PRACTITIONER PERSPECTIVES ON USING § 501(C)(4) ORGANIZATIONS FOR CHARITABLE LOBBYING: REALITIES AND AN ALTERNATIVE

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INTRODUCTION

A charity is not what comes to mind for legislative lobbying. When people think of charities, they often think of the public programs run by charities that directly impact their lives. They may think of the Red Cross assisting in natural disasters, the animal shelter where they adopted their pet, or the local homeless shelter. Most people may wonder why a charity would want or need to lobby, or even whether it's legal for a charity to lobby. In fact, before 1934, legislative lobbying in furtherance of charitable mission was not considered a charitable activity under federal tax law at all.[1]

1. Prior to 1930, there was no statutory restriction on legislative or lobbying activities by charities, and only a few scattered judicial interpretations existed. *See* Judith E. Kindell & John Francis Reilly, *Lobbying Issues*, *in* EXEMPT ORGANIZATIONS: TECHNICAL INSTRUCTION PROGRAM FOR FISCAL YEAR 1997, at 261, 262 (1998), https://www.irs.gov/pub/irs-tege/eotopicp97.pdf. In 1930, however, a court denied charitable tax-exempt status to the American Birth Control League because it disseminated materials to legislators and to the public advocating repeal of laws prohibiting birth control, thus precluding it from being exclusively charitable, educational, or scientific, as the court then understood those terms. Slee v. Comm'r, 42 F.2d 184, 185 (2d Cir. 1930). In 1934, Congress enacted a lobbying restriction on charities by changing the definition of organizations qualifying under § 501(c)(3), to require that "no substantial part of [its] activities [. . .] is carrying on propaganda, or otherwise attempting, to influence legislation." Revenue Act of 1934, ch. 277, § 101(6), 48 Stat. 680, 700. This remained the state of affairs until 1976, with the enactment of § 501(h). I.R.C. § 501(h) (2012).

That has been changing, slowly. In 1934, charities were permitted to lobby to an extent.[2] In 1976, that limit was loosened by the enactment of Internal Revenue Code ("Code") § 501(h).[3] Presently, many charities find that laws and regulations are critical to achieving their charitable missions. Society looks to charities to benefit the community through their impactful work. From our experience, charities often are in a strong position to understand the legal needs of the community because of their proximity to marginalized constituencies. Therefore, it stands to reason that charities have valuable input to legislators trying to enact laws that will have an impact on those constituencies.

Charities often serve those whose interests are deeply affected by public policy decisions but whose voice in public discourse may be muted. These constituencies may be marginalized by poverty, a lack of access to education, a lack of representation, or disenfranchisement from civic engagement. Often, charities do not take full advantage of the opportunities that their charitable status provides to amplify the voice of marginalized communities. A survey conducted in 2000 found that while a substantial proportion of surveyed charities reported some engagement in public policy, the frequency and intensity of their involvement was low, and many charity managers were ambivalent about whether charities should lobby at all.[4] The biggest barriers to participation, according to survey respondents, were a lack of resources, limited staff expertise, and restrictions imposed by federal law.[5] While we believe the first two of these barriers are valid reflections of reality, the third, "restrictions imposed by federal law,"[6] reveals a general misunderstanding of what the law allows, and may also indicate a reluctance to assume the perceived burden of increased

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2. In 1934, Congress enacted the "no substantial part" test as part of the Revenue Act of 1934. § 101(6), 48 Stat. at 700.

3. In 1976, Congress added § 501(h) to the Internal Revenue Code, as part of the Tax Reform Act of 1976, which created an alternative to the "no substantial part" test and represented express congressional recognition that, within limits, lobbying can be a legitimate charitable activity benefiting the public, for which the use of deductible contributions is appropriate. Tax Reform Act of 1976, Pub. L. No. 94-455, § 1307(a)(1), 90 Stat. 1520, 1720-21.

4. Beginning in 2000, OMB Watch, Tufts University, and Charity Lobbying in the Public Interest conducted a multi-year research project called the Strengthening Nonprofit Advocacy Project (SNAP) that surveyed over 1,700 nonprofits nationwide to investigate factors that motivate nonprofit organizations to engage in public policy. *See* Press Release, Ctr. for Effective Gov't, National Study Reveals Nonprofits Face Persistent Barriers in Public Participation (May 28, 2002), https://www.foreffectivegov.org/node/604.

5. *Id*.

6. *Id.*

regulatory compliance that might be triggered by more aggressive engagement in legislative advocacy.

In this Comment, we first provide background on the rules and operating realities for charities as a baseline for § 501(c)(3)[7] charitable lobbying. Part I of this Comment considers a stand-alone social welfare organization under § 501(c)(4) as an alternative for public interest lobbying and compares that option to using a § 501(c)(3) organization to lobby. Part II discusses the common practice of using a tandem social welfare affiliate to extend a charity's lobbying. Finally, having considered the existing options, Part III proposes a change to federal tax law that would significantly reduce the burdens on charities that want to lobby beyond current limits, in the hopes of increasing charity participation.

I. VEHICLES FOR INFLUENCING PUBLIC POLICY: § 501(c)(3) OR § 501(c)(4)?

A. *Using a Charity to Lobby*

We look to charities to benefit the public with their programs, and they are among our most trusted institutions. Charities often are in the best position to know what legal changes are needed precisely because of the programs they run and their connections to their constituencies. Charities' knowledge of their clients' needs gives them incentives to lobby, and our trust in them makes them persuasive resources; however, they are limited by law in their ability to lobby.

1. *Limitations on Charity Lobbying*

Section 501(c)(3), which provides tax exemption for organizations that serve charitable purposes,[8] expressly endorses lobbying by charitable organizations. Specifically, § 501(c)(3) exempts entities, provided that, among other things, "no substantial part of the activities of [the entity] is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h))."[9] By wording the exemption in terms of substantiality,

7. I.R.C. § 501(c)(3) (2012).

8. *Id.*; Treas. Reg. § 1.501(c)(3)-1(c) (as amended in 2017). A more complete explanation of what constitutes "charitable" purposes under § 501(c)(3) is beyond the scope of this Comment.

9. I.R.C. § 501(c)(3).

§ 501(c)(3) establishes that lobbying that does not rise to the level of "substantial" is consistent with exemption.[10]

a. Lobbying Under the "No Substantial Part" Test

However, neither § 501(c)(3) nor the regulations issued under it by the U.S. Department of the Treasury ("Treasury") offer detailed, substantive guidance about what "carrying on propaganda, or otherwise attempting, to influence legislation" means, what "substantial" means,[11] or even how one is supposed to measure whether any lobbying that does occur is "substantial." Old and sparse case law and limited commentary from the Internal Revenue Service ("IRS") provides minimal additional insight. One often cited case held that lobbying that constitutes less than five percent of the charity's "time and effort" (however that might be measured) is not "substantial,"[12] while later decisions cast doubt on the usefulness of a percentage test, stating that all the facts and circumstances of an organization's legislative and other activities would have to be examined.[13] Another court found that, even though the quantity of an organization's actual lobbying contacts was "insignificant," the time the organization spent formulating positions and deciding whether to lobby was substantial and must be considered.[14] This uncertainty has had a severe chilling effect on charity advocacy.[15] Many charities fear unintentionally lobbying too

10. Like all of its activities, a charity's lobbying activities must further its charitable purposes. In other words, a charity is free to lobby, as long as it does not do too much of it. Treas. Reg. § 1.501(c)(3)-1(c)(1).

11. Treasury regulations interpreting the "no substantial part" test provide that any organization whose activities make it an "action organization" does not qualify for exemption. *Id.* § 1.501(c)(3)-1(c)(3)(i). The definition of "action organization" includes an organization a substantial part of the activities of which is attempting to influence legislation by contacting, or urging the public to contact, members of a legislative body for the purpose of proposing, supporting, or opposing legislation, or advocating the adoption of legislation. For this purpose, "legislation" is defined to include "action by the Congress, by any State legislature, by any local council or similar governing body, or by the public in a referendum, initiative, constitutional amendment, or similar procedure." *Id.* § 1.501(c)(3)-1(c)(3)(ii).

12. Seasongood v. Comm'r, 227 F.2d 907, 912 (6th Cir. 1955).

13. Christian Echoes Nat'l Ministry, Inc. v. United States, 470 F.2d 849, 855 (10th Cir. 1972).

14. Kuper v. Comm'r, 332 F.2d 562, 562-63 (3d Cir. 1964).

15. "The chilling effect, which we encounter frequently, if anecdotally, in our practice, derives not just from the uncertainty inherent in the vagueness of the 'no substantial part' test, but also from inconsistent enforcement." JEFFREY M. BERRY & DAVID F. ARONS, A VOICE FOR NONPROFITS 72-74 (2003). The adoption of § 501(h) in 1976 reflected, at least in part, concerns about the challenges that the "no substantial part" test posed for the IRS's enforcement efforts. JOINT COMM. ON TAXATION, 94TH CONG., GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1976, at 415-16 (1976), *as reprinted in* 1976-3 C.B. (Vol. 2) 415-416 (hereinafter "JCT GENERAL EXPLANA-

much and potentially risking revocation of exemption, so they tend to approach any lobbying cautiously.[16]

b. Lobbying Under the § 501(h) Expenditure Test

In 1976, Congress provided most charities[17] with a much more complete, optional alternative to substantiality for determining whether their lobbying activity is acceptable under § 501(c)(3).[18] Where the "no substantial part" test is vague, the § 501(h) "expenditure test"[19] is precise and protective of charities that elect to be governed by it.[20] It sets forth explicit, and in some ways surprisingly

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TION"); *see also* SHANNON K. VAUGHAN & SHELLY ARSNEAULT, MANAGING NONPROFIT ORGANIZATIONS IN A POLICY WORLD 120-122 (2013) (attributing a "chilling effect on advocacy by philanthropic organizations" to enforcement actions and legislative changes in the 1960s).

16. Nayantara Mehta, *Nonprofits and Lobbying: Yes, They Can!*, BUS. L. TODAY, Mar./Apr. 2009, at 27.

17. Only eligible § 501(c)(3) organizations may make the § 501(h) election. I.R.C. § 501(h)(3) (2012). Eligible § 501(c)(3) organizations include: educational institutions described in § 170(b)(1)(A)(ii); hospitals and medical research organizations described in § 170(b)(1)(A)(iii); organizations supporting government schools described in § 170(b)(1)(A)(iv); organizations publicly supported by charitable contributions within the meaning of § 170(b)(1)(A)(vi); organizations publicly supported by fee income within the meaning of § 509(a)(2); and certain § 509(a)(3) supporting organizations. *Id.* § 501(h)(4)(A)-(F). Churches and integrated auxiliaries of churches or associations of churches are disqualified from making the election, having rejected inclusion when § 501(h) was being considered. *Id.* § 501(h)(5)(A)-(B); JCT GENERAL EXPLANATION, *supra* note 15. Certain organizations that are not listed in § 501(h)(5) as disqualified organizations nevertheless may not make a § 501(h) election, because they are not included in § 501(h)(4). Treas. Reg. § 1.501(h)-2(b) (1990). For example, private foundations may not make the election. *Id.* Similarly, organizations described in § 509(a)(4) are not listed in § 501(h)(4) and consequently may not make the election. *Id.*

18. I.R.C. §§ 501(h), 4911.

19. Section 501(h) states that an organization with lobbying activities does not fail to qualify as tax-exempt under § 501(c)(3) because of those activities, so long as they are kept below certain dollar expenditure limits. *Id.* § 501(h)(1)-(2). Section 501(h) also imposes a tax on lobbying expenditures above another lower set of limits. Section 4911 provides details on how the lobbying limits are calculated, defines terms (like direct and grassroots lobbying), describes exceptions to the definitions, and addresses what expenses count as lobbying expenses. I.R.C. § 4911. Although private foundations are governed by the "no substantial part" test with respect to their continued eligibility for exemption, Treas. Reg. § 1.501(h)-1(a), private foundations and their foundation managers are subject to taxes under § 4945 on "taxable expenditures," which include amounts paid or incurred "to carry on propaganda, or otherwise attempt, to influence legislation" as defined in that section. Treas. Reg. § 53.4945-2(a)(1) (as amended in 1990). Effectively, private foundations are banned from legislative lobbying entirely.

