

ESSAY: SOLDIERSTRONG

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INTRODUCTION

SoldierStrong is a charitable entity organized under section 501(c)(3) of the federal tax code.¹ As such, it is both tax exempt as an entity and tax deductible for donors.²

SoldierStrong’s mission is to help our servicemen and women “take their next steps forward.”³ That mission has its roots in the experience of SoldierStrong founder Chris Meek at the World Trade Center in New York City on September 11, 2001 (“9/11”).⁴ Meek, then a trader at Goldman Sachs, was at Ground Zero on the floor of the American Stock Exchange when the terror attack struck that day. Meek was deeply moved by the experience, and particularly by the men and women who ran into the chaos of that day to protect and defend those who had been caught in the attack.⁵ Meek actively sought ways to give back via a series of

1. Letter from Dir. of Exempt Orgs., Internal Revenue Serv., to Soldier Socks Inc. (Nov. 26, 2013), https://www.soldierstrong.org/wp-content/uploads/2014/10/SoldierSocks_Inc_IRS_Determination_Letter.pdf (granting SoldierSocks tax-exempt status under I.R.C. 501(c)(3)).

2. I.R.C. § 501(c)(3) (2012); Letter from Dir. of Exempt Orgs., *supra* note 1.

3. SOLDIERSTRONG, <https://www.soldierstrong.org/> (last visited Jan. 8, 2018).

4. Shawn M. Carter, *Call to Service: High-Tech Devices Help Veterans on the Road to Recovery*, HEALIO (May 2016), <https://www.healio.com/orthotics-prosthetics/industry-news/news/print/o-and-p-news/%7B6510a6bd-1af7-48cb-bf43-02fb02f28109%7D/call-to-service-high-tech-devices-help-veterans-on-the-road-to-recovery>; Susan Keating, *Meet the Man Helping Paralyzed Veterans Stand, One Robotic Skeleton at a Time*, PEOPLE (Feb. 9, 2017, 10:56 AM), <http://people.com/human-interest/meet-the-man-helping-paralyzed-veterans-stand-one-robotic-skeleton-at-a-time/>.

5. Carter, *supra* note 4.

charitable and volunteer efforts from that point forward.⁶

SoldierStrong is the mature form of Meek's post-9/11 effort to find the maximum impact for his philanthropic activity. SoldierStrong itself was formed in 2009, and was originally named SoldierSocks (which reflected the initial mission of the organization).⁷

The change from other philanthropic efforts to SoldierSocks came in July of 2009, when Chris Meek received a letter from Marine Sergeant Major Luke Converse, then deployed in Afghanistan.⁸ Sergeant Major Converse wrote a letter saying that the frontline troops he commanded had all the military advantages they could ask for.⁹ Yet they were missing some simple—but very important—personal items.¹⁰ They did not have enough water to drink, let alone to take a shower or wash their clothes.¹¹ He asked for tube socks, because they would hike all day and throw the old ones away, and baby wipes, or “Sheets of Gold,” for personal hygiene, as this was their form of taking a shower.¹² From that letter, SoldierSocks was born.

SoldierSocks initially reached out to a local sneaker store for tube socks, and a family pharmacy for baby wipes.¹³ Local businesses, schools, churches and synagogues got involved. The first shipment totaled about 1,500 pounds.¹⁴ Then, SoldierSocks was picked up by a radio show based in New York City that is syndicated in eighty markets across the country.¹⁵ After the exposure created by that show, people

6. See Dan Roe, *Meet the Guy Helping Injured Veterans Learn to Walk Again*, MEN'S HEALTH (Feb. 13, 2017), <https://www.menshealth.com/health/injured-veterans-walk-again>.

7. *About SoldierStrong*, SOLDIERSTRONG, <https://www.soldierstrong.org/about-soldier-strong/> (last visited Jan. 8, 2018).

8. Letter from Sergeant Major Luke Converse, to Chris Meek, SoldierStrong (July 2009) (on file with author).

9. *Id.*

10. Carter, *supra* note 4; Letter from Sergeant Major Luke Converse, *supra* note 8.

11. Letter from Sergeant Major Luke Converse, *supra* note 8.

12. *Id.*

13. See Chris Meek, *Community Responded, Expanded When Our Warriors Were in Need*, STAMFORD ADVOC. (Nov. 19, 2009, 5:36 PM), <http://www.stamfordadvocate.com/news/article/Community-responded-expanded-when-our-warriors-258004.php> (“The letter had a simple request for his [Marine] unit: basic toiletry items like tube socks and baby wipes. . . . [T]he Hope Street Pharmacy . . . [and] the Athlete's Foot . . . all immediately offered to help when approached [to help the unit].”).

14. Korey Wilson, *Stamford's Founder of Soldier Socks Helps Troops in Need*, HOUR (Jul. 3, 2013, 5:25 PM), <http://www.thehour.com/stamford/article/Stamford-s-founder-of-Soldier-Socks-helps-troops-8188611.php>.

15. See *id.* For information on the radio show that picked up SoldierSocks' story, see Andrew Barker, *Elvis Duran Receives a Star on the Walk of Fame*, VARIETY (Mar. 2, 2017, 10:00 AM), <http://variety.com/2017/music/spotlight/elvis-duran-star-walk-of-fame-1202000397/>.

volunteered to hold sock drives for SoldierSocks from Maine to Miami, Austin to Hollywood, and all manner of places in between.¹⁶

As the wars in Iraq and Afghanistan began winding down in earnest, SoldierSocks contemplated shutting down. The mission at SoldierSocks was to help our troops take their next steps forward.¹⁷ In fact, over 70,000 pounds of supplies were shipped to seventy-three units in Iraq and Afghanistan.¹⁸ That number will grow as long as America has troops in harm's way.

Yet as more troops returned home, SoldierSocks looked to broaden its scope. First, SoldierSocks created scholarship funds to help supplement the tuition gap the Post-9/11 G.I. Bill leaves.¹⁹ In 2014, SoldierSocks awarded \$275,000 in scholarships.²⁰ These scholarship programs have expanded to include dedicated scholarships at three major higher education institutions, plus a General Scholarship Fund.²¹

For those wounded veterans, SoldierSocks knew the sacrifice did not end just because the wars were over. They were coming home to a veteran's system that, while driven by the very best intentions, was desperately slow to adopt new technologies.²² SoldierSocks believed, and believes still, that veterans of the best military in the world should have access to the best care when they come home. And today that means innovative, customized, responsive solutions that sometimes are not easy to provide in the old system.

As SoldierSocks looked for solutions, it came across Ekso Bionics. Ekso made an exoskeleton suit that enabled paralyzed people to do the

16. See Alexis Harrison, *SoldierSocks Gives Back to Troops*, STAMFORD MAG. (Jul. 18, 2014), <https://stamfordmag.com/features/soldiersocks-gives-back-to-troops/>; Cathryn J. Prince, *Sock'em: Stamford Resident and Founder of SoldierSocks Receives Presidential Volunteer Service Award*, STAMFORD PATCH (May 31, 2011, 2:13 PM), <https://patch.com/connecticut/stamford/sock-em#photo-6293676>.

