

# Lobbying, Advocacy & Political Activities for 501(c)(3) Entities

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# Lobbying, Advocacy & Political Activities for 501(c)(3) Entities

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*Purpose:* To provide 101 level training for staff and board members regarding lobbying, advocacy, and political activity as it pertains to nonprofits exempt under Section 501(c)(3) of Internal Revenue Code (IRC).

*Disclaimer:* The information in this presentation is meant for educational purposes only and not intended or offered as legal advice.

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## Webinar Format:

We will allow for time at the end of today's webinar for questions. If you have a question, please use the chat function and contact KH Administrator.

Access to a copy of today's slides will be sent to all participants following the webinar.

If you are experiencing any technical difficulties, please send an email to Amanda Cote at [acote@kleinhornig.com](mailto:acote@kleinhornig.com)

# Lobbying, Advocacy & Political Activities for 501(c)(3) Entities

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## Outline

- ❑ 501(c)(3)
- ❑ Advocacy vs. Lobbying vs. Political Activity
- ❑ Get Out the Vote (GOTV)
- ❑ MA State Lobbying

# Lobbying, Advocacy & Political Activities for 501(c)(3) Entities

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## Not-For-Profit Organizations (NPOs)

- ❑ Typically a corporation
- ❑ Created under state nonprofit corporation law by filing Articles of Organization
- ❑ Run by Board of Directors pursuant to Bylaws
- ❑ Organized and operated exclusively for a tax exempt purpose under Section 501(c)(3) of the IRS Code (IRC)

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## Internal Revenue Code: §501(a) & §501(c)(3)

- ❑ IRC § 501(a): “An organization described in subsection (c)... shall be exempt from taxation....”
- ❑ IRC § 501(c)(3): “Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals....”

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## IRC §501(c)(3) *continued....*

*“...no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.”*

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## IRC §501(c)(3) Restrictions

- No private benefit
- No substantial lobbying
- No political campaign activities\*

*\*True.... But needs asterisk*



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## Three Rules:

**1. Advocacy**  
Permitted as  
educational  
activity

**2. Lobbying**  
Cannot be a  
substantial  
activity of  
NPO

**3. Political  
Campaign  
Activity**  
Prohibited\*

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## Advocacy

- ❑ Provide information to clients, public, members, decision makers
- ❑ Influence public opinion on issues
- ❑ Encouraging people to vote and participate in the electoral process in non-biased, neutral manner
  - Voter Guides
  - Sponsor Debates
  - Voter registration/GOTV

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## Lobbying

### Attempting to influence legislation through:

- ❑ Directly contacting members of a legislative body;
- ❑ Encouraging the public to contact members of a legislative body; or
- ❑ Advocating a position on a public referendum

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## Advocacy vs. Lobbying

### Advocacy

Permitted as  
educational activity

### Lobbying

Cannot be a  
substantial activity of  
the organization

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## Lobbying: Different Sets of Rules

- ❑ **Funding**: Restriction on use of funding/grants (Federal/State/Private)
- ❑ **Federal Election Commission**: restrictions on campaigns accepting contributions
- ❑ **Sunshine Laws**: Federal/State: registration and reporting by lobbyists and clients
- ❑ **IRS**: Federal tax rule for 501(c)(3)

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## Lobbying: IRS Limits

### Two alternative tests to determine lobbying limits:

1. Insubstantial Test: Determine “insubstantial” amount of money and time spent on lobbying. Insubstantial = small percentage, typically less than 5% of total annual expenditure; *or*
2. Safe Harbor: Elect to undergo the 501(h) expenditure test

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## Lobbying: Federal Limits – 501(h) Expenditure Test

- ❑ Clear guidance
- ❑ Spend a percentage of annual budget on lobbying (i.e. influencing outcome of ballot question or legislative vote)
- ❑ Percentage is different based on your annual budget – but up to 20% for small organization
- ❑ The lobbying nontaxable amount for any organization for any taxable year is the lesser of (A) \$1,000,000 or (B) the amount determined under a table set out in IRC §4911(c)(2)