20. An eligible charity that wants to use the § 501(h) expenditure test to measure its lobbying activity must affirmatively "elect" to do so by filing Form 5768 with the IRS. Treas. Reg. § 1.501(h)-2(a). The election takes effect at the beginning of the tax

narrow, definitions of what constitutes direct or grassroots lobbying, including several powerful exceptions to those definitions.[21]

Under § 501(h), two especially useful exceptions in our experience with clients are first, for nonpartisan analysis, study, or research[22] ("NPASR"), and second, for responses to written requests for technical assistance from a government body.[23] These exceptions allow electing charities to engage in large amounts of direct advocacy on legislation. Second, § 4911 establishes a scaled, mathematical formula for determining exactly how much money a charity can spend each year on lobbying.[24] That limit is calculated as a percentage of "exempt purpose expenditures" ("EPEs"), which include most of a charity's expenditures in pursuit of its charitable purposes, as well as overhead expenses associated with such efforts.[25] However, certain expenditures, such as some fundraising costs and capital expenditures, do not count as EPEs, and therefore do not increase the charity's lobbying limit.[26] The limit ranges from 20% of EPEs for charities with gross receipts up to $500,000, to just under 6% of EPEs for organizations with EPEs of $17 million.[27] Section 4911 imposes a maximum lobbying limit of $1 million, no matter the size of the organization.[28] The scheme also imposes a lower sub-limit on grassroots lobbying set at 25% of the total lobbying limit.[29] Finally, § 501(h) prescribes predictable penalties for exceeding those limits, in the form of a 25% excise tax on the excess total or grassroots lobbying amounts.[30] Only if a charity were to substantially exceed its cumulative annual lobbying limit over a four-year period would its § 501(c)(3) status be revoked.[31] Compared to the "no substantial part" test, § 501(h) and its

year in which the form is filed. *Id.* Consequently, a charity that engages in more lobbying in a given tax year than may be comfortable under the default "no substantial part" test can nonetheless benefit from the protection of § 501(h) by filing Form 5768 at any time during that tax year, including after the lobbying activity has occurred.

21. *See* Treas. Reg. § 56.4911-2(c) (1990).

22. I.R.C. §§ 4911(d)(2)(A), 4945(e); Treas. Reg. §§ 56.4911-2(c)(1), 53.4945-2(d)(1).

23. I.R.C. §§ 4911(d)(2)(B), 4945(e)(2); Treas. Reg. §§ 56.4911-2(c)(3); 53.4945-2(d)(2).

24. I.R.C. § 4911.

25. *Id.* § 4911(e)(1).

26. *Id.* § 4911(e)(1)(C).

27. *Id.* § 4911(c)(2)

28. *Id*. A charity reaches the $1 million limit when its EPEs reach $17 million. Charities with EPEs above $17 million do not benefit from additional lobbying capacity under § 501(h).

29. *Id.* § 4911(c)(4).

30. *Id.* § 501(h)(1).

31. *Id.* § 501(h); I.R.C. § 501(c)(3).

accompanying regulations give charities helpful guidance as they participate in the formulation of legislation. We find many charities view the § 501(h) election option as more certain, especially those seeking to maximize their lobbying within the allowable limits.

However, the power of the expenditure test is not unlimited, and charities actively engaged in influencing legislation may well exhaust their lobbying capacity under the test before the legislative process is complete. Although a very large electing charity, with EPEs substantially exceeding $17 million per year, may find more lobbying room by revoking its election to use the expenditure test and returning to the "no substantial part test,"[32] a smaller charity with sufficient unrestricted funds to spend beyond its lobbying limits under the expenditure test has only two options for accessing more lobbying capacity. Either it can exceed its annual lobbying limit and pay the excise tax on the excess, or it can establish a non-section 501(c)(3) affiliate to undertake the excess lobbying activity. Each of these options is discussed further below.

2. *Funding Charity Lobbying*

Lobbying limit aside, a charity can lobby only to the extent that it has resources available to spend on lobbying. However, increasing the pool of unrestricted funds poses challenges. In our experience, many charities are sustained by funding sources that either prefer not to allow their funds to be used for lobbying, or overly restrict the use of their grants out of excessive caution. As a result, from what we have seen, many charities that lobby spend less on lobbying than their tax status permits, in part because their funds are encumbered with restrictions that make them unavailable for lobbying. The following paragraphs address the main sources of funds charities can use to support their lobbying work: earned revenue, gifts from individuals or corporations, and private foundation grants.

a. *Using Earned Revenue*

As a charitable trust matter, funds that did not come from a donor as a grant or donation, including interest income, income from invest-

32. A charity that has elected to rely on the § 501(h) expenditure test may revoke its election by filing another Form 5768. I.R.C. § 501(h)(6); Treas. Reg. § 1.501(h)-2(d)(1). Revocation takes effect as of the beginning of the tax year following the tax year in which it is filed. Treas. Reg. § 1.501(h)-2(d)(1). In our practice we generally advise against revoking the election until a charity's EPEs are considerably larger than $17 million (perhaps $30 to $40 million), because of the vagueness of the "no substantial part" test.

ments, revenue from the conduct of charitable activities, and unrelated business income, generally are available for a charity to use for lobbying because the donor has not imposed any restriction on the use of donated funds for lobbying. Like all charity assets, these funds are encumbered with a charitable trust defined by the charitable purposes for which the charity was created.[33] However, in the absence of some other source of restriction, a charity can spend these funds as it chooses in service of its exempt purposes and in keeping with the charitable trust, including on lobbying up to its lobbying limit, without adverse tax consequences.[34]

b. Using Funds Raised from Individual Donors or Corporations

Funds donated to a charity by persons or corporate donors[35] may or may not be available for lobbying, depending on the specific circumstances of each donation. Many donors want to support the recipient organization generally and are not concerned with how the charity uses their contribution. Donors may give spontaneously without being solicited, or in response to a broad solicitation not tied to any specific program. These funds would then be available to the recipient charity to spend at its discretion, in service of its charitable purposes, including lobbying.

On the other hand, some donors do care how the recipient charity uses their gift. These donors can earmark the contribution for a specific charitable purpose, activity, or program, via the gift instrument or other contemporaneous written communication. Charitable trust law imposes on the charity an obligation to honor donor intent,[36] so if the

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33. RESTATEMENT (SECOND) OF TRUSTS § 348 cmt. f (AM. LAW INST. 1957) ("Where property is given to a charitable corporation without restrictions as to the disposition of the property, the corporation is under a duty, enforceable at the suit of the Attorney General, not to divert the property to other purposes but to apply it to one or more of the charitable purposes for which it is organized.").

34. *Id.*

35. The use of funds from foreign sources for lobbying raises non-tax issues as well, such as under what conditions the Foreign Agents Registration Act, 22 U.S.C. §§611-621 (2012), applies, or whether funding lobbying directed at ballot measures is within the ban on foreign funding of elections found in the Federal Elections Campaign Act, 52 U.S.C.A. § 30121(a)(1)(A) (Westlaw through Pub. L. No. 115-281). These issues are beyond the scope of this Comment.

36. A charitable trust is defined as "a fiduciary relationship with respect to property arising as a result of a manifestation of an intention to create it, and subjecting the person by whom the property is held to equitable duties to deal with the property for a charitable purpose." RESTATEMENT (SECOND) OF TRUSTS § 348 (AM. LAW INST. 1957). Furthermore, "where property is given to a charitable corporation and it is directed by the terms of the gift to devote the property to a particular one of its pur-

specific charitable purpose intended by the donor does not encompass lobbying activity, then the donated funds are not available for lobbying, even if the donor did not explicitly prohibit the use of the funds for lobbying.

However, donor contributions are rarely earmarked specifically for lobbying, because donors to charities typically want to deduct their contributions from their own taxable income. An individual may generally, and within limits, deduct a donation to a charity as a charitable contribution, but the deduction is lost if the contribution is earmarked for lobbying.[37] Similarly, a corporate donor cannot deduct as a business expense any contribution to a charity that is earmarked for lobbying.[38]

Private foundations are a significant source of funding for many charities. Unlike public charities, however, private foundations in the United States are prohibited from lobbying entirely by § 4945.[39] Under this prohibition, without taking advantage of the special rules discussed below, a private foundation would risk a taxable expenditure any time it makes a grant to a public charity that engages in lobbying, and particularly if the private foundation grant supports a

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poses, it is under a duty, enforceable at the suit of the Attorney General, to devote the property to that purpose." *Id.* § 348 cmt. f.

37. Treas. Reg. §1.170A-1(j)(6) (as amended in 2018); Rev. Rul. 80-275, 1980-2 C.B. 69.

38. I.R.C. § 162(e)(1) (2012).

39. Sections 4945(d)(1) and (e) define as a "taxable expenditure" any amount paid or incurred by a private foundation to influence legislation via direct or grassroots lobbying. Although termed an excise tax, § 4945 operates as a prohibition, imposing an initial tax on lobbying expenditures of 20%, *id.* § 4945(a)(1), and requiring correction of the expenditure, followed by a second-tier tax equal to 100% of the lobbying expenditures if the foundation fails to "correct" the lobbying expenditure, *id.* § 4945(b)(1). As further disincentive, § 4945 may also impose a tax of 5% of the lobbying expenditures on foundation managers personally for knowingly agreeing to lobbying expenditures, *id.* § 4945(a)(2), and a further tax of 50% on those who refuse to agree to correction, *id.* § 4945(b)(2). On the other hand, the regulations implementing § 4945 define direct and grassroots lobbying by reference to the definitions set forth under § 4911, giving private foundations precise guidance about which activities and expenditures constitute lobbying and which do not. Treas. Reg. § 53.4945-2(a) (as amended in 1990). These regulations also provide exceptions similar to those provided to charities under § 4911, and establish an additional exception, available only to private foundations, for communications related to a project that is or will be jointly funded by the foundation and the government. *Id.* §§ 53.4945-2(d), (a)(3). The authors wish to make clear that they personally and professionally support the right of private foundations to engage in public policy debates and influence legislation, through activities that either do not meet the definition of lobbying or fall within one of the several exceptions to lobbying available to private foundations. While the topic is beyond the scope of this Comment, careful use of these definitions and exceptions can give private foundations a significant voice and a seat at the table when policies and laws are being discussed.

specific project that includes lobbying. However, IRS regulations provide two "safe harbors" that a private foundation can use to make a grant to a public charity that lobbies without making a taxable expenditure under § 4945.[40] A private foundation grant is considered a taxable expenditure if it is "earmarked" for lobbying, such as via an oral or written agreement that the grant will be used for lobbying.[41] However, a grant is not considered "earmarked" if it satisfies the requirements of either of the two safe harbors.[42]

i. "General Support" Safe Harbor

The first safe harbor protects a "general support" grant, where decisions about the specific use of grant funds are left entirely to the grantee (within the public charity's exempt purposes). Such a grant is not "earmarked" for lobbying, and therefore not a taxable expenditure by the private foundation, because it is not earmarked for any specific purpose.[43] Not being earmarked for lobbying is enough to protect the private foundation under the regulations: a general support grant agreement need not affirmatively prohibit the grantee from using grant funds for lobbying.[44] Even if the grantee spends all of the grant proceeds on lobbying, and reports to the private foundation that it has done so, the grant will not constitute a taxable expenditure by the private foundation.

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40. Treas. Reg. § 53.4945-2(a)(6).

41. *See id.* § 53.4945-5(a)(6)(i).

42. *See id.*

43. In our practice, we often encounter confusion about the meaning of a grant agreement term providing that the grant is "not earmarked" for lobbying, which charity grantees often misunderstand to prohibit the use of grant funds for lobbying. As discussed above, a grant to a charity that lobbies is not a taxable expenditure under § 4945(d)(1) unless it is earmarked for lobbying, and it is not earmarked for lobbying if it fits within one of the two safe harbors. *Id.* § 53.4945-2(a)(6). Thus, a provision in a general support grant agreement stating that the grant is "not earmarked" for lobbying makes clear that the private foundation does not intend to require the grantee to use any grant funds for lobbying, and signals (to the IRS and anyone else) that the private foundation seeks the protection of the general support safe harbor. Such a provision does not bar the grantee from using general support grant funds for lobbying.

44. Letter from Ward Thomas, IRS, to Charity Lobbying in the Public Interest 2 (Dec. 9, 2004), https://philanthropynewyork.org/sites/default/files/files/events/IRS%20Guidance%2012-9-04_0.pdf. A prohibition on lobbying in a general support grant agreement undermines a primary benefit (to the grantee) of providing general support. General support grants maximize the grantee's flexibility in the use of grant funds and provide access to resources that the grantee can deploy in whatever way will most effectively advance its charitable purposes. A general support grant that prohibits the use of grant funds for lobbying takes away with one hand what it gives with the other, without providing any greater protection to the funder.

In our experience, making a general support grant requires a level of trust many private foundations find hard to muster. Because the foundation cannot force a general support grantee to spend the foundation's resources on any particular program or activity, the foundation must feel confident that the grantee will use its freedom from restrictions to efficiently and effectively deploy grant funds in ways that advance the foundation's charitable purposes. From what we have seen, lack of control over general support grants, coupled with the absence of deep, long-standing relationships between private foundations and many of their grantees, makes many foundations uneasy. As a result, private foundations as a whole[45] are reluctant to take advantage of the general support grant safe harbor, although we have seen evidence of this beginning to change.

ii. "Specific Project" Safe Harbor

The second safe harbor protects a grant to a public charity that supports a "specific project" that includes lobbying, but only if certain criteria are met and documented.[46] The primary requirement is that the amount of the private foundation grant must not exceed the non-lobbying portion of the specific project's budget.[47] To demonstrate satisfaction of this requirement, before making the grant, the foundation must receive information documenting the non-lobbying portion of the specific project from the grantee.[48] The foundation must also determine that it is reasonable to rely on that information. If these criteria are met, the grant will not be deemed earmarked for lobbying, and the grantee's use of grant funds for lobbying will not be attributed to the private foundation.