17. See SOLDIERSTRONG, *supra* note 3.

18. Renée Gearhart Levy, *Unique Alumni-Led Initiatives Enhance Life for Troops and Veterans*, 33 SYR. U. MAG. no. 1, Spring 2016, at 58, http://sumagazine.syr.edu/2016spring/pdf/SUmag_Spg2016.pdf.

19. *Id.*

20. See SOLDIERSTRONG, *supra* note 3. At the time of publication, SoldierStrong has donated \$500,000 in scholarship funds. *Id.*

21. *SoldierScholar*, SOLDIERSTRONG, <https://www.soldierstrong.org/scholarship/> (last visited Jan. 8, 2018).

22. See, e.g., Jeff Denham, *A Long Overdue Change at the VA is About to Improve the Lives of our Veterans*, WASH. EXAMINER (Sep. 17, 2017, 8:00 AM), <http://www.washingtonexaminer.com/rep-jeff-denham-a-long-overdue-change-at-the-va-is-about-to-improve-the-lives-of-our-veterans/article/2626232> ("For almost two decades, Congress has been imploring the Department of Veterans Affairs not only to deliver on our promise to veterans, but also to innovate and modernize.").

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once unthinkable: stand and walk again.²³ Meek reached out to the company's CEO and toured Ekso Bionics' facility. He did not leave that day without committing to funding ten Ekso Suits over a three-year period (at a cost of \$150,000 per suit).²⁴

So SoldierSocks started its new mission and went on a fundraising crusade. It donated its first Ekso Suit to Army Sergeant Dan Rose in December 2013.²⁵ Sergeant Rose sustained his injury on April 27, 2011 when his jeep drove over an improvised explosive device (IED) in Afghanistan, leaving him paralyzed from the chest down.²⁶ Following the selection of Sergeant Rose to receive the first Ekso, SoldierStrong shifted to giving future devices to VA Spinal Centers and affiliated rehab facilities around the country, so the devices would be available to a wider population of veterans.²⁷ As of June 2017, SoldierStrong has donated 12 Ekso devices.²⁸ Those 12 suits now serve a population of more than 25,000 veterans who medically qualify to use them at these rehab centers.²⁹

As the mission evolved and expanded, SoldierSocks changed its name to SoldierStrong.³⁰ The name change reflects how the mission has evolved beyond providing tube socks and baby wipes to front line soldiers. It reflects what has been learned, seen, and experienced first-hand in the mission to help our service members take their next steps forward. Namely that the spirit, courage, and drive of our men and women do not get injured just because their bodies do. They remain as strong—and sometimes grow stronger—than when they served in combat. They are Soldier Strong. And so, the name honors them. The new name also reflects the conviction of SoldierStrong's leadership—the men

23. See Jessica Firger, *On Veterans Day 2015, The Future Is Now: Exoskeleton Suits Helped Injured Vets Walk Again*, NEWSWEEK (Nov. 11, 2015, 11:05 AM), <http://www.newsweek.com/veterans-day-2015-exoskeleton-suits-help-injured-vets-walk-again-392991>.

24. See Press Release, Ekso Bionics Holdings, Inc., Ekso Bionics(TM) and SoldierSocks Expand Partnership with Three-Year, 80-Unit Pledge (Sept. 30, 2014), <https://globe.newswire.com/news-release/2014/09/30/669402/10100520/en/Ekso-Bionics-TM-and-SoldierSocks-Expand-Partnership-With-Three-Year-80-Unit-Pledge.html>.

25. Robyn Blosio Bova, *Stamford's Soldier Socks Helps Military Members Take Next Steps*, STAMFORD DAILY VOICE (Apr. 1, 2014), <http://stamford.dailyvoice.com/neighbors/stamfords-soldier-socks-helps-military-members-take-next-steps/441767/>.

26. *Watch a Paralyzed Veteran Stand Up for the American Flag*, SOLDIERSTRONG, <https://www.soldierstrong.org/stand-4-the-flag/> (last visited Jan. 8, 2018).

27. Erin Arvedlund, *Within Their Grasp*, INQUIRER (Feb. 1, 2016, 3:01 AM), http://www.philly.com/philly/business/20160201_Within_Their_Grasp.html.

28. *Your Donation at Work*, SOLDIERSTRONG, <https://www.soldierstrong.org/your-support-at-work/> (last visited Jan. 8, 2018).

29. *Id.*

30. Arvedlund, *supra* note 27; *About SoldierStrong*, *supra* note 7.

and women served by the SoldierSuit program are owed the same commitment—to provide the best tools and equipment to be physically SoldierStrong again—as was provided when they were going into battle for all of us.

As the program grew, SoldierStrong learned that, of over 46,000 military and veteran focused non-profits, it was the only one focused on advanced medical devices.³¹ SoldierStrong added other devices to build out the SoldierSuit program—giving our American heroes the ability to lead the full lives they deserve.³²

In addition to the Ekso suit, several devices comprise the SoldierSuit. BionX Medical Technologies (BionX) produces bionic solutions that restore normalized function for amputees.³³ SoldierStrong partners with BionX to provide the BiOM ankle, the only powered propulsion prosthesis.³⁴ The BiOM ankle offers more power, stability, and control than other lower extremity prosthetics.³⁵ Deka Research has created a prosthetic arm that allows the wearer to use not just the arm, but the wrist and hand as well—nearly as well as you and I use our own.³⁶ It is a truly revolutionary device, and we are excited about our partnership to provide these arms to veterans who need them. Myomo is leading the way in extending myoelectric prosthetic technology to power braces that help restore function to individuals with neuromuscular conditions.³⁷ In English, that means restoring the ability of veterans with certain injuries to support and move their own arms again.³⁸ SoldierStrong partners with Myomo to deliver the MyoPro to veterans with upper extremity impairment due to traumatic brain injury, spinal cord injury, and other neurological disabilities.³⁹

In providing these elements of the SoldierSuit, the objective is to match the strength of body, mind, and spirit of our warfighters with the strength of the smartest and most innovative thinkers in science and technology that our country has to offer.⁴⁰

31. Levy, *supra* note 18.

32. SOLDIERSTRONG, *supra* note 3.

33. *The SoldierSuit*, SOLDIERSTRONG, <https://www.soldierstrong.org/soldiersuit-proj/> (last visited Jan. 8, 2018).

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. MYOMO, <http://myomo.com/what-is-a-myopro-orthosis/> (last visited Jan. 8, 2018).

39. *Id.*

40. *See* SOLDIERSTRONG, *supra* note 3.

I. ROADBLOCKS TO FULFILLING THE MISSION

The United States enjoys the most technologically advanced military in the world.⁴¹ We spare no effort or expense to equip our warfighters with the best technologies and best tools science can conceive of.⁴² Driving this innovation is the Defense Advanced Research Projects Agency (DARPA).⁴³ DARPA's budget hovers around \$2.8 billion.⁴⁴ Those \$2.8 billion are officially spent "to formulate and execute [research and development] projects that would expand the frontiers of technology beyond the immediate and specific requirements of the military services and their laboratories."⁴⁵ DARPA also describes its mission as being "to prevent technological surprise to the US, but also to create technological surprise for our enemies."⁴⁶

The American commitment to ongoing support for DARPA creates tremendous technical advantages for our warfighters. But what about our veterans? What about those who sacrificed physical ability in the service of our country? Do not they deserve the same commitment?

