

Election Year Issues

MN Nonprofit Law Conference

March 8, 2022

**Sarah Duniway and Wade Hauser,
Lathrop GPM LLP**



Agenda

1. Distinction between c3s and c4s
2. Civic engagement activities in election years
3. Issue advocacy
4. c3s and non-c3s working together
5. Electoral Activities – non-c3s only
6. Questions and discussion

Distinction between c3s and c4s (and other types of exempt orgs)

Nonprofit Basics

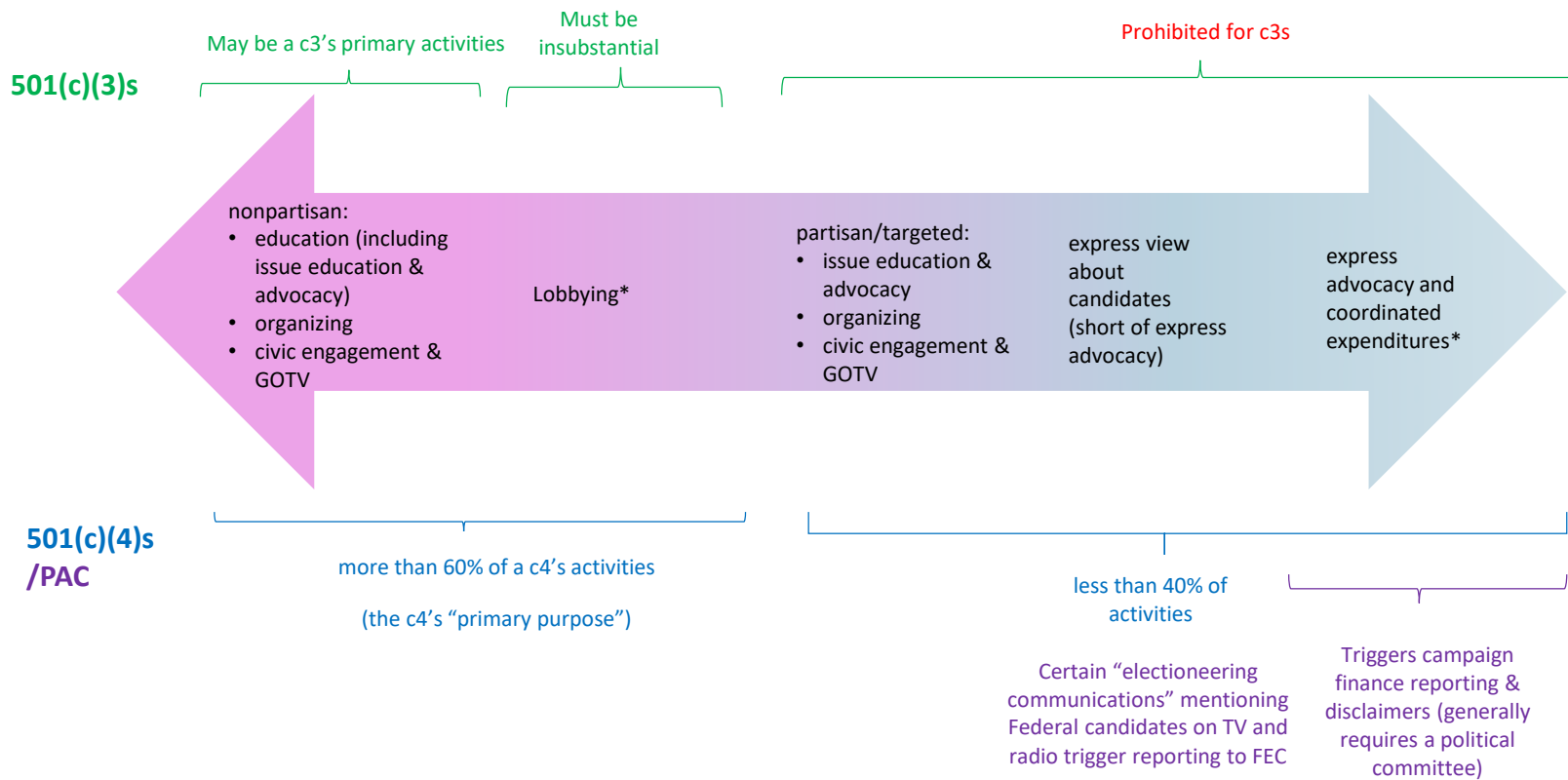
501(c)(3) Organizations

- Nonprofit corporation under state law
 - Governs matters such as Bylaws, Board, fiduciary duties
- Tax-exempt under federal tax law
 - Do not pay corporate income taxes
 - Eligible to receive charitable contributions and foundation grants
 - Distinction between public charities and private foundations
- Organized and must be operated for exclusively *charitable* purposes
 - Education, training, capacity building, issue advocacy
 - May engage in *insubstantial* lobbying
- Prohibited from intervening in candidate campaigns for political office
 - Absolute prohibition, no *de minimis* exception
 - Violation jeopardizes 501(c)(3) status

501(c)(4) Organizations

- Nonprofit corporation under state law
 - Governs matters such as Bylaws, Board, fiduciary duties
- Tax-exempt under federal tax law
 - Do not pay corporate income taxes
 - But *not* eligible to receive charitable contributions or foundation grants (without restrictions)
- Organized and must be operated for *social welfare* purposes
 - Betterment of the community at large
 - Includes all charitable activities
 - May engage in *unlimited* lobbying
 - May engage in some campaign intervention so long as not its “primary purpose,” but cannot contribute to candidates
 - May also sponsor a PAC

Spectrum of Advocacy Activities



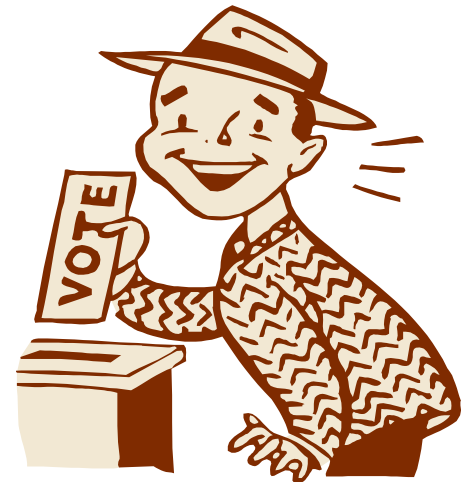