This requirement precludes a private foundation from funding the entire budget of a specific project that includes lobbying. However, under the regulations, so long as none of the grants alone exceed the non-lobbying portion of the project budget, multiple private foundation funders collectively may fully fund a project that includes lobby-

45. One notable exception has been the reported use of general support grants by politically conservative foundations to fund the development and dissemination of the intellectual underpinnings of the conservative movement over several decades. *See* Andrew Rich, *War of Ideas: Why Mainstream and Liberal Foundations and the Think Tanks They Support Are Losing in the War of Ideas in American Politics*, STAN. SOC. INNOVATION REV., Spring 2005, at 18, 22-23.

46. Treas. Reg. § 53.4945-2(a)(6).

47. The application of this requirement to multi-year grants raises additional complications, further discussion of which is beyond the scope of this Comment. *See id.* § 53.4945-2(a)(6)(ii).

48. *Id.* § 53.4945-2(a)(6)(iii).

ing and still be protected by the safe harbor. This is true even if, under the project budget, it is inevitable that some private foundation grant funds will be spent on lobbying. It is also true that the need for multiple funders dilutes the influence on public policy of any one foundation. The practical result of this safe harbor is that a private foundation cannot circumvent the lobbying prohibition by itself—it, or its grantee, must recruit other funding sources to the cause.

Despite its power to enable private foundations to support projects that include lobbying, in our experience, the specific project safe harbor, like the general support safe harbor, is not often used. Foundations may be wary of their obligations to vet the circumstances of the grant and may lack the expertise or internal infrastructure to implement appropriate oversight. Although some foundations have invested in the capacity to use the safe harbor effectively, from what we have seen, many remain uncomfortable or unfamiliar with it, and do not take advantage of it.

3. *Managing a Charity's Lobbying Limit*

Regardless of the funding mechanism, and how a charity that lobbies chooses to measure its lobbying, the charity must remain attentive to its lobbying limit, and must implement reliable mechanisms for tracking and reporting its lobbying activities.[49]

For many other charities, the applicable lobbying limit (under either test) may be more than sufficient to accommodate lobbying needs. This is the case when the desired amount of lobbying is small in relation to the organization's overall activities, or when the charity has few or no unrestricted assets available to devote to lobbying. Other charities will need to consider ways to maximize their lobby limit.

a. *Using Exceptions to the Definition of Lobbying*

Skillful use of key exceptions to the definition of lobbying under § 501(h) can greatly expand a charity's ability to influence public policy without lobbying. For example, a charity that understands the NPASR exception may draft model legislation and package it in a larger document that provides a sufficiently full and fair exposition of the pertinent facts to allow a reader to reach an independent conclu-

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49. Beyond federal tax law, a charity's tracking mechanisms may need to account for disclosure obligations imposed by regulatory compliance requirements arising from other bodies of law unrelated to tax-exempt status, such as a state or local campaign finance rules. *See* discussion *infra* Section I.A.5.

sion about whether to support the legislation. By explaining the rationale for the model legislation, such a document provides not just a legislative proposal, but also a meaningful contribution to the public debate about that legislation, allowing it to qualify for the exception. As a result, the charity can distribute it to legislators, effectively transmitting its views about what it wants them to do, without incurring any lobbying expenditures.

Similarly, a charity that understands the exception for technical assistance requests can arrange to receive a written invitation from the chair of a legislative committee or head of a government department asking, on the committee's or department's behalf, for the charity's input on proposed legislation pending before the committee or being considered by the department. The charity can then respond to that request by appearing before the committee or meeting with the department and offering its views about the legislation, again without incurring any lobbying expenditures.

A charity that has little desire or capacity to influence legislation, or that finds non-lobbying ways to do it, will have no trouble staying within its lobbying limit, and the burden on the charity to monitor and report its lobbying activity to the IRS is relatively light.

b. Challenges to Managing the Lobbying Limit

For many charities, the applicable lobbying limit is a real constraint that poses a practical risk of tax exposure that must be managed.[50] Planning and tracking lobbying activities pose operational challenges. Specifically, administering appropriate oversight requires staff time and other expenditures that are often in short supply.

One challenge is that, under either test, the annual lobbying limit derives from the charity's overall volume of activity in a given tax year, which varies from year to year. It also means that the charity cannot determine exactly what its lobbying limit will be in a given tax year, until after that tax year is over. Accordingly, planning in advance for lobbying at or near the limit must account for some uncertainty and must include a margin of error to prevent exceeding the limit. This is particularly troublesome under the "no substantial part" test, since the limit itself is inherently uncertain.[51]

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50. Because § 501(h) allows an electing charity to exceed its lobbying limit without necessarily putting its exempt status at risk, in rare circumstances, a charity could reasonably decide to do so and pay the resulting excise tax. However, it would have to divert scarce charitable dollars from its charitable programs to paying the tax. I.R.C. §§ 501(h), 4911.

51. *See supra* text accompanying notes 11-16.

Another challenge in managing the lobbying limit is that charities are required to report their lobbying activities to the IRS, and thus need a mechanism for tracking those activities and calculating those expenditures. The IRS has not prescribed any specific tracking method, but in the event of an audit, the burden is on the charity to demonstrate the accuracy of the return, typically by having a paper trail in the corporate records that supports the activities and expenditures required to be disclosed on the charity's annual information return for the year at issue. In practice, that means the charity must track any direct expenses incurred for lobbying, and its staff who participate in lobbying activities should track their time spent on lobbying. For non-electing charities, they must also track volunteer hours spent on lobbying, since they are required to report volunteer lobbying activities to the IRS.[52] Staff time records can then be used to calculate the share of overhead costs (occupancy, utilities, non-program-specific staff resources like accounting and reception, etc.) that are fairly allocable to lobbying. Direct lobbying expenses, staff time spent on lobbying, and allocable overhead all count against the charity's lobbying limit.[53]

i. Taking Advantage of Unused Lobbying Limit

In our experience, when a charity has both ample room under its lobbying limit in a given tax year and access to sufficient unrestricted funds, it has an opportunity to invest in future lobbying activity by granting resources before the end of the tax year to another entity that is not a charity (such as a social welfare organization)[54] that can hold those assets and use them for lobbying in later years. If the charity does not make such a grant, at the end of the tax year, it will lose the ability to devote the funds to lobbying. The charity's grant must be earmarked for a specific charitable project that includes lobbying and would count against the charity's lobbying limit for the tax year in which the grant is made.

52. *See* INTERNAL REVENUE SERV., INSTRUCTIONS FOR SCHEDULE C (FORM 990 OR 990-EZ) 5 (2018), https://www.irs.gov/pub/irs-pdf/i990sc.pdf.

53. Treas. Reg. § 56.4911-3(a) (1990).

54. Lobbying funds should not be transferred to another charity because the recipient charity's expenditures from those funds will count against its own lobbying limit, essentially double-counting the same dollars against both charities' lobbying limits; to be tax-efficient, the transfer must go to an entity that can lobby without limits. This is why charities wishing to pool their lobbying dollars need to identify a vehicle other than one of them for this purpose.

4. *Reporting Charity Lobbying on Form 990, Schedule C*

IRS Form 990, a charity's Annual Information Return, has a separate Schedule C for reporting the charity's lobbying activities.[55] A charity must complete Schedule C, Part II, for any year in which it either engages in lobbying activity or has a § 501(h) election in effect.[56] An electing charity must complete Part II-A of Schedule C, which requires the charity to report its total grassroots lobbying expenditures, direct lobbying expenditures, and exempt purpose expenditures, and to calculate the applicable lobbying limits, in order to determine whether the charity remained within the applicable limits for the filing tax year, as well as for the 4-year period ending with the filing tax year.[57] On the other hand, a non-electing charity must complete Part II-B of Schedule C, which requires significantly more information. The non-electing charity must identify and describe its lobbying activities specifically (e.g., volunteers, media advertisements, rallies, grants, etc.). In addition, the charity must provide the amount that it spent on each method and a detailed narrative description of each lobbying activity in Part IV of Schedule C.[58]

5. *Non-Tax Considerations*

Considerations other than federal tax law may also influence a charity's decision about whether, and how much, to lobby. For example, ballot measure lobbying activity, which constitutes direct lobbying for federal tax purposes, may also trigger extensive campaign finance disclosure obligations. Engaging in certain lobbying activities in a given jurisdiction may require registration and reporting under federal, state, or local lobbying disclosure rules, which a charity may prefer to avoid. Charity lobbying may also raise non-legal concerns, such as the reactions of current or potential allies or donors and impact on the charity's reputation among relevant constituencies.

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55. *Form 990: Return of Organization Exempt from Income Tax*, INTERNAL REVENUE SERV. (2017), https://www.irs.gov/pub/irs-pdf/f990.pdf [hereinafter *Form 990*].

56. A charity's affirmative response on Form 990, Part IV, Line 4, directs it to complete Schedule C. Every Form 990 filer, including a charity, must also fill out Schedule C, Part I, if it engaged in any direct or indirect political campaign activity. *Id*. at Line 3. Such activity is impermissible for a charity and would threaten the charity's tax-exempt status and subject it to excise tax under § 4955. I.R.C. § 4955.

57. I.R.S. Form 990, Schedule C, and Instructions *available at* https://www.irs.gov/forms-pubs/about-schedule-c-form-990-or-990ez.

58. *Id.*

B. Using a Social Welfare Organization to Lobby

The discussion above demonstrates that although charities exempt under § 501(c)(3) can serve their constituencies as powerful proponents of legislative change, their exempt status constrains the extent to which they can do so. Where those constraints are too restrictive, advocates may turn to an alternative vehicle for lobbying such as a social welfare organization exempt under § 501(c)(4).

Section 501(c)(4) provides tax exemption for entities organized and operated "exclusively for the promotion of social welfare."[59] Although not precisely defined in the Code or regulations, "social welfare" encompasses lobbying activities in the public interest, and unlike § 501(c)(3), § 501(c)(4) does not limit the amount of lobbying that a social welfare organization can conduct.[60] As a result, a social welfare organization can engage in as much lobbying as its resources will allow, without adverse tax consequences.

"Social welfare" also includes charitable activity,[61] so as far as the IRS is concerned, a social welfare organization can conduct any activity that could be carried out by a charity, in addition to lobbying. There is no need for a social welfare organization to distinguish or separately track its lobbying activities from any other educational activity that it may conduct.

On the other hand, intervening in a candidate campaign for election to public office is not social welfare activity.[62] A plain reading of the statutory language quoted above strongly suggests that an organization that engages in any, or at least more than an insubstantial amount of, such activity would not be organized and operated "exclusively" for social welfare purposes, and therefore would not qualify for exemption.[63] In a regulation that has recently become highly controversial, however, the IRS has interpreted "exclusively" to mean "primarily" for purposes of § 501(c)(4).[64] In our experience, this regulation effectively, though not explicitly, authorizes social welfare organizations to devote up to forty-nine percent of their efforts to activities that the IRS has determined do not promote social welfare.

The primary source of the controversy is activity that constitutes intervening in a candidate campaign for election to public office

59. I.R.C. § 501(c)(4) (2012).

60. *Id.* § 501(c)(3), (4).

61. Treas. Reg. § 1.501(c)(3)-1(d)(2) (as amended in 2017).

62. Treas. Reg. § 1.501(c)(4)-1(a)(2)(i) (as amended in 1990).

63. *Id.*

64. *Id.* § 1.501(c)(4)-1(a)(2)(ii).

("candidate campaign intervention").[65] In the wake of the United States Supreme Court's landmark decision in *Citizens United v. FEC*,[66] spending on candidate campaign intervention by social welfare organizations increased dramatically,[67] and there have been widespread calls for the IRS to reform its interpretation of the meaning of "exclusively" in this context.[68] For the time being, however, the interpretation remains unchanged. Thus, a social welfare organization can engage in extensive activity that is strictly off limits for a charity.

1. *Funding Social Welfare Lobbying*

Given the significantly greater flexibility in activities under § 501(c)(4) compared to § 501(c)(3)—unlimited charitable activities, unlimited lobbying, and limited political activities—§ 501(c)(4) exempt status has significant up-sides for anyone seeking a vehicle for public interest lobbying.[69] That is, until you consider the funding side of the equation. Federal tax law imposes two significant fundraising disadvantages on social welfare organizations, as compared to charities,[70] which we believe affect their fundraising messages and strategies.

First, contributions to a social welfare organization are not deductible by the individual or corporate donor as charitable contribu-

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65. *Id.*; *see also* Rev. Rul. 81-95, 1981-1 C.B. 332.

66. 558 U.S. 310, 365-66 (2010) (holding that the McCain-Feingold Act's limits on certain campaign spending by corporations and labor unions were unconstitutional restraints on free speech).

67. *See generally* WESLEYAN MEDIA PROJECT AND CENTER FOR RESPONSIVE POLITICS, SPECIAL REPORT ON OUTSIDE GROUP ACTIVITY, 2000-2016 (2016).

