



WASHINGTON NONPROFITS

We make sure nonprofits have what they need to succeed.

January 11, 2018
VIA ELECTRONIC MAIL

TO:

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RE: SB 5991 Hearing Follow Up

Dear Senator Billig,

Thank you very much for your responses to the questions we submitted to you via email regarding SB 5991. On behalf of Washington Nonprofits and its broad membership of community-serving nonprofit organizations, I am writing to submit to you key follow up information and comments in response to the Senate State Government, Tribal Relations, and Elections Committee hearing regarding Senate Bill 5991 held on January 10, 2018. I hope that this information is useful to you and I welcome any questions that you may have.

Hearing Follow Up

1. One of the testifiers suggested that under SB 5991, 501(c)(3) organizations classified as “incidental committees” could be prohibited from raising funds for their mission and core services within 21 days of an election because of their involvement in a ballot measure campaign. We are concerned about this question and request that the committee investigate this concern so that we can help provide an answer to Washington State’s nonprofit community. Such a prohibition could have serious consequences for nonprofit organizations serving communities across Washington State if it compromises their ability to raise funds year-round.



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2. At the beginning of the hearing, the question was raised as to whether or not 501(c)(3) organizations can transfer funds to a 501(c)(4) or Political Action Committee (PAC). They are permitted to do so only to support ballot measure advocacy, never to influence election of a candidate for office. Such contributions count against the organization's federal direct lobbying limit. The attached chart provides a general illustration of how dollars are permitted to flow between different types of nonprofits.

3. There was discussion at the hearing regarding the \$10,000 threshold for disclosure. We strongly recommend against lowering the threshold.

4. It was expressed during the hearing that a lack of clarity exists regarding permissible ballot measure advocacy activities for nonprofit organizations. According to the attached analysis from Bolder Advocacy¹, 501(c)(3) organizations in Washington State are allowed to participate in ballot measure advocacy and must account for those activities as a federal lobbying expense (subject to limits) and report their expenditures to the PDC. Current PDC regulations also require 501(c)(3) organizations to register as a "political committee" if "the organization solicits or receives contributions earmarked or otherwise intended for ballot measure advocacy, or [if] the organization makes expenditures or contributions for ballot measure advocacy and the ballot measure advocacy is its primary purpose or one of its primary purposes."

5. There was testimony during the hearing that indicated the estimated implementation cost of the bill is approximately \$8,000. The fiscal note for the bill is not currently available, so we are unable to analyze an official estimate. However, based on the testimony, we infer that the estimate only refers to the cost of positing additional information to the PDC's website, not the expenses of dissemination of information or education of nonprofits regarding the new requirements. Washington Nonprofits is concerned about compliance if educational outreach is not done. Washington Nonprofits recommends that the legislature consider appropriating funds to accompany this bill that would fund the creation of nonprofit-specific materials to communicate existing and new disclosure laws.

In our organization's experience, Washington State's regulations regarding ballot measure activities and lobbying are not widely known among 501(c)(3) nonprofit organizations. The PDC uses complex language that is inaccessible to non-specialists, and provisions relevant to nonprofits are buried amongst provisions that are only relevant to private sector lobbyists. The guides published by the PDC are also not directly addressed to 501(c)(3) nonprofit organizations, which do not think of themselves as "political committees." Recent attempts from our organization to arrange nonprofit-specific trainings in collaboration with the PDC (either in-person or online) have yet to yield a nonprofit-specific event. We are hopeful that we can arrange a future event and will continue to pursue a partnership to accomplish this goal. We also hope to include the relevant PDC compliance information in our forthcoming advocacy toolkit for nonprofits, for which we would be honored to have assistance from the PDC and legislature.

¹ Bolder Advocacy. Nonprofit Ballot Measure Advocacy: Washington State. 2016.
<https://www.bolderadvocacy.org/wp-content/uploads/2012/07/AFJ-WA-ballot-measure-advocacy-chart.pdf>



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Background on Washington Nonprofits

As the state association for all nonprofits, Washington Nonprofits makes sure that nonprofits across the state of Washington have what they need to succeed. Washington Nonprofits delivers on our mission through three main, integrated initiatives: learning programs, public policy, and engagement. Washington Nonprofits is inspired by our belief that nonprofits represent our democracy in action as people come together to make a difference.