For most of us, the wars have ended. But they have not ended for those who sacrificed physical ability for us. Just since 9/11, there have been more than 52,000 combat related injuries⁴⁷—not including an estimated 320,000 traumatic brain injuries (TBI)⁴⁸ and 400,000 post-traumatic stress disorder (PTSD) cases.⁴⁹

The Department of Veterans Affairs (VA) is there for them. And SoldierStrong has been privileged to work with the wonderful and

41. Skye Gould & Jeremy Bender, *Here's How the US Military Spends Its Billions*, BUS. INSIDER (Aug. 29, 2015, 12:10 PM), <http://www.businessinsider.com/how-the-us-military-spends-its-billions-2015-8>.

42. *See id.*

43. *See About Darpa*, DEF. ADVANCED RES. PROJECTS AGENCY, <https://www.darpa.mil/about-us/about-darpa> (last visited Jan. 8, 2018).

44. *See Budget*, DEF. ADVANCED RES. PROJECTS AGENCY, <https://www.darpa.mil/about-us/budget> (last visited Jan. 8, 2018).

45. *See* FOUND. ENTER. DEV., DARPA SBIR/STTR PROGRAMS: TRANSITION PLANNING GUIDE 11 (2010), <https://www.darpa.mil/attachments/DARPATransitionGuideFinal2-26-16.pdf>.

46. DEF. ADVANCED RESEARCH PROJECTS AGENCY, BRIDGING THE GAP POWERED BY IDEAS 1 (Feb. 2005).

47. Matthew S. Goldberg, *Updated Death and Injury Rates of U.S. Military Personnel During the Conflicts in Iraq and Afghanistan* 1 (Cong. Budget Office, Working Paper No. 8, 2014), https://www.cbo.gov/sites/default/files/113th-congress-2013-2014/workingpaper/49837-Casualties_WorkingPaper-2014-08_1.pdf.

48. *DoD Worldwide Numbers for TBI*, DEF. & VETERANS BRAIN INJ. CTR., <http://dvbic.dcoe.mil/dod-worldwide-numbers-tbi> (last updated Jan. 8, 2018).

49. David Martin, *PTSD Treatment Access to Get Easier for Veterans*, CBS (July 12, 2010, 6:41 PM), <https://www.cbsnews.com/news/ptsd-treatment-access-to-get-easier-for-veterans/>.

committed people of the VA, who care deeply about our veterans. But we find them confined by an old, slow, and bureaucratic set of rules that just cannot seem to keep up with the pace of innovation our economy can produce today. And there is no DARPA for veterans.⁵⁰ So, with the best of intentions, we give our wounded and paralyzed veterans old technology that has been available for decades—or longer.

That simply does not pass the test. It does not meet our collective obligation—our duty—to maintain the commitment to provide our soldiers the best technology after the battle is born, not just before.

SoldierStrong is doing its best to fill that gap. It has identified some of the world's most innovative medical devices⁵¹ through technology that allows things once unimaginable. For paralyzed veterans, let us replace that wheelchair with the ability to get up and walk again.⁵² For amputees, let us replace the hook on your new arm with a wrist and hand combination, or an ankle on your new leg, that works just like the “original equipment.”⁵³

These are not science fiction. They are scientific fact. They are here right now. But, without our help, they are not yet available to our veterans who need them.⁵⁴

While the charitable approach of the § 501(c)(3) organization is one to which SoldierStrong remains committed, it is an approach that relies on the philanthropic impulse of individuals.⁵⁵ Those who are aided by this philanthropy are far too few.

While SoldierStrong has come in contact with many senior federal officials, the legal limitations on its activities as a § 501(c)(3) organization prevent it from aggressively advocating policy change at the governmental level.⁵⁶

50. See *About DARPA*, *supra* note 43 (“DARPA has held to a singular and enduring mission: to make pivotal investments in breakthrough technologies for national security.”); *CARE Core Values*, U.S. DEP’T VETERANS AFF., <https://www.va.gov/icare/> (last updated Jan. 19, 2017) (“Our mission, as the Department of Veterans Affairs, is to care for those ‘who shall have borne the battle’ and for their families and survivors.”).

51. *The SoldierSuit*, *supra* note 33.

52. *Id.*

53. See BIONX, HAVE MORE FREEDOM TO DO THE THINGS YOU WANT (2015), https://www.soldierstrong.org/wp-content/uploads/2016/04/2003135-Rev-C_Patient-Brochure.pdf; *The SoldierSuit*, *supra* note 33.

54. See *The SoldierSuit*, *supra* note 33.

55. *Your Donation at Work*, *supra* note 28.

56. I.R.C. § 501(c)(3) (2012).

II. ESTABLISHING A SECTION 501(C)(4) ORGANIZATION:
MOVING FROM HELPING THE FEW TO HELPING THE MANY

A 501(c)(3) organization can engage in some limited lobbying activity, but doing so exposes the organization to harsh sanctions for even unintentional infractions.⁵⁷ A 501(c)(4) organization can lobby without the same exposure.⁵⁸ That lobbying (or public issue advocacy) will be done by SoldierStrong Access, a sister organization to SoldierStrong.⁵⁹ SoldierStrong Access is organized under § 501(c)(4).⁶⁰

SoldierStrong Access is a nonprofit advocacy organization that promotes public policies that allow veterans greater access to cutting edge medical advancements and expands veterans' access to continuing educational and professional opportunities.⁶¹

The SoldierStrong Access coalition will seek legislative and regulatory changes that support increased research, more efficient medical device trial and approval processes, and funding mechanisms to provide new technologies to veteran care organizations.⁶² Research and innovation, fueled in part by DARPA grants, has made it possible for veterans injured on the battlefield to achieve a never-before-seen level of rehabilitation and functionality.⁶³ New exoskeleton suits allow soldiers with spinal cord injuries, previously told they would never walk again, to regain mobility and get back on their feet.⁶⁴ New generations of prosthetics give amputees the ability to regain a full range of motion and pressure control similar to that of a human arm and hand.⁶⁵ Device manufacturers are making progress in further developing these technologies, but need policy changes and funding support to speed

57. *Id.* (“[N]o substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation . . . and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.”); see 26 C.F.R. § 1.501(c)(3)-1 (2017).

58. I.R.C. § 501(c)(4); 26 C.F.R. § 1.501(c)(4)-1(a)-(2)(i).

59. SOLDIERSTRONG ACCESS, <http://soldierstrongaccess.org/> (last visited Jan. 8, 2018).

60. *Id.*

61. *Id.*

62. *See id.*

63. *See* Al Emondi, *Hand Proprioception and Touch Interfaces (HAPTIX)*, DEF. ADVANCED RES. PROJECTS AGENCY, <https://www.darpa.mil/program/hand-proprioception-and-touch-interfaces> (last visited Jan. 8, 2018); Justin Sanchez, *Revolutionizing Prosthetics*, DEF. ADVANCED RES. PROJECTS AGENCY, <https://www.darpa.mil/program/revolutionizing-prosthetics> (last visited Jan. 8, 2018); *DARPA Helps Paralyzed Man Feel Again Using a Brain-Controlled Robotic Arm*, DEF. ADVANCED RES. PROJECTS AGENCY (Oct. 13, 2016), <https://www.darpa.mil/news-events/2016-10-13>.