The image shows a screenshot of the IRS Form 5768, titled "Election/Revocation of Election by an Eligible Section 501(c)(3) Organization To Make Expenditures To Influence Legislation". The form is for the year 2018. It includes fields for the organization's name, EIN, and address. There are checkboxes for "Election" and "Revocation". The form also contains "General Instructions" and "Affiliated organizations" sections. The "General Instructions" section explains that the form is used to elect or revoke the election to make expenditures to influence legislation. It lists six categories of organizations that are eligible to make such expenditures: 1. Section 170(b)(1)(A)(ii) (relating to research organizations), 2. Section 170(b)(1)(A)(iii) (relating to organizations supporting government activities), 3. Section 170(b)(1)(A)(iv) (relating to organizations publicly supported by charitable contributions), 4. Section 170(b)(1)(A)(v) (relating to organizations publicly supported by contributions, gifts, or services), and 5. Section 501(c)(29) (relating to organizations supporting certain types of public charities other than those described in section 501(c)(29)(A)). The "Affiliated organizations" section explains that the form is used to elect or revoke the election to make expenditures to influence legislation for an affiliated group of organizations. It lists three categories of affiliated organizations: 1. An integrated auxiliary of a church or of a convention or association of churches, 2. A member of an affiliated group of organizations if one or more members of such group is described in a or b of this paragraph, and 3. An organization only if (1) the governing instrument of one such organization provides for the election or revocation of one such organization to include persons (B) who are specifically designated representatives of another such organization or one member of the governing board, officers, or paid executive staff members of such other organization, and (2) the governing instrument of the other organization provides for the election or revocation of one such organization to include or prevent action on legislative issues by the first such organization. For more details, see section 4911 and section 501(f). Note: A private foundation (including a private operating foundation) is not an eligible organization.

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## Lobbying: Federal Limits – 501(h) Expenditure Test

Table set out in IRC §4911(c)(2)

### (2) LOBBYING NONTAXABLE AMOUNT

The lobbying nontaxable amount for any [organization](#) for any [taxable year](#) is the lesser of (A) \$1,000,000 or (B) the amount determined under the following table:

| If the exempt purpose expenditures are—   | The lobbying nontaxable amount is—                               |
|---|--|
| Not over \$500,000                        | 20 percent of the exempt purpose expenditures.                   |
| Over \$500,000 but not over \$1,000,000   | \$100,000, plus 15 percent of the excess of the over \$500,000.  |
| Over \$1,000,000 but not over \$1,500,000 | \$175,000 plus 10 percent of the excess of the over \$1,000,000. |
| Over \$1,500,000                          | \$225,000 plus 5 percent of the excess of the over \$1,500,000.  |



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## Federal Tax Consequences of Lobbying

| Organizations that did not make a 501(h) Election   | Organizations that did make a 501(h) Election  |
|---|--|
| <ul style="list-style-type: none"><li><input type="checkbox"/> Taxed under IRC §4912 on “excess lobbying expenditures”<ul style="list-style-type: none"><li>▪ To the organization (5%)</li><li>▪ To management (5%)<ul style="list-style-type: none"><li>▪ Must be willful and not reasonable</li><li>▪ Levied on “Manager who agreed to the making of the expenditures”</li><li>▪ Jointly and severally liable</li></ul></li></ul></li><li><input type="checkbox"/> Possible revocation of exempt status</li></ul> | <ul style="list-style-type: none"><li><input type="checkbox"/> Taxed under IRC §4911 on “excess lobbying expenditures”<ul style="list-style-type: none"><li>▪ 25% of the amount of the excess lobbying expenditures for the taxable year</li></ul></li><li><input type="checkbox"/> Possible revocation of exempt status</li></ul> |

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## Political Campaign Activity