Washington Nonprofits fully supports nonprofit organizations' rights to advocate and lobby, including on ballot measures. We believe that lobbying and ballot measure advocacy are key tools for engaging nonprofit supporters in the public policy process and our democracy. Further, we believe that nonprofit engagement in ballot measures is an opportunity for organizations to represent their communities and constituents as part of the broader policymaking process. We vigorously oppose charitable nonprofit organizations being used as political tools for partisan politics. The majority of our public policy work in 2017 was dedicated to working to protect nonprofit nonpartisanship by opposing attempts in Congress to repeal the Johnson Amendment. We are proud to say that the Johnson Amendment survived the repeal effort during the tax reform negotiations because of the work of nonprofits throughout the country to stand up for nonpartisanship in our sector.

Washington Nonprofits also supports and commends the effort to ensure transparency in Washington State's elections. We understand the concern held by transparency advocates that certain types of nonprofit organizations are being used as conduits to avoid the disclosure of funds intended to influence elections.

We hope that we can be a constructive resource in the design and implementation of Washington State's disclosure laws that impact nonprofit organizations. Please feel free to contact me or Washington Nonprofits' Director of Public Policy and Advocacy David Streeter at (855) 299-2922 with questions on this matter.

Sincerely,

Laura Pierce

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General Flow of Money Between Nonprofits for Ballot Measure Advocacy

Funds Flowing To:					
Funds Originating With:		501(c)(3)	501(c)(4)	PAC	SuperPAC
	501(c)(3)	X	501(c)(3) can give money to a 501(c)(4) for a ballot measure campaign. This money is often granted to the C4 and the C4 reports back to the C3 on how it was used so that the C3 can account for its use as a lobbying expense against its direct lobbying limit. The C4 cannot use the money from a C3 for candidate expenditures.	501(c)(3) can give money to a PAC only if the PAC is working on ballot measures. The money would be recorded by the C3 as a direct lobbying expense. The PAC cannot use the money from a C3 for candidate expenditures.	Prohibited
	501(c)(4)	A 501(c)(4) can give money to a 501(c)(3) to support the 501(c)(3)'s mission and permitted activities.	X	501(c)(4) can only give to a PAC supporting a candidate if state law allows it to do so. The dollars for that purpose cannot originate with 501(c)(3). A 501(c)(4) can give to a PAC to support a ballot measure activities, and dollars originating with 501(c)(3) can be used for that purpose and are accounted for as a direct lobbying expense by the C3.	501(c)(4) can give money not originating with a 501(c)(3) to a SuperPAC since SuperPAC activities are independent expenditures and not coordinated with candidates.
	PAC	Not the PAC's purpose.	Not the PAC's purpose.	X	PACs can give money to SuperPACs
	SuperPAC	Not the SuperPac's purpose.	Not the SuperPAC's purpose.	SuperPACs can give money to PACs.	X

In general, money flows from left to right on this chart. PACs and SuperPACs generally do not fund 501(c)(3)'s because such donations would divert funds away from the PAC and SuperPAC's explicit political purposes. **In all cases, money originating from a 501(c)(3) can only be used for activities permitted for a 501(c)(3), such as ballot measure advocacy or lobbying.** It is up to the recipient organization to abide by this and for the contributing 501(c)(3) to account for the money as a direct lobbying expense.

Not a comprehensive chart; for general illustrative purposes only. This chart does not constitute legal advice.