64. *The SoldierSuit*, *supra* note 33.

65. Emondi, *supra* note 63.

innovation and increase access to a greater veteran population.⁶⁶

While government programs are in place to research, develop, and test new technologies for our soldiers on the battlefield, no analogue exists to facilitate veterans' access to leading technologies for rehabilitation and functional use.⁶⁷ Public policy around veteran care has not kept up with recent improvements in medical technologies.

In the education space, many veterans face a gap between the cost of their education and the benefits provided by the G.I. Bill.⁶⁸ This gap is made worse when private for-profit institutions fold up (as happened in the fall of 2016 with ITT Technical Institutes).⁶⁹ Approximately 6,800 veterans lost G.I. Bill benefits due to the lack of transitional options.⁷⁰ SoldierStrong Access works for policy change in order to close that gap so our veterans can acquire the skills they need to thrive as private citizens.

A. Structure

SoldierStrong Access will recruit and mobilize a diverse coalition of stakeholders to promote access policies, including three distinct but connected member groups: Veteran Support and Service Organizations, Physicians and Research Experts, and key Industry Representatives.

1. General Membership

The SoldierStrong Access coalition will include a general membership spanning a diverse set of veterans' organizations and patient advocates who could also benefit from greater access to innovative medical devices. SoldierStrong Access will work with member organizations to develop policy priorities and amplify their voices as it relates to medical device access, research, and approval. The coalition will educate policymakers and the general public about the barriers facing veterans and patients in accessing breakthrough devices, and to advocate for public policies that remove those barriers and increase federal investment.

2. Medical Advisory Board

With cutting edge research taking place and technological

66. SOLDIERSTRONG ACCESS, *supra* note 59.

67. *Id.*

68. *Id.*

69. U.S. SENATE COMM. HOMELAND SEC. & GOV'T AFFAIRS, EDUCATION DENIED: THE IMPORTANCE OF ASSISTING VETERANS HARMED BY SCHOOL CLOSURES 1 (Oct. 21, 2016).

70. *Id.*

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breakthroughs being seen each year, researchers and physicians working to rehabilitate and improve mobility for injured veterans will be recruited to serve on the SoldierStrong Access Medical Advisory Board. Members of the Advisory Board will work with the nonprofit to provide a medical perspective on the benefits veterans realize through use of devices that are currently difficult to access.

3. Industry Council

Consisting of device creators and manufacturers, the Industry Council will assist SoldierStrong Access in identifying policy hurdles to access for veterans to innovative and life-changing medical devices. SoldierStrong will work with members of the Industry Council to remove those barriers through legislative and regulatory processes.

B. Policy and Public Awareness Priorities

SoldierStrong Access policy advocacy initiatives could include (but would not necessarily be limited to) the following:

Through the Department of Veterans Affairs, SoldierStrong could seek funding for the purchase of medical devices to benefit veterans, expand partnerships with VA hospitals to host and conduct clinical trials, seek further VA research into medical devices, establish transition pathways for veterans affected by failing for profit institutions, and seek increased funding to close the G.I. Bill gap.

Through the Department of Defense, SoldierStrong could seek partnerships with the Defense Health Agency, further develop DARPA policies to promote technology transfer, seek medical device funding through the Congressionally Directed Medical Research Programs, and use the Peer Reviewed Medical Research Program.

Through the Department of Health and Human Services, SoldierStrong could seek support for research funding through the Center for Disease Control, support for Occupational Safety research, and increased cooperation with the Food and Drug Administration (FDA) on device trials and access.

Through FDA approvals, SoldierStrong could utilize the Office of Device Evaluation—FDA Center for Devices and Radiological Health; de novo classification process, which includes a regulatory pathway for novel, first-of-its-kind medical devices that are generally low-to-moderate-risk (used for ReWalk—Argo Medical Technologies); and the FDA’s definition of a powered exoskeleton: “[A] prescription device that is composed of an external, powered, motorized orthosis that is placed

over a person's paralyzed or weakened limbs for medical purposes."⁷¹

SoldierStrong could also use Occupational Safety and Health Administration approvals, including public comment and advocacy.

Additionally, SoldierStrong Access public awareness initiatives could include showcasing individual veterans' success stories on the medical, educational, and professional fronts; highlighting Department of Defense Funding successes; promoting VA research and partnerships; highlighting education best practices, good actors, and success stories; and highlighting DARPA advancements, successes, and opportunities for non-military applications.

In order to better understand the need for such advocacy, the next section will explore some of the process steps required under the current system in order for a veteran to access innovative medical devices.

III. UNDER THE CURRENT SYSTEM, HOW DO VETERANS ACCESS INNOVATIVE MEDICAL DEVICES?

A. Individual Access

SoldierStrong and other charitable organizations serve as one way a veteran can access cutting edge medical care. As outlined above, this is an expensive process—both in cost and time—limiting the organization to helping only a handful of the population that could benefit.

The Veterans Health Administration is another avenue for access.⁷² Veterans receive good access to quality health care but the process of securing access to a specific treatment, such as an innovative prosthetic, can be quite onerous.⁷³ In 2015, the VA determined that they would pay for certain robotic devices to aid their patients.⁷⁴ Even after the VA determined that they would provide one type of robotic device, to obtain the device, the veteran must of course be enrolled in the veterans' health care system.⁷⁵ Then they must secure an appointment, a diagnosis and a

71. 21 C.F.R. § 890.3480 (2017); *Evaluation of Automatic Class III Designation (De Novo)*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/medicaldevices/deviceregulationandguidance/howtomarketyourdevice/premarket submissions/ucm462775.htm> (last updated Dec. 23, 2017).

72. *About VHA*, U.S. DEP'T VETERANS AFF., <https://www.va.gov/health/aboutVHA.asp> (last updated Oct. 16, 2017).

73. *See* OFF. OF INSPECTOR GEN., U.S. DEP'T OF VETERANS AFFAIRS, REP. NO. 11-02138-116, PROSTHETIC LIMB CARE IN VA FACILITIES 5 (Mar. 8, 2012) [hereinafter PROSTHETIC LIMB CARE IN VA FACILITIES], <https://www.va.gov/oig/pubs/VAOIG-11-02138-116.pdf>.

74. Merrit Kennedy, *Department of Veterans Affairs to Pay for Robotic Legs*, NAT. PUB. RADIO (Dec. 17, 2015), <http://www.npr.org/sections/thetwo-way/2015/12/17/460116193/departments-of-veterans-affairs-to-pay-for-robotic-legs>.

75. Memorandum from Janet P. Murphy, Acting Deputy under Sec'y for Operations and

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treatment plan.⁷⁶ Finally, they must apply and receive access to the device.⁷⁷ These individuals must go through a series of approvals, but do have a strong support network to help them. Families, VA officials, and Veterans Service Organizations all work together to help navigate the process and secure the best course of treatment.⁷⁸ While this does not always work ideally, veterans typically get access to treatment.⁷⁹

The challenge to the individual in most cases can be overcome on a case-by-case basis. At each point in this journey to access, the veteran is charged with navigating the policies that have been put in place that determine who accesses which treatments and devices.⁸⁰ The question remains, that even when successful, does the veteran gain access to the first treatment of choice? To the most up-to-date prosthetic? The most innovative product?