68. Although we propose in Part III *infra* a more limited form of social welfare entity that would not be permitted to engage in candidate campaign intervention, we do not mean to suggest that social welfare organizations generally ought not conduct such activity. The authors personally do not support such limits on the activities of social welfare organizations, although a discussion of the propriety and permissible amount of candidate campaign activity by social welfare organizations as a tax-exempt status is beyond the scope of this Comment.

69. *Compare* I.R.C. § 501(c)(4), *with id.* § 501(c)(3).

70. Prior to recent legislation, the gift tax imposed by § 2501 represented an additional complication for fundraising by § 501(c)(4) organizations. Unlike transfers to § 501(c)(3) organizations, which are exempt from gift tax under § 2522(a)(2), there was no exception to the gift tax for transfers to § 501(c)(4) organizations. After years of the IRS's apparent non-enforcement of the gift tax against these transfers, the Protecting Americans from Tax Hikes Act ("PATH") Act of 2015 added § 2501(a)(6), which provides that transfers to §§ 501(c)(4), 501(c)(5), and 501(c)(6) organizations are not subject to gift tax. Pub. L. No. 114-113, § 408, 129 Stat. 2242. There is still no analogous exception in the estate tax context, however, so testamentary transfers to a § 501(c)(4) organization will generally not reduce federal estate tax.

tions.[71] As a result, in our experience, social welfare organizations tend to rely on a large number of relatively small gifts from individual donors, who are often less concerned about deductibility than donors of large amounts.[72] While corporations may in some limited situations be able to deduct their gifts to § 501(c)(4) organizations as business expenses (as businesses may also do with gifts to charities),[73] we have not commonly seen corporate giving as a significant source of social welfare funding.

Second, the rules governing private foundations impose additional burdens of oversight and accountability on any grant by a private foundation to a non-charity, including a specific obligation to include in the grant agreement an explicit prohibition on the use of grant funds for lobbying.[74] In our experience, while theoretically possible, private foundation funding of § 501(c)(4) organizations is in practice quite rare, and would have to be directed to their non-lobbying social welfare activities in any event.

A public charity, unlike a private foundation, may make a grant earmarked for lobbying in furtherance of its charitable purposes to a non-charitable entity, with appropriate safeguards and oversight, including a written grant agreement.[75] In California, ballot measure committees typically claim tax-exempt status under § 501(c)(4), and charities frequently contribute to them. Federal law prohibits a social welfare organization that engages in lobbying from receiving federal

71. *See* I.R.C. § 170(c). The Code imposes an affirmative obligation on social welfare organizations to inform donors of the non-deductibility of contributions. I.R.C. § 6113(a), (b)(1). In our experience, social welfare organizations tend to overlook one fundraising opportunity that arises when potential donors express a preference for making a deductible contribution. A social welfare organization can invite such donors to contribute the net that they would have realized, after deduction, if they had made the contribution to a charity instead. This strategy contradicts the instinct of development staff, who tend to think about how to increase gifts rather than reduce them, but reducing the ask to account for the lack of deduction can promote more giving to a social welfare organization.

72. Large social welfare organizations often rely on a large membership for fundraising. Examples include MoveOn.org, AARP, and the National Rifle Association.

73. I.R.C. § 162.

74. *Id.* § 4945(h); Treas. Reg. § 53.4945-5(b)(3)(iv) (as amended in 2015). These rules, known as "expenditure responsibility," are designed to ensure that a private foundation grant to a non-charity may only be used for specific charitable activities. See *supra* note 43 for further details. Neither a private foundation nor a public charity may make a general support grant to a social welfare organization. *See* Rev. Rul. 68-489, 1968-2 C.B. 210.

75. In fact, if charities wish to pool their resources for lobbying, this can only be done tax efficiently in a non-charitable entity such as a § 501(c)(4) organization, as discussed in *supra* note 54.

funds through an award, grant, or loan.[76] In summary, social welfare organizations often have a harder time raising the resources they need to support their activities than charities working on similar issues, and they typically rely on different appeals, sources, and fundraising strategies.[77]

2. *Reporting Social Welfare Lobbying (and Political Activities) on Form 990*

Like a charity, a social welfare organization is required to file an annual Form 990 with the IRS. Under some circumstances, a social welfare organization may also be required to complete parts of Schedule C to Form 990, though the specific information to be provided is different from that required of a charity.[78] A social welfare organiza-

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76. 2 U.S.C. § 1611.

77. For some social welfare organizations, an additional constraint arises in the context of contributions from corporations. As noted previously, federal tax law prohibits corporations from deducting lobbying expenditures as a business expense. *See supra* note 73 and accompanying text. This prohibition includes contributions made to, among others, a social welfare organization to support lobbying. I.R.C. § 162(e)(1). However, as a general rule, a corporation is permitted to deduct, as a business expense, the payment of membership dues that it pays to a social welfare organization of which the corporation is a member. *See id.* § 162(e)(2). This situation created an opportunity for abuse: the corporation could pay dues to the social welfare organization, and the social welfare organization could use some or all of the dues revenue to conduct lobbying activities; the § 501(c)(4) organization is exempt from income taxes, so the absence of a deduction is irrelevant to it. I.R.C. § 501(c)(4). The result would be that the corporation would be able to deduct its membership dues, even though the dues funded lobbying expenses the corporation would not be entitled to deduct if it had incurred them directly.

To prevent this abuse, § 6033(e) imposes a scheme known as the "proxy tax" on, among others, social welfare organizations with dues-paying, corporate members. I.R.C. § 6033(e). Under these complex rules (a more complete discussion of which is beyond the scope of this Comment), a social welfare organization that raises money via dues or similar payments from members that might claim a business expense deduction has two options: it may notify its members of the portion of their dues payments that was used for (non-deductible) political purposes, including lobbying, and that that portion of dues is not deductible by members as a business expense; or it may pay a "proxy tax" on the assumption that the members deducted the full amount of their dues payments, despite their use for such purposes. *Id.* If the social welfare organization takes the first approach, then the members, having been informed of the non-deductibility of their dues, may not claim a deduction, so the IRS is satisfied that the organization is not facilitating tax fraud. If the organization takes the second approach, then the IRS is satisfied that it has received from the organization all of the tax that the members would have owed and is not concerned about whether the members claimed a deduction for the full amount of their dues payment. Either way, though, the proxy tax rules add a layer of complexity to the compliance obligations of social welfare organizations that lobby with funds raised from corporate members.

78. I.R.S. Form 990, Schedule C, and Instructions *available at* https://www.irs.gov/forms-pubs/about-schedule-c-form-990-or-990ez.

tion also needs to complete Schedule C, Part I, for any year in which it conducts direct or indirect political campaign activities.[79] In addition, a social welfare organization must complete Schedule C, Part III, if it receives membership dues, assessments, or similar amounts[80] that may trigger proxy tax liability.[81] To be clear, a social welfare organization does not report its lobbying activity.[82]

C. *Deciding Which Type of Vehicle to Use for Lobbying Activity*

The many differences between § 501(c)(3) charities and § 501(c)(4) social welfare organizations invite a fundamental question for anyone seeking to conduct or support activities designed to influence public policy: which type of entity is the best vehicle? The answer, of course, varies with the circumstances, some of which favor a charity while others favor a social welfare organization.

1. *Factors Favoring a Charity*

a. *Fundraising Strategy Depends on Donors Who Expect a Deduction*

The most common and influential factor favoring the use of a charity is donors seeking a deduction. If an individual or corporate donor prefers to make a deductible contribution, then the recipient must be a charity, and the gift must not be earmarked for lobbying. Donors giving small amounts may not feel strongly about being able to claim a deduction because the impact of the deduction on their tax circumstances may be negligible. Larger donors, though, often require a deduction for their own tax planning purposes, constraining them to give to a charity.

b. *Fundraising Strategy Depends on Private Foundation Support*

Most grant-making private foundations only support charities,[83] so if a project depends at least in part on foundation funding, then it is most likely that a charity will need to be involved. While some private foundations are comfortable funding fiscally-sponsored projects[84] that include re-grants to non-charity affiliates or allies, others are not.

79. *Id.*
80. Rev. Proc. 98-19, 1998-7 I.R.B. 30.
81. See *supra* note 77 for a discussion of the proxy tax.
82. *See supra* note 78.
83. *See supra* note 74 and accompanying text.
84. Fiscal sponsorship refers to a wide range of arrangements between a § 501(c)(3) public charity and a project in which, typically, the charity receives and expends funds

Private foundation funding can be particularly beneficial to a charity if the foundation in question understands and is willing to use one or both of the grant-making safe harbors discussed above that allow the charity to use private foundation grant funds for lobbying. A proposed project that includes lobbying creates an opportunity for a charity to educate private foundations about the availability and power of the safe harbors to improve the impact of their grant-making.

c. Lobbying Limit Under § 501(c)(3) Comfortably Exceeds Expected Lobbying Activity

Charity lobbying limits, particularly with deft use of the definitions and exceptions available under § 501(h), are more generous than most people, including charity managers and donors, realize. If the contemplated lobbying will not come close to the applicable lobbying limit, then the charity can safely lobby without devoting significant resources to managing its expenditures to avoid exceeding the limit.

d. Unrestricted Funds Are Available

Some charities, such as those that are heavily dependent on grants from private foundations or government agencies, have very little unrestricted funding available. A charity that has at least some funding that it is free to decide to use for lobbying (for example, investment income, program service revenue, or general support gifts), may be an appropriate lobbying vehicle.

e. Public Perception

The goodwill associated with charities is a powerful factor in choosing to lobby through a charity. Charity status typically confers a "halo effect" on the organization and its individual and corporate donors, making it more appealing to some donors to support a charity over a non-charity doing the same work. When a donor is concerned about public perception of the donor and of the donor's involvement in the community, giving to a charity may address that concern more effectively than supporting a social welfare organization.[85]

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to advance the project while retaining control and discretion over the funds. *See* Gregory L. Colvin, Fiscal Sponsorship: 6 Ways To Do It Right (2d ed. 1993, 2005).

85. Some social welfare organizations—the Sierra Club is an example—have achieved the halo status usually associated with charities in the public mind. And social welfare organizations generally, as nonprofits dedicated to the public welfare, do have more of a halo than for-profit private businesses.

2. *Factors Favoring a Social Welfare Organization*

a. *Donors Do Not Intend to Claim a Deduction*

Some donors are willing to make significant contributions to support causes of interest, without claiming a charitable contribution deduction, especially when they understand that non-deductible contributions can be used by the recipient for greater and more direct impact in the legislative and electoral realms than charitable contributions. A donor may have exceeded her annual limit on charitable contribution deductions for the year,[86] or may have other reasons for forgoing a deduction. Either way, the ability to offer donors a deduction is the most potent advantage that a charity has, so if a donor is not concerned with receiving that benefit, then the broader capabilities and lower risks associated with a social welfare organization will be more appealing.

b. *Objectives Are Inconsistent with § 501(c)(3) Requirements*

If the primary objective to be accomplished "may be attained only by legislation or a defeat of proposed legislation," and the work involved will include advocacy or campaigning for such objective(s), then the organization created to conduct that activity will constitute an "action organization" under IRS regulations, and will not qualify for exemption under § 501(c)(3).[87] An action organization may qualify for exemption, though, under § 501(c)(4).[88] An organization formed to support or oppose a ballot measure would constitute an action organization under these rules, and ballot measure campaigns (particularly at the state level) are generally so expensive that an organization devoted to passing or defeating a ballot measure would expect to spend far more than the lobbying limit available to a charity under federal tax law.[89]

The action organization regulations also caution against trying to squeeze too much lobbying into a charity.[90] A charity that loses its

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86. Section 170(b) limits the amount of the charitable contributions that an individual may deduct in any given tax year to a certain percentage of the donor's "contribution base" for such year. The applicable percentage limitation with respect to a particular charitable contribution depends on the federal tax status of the donee organization and the nature of property contributed. I.R.C. § 170(b)(1)(A)-(B).

87. Treas. Reg. § 1.501(c)(3)-1(c)(3) (as amended in 2017); *see also supra* note 11.

88. Treas. Reg. § 1.501(c)(3)-1(c)(3)(v).

89. *Id.* In some jurisdictions, an organization that raises and spends money to pass or defeat a ballot measure would also be subject to campaign finance disclosure obligations. Compliance with those rules requires consultation with knowledgeable counsel.

90. *Id.* § 1.501(c)(3)-1(c)(3).

exempt status because of excess lobbying (or partisan political activity) cannot simply convert to a social welfare organization. In fact, if revocation occurs because of lobbying or political activities, the failed charity cannot qualify for exemption in the future under § 501(c)(4), or any other subsection of § 501(c).[91]

Examples of action organizations under these rules include: a religious ministry "[a]n essential part of the program of [which] was to promote desirable governmental policies consistent with its objectives through legislation";[92] an organization substantially engaged in promoting legislation to protect or otherwise benefit animals;[93] and an organization that advocated for the adoption of a "flat tax, a goal that could only be accomplished by legislation."[94]

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91. I.R.C. § 504; Treas. Reg. § 1.504-1 (as amended in 1990).