Nonprofit Ballot Measure Advocacy Washington State

- Nonprofit 501(c)(3) and 501(c)(4) organizations [may advocate for or against ballot measures](#) in Washington State. Such activity is regulated *both* by the IRS and Washington campaign finance law.
- IRS (Lobbying) → Under the IRS regulations, nonprofit ballot measure advocacy is regulated as “lobbying”. From the moment the first petition to get a measure on the ballot is circulated, an organization’s work on that ballot measure will count toward the organization’s lobbying limit.¹
 - The way in which a 501(c)(3) will count its ballot measure activity towards its lobbying limit depends on whether the organization has made the [501\(h\) election](#).
 - Purely educational communications – ones that do not reflect a view for or against the ballot measure if it is part of nonpartisan analysis, study or research – will not count toward an organization’s lobbying limit. Only communications that *reflect a view* on a ballot measure count towards the lobbying limit.
- WA State Law (Campaign Finance) → WA State law regulates nonprofit ballot measure advocacy under its campaign finance law. Unlike IRS regulations, Washington law does not limit the amount of money a 501(c)(3) may spend on ballot measure advocacy. Rather, it requires certain expenditures and contributions for ballot measure advocacy to be disclosed to the Public Disclosure Commission (PDC).
 - When will an organization participating in WA state ballot measure advocacy be required to *register* as a political committee?
 - If the organization solicits or receives contributions earmarked or otherwise intended for ballot measure advocacy, *or*
 - The organization makes expenditures or contributions for ballot measure advocacy and the ballot measure advocacy is its *primary* purpose or *one of its primary* purposes.

¹ Lobbying limits are applicable only to 501(c)(3) organizations; 501(c)(4)s may carry out unlimited lobbying (so long as the effort furthers the organization’s tax-exempt purpose). Additionally, 501(c)(4)s are permitted to support or oppose candidates so long as that is not their [primary activity](#), but 501(c)(3)s are **absolutely prohibited** from supporting or opposing candidates for public office, and therefore must [heed caution](#) when advocating for ballot issues that may be closely tied to a candidate(s).

- This means that if a nonprofit organization's *primary purpose* or one of its *primary purposes* is to affect ballot measure(s), it must register and report as a political committee. Similarly, if a nonprofit organization expects to receive or receives contributions to be used in support of or opposition to a ballot measure, it must register and report as a political committee.
- An entity that is otherwise obligated to register as a political committee must do so within two weeks of organization or within two weeks after the date on which it first has the expectation of receiving contributions or making expenditures, whichever occurs first.²
- Even if an organization does not meet the above thresholds for having to *register* as a political committee, does the organization have to *report* any of its contributions or expenditures?
 - If a nonprofit spends \$100 or more on ballot measure advocacy independently, i.e., not as a contribution to a political committee that will be reported by that committee, it must report that expenditure to the PDC on a [Form C6](#) within five days of the expenditure – and potentially within 24 hours, if spent at least \$1,000 on an advertisement that appears within 21 days of the election.
 - This applies not only to cash spent, but in-kind contributions. ***Note: Special attention should be paid to this requirement.*** On October 14, 2015, the State of Washington sued The Freedom Foundation, a 501(c)(3) non-profit organization, in Thurston County Superior Court for not having reported the value of pro bono legal services it provided through its staff to plaintiffs in three lawsuits that were aimed at getting certain ballot measures put to a vote of the residents of three cities. The State asserts that the donated legal services were independent expenditures made in support of the ballot measures. While this suit was dismissed by the superior court on May 17, 2016, the State's appeal is currently pending in the Washington State Court of Appeals, Division Two.
 - If a nonprofit contributes over \$20,000 in the aggregate (either monetary or market value of in-kind contributions) to a ballot measure campaign in the preceding calendar year, or makes independent expenditures totaling over \$1,000 supporting or opposing one or more ballot measure during the preceding calendar year, it must file a [Form C7](#) by the last day in February in the following calendar year. Expenditures greater than \$25 must be itemized, so nonprofits must keep track of each of their expenditures – and make sure that they match up with what the committee is reporting as contributions from that nonprofit.

² A nonprofit planning to create a political committee should consult with an attorney, as there may be additional IRS reporting requirements that apply.

