes. Congress was so opposed to the IRS making any rules about (c)(4)s that it included a rider in the 2016 Omnibus Spending Bill, that prevents the IRS from spending any money in 2016 on the matter.

improvements.” More importantly, those groups—which are not required to reveal the identities of their donors—have long been permitted to take part in an unlimited amount of lobbying and political campaign activities as long as such activities are not the organization’s primary activity.

In spite of recent controversies about 501(c)(4)s, they remain a vital tool for nonprofits and foundations seeking to shape policy outcomes that benefit their members, constituencies, grantees, and society at large. This publication explores the special role they play within the nonprofit

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and philanthropic communities, and within the American political system, and has been written to dispel myths and encourage their thoughtful use within the democratic process.

How Are 501(c)(4)s Unique?

While the statutory framework requires 501(c)(4) groups to be “operated exclusively for the promotion of social welfare,” the IRS and the courts have historically permitted them to maintain their tax-exempt status so long as they are “primarily engaged in promoting in some way the common good and general welfare of the community.” Unlike their (c)(3) counterparts (and sometime partners) they are allowed to undertake a mixture of advocacy activities that includes work designed to influence the outcome of elections. Under the rules, they have the almost unlimited ability to use a variety of issue-based advocacy strategies to weigh in on important issues of the day, but with the option to enter the political arena in a limited way. It’s the combination of the two components—issue-based advocacy and ability to engage in the political process—that makes

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1. *Hearts & Minds: The Untold Story of How Philanthropy and the Civil Marriage Collaborative Helped America Embrace Marriage Equality*. Proteus Fund, 2015. <http://proteusfund.org/sites/default/files/upload/inline/29/files/heartsandmindsnov5.pdf>

Additionally, there are rules for private foundations that require them to exercise expenditure responsibility when making grants to 501(c)(4) groups. Often, this combination of private foundation restrictions and non-deductibility of contributions can make fundraising for a (c)(4) difficult in comparison to a (c)(3), creating conditions that encourage social welfare organization to stay mission-focused and build a passionate base of donors and supporters.

Since 501(c)(4)s cannot accept tax-deductible contributions, the Internal Revenue Code provides an advocacy incentive to these entities. Social welfare groups

may engage in unlimited lobbying (if relevant to its social welfare purpose) and participate in limited partisan political activity. The amount of political activity in which a social welfare organization can engage has been the subject of much debate.² Some nonprofit professionals and attorneys reason that a 501(c)(4) organization is entitled to dedicate up to 49% of its expenditures or activity to partisan political activity. Many organizations keep their expenditures for political activity under 40% of their total budgets out of an abundance of caution, although no definitive standard has ever been issued by the IRS.

2. In fact, the IRS had been [planning to issue](#) a new Notice of Proposed Rulemaking to define political activity and the standard for permissible activity. However, the Consolidated Appropriations Act of 2016 (passed by Congress on December 18, 2015) prohibits the IRS from using any funds to “issue, revise, or finalize any regulation, revenue ruling, or other guidance not limited to a particular taxpayer relating to the standard which is used to determine whether an organization is operated exclusively for the promotion of social welfare for purposes of section 501(c)(4) of the Internal Revenue Code of 1986.”

So What Can 501(c)(4)s Do?

5 01(c)(4)s interested in pursuing political options need to determine which of their activities constitute political activity—and therefore fall outside the primary social welfare purpose—so that they can calculate whether or not they will stay within the 49% threshold.

According to Section 527(e)(2) of the tax code, an activity is considered political if it is “influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office....” Such activities³ include:

- Endorsements of a candidate;
- Publication or distribution of statements in favor of, or in opposition to, a candidate;
- Direct financial contributions to a candidate, political party,

or PAC (other than a ballot measure PAC) including, but not limited to:

- Mailing, membership, or donor lists or other resources for fundraising;
- Provision of facilities or office space;
- Staff time;
- Polling results;
- Organizing volunteers for the campaign;
- Opposition research;
- Comparative ratings of candidates.
- Publicizing names of political candidates who support or oppose the organization's position on public issues;
- Membership communications expressly advocating the election or defeat of a candidate; and,

3. *The Connection: Strategies for Creating and Operating 501(c)(3)s, 501(c)(4)s and Political Organizations—Third Edition*. Alliance for Justice, 2012. Pag. 13. http://bolderadvocacy.org/wp-content/uploads/2012/10/The_Connection_paywall.pdf

- Payment of the administrative and fundraising costs of a political organization.