*Supporting or opposing a ballot measure is considered lobbying for IRS purposes, and it also triggers campaign finance reporting requirements

*Incorporated c4s cannot coordinate expenditures with candidates

Civic Engagement Activities

Nonpartisan Civic Engagement

- Educate voters on voting process
 - Registering voters
 - Provide information on how to vote
 - Provide information on absentee balloting
- c3s cannot target these activities based on political factors
 - Be cautious about combining these activities with issue education
- C4s, c5s, and c6s can do partisan targeting but it would count as non-social welfare/primary purpose



Capacity Building, Organizing, Training

Community
organizing

Training

Nonpartisan
voter education

Nonpartisan
GOTV

Nonpartisan
voter
registration

- To be charitable/social welfare, must be entirely non-partisan
 - Not attempting to influence the outcome of an election
- Target based on engagement, interest, organizational capacity, not on election-related factors
- Strongest if this is a regular part of an organization's work
 - More meaningful engagement
 - More clearly nonpartisan

Candidate Forums and Visits

- 501(c)(3) organizations (and c4s) may invite candidates, if:
 - Provide equal opportunity to participate to candidates seeking same office
 - Organization does not indicate support for or opposition to the candidate
 - at, before or after the event
 - A disclaimer is helpful
 - Focused on issues
 - Discussing a broad range of issues is safest
- c3s can also invite an officeholder to speak in official capacity (but all factors must be considered, including proximity to an election and whether candidacy is mentioned)
- True memberships orgs (other than c3s) can invite select candidates to appear before the org's members