- Under Washington law, a ballot measure is any proposition or question proposed to be submitted to voters of the state or any municipal corporation, including any initiative, recall, or referendum proposition, “from and after the time when the proposition has been initially filed with the appropriate election officer of that constituency before its circulation for signatures.” [RCW 42.17A.005\(4\)](#). This means that even expenditures made in support of a ballot measure before it is officially on the ballot may need to be disclosed to the PDC.
- - **Special note for Lobbyist employers:** If you made one or more contributions, including in-kind contributions like staff time (even staff time devoted to running your organization’s political committee’s operations), during one calendar month totaling more than \$110 to a political committee, you must file a monthly political contribution report ([PDC Form L3c](#)). This includes contributions to your organization’s own political committee. Employer contributions that are made through and reported by a registered lobbyist do not need to be reported on an L3c, because the registered lobbyist is reporting this information on their L2 report.
 - **Note: Special attention should be paid to these reporting requirements.** Between September of 2015 and April of 2016, the State of Washington brought four separate lawsuits against non-profit organization lobbyist employers for having failed to file the required L3c forms discussed herein.
- Non-monetary contributions made to a political committee in the form of anything of value provided for less than its full market value will be treated as an in-kind contribution. Thus, a nonprofit organization donating anything of value, including staff time and other non-monetary contributions, to a political committee, must inform the political committee of that donation, so the political committee can report it in a timely manner.
- What does the *political committee* have to report/disclose?
 - The committee itself is required to track and disclose contributions (monetary and in-kind) it receives from individuals, entities, and corporations – including nonprofit organizations.
 - The committee is required to report all of its expenditures.
 - A ballot measure committee is required to disclose the “Top Five Contributors” on political advertisements in support of a ballot measure costing \$1,000 or more. This requires that the top five contributors (whether individual or entity, e.g. nonprofit organization) having contributed an excess of \$700 to the committee in the 12-months prior to the ad’s publication be written (or spoken for TV and radio).

- Note: nonprofit organizations that make monetary or in-kind contributions to a committee are *not* required to file their own disclosure reports if they do not employ any lobbyists.

The chart below lays out some common activities that a nonprofit organization might carry out in support of a ballot measure. So long as the nonprofit's *primary purpose* or one of its *primary purpose* is not to impact the results of election(s), and the nonprofit does not receive contributions to be used specifically for ballot measure advocacy (or other election-related advocacy), the organization will not have to register as a political committee.

*All activities listed below that qualify as Lobbying under the IRS rules are designated as such for organizations that have made the **501(h) election**, and are considered "direct lobbying" for the purpose of IRS lobbying limits

Activity	Example	Lobbying under IRS rules?	Contribution to the PAC under WA campaign finance rules?
Communications – Public			
Communication <ul style="list-style-type: none"> ▪ With the public ▪ Refers to ballot measure ▪ Reflects view on ballot measure 	"Vote YES on Referendum 1"	Lobbying	Contribution
Communication <ul style="list-style-type: none"> ▪ With the public ▪ Refers to ballot measure ▪ Reflects view on ballot measure ▪ Is a letter to the editor/editorial or replies thereto and payment for the printed space or broadcast time is not normally required 	Letter to the Editor in a regularly scheduled newspaper titled "Why Washington should pass Referendum 1"	Lobbying	Not contribution or expenditure (specifically exempted)
Communication <ul style="list-style-type: none"> ▪ With the public ▪ Refers to ballot measure ▪ Does <i>not</i> reflect view on ballot measure 	"Referendum 1 provides Washington voters the opportunity to decide on an import issue"	Not lobbying	Not contribution

Activity	Example	Lobbying under IRS rules?	Contribution to the PAC under WA campaign finance rules?
Communication <ul style="list-style-type: none"> With the public On issue that is subject of the ballot measure Does <i>not</i> directly or indirectly refer to ballot measure 	“Increasing sales tax on cigarettes will generate more funds for the state”	Not lobbying	Not contribution
Communications – Internal			
Communication <ul style="list-style-type: none"> Limited to members of or contributors to political committee Refers to ballot measure Reflects view on ballot measure 	“Vote YES on Referendum 1”	Lobbying	Contribution (if made by an organization to the ballot measure committee’s members/contributors). Not expenditure (if made by political committee to its members/contributors – internal communications specifically exempted, regardless of cost).
Communication <ul style="list-style-type: none"> Limited to members of a labor organization or membership organization (including a membership-based nonprofit) Refers to ballot measure Reflects view on ballot measure 	“Vote YES on Referendum 1”	Not lobbying (member communications exception applies)	Not Contribution
Research			