- ❑ Any “**campaign intervention**” – activity that may hurt or help the chances for election by any particular candidate or group of candidates for office, including:
  - Endorsements of candidates
  - Contributions (to candidates or PACs)
  - Public statement for/against a particular candidate
  - Distributing materials that favor a particular candidate
  - This includes materials prepared by third party
- ❑ Regardless of political party affiliation
- ❑ Determined by using facts and circumstances test

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## Political Campaign Activity

### Tax Consequences for “Political Expenditures” under IRC §4955

- ❑ On the organization:
  - 10% tax imposed for each political expenditure
  - 100% tax imposed if not corrected in the taxable year
- ❑ On management:
  - 2.5% tax imposed on agreement of any organization manager to making of a political expenditure
  - 50% tax imposed if manager refused to agree to part or all of the correction
  - Manager must know that it is a political expenditure
  - Tax is not imposed if expenditure is not willful and is due to reasonable cause
  - Levied on “manager who agreed to the making of the expenditure”
  - Jointly and severally liable
  - Can be protected if relied on 3<sup>rd</sup> party
- ❑ Possible revocation of exempt status

# Lobbying, Advocacy & Political Activities for 501(c)(3) Entities

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## Political Campaign Activity: The Asterisk\*

- ❑ 1954 – Johnson Amendment
  - Prohibits 501(c)(3) organizations from engaging in political campaign activity: “which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.”
- ❑ IRS rarely used Johnson Amendment
- ❑ Dormant issue until 2016 election

*“I will get rid of and totally destroy the Johnson Amendment and allow our representatives of faith to speak freely and without fear of retribution...”*

- President Trump, National Prayer Breakfast (Feb. 2017)

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## Political Campaign Activity

### Example:

*Ms. Lane is the executive director of Metropolis, Inc., a 501(c)(3) community development organization. She gets a call from Mr. Kent at the Daily Planet – the city’s local newspaper. The governor, Mr. Luther, is in the midst of a tough re-election campaign, and he is about to release a major policy proposal on fighting crime. Mr. Kent wants to know if Ms. Lane has an opinion regarding Mr. Kent and his election prospects.*

# Lobbying, Advocacy & Political Activities for 501(c)(3) Entities

## Permissible Electoral Advocacy

| Yes (Advocacy)   | No (Political Activity)   |
|--|---|
| <ul style="list-style-type: none"><li><input type="checkbox"/> Register people to vote</li><li><input type="checkbox"/> Distribute nonpartisan materials on candidates or ballot measures</li><li><input type="checkbox"/> Help voters understand the election process</li><li><input type="checkbox"/> Encourage people to vote</li><li><input type="checkbox"/> Provide information to all candidates on NPO's issues</li><li><input type="checkbox"/> Sponsor nonpartisan candidate forums (subject to lobbying limits)</li></ul> | <ul style="list-style-type: none"><li><input type="checkbox"/> Endorse candidate</li><li><input type="checkbox"/> Support candidate with NPO resources</li><li><input type="checkbox"/> Show Preference for candidates (rate)</li><li><input type="checkbox"/> Campaign against a candidate</li></ul> |

# Lobbying, Advocacy & Political Activities for 501(c)(3) Entities

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## Permissible Electoral Advocacy: GOTV

- ❑ Nonpartisan information about process rather than support of particular candidate
- ❑ Register/educate member, staff, board, volunteers, and clients
- ❑ Set up tables or work in community to register voters
- ❑ Have registration forms available at office/events/meetings

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## Permissible Electoral Advocacy:

### Voter Registration/Education – Sample Language:

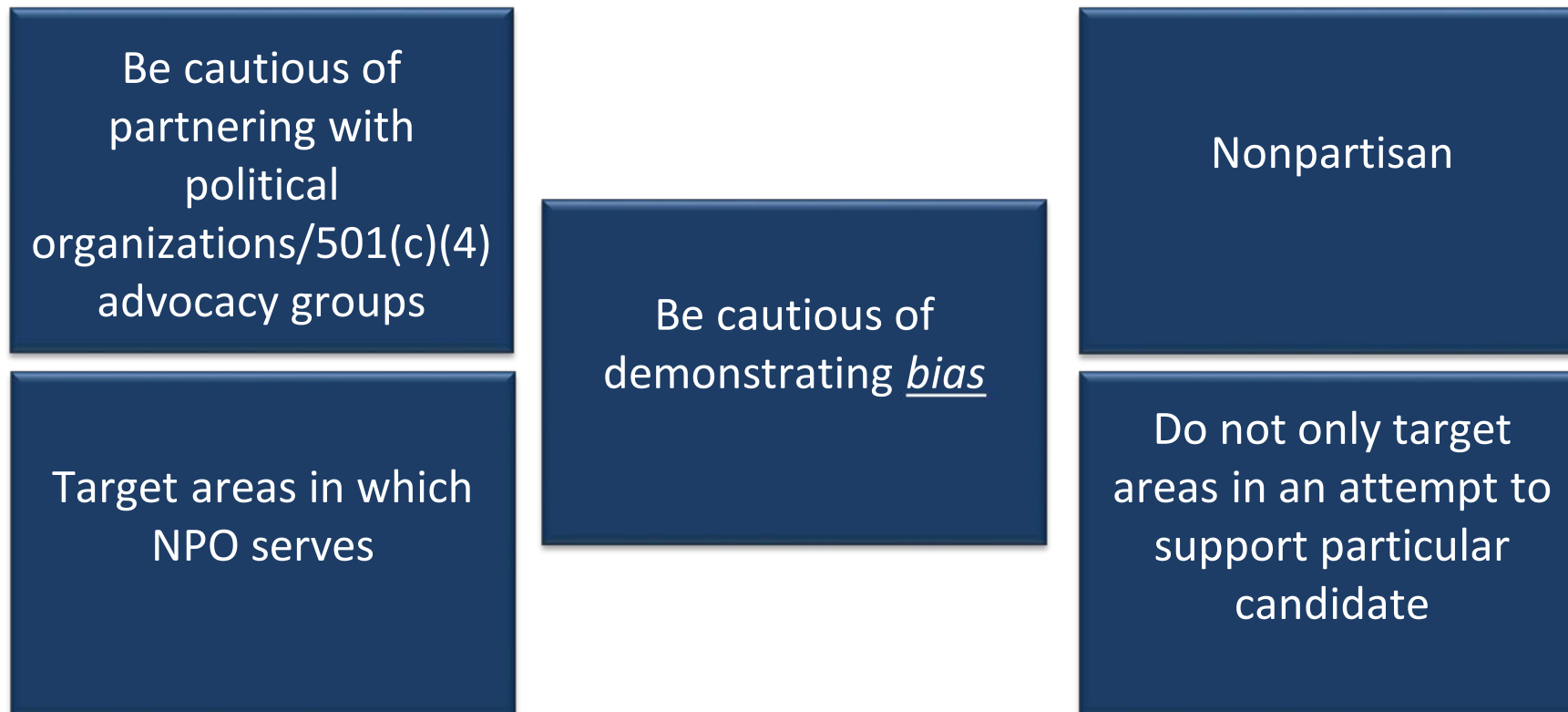
*“These voter registration services are available without regard to the voter’s political preference. Information and other assistance regarding registering or voting, including transportation and other services offered, shall not be withheld or refused on the basis of support for or opposition to particular candidates or a particular party.”*



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## Permissible Electoral Advocacy: Voter Registration/Education Tips



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## Permissible Electoral Advocacy: GOTV – Example

Big Cats Rescue Inc. (BCR) is a 501(c)(3) based in Massachusetts that educates the public on animal welfare. Candidate Joe is running for the state legislature and a big part of his platform is challenging the animal welfare policies of his opponent, incumbent Candidate Carole.

Shortly before the election, BCR sets up a telephone bank to call registered voters in the district in which Candidate Joe is running. During the calls, Rick a volunteer for BCR, asks voters questions about their views on animal welfare issues. If the voter appears to favor Candidate Joe's stance, Rick thanks the voter and ends the call. If the voter appears to favor Candidate Carole's stance, then Rick reminds the voter about the upcoming election, and even offers transport to the polls.