B. Many Public Policy Makers Impact Access—How are These Access Policies Made and What is Their Purpose?

The process that a veteran goes through to obtain access to approved therapies and devices—such as an exoskeleton—is based on a series of policy decisions that have been made and applied across the entire Department of Veterans Affairs Health Care System.⁸¹

The Veterans Health Administration, coupled with the Veterans Benefits Administration, determines not only which patients can get which treatment but also the specific treatments and devices they can access.⁸² As explained below, many different decision-makers impact a veteran's access to a specific medical treatment, including the FDA, the OMB, and various parts of the VA. Clinical treatment protocols are

Mgmt., to Medical Center Directors 1–2 (Dec. 10, 2015) [hereinafter ReWalk Memo], <https://www.sci.va.gov/docs/VAREWalkClinicalProtocol.pdf>.

76. *Id.*

77. *Id.*

78. *See About PSAS*, U.S. DEP'T VETERANS AFFS., https://www.prosthetics.va.gov/psas/About_PSAS.asp (last updated June 10, 2015).

79. *See generally* PROSTHETIC LIMB CARE IN VA FACILITIES, *supra* note 73 (discussing the experiences of some veterans in obtaining VA prosthetic services).

80. *See, e.g., Benefits for Veterans, Dependents, and Survivors*, U.S. DEP'T VETERANS AFFS., https://www.va.gov/opa/publications/benefits_book/benefits_chap01.asp (last updated Apr. 21, 2015).

81. Veterans' Health Care Eligibility Reform Act of 1996, Pub. L. No. 104-262, 110 Stat. 3177 (codified as amended in scattered sections of 38 U.S.C. (2012)); *see* VETERANS BENEFITS MANUAL 719–20 (Barton F. Stichman et al., eds. 2016) (discussing the Veterans' Health Care Eligibility Reform Act of 1996, which makes all VA health care entitlement dependent on available VA funding).

82. *See About VHA*, *supra* note 72; *About VBA*, U.S. DEP'T VETERANS AFFS., <https://www.benefits.va.gov/BENEFITS/about.asp> (last updated Nov. 14, 2017).

developed that represent best practices and give direction and guidance to practitioners and patients alike.⁸³

One example of such a protocol was released in December 2015: the VA issued the *Clinical Protocol for Veterans use of the ReWalk™ Powered Exoskeleton*.⁸⁴ That document outlines the clinical protocol for veteran evaluation, training, and issuance of one approved device.⁸⁵ As future devices are approved, similar protocols will be developed and issued, taking time and setting limits around who can access the treatment. Further, within the VA, there are multiple decision-makers that could impact the availability of a device or a veteran's ability to secure access to the device.⁸⁶ Resources are not unlimited, so budget constraints may cause policy to favor one device over another. Different Veterans Integrated Service Networks have different fiscal and treatment challenges that lead to unequal application of access policies.⁸⁷

1. Other Federal Policy-Makers Impacting Access

It is important to note that the VA is not the only federal policy-maker that influences access. The path of development, approval and access to the most innovative prosthetic devices, such as exoskeletons, passes through several federal agencies that are not required to coordinate, communicate or share resources.

2. Basic Research and Development

Multiple federal agencies play a role in providing grant funding for basic and applied research into robotics and bionic prosthetics, including the Department of Defense, the National Institutes of Health, and the VA.⁸⁸ These grant opportunities are often interrelated and combine

83. See *VA/DoD Clinical Practical Guidelines*, U.S. DEP'T VETERANS AFFS., <https://www.healthquality.va.gov/> (last updated Oct. 3, 2017).

84. ReWalk Memo, *supra* note 75.

85. See *id.*

86. See CMS ALL. TO MODERNIZE HEALTHCARE, INDEPENDENT ASSESSMENT OF THE HEALTH CARE DELIVERY SYSTEMS AND MANAGEMENT PROCESSES OF THE DEPARTMENT OF VETERANS AFFAIRS 23 (2015), https://www.va.gov/opa/choiceact/documents/assessments/integrated_report.pdf (discussing congressional actions mandating defined sets of services for groups of prioritized veterans).

87. *Id.* at 24.

88. See U.S. DEP'T OF DEFENSE, ORTHOTICS AND PROSTHETICS OUTCOMES RESEARCH PROGRAM 2 (2016), <http://cdmrp.army.mil/oporp/pbks/oporppbks2017.pdf>; J.R. Wilson, *Prosthetics Meet Robotics*, MIL. & AEROSPACE ELECTRONICS (Oct. 8, 2013), <http://www.militaryaerospace.com/articles/print/volume-24/issue-10/special-report/prosthetics-meet-robotics.html>; *NIH-Funded Research Lays Groundwork for Next-Generation Prosthetics*, NAT'L INSTS. HEALTH (Feb. 9, 2015), <https://www.nih.gov/news-events/news-releases/nih-funded-research-lays-groundwork-next-generation-prosthetics>.

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multiple federal agencies, corporations and research organizations such as universities.⁸⁹

3. DoD/DARPA

For more than fifty years, DARPA has operated under one mission—to make pivotal investments in breakthrough technologies for national security.⁹⁰ As such, DARPA plays the critical role in the development of these breakthrough devices. In fact, many of the technological advances that have led to exoskeleton development started in these DARPA-supported research labs.⁹¹ The technology developed in the DARPA laboratories in partnership with the private sector hopefully will mature in the private sector and be made available to patients.

The DARPA investment of federal resources could end at this point and other government departments, in this case the VA, might not get the benefits of the research unless the basic research is transferred to the private sector for full development into uses outside of military needs.

4. National Institutes of Health

The National Institutes of Health is a government-funded medical research agency that is comprised of twenty-seven Institutes and Centers.⁹² One center, the National Institute of Biomedical Imaging and Bioengineering, focuses on research and development, including a Rehabilitation Engineering office.⁹³

5. Administration for Community Living

The Administration for Community Living, another agency of the Department of Health and Human Services, also funds research to support the development of rehab devices.⁹⁴ The National Institute on Disability, Independent Living, and Rehabilitation Research leads these

89. See Mark Geil, *Military-Funded Prosthetic Technologies Benefit More Than Just Veterans*, CONVERSATION (May 24, 2017), <http://theconversation.com/military-funded-prosthetic-technologies-benefit-more-than-just-veterans-76891>; Sanchez, *supra* note 63.

90. *About Darpa*, *supra* note 43.

91. See generally Bruce Upbin, *First Look at a Darpa-Funded Exoskeleton for Super Soldiers*, FORBES (Oct. 29, 2014, 1:27 PM), <https://www.forbes.com/sites/bruceupbin/2014/10/29/first-look-at-a-darpa-funded-exoskeleton-for-super-soldiers/#44988d4362a0> (discussing Ekso Bionic's new exoskeleton as improvement from original Darpa-funded eLEGS exoskeleton).

92. *Who We Are*, NAT'L INSTS. HEALTH, <https://www.nih.gov/about-nih/who-we-are/organization> (last updated Jan. 31, 2017).