Activity	Example	Lobbying under IRS rules?	Contribution to the PAC under WA campaign finance rules?
Nonpartisan analysis, study or research <ul style="list-style-type: none"> Includes sufficiently full and fair exposition of pertinent facts such that reader can draw own conclusions Distributed/made available to members of the general public (not just one side) Refers to ballot measure Reflects view on ballot measure 	A 501(c)(3) publishes a report detailing fully and fairly the facts of a certain issue and, based on the findings in the report, expresses support for Referendum 1	Not lobbying	Dependent on the facts and circumstances, this activity may or may not constitute a contribution to a committee. For example, if the organization provides the report to the committee but does not make it available to anyone else, it would likely constitute a contribution to the committee. <i>Please consult a lawyer.</i>
Nonpartisan analysis, study or research <ul style="list-style-type: none"> Includes sufficiently full and fair exposition of pertinent facts such that reader can draw own conclusions Distributed/made available to members of the general public (not just one side) Discusses general subject of ballot measure Does <i>not</i> refer to ballot measure or reflect view on ballot measure 	A 501(c)(3) publishes a report detailing fully and fairly the facts of a certain issue that is the same issue as Referendum 1 – but the report does not mention the Referendum	Not lobbying	(See above)
Issue research	<ul style="list-style-type: none"> Conducting legal or factual research on the issue presented in Referendum 1 Conducting surveys of voters' attitudes towards Referendum 1 	Not lobbying, so long as not done merely as precursor to lobbying	Contribution
Organizing			

Activity	Example	Lobbying under IRS rules?	Contribution to the PAC under WA campaign finance rules?
Organizing volunteers for event to support ballot measure campaign	Organization A turns out volunteers to a political rally with instructions to wear t-shirts and buttons saying "Vote YES on Referendum 1"	Lobbying (if Organization A has made the 501(h) election, only the actual expenditures, including staff time, count as lobbying)	Contribution
Organizing volunteers for event in support of general issue of ballot measure, but not the campaign itself	Organization B turns out volunteers to a political rally without discussing Referendum 1 or cooperation with the ballot measure campaign	Not lobbying	Not contribution
Voter registration ▪ Including statements for or against ballot measure	"Do you support Referendum 1? Register here to vote."	Lobbying	Contribution
Voter registration ▪ Non-partisan and neutral or no message	"Election day is coming: register today."	Not lobbying	Not contribution
GOTV ▪ Including statements for or against ballot measure	"Today we decide whether Washington will increase its revenues while discouraging smoking: get out and vote 'yes' on Referendum 1!"	Lobbying	Contribution
GOTV ▪ Non-partisan and neutral or no message	"Vote today."	Not lobbying	Not contribution
Fundraising			
Hosting fundraiser for ballot measure campaign	"Come support the Vote Yes on 1 Campaign", and donations are non-tax deductible and made directly to the <i>committee</i> .	Lobbying (cost of event)	Contribution (cost of event is in-kind contribution to committee)

Activity	Example	Lobbying under IRS rules?	Contribution to the PAC under WA campaign finance rules?
Hold fundraiser for organization's own ballot measure advocacy	"Support our work to pass Referendum 1", and donations are non-tax deductible and made directly to the <i>organization</i> .	Lobbying (cost of event)	Contribution (cost of event is in-kind contribution to committee) Raising money for ballot measure advocacy will require the organization itself to register as a political committee (and comply with reporting requirements). Also, any "earmarked" contributions made to one committee but intended for another committee must be reported on special Form E .
Coordinated Activities			
Any other expenditure coordinated with or made at request or suggestion of campaign not otherwise lobbying or expenditure		Not lobbying	Could be in-kind if genuinely contributing something of value to the campaign

Written by Jim Oswald, Dmitri Iglitzin and Laura Ewan, Schwerin Campbell Barnard Iglitzin & Lavitt, LLP, 18 West Mercer St., Suite 400, Seattle, WA 98119.

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