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in the 2008 election, Health Care for America Now (HCAN) could attempt to convince candidates, including then-Senator Barack Obama, to endorse a set of principles related to the health care coverage debate, and in 2014, the Latino Victory Project could support Latino candidates who were running for office.

Appendix A spells out what (c)(4)s can do in comparison to (c)(3) public charities. Notably, many of these activities, such as candidate endorsements and public statements favoring or opposing candidates, only became possible after the Supreme Court's *Citizens United* decision.⁴

4. In *Citizens United v. Federal Election Commission*, 558 U.S. __ (2010), the Supreme Court struck down restrictions on corporate and union spending for independent public communications that “expressly advocate” the election or defeat of clearly identified candidates. See *The Connection* for an in-depth discussion of the decision (pages 18–25).

What Types of 501(c)(4)s Are There?

There may be as many as 89,000 501(c)(4) organizations in this country, representing every conceivable ideology, including many groups with community service and social welfare purposes that have no policy or political component at all. Although most of the recent attention has focused on those that are politically oriented, it's important to understand that the (c)(4) category has a long and storied history of service to American communities and public discourse and includes an extraordinarily wide range of groups.

Those social welfare groups that do have specific policy-related missions have been able to use the flexible nature of their (c)(4) status to galvanize their membership around their issues and use the power of their collective memberships to hold elected officials accountable for their actions. These groups also support candidates that espouse the views of their

members and use political power to push individuals to the polls to vote for those candidates. Of course, not all policy-oriented (c)(4)s engage in partisan political activity. AARP, for example, does not endorse or oppose candidates. Under the banner of its Public Policy Institute, the group engages in issue advocacy, unlimited lobbying, and research on issues like social security and Medicare. AARP, like many social welfare groups, can use its large and powerful membership base to encourage legislators to back or oppose legislation that would impact its mission.

Through their extensive lobbying efforts, 501(c)(4) organizations have been critical to the passage of key legislation. For instance, the Innocence Protection Act was passed in 2004 due to a five-year education and lobbying campaign by The Justice Project, a 501(c)(4) organization. The law might not have been passed "if grant-makers had not been willing to

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fund effective advocates engaged directly in the legislative process.”⁵ As Frank Sharry, an immigration reform champion, has stated, “501(c)(4) money has the Midas touch. . . . You can’t win a legislative battle without straight-up advocacy dollars.”⁶

The unlimited lobbying capacity of social welfare organizations also makes them a very valuable vehicle for ballot measure campaigns and coalition leadership. Legislative and ballot measure campaigns, and other advocacy efforts at the federal, state, and local levels,

require broad collaboration among many organizations, utilizing the strengths of both 501(c)(3)s and 501(c)(4)s. A recent example of successful collaboration between 501(c)(3)s and 501(c)(4)s through a creative grant-making process can be found in the “Yes on Proposition 47” campaign in California. Vote Safe, a 501(c)(4) established by several advocates and funders (501(c)(4) and individual donors), formed Californians for Safe Neighborhoods and Schools to push the initiative forward. Californians for Safety and Justice, a 501(c)(3) primarily funded by private foundations, provided research, training, and education on the measure. Through this interplay of (c)(3) and (c)(4) groups, the campaign helped pass one of the most far-reaching sentencing reforms in history. In addition to this remarkable victory, 501(c)(3)s and 501(c)(4)s in California also built up a lasting coalition for future social justice campaigns.

5. *Investing in Change: Why Supporting Advocacy Makes Sense for Foundations*. Atlantic Philanthropies, 2008. Pag. 6. <http://www.atlanticphilanthropies.org/research-reports/atlantic-reportinvesting-change-why-supporting-advocacy-makes-sense-foundations>

6. *Id.* at Pag. 9.

Who Donates to 501(c)(4)s, and What About Donor Disclosure?

Social welfare organizations are not required to reveal their donors to the public. According to *The Case for Supporting Progressive 501(c)(4)s*,⁷ “although 501(c)(4)s are required to report to the IRS the names of donors who have given more than \$5,000 during the year, the rules permit organizations to redact the names of those contributing from the forms that are made available to the public. Donations given for the purpose of making an independent expenditure in support of or opposition to specific federal candidates must be reported to the Federal Election Commission. General support contributions from a donor to a 501(c)(4) are not reported on the forms filed with the FEC.”