93. *Id.*

94. *Research and Development*, ADMIN. COMMUNITY LIVING, <https://www.acl.gov/node/606> (last updated May 18, 2017).

efforts.⁹⁵

These federal investments in research and development are an important contribution to the base of knowledge around emerging technologies, support technology transfer to the private sector, and provide the crucial “first dollar” investments that allow for the ultimate commercialization of medical devices.

6. Food and Drug Administration

All medical devices must gain the approval of the FDA.⁹⁶ Device approval for commercial sale requires successful completion of a number of regulatory hurdles designed to ensure device effectiveness and end-user safety.⁹⁷ Within the FDA, the Centers for Devices and Radiological Health is responsible for reviewing and approving each device.⁹⁸

Each device that seeks FDA approval falls into one of three classes that are based on the level of review deemed necessary to assure the safety and effectiveness of the proposed device.⁹⁹ According to the FDA, “[t]he class to which your device is assigned determines, among other things, the type of premarketing submission/application required for FDA clearance to market. If your device is classified as Class I or II, and if it is not exempt, a 510k will be required for marketing.”¹⁰⁰

The FDA made the determination that exoskeletons would be regulated as medical devices subject to premarket review.¹⁰¹ This was confirmed in December 2014 when the FDA notified an exoskeleton device manufacturer that the product would be subject to premarket

95. *Id.*

96. *FDA’s Role in Regulating Medical Devices*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/MedicalDevices/ProductsandMedicalProcedures/HomeHealthandConsumer/HomeUseDevices/ucm204884.htm> (last updated Mar. 15, 2017). *See generally* Federal Food & Drug Cosmetic Act, 21 U.S.C. §§ 301–399(f) (2012) (indicating the FDA’s authority to regulate medical devices); 21 C.F.R. §§ 800–1299 (2017) (evidencing the FDA’s regulations for medical devices in general and for specific medical devices).

97. 21 U.S.C. § 360c(b)(2) (“The Secretary shall appoint to each panel . . . persons who are qualified by training and experience to evaluate the safety and effectiveness of the devices . . .”).

98. *FDA’s Role in Regulating Medical Devices*, *supra* note 98.

99. 21 U.S.C. § 360c(a)–(b); 21 C.F.R. §§ 860.1–860.136 (indicating the FDA’s classification procedure for medical devices); *FDA’s Role in Regulating Medical Devices*, *supra* note 98.

100. *FDA’s Role in Regulating Medical Devices*, *supra* note 98.

101. Medical Devices; Physical Medicine Devices; Classification of the Powered Exoskeleton, 80 Fed. Reg. 36, 9600 (Feb. 24, 2015) (codified at 21 C.F.R. § 890.3480).

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controls.¹⁰²

Further, within this regulatory structure, FDA has determined that powered exoskeleton devices will be regulated as tier two devices.¹⁰³ This classification moved the products from a “low risk” determination into one that requires the establishment of special controls to ensure safety and effectiveness.¹⁰⁴

Because of the differing classifications and the requirements of each, the device approval process can be timely and costly.¹⁰⁵ Advocacy can help move these processes more quickly, bringing new developments to patients more quickly and at lower cost.

C. Providing Funding

1. Office of Management and Budget

The Office of Management and Budget (OMB) “serves the President of the United States in overseeing the implementation of his vision across the Executive Branch.”¹⁰⁶ A primary function of OMB is development and execution of the federal budget.¹⁰⁷ OMB uses its role to oversee and inform policies and priorities in all federal agencies, including the VA.¹⁰⁸

2. Congressional Committees

Both the House and Senate have authorizing committees with jurisdiction over programs impacting veterans, including veterans’ health care.¹⁰⁹ The House Committee on Veterans Affairs and the Senate Committee on Veterans Affairs work together to provide the VA with authority to provide for veterans’ needs and set the broad term policies

102. Alexander Gaffney, *FDA Says it Will Regulate Robotic Exoskeletons*, REG. AFFS. PROFS. SOC’Y (Feb. 23, 2015), <http://www.raps.org/Regulatory-Focus/News/2015/02/23/21436/FDA-Says-it-Will-Regulate-Robotic-Exoskeletons/>.

103. Medical Devices; Physical Medicine Devices; Classification of the Powered Exoskeleton, 80 Fed. Reg. 36,960 (Feb. 24, 2015) (codified at 21 C.F.R. § 890.3480).

104. *FDA’s Role in Regulating Medical Devices*, *supra* note 98.

105. *Medical Device Makers Spend Millions to Meet FDA Rules, Study Finds*, MEDCITY NEWS (Nov. 19, 2010, 12:20 PM), <https://medcitynews.com/2010/11/medical-device-makers-spend-millions-to-meet-fda-rules-study-finds/>.

106. *Office of Management and Budget*, WHITE HOUSE, <https://www.whitehouse.gov/omb> (last visited Jan. 8, 2018).

107. *Id.*

108. *Id.*

109. HOUSE COMM. ON VETERANS’ AFFS., <https://veterans.house.gov/about/history.htm> (last visited Jan. 8, 2018); SENATE COMM. ON VETERANS’ AFFS., <https://www.veterans.senate.gov/about> (last visited Jan. 8, 2018).

that the VA must follow.¹¹⁰

However, funding for the VA to implement these policies and pay for its health care facilities, programs, and procurement comes from different Congressional committees.¹¹¹ The House and Senate Committees on Appropriations each have subcommittees that provide the actual funding for the programs that the VA undertakes.¹¹² Notably, several of the federal agencies involved in research and approval fall outside the authorization of these Committees, meaning even more Congressional Committees must be engaged.¹¹³

These authorizing and appropriating roles make members of Congress critical allies in setting VA priorities, allowing them the opportunity to provide direction on any number of issues, including which medical devices should be covered and paid for.

D. Vehicle for Advocacy

Access to devices for individual veterans remains an arduous process, and even when successful, the veteran may not be able to access the newest and the best device. This is the case with the exoskeleton and other prosthetic devices.¹¹⁴

One way to ease this burden is through a broader advocacy campaign that presents a uniform access message to the Congress and the numerous federal agencies that play a role in the development, approval, acquisition, and funding of devices. A nonprofit organization with a sole focus on advocacy can engage each player with a consistent advocacy message to seek faster approvals, more funding, and greater access policies.

110. See CONSTITUTION, JEFFERSON'S MANUAL, AND RULES OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 114-192, § 740 (2014) (adopted by 115th Congress through H.R. Res. 5, 115th Cong. (2017)); STANDING RULES OF THE SENATE, S. DOC. NO. 113-18, R. XXV(p), at 27 (2013).

111. JAMES V. SATURNO, BILL HENIFF JR. & MEGAN S. LYNCH, THE CONGRESSIONAL APPROPRIATIONS PROCESS: AN INTRODUCTION 1-2 (2016); HOUSE COMM. ON VETERANS' AFFS., *supra* note 111.

112. SATURNO ET AL., *supra* note 113, at 1-2; *Subcommittees*, HOUSE COMM. ON APPROPRIATIONS, <https://appropriations.house.gov/subcommittees/> (last visited Jan. 8, 2018) (listing Military Construction, Veterans Affairs and Related Agencies as a subcommittee); *Subcommittees*, SENATE COMM. ON APPROPRIATIONS, <https://www.appropriations.senate.gov/subcommittees> (last visited Jan. 8, 2018) (listing Military Construction, Veterans Affairs, and Related Agencies as a subcommittee).