Voter Guides/Candidate Questionnaire

- Voter Guide
 - Educate voters about the candidates' positions on issues
 - To be nonpartisan (a c3/social welfare activity):
 - Include *broad range* of issues
 - Include all candidates
 - Ask open-ended questions
 - Include the candidates' narrative, do not paraphrase, and avoid commenting
 - Do not state the organization's position on issues or rate candidates
 - Publish widely
 - No biased formatting
- Different than legislative scorecards which report the votes of incumbents on a range of issues (and, if done by a c3, should not comment on elections)

Issue Advocacy

Lobbying limits

- Lobbying is generally permitted for c3s in small doses
 - 501(h) election: roughly <20% total expenditures (decreases as size of the organization increases)
 - Capped at \$1 million
 - No election: “insubstantial” part of total activities
- c4s can generally engage in unlimited lobbying
 - The IRS may consider some lobbying-like activities to be electoral activities that count against a c4’s primary purpose limitation
 - Depends on all facts and circumstances (including proximity to an election)

IRS definition of “Lobbying”

- Only some issue advocacy meets the IRS definition of lobbying
- “Lobbying” for IRS purposes means attempting to influence specific legislation
 - Legislation
 - Action by Congress, state legislature, local council, tribal legislative body, public on a ballot measure
 - “Specific” means introduced or a specific proposal
 - Influence
 - Direct lobbying
 - Directed at decision-maker
 - Urge specific action
 - Grassroots lobbying
 - Directed at public
 - Call to action

Issue Advocacy that is *not* Lobbying for IRS purposes

- c3s can engage in the following activities without limit (if they are nonpartisan)
 - Research
 - Discuss broad social issues
 - Educate the public on specific policy issues
 - Nonpartisan study & research
 - Can include position on legislation as long as contains “full and fair exposition of the facts” such that reader can draw own conclusions
 - Attempts to influence regulatory/administrative action (but may require reporting in MN)
 - Litigation
- c4s, c5s, and c6s can also engage in these activities without limit

Accountability Communications

- c3s can comment on officeholders' votes and positions, but doing so close in time to an election creates risk
- Non-c3s can as well, but doing so close in time to an election may make it a non-primary purpose activity
- To minimize the risk:
 - Do not mention an officeholder's candidacy for re-election
 - Time communications based on non-electoral factors (a pending vote, the end of session, etc.)
 - Do not target communications based on election-related factors (i.e., to swing districts, only officeholders that are up for re-election, etc.)
 - Establish a track record of advocating on the issue outside of an election year
 - Do not focus solely on an issue that has been raised as a distinction between candidates

Candidate Education

- c3s may educate candidates on your issues
 - Equal opportunity to all candidates; make advocacy publicly available
- c3s may attempt to persuade candidates on the issues
- c3 may not ask them to make a pledge, or endorse an agenda or platform, or rank candidates
- Candidate education counts as lobbying if it is an attempt to influence specific legislation
- Exempt orgs should avoid being so involved that you become a campaign advisor
 - No longer nonpartisan
 - Risks providing an in-kind contribution to the candidate of your staff time/materials
 - Private benefit concerns

c3s and non-c3s working together

General Rules

- c3s can collaborate with non-c3s on:
 - Shared policy goals
 - Lobbying
 - Nonpartisan issue advocacy and education
 - Organizing, capacity building
- c3s cannot
 - Subsidize a non-c3 (except for restricted grant re activities c3 could do directly)
 - Allow non-c3 to use c3 assets (materials, lists, etc.), unless non-c3 pays FMV
 - Allow non-c3's political activities to be attributed to the c3 (by using c3's name, logo, etc.)
 - strategize with non-c3s regarding ways for the c3 to supplement the non-c3's electoral work

List Building

- Options
 - Rent 501(c)(3) list
 - Swap lists
- Key principles
 - Written agreement
 - Non-c3 must pay fair market value/fair exchange of value
 - Ultimately each org should have its own list
 - Ensure privacy policy permits sharing in this manner
 - c3s cannot share lists with campaigns unless the list is genuinely available to all candidates in the race

Websites/Social Media

- Each organization must have its own website
- Can be hosted on the same underlying site, but:
 - Non-c3 must pay its own share of costs
 - Watch out for nesting
 - Ensure design does not include 501(c)(3) name and logo on non-c3 pages with political activity content
 - The more visually distinct, the better
 - Links
 - If non-c3 website linked from 501(c)(3) page, watch content on landing page
 - “Two click” rule
- Maintain distinct social media profiles