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Significantly, the use of social welfare groups for electoral spending is weighted heavily toward conservative organizations, according to the [Center for Responsive Politics](#). In the 2014 election cycle (the most recent with full data), conservative groups spent \$124.9 million and liberal groups spent \$34.9 million on independent expenditures and electioneering

7. *The Case for Supporting Progressive 501(c)(4)s in the Post-Citizens United Era*. Alliance for Justice Action Campaign, 2012. <http://afjactioncampaign.org/wp-content/uploads/2015/02/The-Case-for-Supporting-Progressive-501c4s.pdf>

communications. Another \$13.4 million came from other groups or bipartisan organizations.

Ideology aside, organizations and funders have come to recognize that effective policy strategies usually require nonprofits to pursue some level of election activities, since elected officials who pass laws are most sensitive to messages that come from voters. For many nonprofits, this kind of work is not just about raising money to support friendly candidates, but also about encouraging Americans to turn out and vote for candidates who will support the issues about which they care most.

The reality is that the bulk of political activity by most social welfare organizations takes the form of get-out-the-vote efforts, candidate scorecards, voter registration work, and issue-related advertising. Most of these activities fall into a category that could be described as fostering civic engagement.

But more and more, social welfare organizations also are active during campaigns to ensure that the policies they care about are added to the mix of topics being debated. Even in circumstances where electoral victory is unlikely, there is intrinsic value in forcing candidates to react to issues that matter to the nonprofit's members and supporters. They see political work as a means to an end, the nature of which runs the gamut of every conceivable ideology and issue.

Additionally, in the present hyper-partisan climate there is a growing understanding that the basic decisions about policy are made, for all intents and purposes, in the election; once candidates become legislators or chief executives they rarely stray from ideological orthodoxies. For those groups with strong policy orientations, it's counterproductive to stay out of the electoral process.

Is There a Role for Foundations in the 501(c)(4) World?

The vast majority of funding raised by 501(c)(4)s comes not from the foundation world, but from individuals, membership dues, unions, fee-for-service, or other sources. For the most part, private and public foundations only make grants to 501(c)(3) public charities, but it is possible for a traditional foundation to make grants to a 501(c)(4), as long as the funds are not available for electoral uses and comply with certain limitations.

Public foundations, such as community foundations, may make grants to a 501(c)(4) for educational and lobbying activities—any activity in which the public foundation could engage itself. The grant funds cannot be used for supporting or opposing candidates. Also, unless the grant specifies otherwise, the grant will count against the public foundation's grassroots lobbying limit.

Private foundations may make grants to 501(c)(4) organizations

Private foundations may make grants to 501(c)(4) organizations (or other non-public charities) as long as the grant is for charitable purposes. Charitable purposes include any permissible 501(c)(3) public charity activity, except lobbying and voter registration.

(or other non-public charities) as long as the grant is for charitable purposes. Charitable purposes include any permissible 501(c)(3) public charity activity, except lobbying and voter registration. Although a private foundation can fund a 501(c)(3) organization for lobbying and voter registration activity, subject to specific rules, it is prohibited from funding a 501(c)(4) for these activities. The private foundation must follow very specific due diligence, oversight, and reporting requirements (called

expenditure responsibility) for a grant to a non-public charity.

Though foundations are unable to support significant elements of 501(c)(4) operations, it's worth remembering that philanthropic organizations can—and should—support other forms of advocacy, particularly through their (c)(3) grantees.

Sometimes charitable groups feel compelled to form companion social welfare groups because of the restrictive language that often appears in private foundation grants and the overall reluctance of foundations to encourage (c)(3) groups to engage in advocacy. In order to counter this trend, foundations are encouraged to avoid using overly restrictive language in grant agreements; provide flexible general-support grants and multi-year grants; and encourage dynamic advocacy in all its forms, including legitimate (c)(3) activity such as lobbying. When

a foundation focuses on building the organizational structure and advocacy capacity of its grantees, it allows the grantee to engage fully in the kind of work essential to advancing the public policy goals that serve their constituents and communities. In many cases, it is more productive to help a charitable group reach its full limits as an effective advocate before starting a conversation about adding (c)(4) capability, which is a complex and burdensome task.

In addition, not all grantmakers are traditional private foundations. For instance, Open Society Policy Center and Champion Advocacy Fund are themselves 501(c)(4)s that make grants. Others, like Atlantic Philanthropies, by being incorporated outside the United States, are not subject to the same rules as entities created in the US. And some funders are using alternative models, such as LLCs or for-profits, that allow greater flexibility in choosing grant recipients.