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## Permissible Electoral Advocacy: Educating Candidates

- ❑ Nonpartisan – provide the same information to all candidates
- ❑ Provide information (policy papers, research, program details) so candidates can understand issues
- ❑ Avoid assisting a candidate develop his/her own policy paper/research (could be seen as partisan support)

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## Permissible Electoral Advocacy: Candidate Forums

- ❑ Nonpartisan – provide the same opportunity to all candidates
- ❑ All candidates are invited
- ❑ Rules of forum are fair to all participants
- ❑ Consider the questions asked and whether they cover a broad range of issue or are targeted to show preference

# Lobbying, Advocacy & Political Activities for 501(c)(3) Entities

## Permissible Electoral Activity: Voter Guides

- ❑ Candidate Guides
- ❑ Candidate Questionnaires
- ❑ Ballot Measure Guide

**2012 Values Voter Republican Presidential Voter Guide**

**FRC Action**  
The Legislative Affairs of FUNDRAISING COUNCIL

| Question  | Michele Bachmann     | Newt Gingrich        | Jim Huntsman        | Ron Paul             | Rick Warren          | Mitt Romney          | Rick Santorum        |
|---|----------------------|----------------------|---------------------|----------------------|----------------------|----------------------|----------------------|
| <b>ABORTION</b><br>Do you support or oppose taxpayer funding of abortions?  | OPPOSE <sup>1</sup>  | OPPOSE <sup>1</sup>  | OPPOSE <sup>1</sup> | OPPOSE <sup>1</sup>  | OPPOSE <sup>1</sup>  | OPPOSE <sup>1</sup>  | OPPOSE <sup>1</sup>  |
| <b>PLANNED PARENTHOOD</b><br>Do you support or oppose giving tax dollars to Planned Parenthood?   | OPPOSE <sup>1</sup>  | OPPOSE <sup>1</sup>  | UNKNOWN             | OPPOSE <sup>1</sup>  | OPPOSE <sup>1</sup>  | OPPOSE <sup>1</sup>  | OPPOSE <sup>1</sup>  |
| <b>STEM CELL RESEARCH</b><br>Do you support or oppose the federal funding of embryonic stem cell research?  | OPPOSE <sup>1</sup>  | MIXED <sup>1</sup>   | MIXED <sup>1</sup>  | OPPOSE <sup>1</sup>  | OPPOSE <sup>1</sup>  | OPPOSE <sup>1</sup>  | OPPOSE <sup>1</sup>  |
| <b>HUMAN CLONING</b><br>Do you support or oppose federal legislation prohibiting human cloning of all kinds, both "therapeutic" and "reproductive"?                           | SUPPORT <sup>1</sup> | OPPOSE <sup>1</sup>  | UNKNOWN             | MIXED <sup>1</sup>   | SUPPORT <sup>1</sup> | SUPPORT <sup>1</sup> | SUPPORT <sup>1</sup> |
| <b>ESTATE TAX</b><br>Do you support or oppose the repeal of the federal estate tax?   | SUPPORT <sup>1</sup> | SUPPORT <sup>1</sup> | UNKNOWN             | MIXED <sup>1</sup>   | SUPPORT <sup>1</sup> | SUPPORT <sup>1</sup> | SUPPORT <sup>1</sup> |
| <b>TRADITIONAL MARRIAGE</b><br>Do you support or oppose a marriage protection amendment to the U.S. Constitution that defines marriage as the union of one man and one woman? | SUPPORT <sup>1</sup> | SUPPORT <sup>1</sup> | UNKNOWN             | SUPPORT <sup>1</sup> | SUPPORT <sup>1</sup> | MIXED <sup>1</sup>   | SUPPORT <sup>1</sup> |
| <b>ENDA</b><br>Do you support or oppose the federal Employment Non-Discrimination Act?  | OPPOSE <sup>1</sup>  | UNKNOWN              | UNKNOWN             | OPPOSE <sup>1</sup>  | SUPPORT <sup>1</sup> | SUPPORT <sup>1</sup> | SUPPORT <sup>1</sup> |
| <b>JUDICIAL</b><br>Do you support or oppose strict constructionist judges?  | SUPPORT <sup>1</sup> | SUPPORT <sup>1</sup> | UNKNOWN             | SUPPORT <sup>1</sup> | SUPPORT <sup>1</sup> | MIXED <sup>1</sup>   | SUPPORT <sup>1</sup> |
| <b>EDUCATION</b><br>Do you support or oppose Parental rights in education (educational choices)?  | SUPPORT <sup>1</sup> | SUPPORT <sup>1</sup> | MIXED <sup>1</sup>  | SUPPORT <sup>1</sup> | SUPPORT <sup>1</sup> | SUPPORT <sup>1</sup> | SUPPORT <sup>1</sup> |
| <b>MILITARY</b><br>Do you support or oppose the elimination of the policy that prohibits open homosexuality in the military?  | OPPOSE <sup>1</sup>  | OPPOSE <sup>1</sup>  | UNKNOWN             | SUPPORT <sup>1</sup> | OPPOSE <sup>1</sup>  | SUPPORT <sup>1</sup> | OPPOSE <sup>1</sup>  |