Electoral Activities – non-c3s only

Campaign Finance Rules for non-c3s

- Corporations (including nonprofits) cannot contribute to candidates
- Non-c3s can make “independent expenditures” and non-express advocacy communications intended to influence the election (up to IRS primary purpose limits)
- c3s cannot engage in any of these activities (whether or not they include express advocacy)

Independent Expenditures vs. Coordinated

- Why the distinction matters
 - Coordinated activity = in-kind contribution to candidate or party
 - Not permitted for a corporation (including a nonprofit)
 - Contributions/coordinated activities must be paid for by a traditional PAC (subject to source and amount limitations)
 - Independent activities
 - Can be done by a c4, c5, or c6 (not c3s)
 - No source or amount limitations
 - (Other than primary purpose for tax purposes)

Independent Activities

- Done *without*:
 - express or implied consent
 - authorization
 - cooperation
 - in concert with
 - at the request
 - at the suggestion
- of the candidate, the candidate's committee, or the candidate's agent
- Contributions to political parties are also prohibited

Ok – does not defeat independence

- Candidate asks that expenditure not be made
- Candidate provides donor list without further instruction or suggestion
- Use of public information
- Endorsements – can communicate with candidate to decide who to endorse. Can't coordinate external communications of endorsement.
- Hyperlinks to candidate's website
- Engaging in both independent and coordinated work if the organization maintains a firewall

Defeating independence – examples

- Candidate (or campaign) provides nonpublic info about needs
- Candidate (or campaign) receives nonpublic info regarding IE spender's plans
- Candidate participated in fundraising for the organization other than general treasury money
 - In same year as election
 - Soliciting or collecting money
 - Appearing as a speaker at an event raising money
- Candidate held office in organization
 - In same year as election
 - Chair, Deputy Chair, Treasurer, Deputy Treasurer
- Use common vendor that does not have a firewall policy

IE Reporting

- Express advocacy communications are true “Independent Expenditures”
 - Expressly advocate for or against a clearly identified candidate
 - Vote for/against or functional equivalent
- Independent Expenditures trigger campaign finance reporting
 - Federal candidate → FEC reporting
 - State candidate → MN Campaign Finance Board registration and reporting
 - Local candidate → MN CFB or local jurisdiction registration and reporting
- Requires political committee/fund registration in MN. A PAC is strongly recommended at the Federal level.
 - c4s can contribute unlimited amount to IE-only PAC (subject to primary purpose limit)

IE Disclaimers

- All independent expenditures must carry a disclaimer
- Must use mandatory language
 - Federal:
 - “Paid for by _____ PAC (www._____.org) and not authorized by any candidate or candidate’s committee.”
 - MN:
 - “This is an independent expenditure prepared and paid for by _____ PAC, (www._____.org). It is not coordinated with or approved by any candidate nor is any candidate responsible for it.”
- Physical address or website works in disclaimer. For MN, website must include physical address.
- Facebook’s tagline not enough

Non-Express Advocacy Activities

- Some communications that do not contain express advocacy (e.g., “vote for,” “support,” “defeat,” etc.) may count as electoral (non-primary purpose) activities for IRS purposes
- However, if independent of a party or candidate, organizations (other than PACs and c3s) can generally make hard hitting issue advocacy communications without triggering a requirement to file campaign finance reports with the CFB or FEC
 - All PAC activities must be reported
 - Federal “electioneering communications” (on TV or radio close to an election) require reporting

“Traditional” PACs

- Traditional PACs (as opposed to Super PACs) may only receive contributions from individuals
 - Traditional PACs can receive very limited administrative support from an affiliated nonprofit
- May contribute to candidates and political parties
- May not be a conduit for coordination between candidates and IE groups
 - Maintain a firewall if doing coordinated work

Questions?

Contact



Sarah Duniway

Sarah.Duniway@lathropgpm.com

(612) 632-3055



Wade Hauser

Wade.Hauser@lathropgpm.com

(612) 632-3061