Conclusion

Social welfare organizations engage in political work as both a means and an end to policy change. This work enables the engagement, organization, and mobilization of constituencies and communities that might not otherwise have a voice in policymaking or the political process. And it provides a potent mechanism to inform and influence the outcomes of policy debates that might not otherwise occur. Joining an organization to express support for a legislative agenda, comparing candidate views on key issues, sharing the impact of a ballot initiative, or highlighting positions or policies an elected official has endorsed are some of the many instances of how this work can take shape.

While some observers may characterize this kind of civic engagement in a negative light, it's also an example of democracy in action.

Organizations need to pursue multiple strategies to achieve their

501(c)(4) organizations are key to effective campaigns and movements. Time and time again, the flexibility of 501(c)(4)s leads to innovative strategies that creates tangible results.

goals. Past experience demonstrates that coordinated efforts of (c)(3)s and (c)(4)s bring a variety of strategies and tactics to any given campaign. In this hyper-partisan era, a 501(c)(4) provides “maximum cover” to nonprofit advocates and funders seeking to achieve transformative policy change. Advocates are able to speak forcefully about issues of importance and funders are able to support robust advocacy. 501(c)(4) organizations are key to effective campaigns and movements. Time and time again, the flexibility of 501(c)(4)s leads to innovative strategies that create tangible results.

Appendix A

This checklist provides examples of the kinds of advocacy activities that 501(c)(3) public charities and 501(c)(4) social welfare organizations are permitted to do under federal tax law. Under federal tax law, partisan political activity cannot be the primary purpose of a 501(c)(4) organization.

When engaging in political

activity, organizations must comply with federal, state, and local election law. See *The Connection: Strategies for Creating and Operating 501(c)(3)s, 501(c)(4)s and Political Organizations*, 3rd Ed. and *The Rules of the Game, A Guide to Election-Related Activities for 501(c)(3) Organizations*, 2nd Ed.⁸ for more details about the activities described on the following pages.

8. *The Connection: Strategies for Creating and Operating 501(c)(3)s, 501(c)(4)s and Political Organizations*, Second Edition. Alliance for Justice, 2012. http://bolderadvocacy.org/wp-content/uploads/2012/10/The_Connection_paywall.pdf

ACTIVITY	501(c)(3) Public Charity	501(c)(4)
Lobby for/against legislation	LIMITED	UNLIMITED
Support/oppose ballot measures	LIMITED	UNLIMITED
Conduct public education and training sessions about participation in the political process	YES	YES
Educate candidates on issues within purview of the organization	YES (must offer information to all candidates)	YES
Sponsor a debate between candidates, where all viable candidates are invited and given equal opportunity to speak on a broad range of issues	YES	YES
Distribute voter guides to the public that set out the candidates' views on a broad range of issues	YES	YES
Distribute voter guides to the public that compare candidates on issues of importance to the organization	NO	YES
Rent mailing lists and facilities at fair market value to other organizations, legislators, and candidates	YES (if rent, must allow any candidate to rent)	YES (may rent to select candidates only)
Conduct nonpartisan get-out-the-vote activities, voter registration, and education drives	YES	YES
Conduct voter registration and GOTV activities based on party affiliation or how people will vote	NO	YES
Conduct nonpartisan voter protection activities	YES	YES
Establish a 501(c)(4)	YES	YES

ACTIVITY	501(c)(3) Public Charity	501(c)(4)
Endorse candidates and publicize its endorsements	NO	YES
Fund independent expenditures in support of or opposition to a candidate	NO	YES
Make campaign contributions (monetary or in-kind)	NO	DEPENDS ON ELECTION LAW (prohibited for federal candidates; permissible in some states)
Establish and pay for the administrative and fundraising costs of a connected political organization (separate segregated fund)	NO	YES
Criticize sitting elected officials	YES (may not attack their personal characteristics or attack them in their status as a candidate)	YES
Compare organization's issue position with that of a candidate	NO	YES
Connect organization's criticism of public official to voting in an election	NO	YES
Highlight the differences between candidates for public office on a high-profile issue on which the candidates have diverging views	NO	YES
Ask candidates to sign pledges on any issue	NO	YES
Post partisan political messages on Facebook, Twitter, or Tumblr	NO	YES



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