92. Christian Echoes Nat'l Ministry, Inc. v. United States, 470 F.2d 849, 855 (10th Cir. 1972). An organization initially recognized as exempt under § 501(c)(3) maintained religious radio and television broadcasts, authored publications, and conducted evangelistic campaigns focused on supporting Christian conservatives and opposing communism. *Id.* at 852. As part of these campaigns, the organization encouraged readers or viewers to call their congressperson to support a policy or to support or oppose particular politicians in an election. *Id.* at 855. The taxpayer argued that it had not conducted any lobbying because it never supported or opposed a particular bill or endorsed a political candidate. *Id.* at 853. The IRS and the Tenth Circuit rejected both that characterization of the facts and the argument that lobbying requires formal endorsements. *Id.* at 853, 855-56. The Tenth Circuit found that a substantial portion of the organization's activity was influencing legislation and intervening in political campaigns and upheld the retroactive revocation of the organization's tax-exempt status. *Id.* at 855-56, 858.

93. Rev. Rul. 67-293, 1967-2 C.B. 185. An organization that operated a community pound for the humane treatment of strays engaged in "substantial" lobbying but argued that the lobbying constituted charitable activities because all the legislation it supported was beneficial to the community and because it did not contact legislators directly but instead urged other people to do so. *Id.* The IRS rejected both arguments but ruled that the organization's substantial lobbying was consistent with its status as a § 501(c)(4) organization. *Id.*

94. Fund for the Study of Economic Growth and Tax Reform v. IRS, 161 F.3d 755, 757 (D.C. Cir. 1998). An organization formed by then-Senate Majority Leader Bob Dole and then-Speaker of the House Newt Gingrich, both Republicans, appealed the IRS's denial of the Fund's application for tax-exempt status under § 501(c)(3). *Id.* at 756-58. The application stated that the Fund had been established to " 'fund the study, research and analysis of ideas and proposals to reform the Nation's tax system' " by raising money to support the National Commission on Economic Growth and Tax Reform, a partisan body also established by Dole and Gingrich. *Id.* at 756. While its application was pending, the Fund conducted hearings on income tax reform and published a report recommending to Congress and the President that the Code be repealed in its entirety and that this should be a test for any legislation passed by Congress or signed by the President. *Id.* Given the nature of the organization's activity and its operation in close connection with the Commission and its singular effort to pass a flat tax, the Court held that the IRS properly denied the Fund's application because the Fund constituted an "action organization" under Treas. Reg. § 1.501(c)(3)-1(c)(3)(iv). *Id.* at 759-60.

II.
WHEN ONE IS NOT ENOUGH: CHARITY/SOCIAL WELFARE TANDEM ORGANIZATIONS

Often, the circumstances surrounding a policy change effort do not unambiguously favor one vehicle over another. In many cases, each vehicle brings advantages and disadvantages. In these cases, a common strategy is to take advantage of both types of vehicle simultaneously via a tandem affiliated structure, consisting of a charity and a social welfare organization closely coordinating on a shared mission and strategy. If carefully structured and operated, the tandem enterprise can safely raise both charitable and non-charitable funds and leverage them in a broad, aggressive campaign to accomplish societal change.[95]

Accomplishing this comes at a cost, though. In our experience, tandem structures require constant vigilance to operate properly, particularly with respect to constructing and securing the boundary between the affiliates. While this burden is manageable when the necessary skills and resources are available, charities with limited resources will face significant practical and financial obstacles to forming a lobbying affiliate.[96] While there are countless examples of tandem affiliates effectively using this model, our experience is that for many charities (and their donors), despite the clear and substantial benefits, the prospect of forming, maintaining, and operating another entity is sufficiently daunting that they opt instead to accept the § 501(c)(3) lobbying limit, acceding to its constraint on their ability to engage in public policy advocacy in favor of avoiding the additional perceived risks, cost, and complication of management and regulatory compliance for two entities. We discuss the benefits and challenges of tandem structures in the following sections.

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95. For a more detailed discussion of the structural and operational requirements of affiliated enterprises, see Rosemary E. Fei & Gregory L. Colvin, *How to Set Up and Maintain an Action Fund Affiliated with a Charity*, 15 TAXATION OF EXEMPTS 184 (2004).

96. Of course, a social welfare organization could also be the pre-existing and/or dominant entity in a tandem structure, and in fact there are generally significant advantages to that arrangement, relating to the use of shared branding and resources, especially if a § 527(f)(3) separate segregated fund of the social welfare organization to conduct or fund partisan political activities is also contemplated. This Comment, however, focuses exclusively on charitable lobbying activities, so having the charity be the dominant entity would be more typical. Moreover, a tandem in which the social welfare organization is the dominant entity would not face many of the problems addressed by the proposal we make in Part III, and so we do not discuss it further here.

A. Advantages of a Tandem Affiliated Structure

Based on our work with clients over many years, the main advantage of an affiliate structure is its ability to deliver both the tax benefits of a charity and the expanded advocacy capabilities of a social welfare organization in a flexible enterprise with a single shared mission. On the charity side, the tandem enterprise offers deductibility of contributions from individual and corporate donors, access to private foundation grants, use of a charity's § 501(h) lobbying limit to maximum effect, and the charity halo effect. Our clients find that these benefits promote goodwill among key constituencies, including potential donors, activists, and community allies. This expanded access to support and collaboration makes it easier to raise funds that the affiliated enterprise can spend on lobbying, and, as explained more fully below, creates an opportunity to sequester current available resources to be used in the future for lobbying.

On the social welfare side, the primary benefit of the affiliated enterprise, for lobbying purposes, is the social welfare organization's capacity to lobby, limited only by its access to unrestricted funds.[97]

Put somewhat differently, the disparity in lobbying capacity between a charity and a social welfare organization creates an opportunity for charities seeking to expand their lobbying capability. By forming a social welfare organization that it controls, a charity gains the ability to provide for an amount of lobbying activity, conducted with separately raised funds and overseen by a separate governing body, that far exceeds the lobbying the charity would be able to conduct on its own. In addition to the advantages for tandems in terms of the range of possible activities and funding sources, operating two entities in tandem is generally less expensive than operating two entities completely independently. We typically see tandem organizations sharing resources, especially staff and offices, where economies of scale often provide significant cost savings compared to operating two entities on a stand-alone independent basis.

97. The social welfare affiliate also creates the possibility of participation in candidate campaign intervention, either directly or through a separate segregated fund under § 527(f)(3). *See infra* note 126 and accompanying text. In our experience, this capability is sometimes the primary motivation of a charity's leadership for establishing a social welfare affiliate. Of course, this cannot be the charity's motivation, and any tandem enterprise must be prepared to devote attention and resources to insulating the charity completely from any candidate campaign intervention.

B. Structure and Governance of Affiliates

Generally, a key challenge facing tandem organizations is ensuring that both sides of the affiliated enterprise remain committed to a common purpose and strategic vision, while maintaining sufficient independence to remain separate for federal tax and other legal purposes. Balancing these opposing goals requires careful planning and consistent operational discipline. The governance relationship between the tandem affiliates is a key element in achieving this balance. Note that, for purposes of this discussion, we assume that the charity will control the social welfare organization.[98]

1. Preserving a Common Purpose and Vision

Operating via a tandem structure requires that both affiliates continue to work collaboratively toward a shared purpose and vision. We have seen cases where the social welfare organization decides unilaterally to change strategic or substantive direction, a shift known as "mission drift," with the result that the benefit of the collaboration is lost and the charity's investment in establishing the affiliation is wasted.[99] While people forming affiliates typically enter the arrangement with the best intentions and a deep commitment to the common enterprise, differences of opinion can emerge over time and damage or even destroy the collegiality of the affiliation.

Fortunately, affiliate leaders can prevent mission drift by providing, in the bylaws of the social welfare organization, for interlocking governance with, and control by, the charity. We advise clients that the charity's authority to enforce adherence to the common mission while still respecting the day-to-day operational independence of the social welfare organization depends on the answers to two questions: Who selects the affiliate's directors? And whom do they select?

a. Who Selects the Affiliate's Directors?

We group nonprofit corporate governance options into three basic models with respect to determining who will serve as the directors

98. Affiliate structures can also provide for the social welfare organization to control the charity, which simplifies some concerns but also raises additional issues not discussed here.

99. We have seen this scenario more than once, where the charity was so concerned about excessive control over, or overlap with, the board of directors of its § 501(c)(4) affiliate that, in the end, the charity lost control of its own affiliate entirely, and its only recourse was to form another § 501(c)(4) affiliate to replace the first one and carry out the charity's excess lobbying.

of the corporation[100]: (a) the incumbent directors elect their own successors (sometimes referred to as a self-perpetuating board); (b) a membership elects the directors; or (c) a third party holds the power to designate the directors, either by appointment, or by having directors serve by virtue of holding specified offices in another organization (often referred to as *ex officio*[101] directors), or by having one organization be the sole corporate member of the other. Further flexibility is available by combining models, such as where some directors are designated by a third party and the balance are elected by incumbents. We have encountered tandem governance relationships spanning the range of models in our practice.

At one end of the spectrum we occasionally find no formal governance relationship: the charity and the social welfare organization may each have a self-perpetuating board, without any binding requirements in their governing documents regarding whom they may select, but with a practice of having the boards overlap.[102] We sometimes refer to this as coincidental, rather than structural, overlap. Coincidental overlap situations are highly susceptible to mission drift; we do not recommend them, and so do not discuss them further here.

At the other end of the spectrum, the bylaws of one corporation may give the other corporation complete authority to name the board of the first one. For example, a social welfare affiliate's board might automatically consist of the officers of the charity, or the charity could be the social welfare organization's sole member, or the charity could be given the power in the social welfare affiliate's bylaws to designate the board.

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100. Not all states' corporate laws offer all three models. For example, Delaware requires a membership structure and does not statutorily provide for a self-perpetuating board, but that result can be achieved by defining the directors as the only members. In West Virginia, there is no statutory provision for third-party designation of directors, so if that is preferred, a sole member structure comes closest to achieving the desired result. In our experience, it is usually possible to structure a nonprofit's governance to mimic any model in any state. These details of implementation are beyond the scope of this Comment.

101. In our practice, we often encounter confusion over the meaning of *ex officio*, which means "by virtue of the office," but which some nonprofit managers misunderstand to mean "non-voting." In most (if not all) states, there is no such thing as a "non-voting" director; a person who does not have the power to vote simply is not a director. Conversely, a person who is selected to serve as a director by virtue of holding some other position (i.e., *ex officio*) is entitled to all of the rights (including the right to vote), and has all of the obligations, of a director.

102. With such informal arrangements, we have seen situations where there is nothing in either affiliate's bylaws indicating they are affiliated, and there may in fact be no legal substance to the affiliation. The existence of a relationship may depend entirely on an undocumented and unenforceable understanding in the minds of the current leadership, which may be lost if enough of them change their minds.

In between these extremes of total absence of control and complete control, we frequently see situations where the board of one corporation consists of some designated or *ex officio* directors, and other directors who are elected by the sitting directors.

Under the applicable state's corporate law, those who select a director may also automatically have the power to remove that director, with or without cause.[103] In other situations, those who select a director may be given such removal power by the governing documents.[104] In our view, having removal power is as essential to a charity's ability to control its affiliate as the power to select directors in the first place, since it means the charity can, in its sole discretion, replace any directors who act contrary to the charity's preferences. For example, if the social welfare organization's board seeks to take it in a different direction from the way the charity understands the common purpose of the affiliated enterprise, the charity could unilaterally remove the directors who support the change and replace them with new directors whose understanding of the social welfare organization's mission is more closely aligned with that of the charity.

b. Whom Do They Select?

Regardless of who is given the right to choose the social welfare affiliate's directors, nonprofit corporate law typically allows the bylaws to set qualifications for directors and requirements for the overall composition of the board.[105] This tool can be used many different ways. A common strategy we encounter is requiring overlap between the boards of the charity and the social welfare organization. This overlap can range from a minority of both boards, providing the charity with a window into the social welfare organization's board discussions and some voice in the room; to a bare majority of the social welfare organization's directors coming from the charity's board, giving the charity some degree of control to all the directors of the social welfare organization coming from the charity's board, or even having the charity's board automatically serve as the board of the social welfare organization, putting the charity clearly in the driver's seat.

Directors of the social welfare organization owe fiduciary duties solely to the social welfare organization when acting in that capacity and must make decisions based on its best interests, not those of the

103. *See, e.g.*, CAL. CORP. CODE § 5222(a) (West 2018).

104. *See, e.g.*, *id.* § 5222(f).

105. MODEL NONPROFIT CORP. ACT § 8.02 (2008).

charity.[106] Nonetheless, where at least a majority of the social welfare organization's board also serves on the charity's board, their views about what is in the social welfare organization's interests will presumably reflect their understanding of the role the social welfare affiliate is designed to play in furthering the tandem's common purpose. The practical result is that the actions of the social welfare board will be consistent with the preferences of the charity's leadership.