113. See JAMES V. SATURNO & JESSICA TOLLESTRUP, APPROPRIATIONS SUBCOMMITTEE STRUCTURE: HISTORY OF CHANGES FROM 1920 TO 2015, at 8 (2015).

114. *The SoldierSuit*, *supra* note 33; *Your Donation at Work*, *supra* note 28.

VI. A LOOK AT 501(C)(4)

A. *History of 501(c)(4)s*

The historical use of the 501(c)(4) “social welfare organization” exemption can be seen as developing over many years as a category of “none of the above,” meaning since its creation this particular section has become a home for organizations that do not fit well into any other nonprofit category, while also lacking the characteristics of a for-profit entity.¹¹⁵ The original provision dates to the original income tax code in 1913, which contained an exemption for “any civic league or organization not organized for profit, but operated exclusively for the promotion of social welfare.”¹¹⁶ Many organizations in this area are working in the promotion of community interests and social welfare, however, and do not qualify for traditional 501(c)(3) status because they have a limited membership or serve a limited population (i.e., local Rotary chapters and the like.)¹¹⁷

In a major tax code overhaul in 1954, the current Section 501(c) subchapter was created delineating the now familiar various types of nonprofits.¹¹⁸ Shortly thereafter, the IRS explicitly determined, “that grassroots issue advocacy, legislative advocacy, and lobbying activities” fall under the purview of social welfare activity covered by 501(c)(4), although organizations with the purpose of pursuing such activities were, and remain, a small subsection of the overall 501(c)(4) universe.¹¹⁹ Recent research indicates that less than one out of three 501(c)(4) organizations engage in political or lobbying activity, and those represent less than one-seventh of the overall revenue in the 501(c)(4) sector.¹²⁰

In a 1981 ruling, the IRS explicitly allowed 501(c)(4) organizations to engage in political activity—which critically is distinct from policy

115. See I.R.S. Gen. Couns. Mem. 33,495 (Apr. 27, 1967); JEREMY KOULISH, FROM CAMPS TO CAMPAIGN FUNDS: THE HISTORY, ANATOMY, AND ACTIVITIES OF 501(C)(4) ORGANIZATIONS 1–2 (2016), https://www.urban.org/research/publication/camps-campaign-funds-history-anatomy-and-activities-501c4-organizations/view/full_report; Raymond Chick & Amy Henchey, Political Organizations and IRC 501(c)(4) (1995), <https://www.irs.gov/pub/irs-tege/eotopicm95.pdf> (unpublished article from Exempt Organizations Continuing Professional Education); Social Welfare, What Does it Mean? How Much Private Benefit is Permissible? What is a Community? (1981), <https://www.irs.gov/pub/irs-tege/eotopicg81.pdf> (unpublished article from Exempt Organizations Continuing Professional Education).

116. Act of October 3, 1913, ch. 16, § G(a), 38 Stat. 114, 172 (codified as amended at 26 U.S.C. § 501(c)(4) (2012)).

117. See I.R.S. Gen. Couns. Mem. 33,495 (Apr. 27, 1967).

118. Internal Revenue Code of 1954, Pub. L. No. 83-591, § 501(c), 68A Stat. 3, 163 (codified as amended at 26 U.S.C. § 501).

119. KOULISH, *supra* note 118, at 3, 14; see Rev. Rul. 55-269, 1955-1 C.B. 29.

120. See KOULISH, *supra* note 118, at 2, 6–7.

advocacy—as long as that was not the “primary purpose” of the organization.¹²¹ The lack of clarity as to what “primary purpose” means is a major reason for the significant controversy today around 501(c)(4) organizations—and the reality is that controversy spills over to a 501(c)(4) organization that may wish to engage in “grassroots issue advocacy, legislative advocacy, and lobbying activities,” but not in political activity.¹²²

Together, the small subset of 501(c)(4) organizations are called “advocacy organizations.”¹²³ However—and interestingly for purposes of this discussion—no analysis has been completed to attempt to split and define or delineate the “advocacy organization” sector between those that engage in political and campaign-related activity—which garner much of the attention¹²⁴—and those that solely advocate for a “social welfare” cause, such as necessary policy changes for enhanced care of certain veterans through policy lobbying, but do not engage in any political or campaign-related activity.¹²⁵ Thus, a group such as SoldierStrong, which desires to advance specific policy changes, but has no interest in political or campaign activities, through the creation of 501(c)(4), becomes organized in the same manner—and is thus directly tied in eyes of many—with organizations operating in the much more controversial political and campaign sphere.

It is a fairly common practice for a 501(c)(3) to establish a related 501(c)(4) to conduct lobbying activities in support of the mission of the 501(c)(3).¹²⁶ However, this route involves extensive complications as well. Primarily, complex financial and accounting measures must be put in place so the 501(c)(3) is able to demonstrate that it is not subsidizing the lobbying activities of the 501(c)(4).¹²⁷ In this kind of situation, the

121. Rev. Rul. 81-95, 1981-1 C.B. 332.

122. See KOULISH, *supra* note 118, at 3.

123. *Id.* at 2, 15.

124. *Id.* at 2, 3; see, e.g., Sean Sullivan, *What is a 501(c)(4), Anyway?*, WASH. POST (May 13, 2013), https://www.washingtonpost.com/news/the-fix/wp/2013/05/13/what-is-a-501c4-anyway/?utm_term=.0a0d955059bb.

125. *Social Welfare Organizations*, INTERNAL REV. SERVS. (Aug. 27, 2017), <https://www.irs.gov/charities-non-profits/other-non-profits/social-welfare-organizations>.

126. Judith E. Kindell & John Francis Reilly, *Lobbying Issues* 337 (1997), <https://www.irs.gov/pub/irs-tege/eotopicp97.pdf> (unpublished article from Exempt Organization Continuing Professional Education).

127. See Siri Mielke Buller, *Lobbying and Political Restrictions on §501(c)(3) Organizations: A Guide for Compliance in the Wake of Increased IRS Examination*, 52 S.D. L. REV. 136, 164 (2007); Kindell & Reilly, *supra* note 129, at 337–38; Mike Sorrells & Joyce Underwood, *Tax Issues with Complex Nonprofit Organization Structures*, NONPROFIT STANDARD (BDO), Sept. 2015, at 7, <https://www.bdo.com/getattachment/cff0ac38-205e-41b5-a714-73a2482e5d96/attachment.aspx>.