Go to [www.frcaction.org](http://www.frcaction.org) for more 2012 election updates

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# Lobbying, Advocacy & Political Activities for 501(c)(3) Entities

## Permissible Electoral Advocacy: Voter Guides, Candidate Guides and Questionnaires

Provide the same type of information for all candidates:

Name and Photo

Current Occupation

Party affiliation

List of major endorsements provided by the candidate

Campaign contact information

For Questionnaire, include responses in entirety, do not summarize or edit



Nonpartisan

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## Printed Material, Websites & Social Media

- ❑ NPOs cannot publicize or distribute statements supporting or opposing a candidate for public office. This includes:
  - Facebook
  - Instagram
  - Twitter
  - Webpage
  - Text
  - Blog
- ❑ Materials should be nonpartisan with intent to educate regarding voter process
- ❑ NPOs may link to candidate-related material – if the link serves as a purpose related to the organization’s charitable mission



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## Political Activity: Staff

- ❑ What staff does in personal time is personal choice
- ❑ “Personal time” = outside of normal work hours
- ❑ If name of NPO listed alongside name on candidate information – include “for identification purposes only”
- ❑ Same applies to Board members and volunteers



# Lobbying, Advocacy & Political Activities for 501(c)(3) Entities

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## Get Out The Vote - The New “Normal”

**Primaries:** Many states are rescheduling or canceling Presidential primary elections

### Strategies:

- ❑ Every Voter Needs to Know:
  - Polling locations
  - Open and closing times
  - What to bring with them
  - Options for mail-in ballots and early voting
  
- ❑ Plan voter education events, candidate forums, and town halls as remote events (aim for late summer/early autumn)

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## Get Out The Vote - The New “Normal”

### Resources

- ❑ Voting by Mail (ACLU: <https://www.aclu.org/news/voting-rights/keep-calm-and-carry-on-voting-how-to-vote-by-mail-during-the-coronavirus-outbreak/>)
- ❑ State-by-State Polling Locations and Rules (Nonprofit Vote: <https://www.nonprofitvote.org/voting-in-your-state/>)
- ❑ COVID-19 Voting Alerts (League of Women Voters: [www.vote411.org](http://www.vote411.org))

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## Tips to Prevent Problems:

- ❑ Create written policy prohibiting specific political activities and educate Board/Officers/Senior Staff about policy
- ❑ Establish internal controls to prevent political expenditures
- ❑ Issue advocacy should coincide with legislation not an election
- ❑ Discuss restrictions with staff – prohibit tasks related to political activities during working hours or using organization’s resources
- ❑ Monitor social media
- ❑ NPO leaders should consider using disclaimers in their personal political activities
- ❑ Include disclaimers when activities or communications involve candidates

# Contact Information

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