Board overlap, while a common strategy we see, is not required for charity control over its social welfare affiliate. A designator or membership structure allows a charity to install as directors of the social welfare organization individuals who owe no fiduciary duties to the charity and who may not even have any formal relationship to the charity. With the power to remove directors it selects,[107] the charity can thus retain complete control over the social welfare organization's strategic direction even with no board overlap. In our experience, if none of the same individuals serve on both boards, designation power increases the actual and apparent independence from the charity of the social welfare organization's board's decision making and allows the composition of the boards to better accommodate the different skill-sets and leadership needs of each entity, while fully protecting the charity's ability to ensure that the social welfare organization board will make decisions furthering the interests of the charity as well as the social welfare organization.

Another strategy would be to install charity officers or staff as the social welfare organization's board, either as a matter of custom and practice, or *ex officio*. This approach is the one that most clearly establishes the charity as the dominant entity and the social welfare affiliate as subordinate, but it also has the practical result that individuals responsible for day-to-day operations of the charity have strategic control over the social welfare entity, requiring especially careful observance of the legal separation between the two entities to minimize the risks of the two entities being collapsed into one, as discussed further below.

c. Striking the Right Balance

In light of the tension between risking mission drift and the loss of its lobbying voice, on the one hand, and risking collapse of the social welfare affiliate into the charity with potentially dire conse-

106. *Id.* § 8.30. In California, a director's fiduciary duties to the corporation are codified in CAL. CORP. CODE § 5231.

107. *See supra* notes 103-104 and accompanying text.

quences for the charity's § 501(c)(3) status, on the other hand, what combination of who selects the directors, and whom they select, makes most sense? Each situation is different, but what follows is our starting recommendation when advising clients. To eliminate the risk of mission drift, we typically recommend that the charity be given the power to name (and remove) at least a majority of the social welfare affiliate's board, and even the entire board where the parties find that workable from the perspective of internal organizational politics and external optics. Then, to bolster the day-to-day independence in operations of the social welfare affiliate, we recommend that a majority of the social welfare affiliate's board consists of individuals who do not owe fiduciary duties to the charity, that is, the charity's directors, officers, and employees. In other words, the charity can appoint whomever it wants, so long as a majority of the affiliate's board will be disinterested from the charity. In our experience, most affiliate structures involve both shared resources (such as staff, office space, mailing lists, etc.) and transactions between the two entities. The presence of a majority of independent directors on the social welfare organization's board thus allows approval of such transactions, including reimbursement for the use of shared resources by a majority of directors who owe fiduciary duties to only the social welfare organization, without conflicting loyalties to the charity, and vice versa.

We typically advise against complete board overlap, even though it is not legally prohibited. In our experience, identical boards increase the risk of confusion and mistakes about which entity is doing what, at both the board and staff levels. Nonetheless, some larger and more sophisticated tandem enterprises with access to both internal expertise and knowledgeable outside counsel typically safely maintain the boundary between the affiliates despite having complete board overlap. The charity's governance control over the board of its social welfare affiliate does not exist in a vacuum, but rather in the context of potentially overlapping corporate officers, staff, and volunteers. Striking the right balance at the board level should take into consideration these other control levers for ensuring that the tandem enterprise will operate smoothly.

2. *"Maximum Feasible Separation" and Boundary Maintenance*

While a close governance relationship is important for preventing mission drift, adequate separation between the entities is equally important because of the difference in tax statuses. The value our clients seek in creating affiliated entities arises from the fact that a social welfare organization can do things that are inconsistent with a char-

ity's qualification for exemption. But the corollary is that affiliated entities must ensure that the social welfare organization's activities, including any lobbying activity that exceeds the charity's lobbying limits, not to mention any candidate campaign intervention activities,[108] are not attributable to the charity. Thus, if the entities and their respective activities are not sufficiently distinct, there is a risk that some or all of the activities of the social welfare organization could be attributed to the charity, exposing the charity to adverse tax consequences ranging from excise tax liability to complete loss of exemption.

Some indicia of separation are easy, and especially important, for maintaining a secure and stable boundary between such closely related entities.[109] We recommend that each organization be housed in a separate legal entity in corporate form. Each corporation should have its own governing body that functions independently of the other's, with separate meetings and minutes (although, as we have seen, the governing bodies may be interrelated). Each must maintain separate bank accounts and avoid commingling assets, and separately comply with applicable regulatory filing requirements and other obligations. Each must have its own legal name, although the names may reflect a common brand. These factors provide a firm basis for the IRS to determine that the entities have sufficient day-to-day operational independence for their separate entity status to be respected.

At the same time, however, the reality of operating two entities working together toward a common mission constrains the extent to which separation is feasible. It is often impractical, inefficient, or counterproductive to develop separate leadership, duplicate key staff, rent separate office space, develop separate donor lists, or even establish a fully distinct brand, for the social welfare organization. Yet, each shared resource and common interaction can undermine the case for separateness and increase the risk of attribution, unless both entities share and interact in a manner that demonstrates actual operational

108. *See supra* Section I.B. As discussed in Section I.B, under the IRS's current regulatory interpretations of § 501(c)(4), a social welfare organization can conduct some non-social-welfare activity, so long as that activity does not constitute the organization's "primary" activity, Treas. Reg. § 1.501(c)(4)-1(a)(2), and one example of such activity commonly (though certainly not uniformly) conducted by social welfare organizations is candidate campaign intervention. In contrast, § 501(c)(3) provides that "no part" of the organization's activities may include such activity, effectively prohibiting charities from any candidate campaign intervention.

109. For a general discussion of maintaining separation between related organizations, see *supra* note 97, which addresses the various factors mentioned in the following text in this paragraph.

independence. In our experience, staff is perhaps the most common shared resource in a tandem, and also one of the most difficult to handle. In the tandem affiliate setting, "shared staff" usually means charity employees working part-time on the social welfare organization's activities and being required to track their time spent for each entity. Individual staff time data is then aggregated and used to allocate other expenses like rent and utilities. While having a process for capturing data on staff time and then using it to calculate allocations of staff and various other expenses may be straightforward in concept, in practice, staff typically resist filling out time sheets, and the accounting algorithms for allocating payroll and other expenses can be onerous and complicated.

In light of the practical necessity of some blurring of the boundary between the entities, we advise affiliated entities to adopt a strategy of maximum feasible separation, under which they take every step they reasonably can to demonstrate separateness. Attending to details such as the respective identities of the two entities,[110] both online and in the real world, is painstaking but necessary work to strengthen the integrity of the boundary between the entities. This often requires investment in training staff and directors about both the applicable tax rules and how to communicate about the entities' respective activities and monitoring their activities and messages to ensure that each activity is properly attributed to the appropriate entity.[111] Put another way, the goal of maximum feasible separation is to eliminate, to the extent practical, any ambiguity about which entity is conducting any given activity or making any given expenditure.

C. Funding the Lobbying Activities of a Social Welfare Affiliate

1. Contributions from an Affiliated Charity

A primary benefit of a tandem structure is the opportunity it provides to leverage the respective advantages of different tax-exempt statuses into a more robust capacity for lobbying. Because the charity affiliate can offer donors a deduction and receive grants from private foundations, it can raise funds from sources not otherwise available to

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110. Examples of such details include websites, e-mail addresses, telephone numbers, and collateral, like business cards and letterhead.

111. In our practice, a common indicator of the challenges posed by affiliation is the frequency with which we are called upon to advise and train our affiliate clients about the risks associated with the use of collective pronouns ("we", "us", "our") to describe the activities of affiliates. Such ambiguity invites interpretation by the IRS and other regulators as to which affiliate is being referred to, and any opportunity for regulatory interpretation creates risk.

the social welfare affiliate. The charity can then grant its unrestricted funds to its social welfare affiliate for lobbying, within its lobbying limit (under either the "no substantial part" test or the § 501(h) election), giving the social welfare affiliate access to potentially significant additional resources.[112]

Grants by a public charity to a non-charitable entity, even an affiliated one, require that the charity earmark its funding for specific charitable activities and programs using a written grant agreement, and oversee use of grant funds to ensure they are in fact charitable.[113] To the extent that the grant agreement permits the social welfare affiliate to use grant funds for lobbying, the grant will count against the charity's lobbying limit for the tax year in which it makes the grant,[114] but the charity can also make grants to its social welfare affiliate to conduct any charity-friendly activity in addition to lobbying, such as research or educational programs.[115]

The charity's grant by itself does not increase the funds available to the tandem enterprise as a whole for lobbying, and if that grant were a social welfare affiliate's only source of funding, forming the affiliate would not be worth the effort. The social welfare organization must leverage the charity's support to raise additional funds from other sources in order for the enterprise to be able to spend more on lobbying than the charity could have spent directly alone. However, no law requires the social welfare affiliate to spend the grant funds in the year in which it received them.[116] It can, in effect, accumulate charity grant funds received in multiple years, effectively building a war chest of charitable dollars to be used later for lobbying in furtherance of the charity's purposes.

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112. I.R.C. § 501(h).

113. *See* Rev. Rul. 66-79, 1966-1 C.B. 48; Rev. Rul. 63-252, 1963-2 C.B. 101.

114. Treas. Reg. § 56.4911-3(c) (1990).

115. *Id.* § 56.4911-3(c)(3)(i)(B); *id.* § 56.4911-4(f)(3). A charity's support for its social welfare affiliate's non-lobbying work can free up other funds raised by the social welfare organization for use in support of its lobbying activities or may be useful where it makes sense for the social welfare affiliate to conduct some non-lobbying activities that are tightly intertwined with its lobbying.

116. The terms of the grant agreement governing the charity grant should establish the social welfare affiliate's specific obligations with respect to how and when it must use grant funds. Although the charity affiliate must ensure that grant funds are spent in furtherance of its charitable purposes, there is no legal requirement that the charity impose on the social welfare affiliate an obligation to spend the grant funds within any specific, prescribed time period. Accordingly, unless the grant agreement requires otherwise, the social welfare affiliate can hold grant funds for future use in furtherance of the specified charitable purposes.

2. *Contributions from Individual or Corporate Donors*

As discussed in Section I.B above, a social welfare organization can raise funds directly from individuals and corporations that support its mission. Individual and corporate donors cannot claim a deduction for the donation as either a charitable contribution[117] or a business expense.[118] Nonetheless, close affiliation with a well-known charity can be a substantial advantage for a § 501(c)(4) organization in fundraising, relative to stand-alone appeal. Small donors may not be concerned about deductibility of minimal amounts and, in our experience, even larger donors are often willing to forego deductions if they strongly support the public policy goals of the affiliated enterprise and understand the lobbying restrictions imposed on deductible gifts. Operating two organizations in tandem allows the enterprise to offer donors a choice, so that only donors who require a tax deduction fund the charitable entity.[119] Moreover, as noted above,[120] prospective donors who are willing to make a deductible contribution to a charity should be economically indifferent to making a smaller nondeductible contribution to a social welfare organization furthering the same cause.

3. *Contributions from Unaffiliated Exempt Organizations*

A social welfare affiliate can raise funds from exempt organizations with which it is not affiliated, but which seek to work in coalition with the tandem enterprise to accomplish common purposes. In our experience, such coalitions frequently include a mix of charities, social welfare organizations, labor unions (exempt under § 501(c)(5)),[121] and trade associations or business leagues (exempt under § 501(c)(6)).[122] Pooling funds in a single entity that conducts activities on behalf of the coalition reduces the risk of conflicting priorities and messages and increases efficiency by avoiding duplication of effort.

117. I.R.C. § 170(c)(2)(D); Treas. Reg. § 1.170A-1(j)(5) (as amended in 2018).

118. I.R.C. § 162(e); *see generally* Treas. Reg. §§ 1.162-20 (as amended in 1995); *id.* § 1.162-28 (1995); *id.* § 1.162-29 (1995).

119. This flexibility available to donors to tandem enterprises can also be useful for bifurcating a single larger gift or bequest from a single donor/decedent, allowing allocation of only so much of the gift as the donor or estate can deduct to the charity, with the balance given to the social welfare organization.

120. *See supra* note 71.

121. I.R.C. § 501(c)(5).

122. *Id.* § 501(c)(6).

D. *Social Welfare Organizations, Candidate Campaign Intervention, and Separate Segregated Funds*[123]

Creating a social welfare organization affiliate offers one further significant potential opportunity for a risk-tolerant charity seeking to maximize its ability to influence public policy: the possibility of influencing elections albeit indirectly. Unlike a charity, which is strictly prohibited from intervening in candidate campaigns, a social welfare organization can, within limits, support or oppose candidates for election.[124] While activity to influence candidate elections is legal, within limits, for a social welfare organization, such expenditures will subject the social welfare organization to tax under § 527(f), but only if it has net investment income, and then only to the extent of that income.[125] However, even if it has net investment income, a social welfare organization can still avoid this tax if it establishes a separate account, called a "separate segregated fund" ("SSF"), organized and operated primarily for the purpose of raising and spending funds to influence the election, nomination, appointment, or selection of any individual to any public office.[126] Although an SSF can be nothing more than a bank account, it is treated for tax purposes as a separate political organization exempt under § 527, and therefore its expenditures are not attributable to its § 501(c) sponsor and do not trigger the tax imposed by § 527(f).[127]

A charity would violate the § 501(c)(3) prohibition against candidate campaign intervention[128] if it established an SSF of its own. However, a social welfare affiliate, even one controlled by a charity, can establish and maintain an SSF, including payment of associated administrative costs, without jeopardizing the exempt status of its af-

123. This section briefly summarizes a portion of § 527, which sets forth a complex system governing the tax implications of partisan political activity by exempt organizations. A complete explanation of the elaborate regulatory scheme under § 527 is beyond the scope of this discussion.

124. Treas. Reg. § 1.501(c)(4)-1(a)(2) (as amended in 1990); Raymond Chick & Amy Henchey, *Political Organizations and IRC 501(c)(4)*, *in* EXEMPT ORGANIZATIONS: TECHNICAL INSTRUCTION PROGRAM FOR FISCAL YEAR 1995 (1996), https://www.irs.gov/pub/irs-tege/eotopicm95.pdf ("Reg. § 1.501(c)(4)-1(a)(2)(ii) provides that the promotion of social welfare does not include direct or indirect participation in political campaigns on behalf of or in opposition to any candidate for public office. Thus, an organization exempt under IRC 501(c)(4) may engage in political campaign activities if those activities are not the organization's primary activity.").

125. I.R.C. § 527(f)(1).

126. *Id.* § 527(f)(3); Treas. Reg. § 1.527-2(b) (as amended in 1985). This opportunity is also available for non-charitable organizations exempt under other subparagraphs of § 501(c). I.R.C. § 527(f)(3); Treas. Reg. § 1.527-6(f) (1980).

127. I.R.C. § 527(f)(3); Treas. Reg. § 1.527-2(b).

128. I.R.C. § 501(c)(3).

filiated charity, provided, that is, that no charitable dollars are transferred to, or used to subsidize, the § 501(c)(4) organization's non-charitable activities (including its SSF).[129] In other words, the affiliated structure legally allows a charity to create, through its social welfare affiliate, the capacity to influence elections, provided that the affiliated enterprise raises non-charitable funds to cover the associated non-charitable expenditures.

On the other hand, for a risk-averse or under-resourced charity, having an affiliate that can intervene in candidate campaigns can be frightening. The opportunity may not be something the charity wants to exploit, especially considering the painstaking policing of boundaries between the charity and its social welfare affiliate this arrangement requires. In our practice, we have found that the potential for engaging in partisan electoral activity is often seen as a disadvantage, rather than a benefit, of creating a tandem.[130]

III.
A PROPOSAL: THE SEPARATE SEGREGATED LOBBYING FUND

So far, this Comment has focused on the current landscape for lobbying in the public interest. As explained above, there are three options available to practitioners and their clients under existing law. First, clients may use a § 501(c)(3) charity, with its associated advantages (deductible charitable contributions for the organization) and disadvantages (limits on lobbying). Second, clients may use a § 501(c)(4) social welfare organization, which does not provide charitable contribution deductions for supporters but also does not impose lobbying limits. Finally, clients may operate one entity of each status in tandem. This affiliate structure provides the organizations collectively with access to the advantages of both charity and social welfare status but at the significant cost and effort of maintaining two legal entities and policing the boundary between them.

129. Ward L. Thomas & Judith E. Kindell, *Affiliations Among Political, Lobbying and Educational Organizations*, *in* EXEMPT ORGANIZATIONS: TECHNICAL INSTRUCTION PROGRAM FOR FISCAL YEAR 2000, at 255, 264 (2001).

130. It is unclear how various pending proposals to limit or repeal the so-called Johnson Amendment—the language in § 501(c)(3) that prohibits charities from intervening or attempting to intervene in candidate elections for public office—would affect this calculus for most charities. *See, e.g.*, Tom Gjelten, *Another Effort to Get Rid of the 'Johnson Amendment' Fails*, NPR (Mar. 22, 2018, 5:21 PM), https://www.npr.org/2018/03/22/596158332/another-effort-to-get-rid-of-the-johnson-amendment-fails. It would be a different world if lobbying were limited for charities but candidate campaign intervention was not.

In this final section of our paper, we suggest an alternative option that does not currently exist for charitable lobbying.[131] It borrows conceptually from the treatment of political activities of § 501(c)(4) organizations conducted through an SSF under § 527(f).[132] We will refer to it as a separate segregated lobbying fund, or SSLF.

A. *Overview of SSLFs*

So how would an SSLF work? Like an SSF of a social welfare organization, an SSLF of a charity would be subject to a different characterization for federal tax purposes than under entity or corporate laws. For entity or corporate law purposes, an SSLF would be merely a fund held in a bank account separate from the charity's other funds, owned and controlled by the charity, and not a separate legal entity.[133] But for federal tax purposes, the SSLF would be treated as an organization separate from the charity and exempt under § 501(c)(4).[134] The charity would continue to be subject to all the existing rules applicable to an organization exempt under § 501(c)(3) as a public charity,[135] including lobbying limits under the "no substantial part" test, or under

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131. We acknowledge that our SSLF proposal is a modest addition to existing law that requires minimal legislative change to the existing legal framework. We applaud more audacious proposals—such as eliminating the separate limit on grassroots lobbying or drastically simplifying the sliding scale calculation of the limit; raising the § 501(h) limits; or indexing the limits for inflation; making the 501(h) election the default for charities; or even eliminating any limit on lobbying by charities entirely. The authors hope this more modest proposal may have a greater chance of adoption than more ambitious proposals, yet would in practice provide charities much of the benefit promised by them.

132. For further information on the structure and rules governing § 527(f)(3) SSFs, see Elizabeth J. Kingsley, *Election Law, Tax Law, and Funding a 'Connected' PAC*, TAXATION OF EXEMPTS, Nov./Dec. 2009, at 44.

133. Note that avoiding a separate legal entity is a key feature of the SSLF proposal. Forming a separate, unincorporated association to house lobbying activities is not a comparable alternative because, though an unincorporated association may avoid some of the formal and regulatory compliance requirements that apply to corporations, an unincorporated association is a separate legal entity that will require attention and maintenance approaching the levels for tandem corporations, significantly greater than what would be needed for a bank account.

134. I.R.C. § 527(f)(3). A § 527(f)(3) SSF is treated as a separate political organization tax-exempt under § 527 from its sponsoring § 501(c)(4) organization for tax purposes, but is not a separate legal entity for purposes of any other body of law (contract, tort, corporate, property, etc.). This is the fundamental conception that our proposal takes from § 527—that it is possible to have two entities for tax purposes while having just one for other legal purposes.

135. I.R.C. § 501(c)(3). This proposal takes the position that § 501(c)(3) organizations classified as private foundations should not be able to have an SSLF. Private foundations are currently subject to a lobbying prohibition under § 4945, and this proposal was not intended to disturb that fundamental existing difference between public charities and private foundations.

the § 501(h) expenditure test if the charity so elected. The SSLF would be subject to all the existing rules applicable to an organization exempt as a social welfare organization under § 501(c)(4) with one key exception: it would be restricted exclusively to lobbying as defined for public charities, and would not be able to engage in unrelated activities, including candidate campaign intervention.[136]

Because of the ease in creating it, an SSLF could be useful to charity clients with an occasional need for excess lobbying, but based on the authors' experience, its real value is as an alternative to setting up a separate tandem legal entity for on-going lobbying in excess of what a charity can do under existing law. The SSLF relieves the charity not only of the burden of setting up a whole new organization, maintaining it, and policing the boundaries between the charity and its affiliated social welfare organization, but also eliminates what clients often perceive to be the unacceptable risk of having partisan political activities of the affiliate attributed to the charity. In our practice, the threat of losing § 501(c)(3) status looms large, especially for charities with limited resources for overhead.[137] By restricting SSLFs to lobbying, charities' comfort level with them would be higher. Our hope is that SSLFs would encourage more lobbying by charities by making lobbying easier and less risky than it is under current law.

B. Forming an SSLF

Forming an SSLF would require no greater corporate formality than opening a bank account, which could be accomplished by the charity's board of directors adopting a corporate resolution—no incorporation, no separate officers, and no separate governing body.[138] Without the requirement for separate governance, "mission drift"[139] would be impossible with an SSLF. The SSLF would obtain its own federal employer identification number, which would attach to the bank account, and the SSLF would be required to comply with all initial and periodic filing requirements applicable to an organization

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136. I.R.C. § 501(c)(4). As noted in the next paragraph, eliminating the possibility of candidate campaign intervention activities is a key feature recommending the SSLF proposal (at least so long as the Johnson Amendment prohibiting such activities for charities remains part of the law). It is the price an SSLF pays for eliminating much of the complexity in its relationship to its charity sponsor. I.R.C. § 510(c)(3). And for that charity sponsor, it eliminates what is often seen as a key problem associated with traditional tandems, and so for those charity sponsors this is a very small price to pay.

137. It is unclear to the authors how full or partial repeal of the Johnson Amendment would affect charities' approach to this issue.

138. If desired, the charity's board could appoint a board committee and charge it with controlling or overseeing the SSLF on behalf of the charity's board.

139. *See supra* Section II.A.

exempt under § 501(c)(4).[140] Finally, it would have the option to apply for recognition of its tax-exempt status or to self-declare its § 501(c)(4) status.[141] In other words, an SSLF would be a specialized type of § 501(c)(4) organization for federal tax purposes.[142]

C. Function of the SSLF

Like any other § 501(c)(4) organization, the SSLF's funds could be spent on lobbying activities without limit. However, given the limited purpose of SSLFs to allow charities to amplify their voices in the legislative context without having to create a separate legal entity, the SSLF would be strictly limited to lobbying activities, as defined for public charities under §§ 501(h) and 4911 and related regulations thereunder, and with the same exceptions.[143] The SSLF would be barred from conducting any non-charitable activities, including candidate campaign intervention.

A key difference in operating charity-social welfare tandem affiliates, compared to a charity operating an SSLF, would be the elimination of the need for policing the boundaries separating the charity from the social welfare organization. The SSLF would be part of the charity for non-tax purposes, without a requirement for separate governance or separate operations. Only careful separation of funding sources would be required, to ensure that no charitable deduction is available for contributions to the SSLF—a significantly lighter burden to undertake. Moreover, as advisors to tandem organizations, we find we must constantly caution our clients of the risks of not being clear to the audience about the entity that is speaking. Otherwise, there is a risk that communications of the social welfare organization could be attributed to the charity, thus causing the charity to be taxable on excess lobbying, or if the social welfare organization's lobbying activities are extensive enough, even liable to revocation of its 501(c)(3) exempt status.[144] This is ironic, considering that often the entire point of establishing a lobbying affiliate is to give the charity a greater voice in public policy debates, yet in order to minimize the risks of misattribution, we must advise them to establish separate but related branding for each side of the tandem (commonly something like "Charity

140. I.R.C. § 501(c)(4).

141. *Id.*

142. Ideally, state tax laws would also allow the SSLF to be recognized as exempt under each state's equivalent of § 501(c)(4), so that federal and state treatment of the SSLF would conform.

143. I.R.C. § 501(h); *id.* § 4911.

144. *See supra* note 111 and accompanying text.

Name" and "Charity Name Action Fund"). Current law thus requires the charity to insulate itself from its own voice. It would be simpler if, at least from a federal tax perspective,[145] all the charity's lobbying communications could be branded as belonging to the charity, regardless of whether a communication is funded directly by the charity within its lobbying limit or by its component SSLF from non-deductible dollars.

This question of common branding and the ease with which charities may engage in lobbying beyond charitable limits through an affiliate may have constitutional implications. In the *Taxation With Representation* case, the ease of a charity forming a social welfare affiliate was an important consideration in determining that the lobbying limits imposed on charities' use of deductible charitable dollars by federal tax law did not unconstitutionally silence charities' voices.[146] But in *Citizens United*,[147] the requirements to establish a separate segregated fund under § 527(f) were described as "burdensome," "expensive to administer," and "onerous," to the extent that requiring corporations to form such a fund in order to independently spend in connection with an election did not meet constitutional muster.[148] Yet,

145. Unfortunately, charities may still face separate branding requirements, if the nature or amount of their lobbying messages and expenditures requires reporting under campaign finance disclosure laws (such as for ballot measure lobbying, *see, e.g.*, California's Political Reform Act, CAL. GOV'T CODE §§ 81000 *et seq*. (West 2018)) or lobbying registration and reporting laws (such as the federal Lobbying Disclosure Act of 1995, 2 U.S.C. § 1601 *et seq.*). Nonetheless, much charitable lobbying will not trigger such reporting obligations, so that eliminating the need for separate branding under federal tax law should significantly simplify charity lobbying and increase the ease of charities speaking out directly on matters of public policy import.

146. Regan v. Taxation with Representation of Wash., 461 U.S. 540, 544-45 (1983) (upholding the lobbying restriction under § 501(c)(3) against a First Amendment claim). The Court noted that the requirement "that the two groups be separately incorporated and keep records adequate to show that tax-deductible contributions are not used to pay for lobbying" was "not unduly burdensome." *Id*. at 545 n.6. In a concurring opinion, Justice Blackmun (joined by two other justices) argued that "[i]f viewed in isolation, the lobbying restriction contained in §501(c)(3) violates the principle, reaffirmed today, . . . 'that the Government may not deny a benefit to a person because he exercises a constitutional right.'" *Id*. at 552 (Blackmun, J., concurring). Despite this reservation, Blackmun concurred in the outcome because, in his view, "the constitutional defect that would inhere in §501(c)(3) alone is avoided by §501(c)(4)." *Id*. In other words, the lobbying limit under § 501(c)(3) survived a First Amendment challenge because of the ability of a charity to establish and control a § 501(c)(4) affiliate that can lobby without limit in service of the charity's exempt purposes.

147. *See* Citizens United v. FEC, 558 U.S. 310, 337-38 (2010).

148. *Id.* at 337-39. The Court's discussion in *Citizens United* quoted from text actually centered on federal election law regulations for political action committees under 2 U.S.C. § 441(b). Such § 441(b) funds are described in the definition of political organizations found in § 527(e)(1). Section 527(f)(3) describes the subset of such funds where the fund's sponsor is a tax-exempt organization rather than a taxable

at least from a corporate perspective, establishing a § 527(f)(3) fund requires far less time, effort, and expense than forming and maintaining a separate legal entity § 501(c)(4) affiliate.[149] We are not suggesting that the lobbying limits on charities may be unconstitutional. Rather, we are suggesting that significantly reducing the difficulty and expense to charities of engaging in legislative lobbying—core constitutional speech—with strictly non-deductible dollars, is a worthwhile goal. And that is what we believe could be achieved through making SSLFs available to charities.

D. *Funding an SSLF*

1. *Deductibility of Contributions*

As discussed above in Sections I.B.1, I.C.1, and I.C.2., a key distinction between organizations exempt under §§ 501(c)(3) and 501(c)(4) is deductibility of contributions: those to a charity are deductible by donors as charitable contributions, while those to a social welfare organization are not.[150] Our proposal would not change that. Contributions to a charity that establishes an SSLF would remain deductible if they are not earmarked at all, or are earmarked for the charity's general purposes or its specific charitable non-lobbying projects, activities or programs, but contributions earmarked for lobbying, including contributions earmarked by the donor for the SSLF, would not be deductible as charitable contributions. Contributions made directly by donors to the SSLF, as contributions to a § 501(c)(4) organization, would not be deductible as charitable contributions.

2. *Administrative and Fundraising Support from the Sponsoring Charity*

While in the § 527(f)(3) context the expenses of administering a political separate segregated fund generally do not count as expenditures for political purposes,[151] for the SSLF we propose that the char-

business corporation. In other words, the type of entity being discussed by the Court in *Citizens United* was the functional equivalent of a § 527(f)(3) separate segregated fund. For further information on these rules, see Ellen P. Aprill, *Regulating the Political Speech of Noncharitable Exempt Organizations after* Citizens United, 10 ELECTION L.J. 363 (2011).

149. I.R.C. § 527(f)(3); *id.* § 501(c)(4).

150. *See supra* Sections I.A-I.B.

151. I.R.C. § 527(f); Treas. Reg. § 1.527-6(b) (1980); *see also* Nancy E. McGlamery & Rosemary E. Fei, *Taxation with Reservations: Taxing Nonprofit Political Expenditures after* Citizens United, 10 ELECTION L.J. 449 (2011). A § 527(f)(3) fund is arguably only minimally a creature of tax law. Much of their legal essence, including definitions relating to what constitutes their exempt function and rules for how the

ity's expenditures to administer its SSLF would be deemed lobbying expenditures, subject to the charity's lobbying limits and using reasonable allocation methods for shared expenses such as overhead. Similarly, we propose that expenditures incurred by the charity for raising funds directly into the SSLF, or a share of joint fundraising for the charity and its SSLF, would be allocated to lobbying.

Joint fundraising, which commonly occurs between a charity and its lobbying affiliate in the tandem setting, raises questions of both allocation of related expenses and the timing and flow of funds. As to allocation, the IRS has accepted allocation of joint fundraising expenditures in a tandem based on the relative share of the funds raised at the joint event or from the joint solicitation.[152] We would adopt that approach in our proposal.

With respect to the timing and flow of funds, our experience in advising tandem charity-social welfare organizations is that, in responding to a joint fundraising appeal, a donor is often not required to write two separate checks, one to each entity, but rather is permitted to write a single check to one entity, and to indicate how the single amount should be split between the two entities, such as by checking boxes on a donor reply form. In these situations, the entity receiving the funds accepts the portion of the funds intended for the other entity, acting as the other's agent, ideally pursuant to an express agency agreement.[153] In the case of the SSLF, while there are two separate entities for tax purposes, there would be only one legal entity—the charity—with the power to enter into contracts; in this context, the idea that the charity contracts with its SSLF, or acts as the agent for its SSLF, is legally meaningless. Accordingly, we propose that the charity could receive donations earmarked for its SSLF, and so long as such earmarked donations were transferred into the SSLF rather than being spent by the charity directly for lobbying, those transfers of

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fund must be operated, is found in election laws, whether at the federal level or in the various states and even in local jurisdictions. For example, by reference to election law rules, expenditures by a § 501(c)(4) organization incurred to administer its § 527(f)(3) fund are not treated as taxable political expenditures. 11 C.F.R. § 114.5(b) (2018). While the activities of an SSLF may be subject to registration and reporting under lobbying laws, we do not expect general lobbying rules to play such a fundamental role in SSLFs as election laws do for § 527(f)(3) funds, and in this respect SSLFs would be dissimilar and simpler.

152. Fei & Colvin, *supra* note 95, at 189.

153. Such agency agreements typically address such matters as when or how frequently funds raised will be transferred from the receiving entity to the designated recipient, which entity accrues any interest on funds held prior to transfer, and which entity will acknowledge donors and provide them with receipts for their gifts.

earmarked funds would not count as lobbying expenditures by the charity.

3. "Grants" from the Sponsoring Charity to the SSLF

When a donor earmarks funds for the SSLF, under the terms of the gift, the charity lacks sufficient control and discretion over those funds to divert the gift to other purposes. Accordingly, the charity's transfer to the SSLF of such earmarked funds, for which the donor cannot claim a deduction, should be viewed as a contribution to the SSLF, not from the charity, but from the donor. Correspondingly, as discussed above, under our proposal, the transfer of such earmarked funds would not count against the charity's lobbying limit.

On the other hand, the charity does have sufficient control and discretion over funds that have not been earmarked by a donor for the SSLF, so any transfers by the charity from its non-SSLF-earmarked funds would be treated as a grant by the charity to a § 501(c)(4) organization for lobbying purposes, and thus would count against the charity's lobbying limit in the year of transfer. But, unlike a grant to a separate non-charitable legal entity, given the narrow purposes of the SSLF and the charity's complete control over the SSLF's expenditures, and the reality that the SSLF is not a separate legal person from the charity, such a transfer would not require a grant agreement between the charity and the SSLF restricting use of the granted assets.

4. Private Foundation and Corporate Funding of SSLFs

Because SSLFs are designed to fund a charity's lobbying activities, we would not expect them to receive any earmarked funding from private foundations. A private foundation making a grant to a non-charity such as a § 501(c)(4) organization is required to exercise expenditure responsibility over such grants under § 4945(d)(4)(B).[154] An expenditure responsibility grant agreement must contain a prohibition on using the private foundation grant funds for lobbying,[155] which would exclude all the activities of an SSLF. Similarly, we would treat any contributions by business corporations made to, or earmarked for, the SSLF, as subject to the prohibition on business expense deduction for lobbying expenditures imposed by § 162(e).[156]

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154. I.R.C. § 501(c)(4); *id.* § 501(c)(3).

155. Treas. Reg. § 53.4945-5(b)(3)(iv) (as amended in 2015).

156. *See supra* Section I.B.

E. SSLF Transfers to Sponsoring Charity

On the theory that social welfare activities include charitable activities so that a § 501(c)(4) organization is permitted to engage in § 501(c)(3) activities without limit, we would permit an SSLF to make unrestricted transfers without consideration to its charity parent, without tax law penalty, which the charity could use for any of its charitable activities, including to cover its expenses for administering the SSLF. Depending on what is specified in the terms of gift instruments, such transfers without consideration might still risk violating the intent of the SSLF's donors, with potential adverse consequences under state law. Moreover, since donations to the SSLF are not eligible for the charitable contribution deduction, transferring them to a charitable entity for its use is inefficient. We think these would be sufficient disincentives to eliminate such transfers in practice except under extraordinary circumstances. However, for simplicity, except for transfers to its parent charity, we would restrict the SSLF's direct expenditures to lobbying expenditures only. And, as noted above, unlike regular § 501(c)(4) social welfare organizations but consistent with their status as part of a § 501(c)(3) public charity, an SSLF would not be allowed to engage in any § 527 candidate campaign intervention activities at all.[157]

F. Reporting Obligations of an SSLF

As discussed above, our proposal is that SSLFs would be treated as a form of § 501(c)(4) social welfare organization, separate (for tax purposes) from their public charity parents. Accordingly, each SSLF would be required to give the IRS notice of its formation using Form 8976. Each SSLF would have its own IRS Form 990 annual filing obligation. Additionally, like other social welfare organizations, each SSLF would have the option of self-declaring its § 501(c)(4) status or applying to the IRS for recognition of its § 501(c)(4) status on Form 1024-A.

G. Reporting Obligations of a Public Charity Sponsoring an SSLF

In keeping with an SSLF's status as a separate tax-exempt organization for tax purposes, an SSLF's expenditures would not be attributed to, or reported by, its public charity parent. As noted above, these expenditures would be reported on the SSLF's own Form 990. An SSLF's public charity parent would report on its annual Form 990 that

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157. I.R.C. § 501(c)(4); *id.* § 501(c)(3).

it has established and maintains one or more SSLFs. It would also report the amount of any general fund transfers from the charity's treasury accounts to the SSLF, plus any other lobbying expenditures incurred by the charity, such as lobbying expenditures that count against the charity's lobbying limits on its Form 990 Schedule C, and any administrative expenses incurred by the charity to maintain its SSLF, whether as direct expenses for SSLF administration, or as an allocated share of administrative expenses such as overhead, or as lobbying expenditures that count against the charity's lobbying limits that are also on its Form 990, Schedule C. To the extent that an SSLF assumes a membership funding model and receives dues from members, it would be subject to the existing proxy tax or disclosure rules under § 6033(e) of the Code and regulations thereunder, discussed briefly above.[158]

H. Final Thoughts on SSLFs

This proposal by no means solves every difficulty facing an activist charity that wants to further its charitable purposes by lobbying in excess of the current lobbying limits. It only addresses the burdens of creating and maintaining a separate legal entity, with a separate governance structure, separate corporate filings, and a distinct brand, for the sole purpose of expanding the charity's lobbying capacity. It does not lift the existing limit on lobbying by § 501(c)(3) public charities with deductible dollars[159] but does allow a charity to control lobbying with non-deductible dollars beyond its own lobbying limits. It also does not lift the absolute prohibition on campaign intervention by charities, nor does it eliminate the need to define lobbying or the burden of tracking and reporting lobbying expenditures. It would, however, significantly lower the barriers and costs activist charities face in lobbying in the public interest, which should result in more such lobbying, providing greater counterbalance to corporate lobbying for private interests. We believe this proposal furthers good policy while providing a simple, practical, and valuable alternative to activist charities.[160]

158. I.R.C. § 6033(e); *see supra* note 77.

159. Nor, as discussed above, would it affect the prohibition in § 4945 on lobbying by § 501(c)(3) private foundations. I.R.C. § 4945(d)(1); Treas. Reg. § 53.4945-2 (as amended in 1990).

160. The authors appreciate that the prospects for enacting legislation to make SSLFs available are currently dim but offer this proposal in hopes that it may inform efforts at some more auspicious time in the future.

CONCLUSION

In our practice, perhaps the most common scenario we encounter is an existing public charity that becomes interested in influencing public policy in furtherance of its charitable mission, either for the very first time, or at a higher level than before. Very often, with careful and strategic use of the definitions of lobbying and especially the exceptions to lobbying, such charities are able to satisfy their lobbying needs without exceeding their lobbying limit under § 501(h). Very large charities may be able to do all the lobbying they need without the § 501(h) election, using the "no substantial part" test.

However, if that level of lobbying is insufficient for a charity's needs, or if a charity's leadership concludes that not only lobbying but engagement in candidate campaign intervention in furtherance of the charity's purpose is required, or if a new organization comes to us with lobbying as its primary function, then forming a § 501(c)(4) affiliate or a stand-alone § 501(c)(4) organization may be a good alternative.

But charities interested only in more lobbying flexibility, and not the candidate campaign intervention capacity of a social welfare organization, are often daunted by the complication, expense, and increased risk of properly establishing and maintaining a separate legal entity, in addition to the one they already operate (often with minimal staff and tight budgets). Properly managing a separate entity would also require constant policing of its relationship to the charity because of the potential for the affiliate to engage in activities like candidate campaign intervention that are entirely prohibited for a charity. Where only additional lobbying capacity is desired, or where the risk associated with full social welfare capabilities is uncomfortably high, allowing charities to form an SSLF would be a simpler, less burdensome, less risky, and more efficient way for charities' voices to be heard in our nation's public policy debates.