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norm would be shared office space, staff, consultants, and other administrative support structures.¹²⁸ Accounting and control measures must be established to demonstrate that the 501(c)(4) is paying the arms-length fair market value of any of these costs or else the tax exempt status of the 501(c)(3) could be placed in jeopardy.¹²⁹ The determination by the IRS whether this standard has been violated is based on a totality of the facts and circumstances test, which always carries a certain amount of discretion—and therefore uncertainty—with it.¹³⁰

B. The Split in Advocacy Organizations Between Campaign-Related Activity and Lobbying

What would normally be considered “campaign election advocacy” is technically referred to as an “exempt function” and is defined by the IRS as follows:

The term “exempt function” means the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of the Presidential or Vice Presidential electors, whether or not such individual or electors are selected, nominated, elected, or appointed. Such term includes the making of expenditures relating to an office described in the preceding sentence, which if incurred by the individual, would be allowable as a deduction under section 162(a).¹³¹

501(c)(3) organizations are prohibited from engaging in “exempt functions.”¹³² Certain activities or expenditures may not be prohibited depending on the facts and circumstances. For example, certain voter education activities (including presenting public forums and publishing voter education guides) conducted in a nonpartisan manner do not constitute prohibited political campaign activity.¹³³ In addition, other activities intended to encourage people to participate in the electoral process, such as voter registration and get-out-the-vote drives, would not be prohibited political campaign activities if conducted in a nonpartisan manner.¹³⁴

128. See B. HOLLY SCHADLER, *THE CONNECTION: STRATEGIES FOR CREATING AND OPERATING 501(C)(3)S, 501(C)(4)S AND POLITICAL ORGANIZATIONS* 37, 39 (3d ed. 2012), https://bolderadvocacy.org/wp-content/uploads/2012/10/The_Connection_Ch2_paywall.pdf; Kindell & Reilly, *supra* note 129, at 337–38.

129. Kindell & Reilly, *supra* note 129, at 337–38.

130. *Id.*

131. I.R.C. § 527(e)(2) (2012).

132. *Id.* § 501(c)(3).

133. See Kindell & Reilly, *supra* note 129, at 337–38.

134. *Id.* at 378.

“On the other hand, voter education or registration activities with evidence of bias that (a) would favor one candidate over another; (b) oppose a candidate in some manner; or (c) have the effect of favoring a candidate or group of candidates, will constitute prohibited participation or intervention.”¹³⁵ The critical distinction for this discussion is between campaign election advocacy (“exempt functions”) and legislative advocacy.

C. Common Tax Law Restrictions on Activities of Exempt Organizations

The chart below, made by the IRS, “compares seven federal tax law attributes of five common types of tax-exempt organizations.”¹³⁶

	501(c)(3)	501(c)(4)	501(c)(5)	501(c)(6)	527
Receives tax-deductible charitable contributions.	YES	NO	NO	NO	NO
Receives contributions or fees deductible as a business expense.	YES	YES	YES	YES	NO
Substantially related income is exempt from federal income tax.	YES	YES	YES	YES	YES
Investment income is exempt from federal income tax.	LTD*	YES	YES	YES	NO
Engages in legislative advocacy.	LTD	YES	YES	YES	LTD
Engages in candidate election advocacy.	NO	LTD	LTD	LTD	YES
Engages in public advocacy not related to legislation or election of candidates.	YES	YES	YES	YES	LTD

However, as this chart demonstrates, an organization such as SoldierStrong that wishes to engage in significant legislative advocacy,

135. *The Restriction of Political Campaign Intervention by Section 501(c)(3) Tax Exempt Organizations*, INTERNAL REV. SERVS., <https://www.irs.gov/charities-non-profits/charitable-organizations/the-restriction-of-political-campaign-intervention-by-section-501-c-3-tax-exempt-organizations> (last updated Sept. 13, 2016).

136. *Common Tax Law Restrictions on Activities of Exempt Organizations*, INTERNAL REV. SERVS., <https://www.irs.gov/charities-non-profits/common-tax-law-restrictions-on-activities-of-exempt-organizations> (last updated Aug. 12, 2017).

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but not in candidate election advocacy, has no distinct place under current law.¹³⁷

D. The Stigma Associated with 501(c)(4)s

In recent years, although a relatively few number of 501(c)(4) organizations actually engage in any candidate election advocacy, these organizations have become inextricably linked in the public dialog with “dark” money and are often referred to as “shadowy.”¹³⁸ The gravamen of the complaint by those using such labels is that unlimited funds may flow through these organizations combined with no public disclosure of the donors.¹³⁹

Many commentators mistakenly believe that the Supreme Court’s decision in *Citizens United v. Federal Election Commission*¹⁴⁰ created this situation; however, the ability of 501(c)(4) organizations to collect and expend funds on candidate election advocacy and like activities without public disclosure of funds existed well before *Citizens United*.¹⁴¹ What *Citizens United* did was expand the types of funds that were allowed to be donated to a 501(c)(4) organization—but that decision did not create the secrecy that some complain of and that has come to taint the entire sector in the eyes of many.¹⁴²

CONCLUSION: WHY A 501(C)(4)? WE HAVE NO CHOICE.

In addition to the redundancy involved in raising funds and creating

137. *Id.*

138. See Michael Beckel, *Major U.S. Companies Quietly Funnel Dark Money to Politically Active Nonprofits*, HUFFINGTON POST (Jan. 16, 2014, 12:12 AM), https://www.huffingtonpost.com/2014/01/16/dark-money_n_4604839.html; Chris Good, *Don’t Blame Citizens United*, ATLANTIC (Oct. 20, 2010), <https://www.theatlantic.com/politics/archive/2010/10/dont-blame-citizens-united/64906/>; Jeremy Koulisch, *There are a Lot of 501(c)(4) Nonprofit Organizations. Most are Not Political*, URB. INST. (May 24, 2013), <https://www.urban.org/urban-wire/there-are-lot-501c4-nonprofit-organizations-most-are-not-political>; Anna Massoglia, *Bringing Dark Money Out of the Shadows*, KNIGHT FOUND. (Apr. 27, 2016), <https://www.knightfoundation.org/articles/bringing-dark-money-out-shadows>; *The Shadow of ‘Dark Money’ Haunts the Midterms*, WASH. POST (Sept. 2, 2014), <https://www.washingtonpost.com/opinions/the-shadow-of-dark-money-haunts-the-midterms/2014/09/02/>; *Political Nonprofits (Dark Money)*, OPENSECRETS.ORG, https://www.opensecrets.org/outsidespending/nonprof_summ.php (last updated Jan. 8, 2018).

139. See Beckel, *supra* note 141; Andrew Perez & Margaret Sessa-Hawkins, *Campaign Finance Reform Emerges Briefly as Topic In Ugly Trump-Clinton Debate*, DARK MONEY WATCH (Oct. 10, 2016), <http://www.darkmoneywatch.org/campaign-finance-reform-emerges-briefly-as-topic-in-ugly-trump-clinton-debate/>; *Political Nonprofits (Dark Money)*, *supra* note 141.

140. *Citizens United v. Fed. Elec. Comm’n*, 558 U.S. 310, 319 (2010).

141. Good, *supra* note 141.

142. *Citizens United*, 558 U.S. at 339; Sullivan, *supra* note 127.

branding separately for an advocacy companion to an existing 501(c)(3) organization, the time it takes to launch a 501(c)(4) also hinders an organization whose mission is to impact public policy on behalf of a constituency with a clear need. For example, as the 501(c)(3) is operating, maturing, and growing, it identifies a clear policy gap. However, it is legally discouraged from adding policy advocacy to its mission.¹⁴³ As the volunteers at the 501(c)(3) navigate their way through tax law, approach donors for a second pitch, submit filings for a second non-profit organization, build a second website, and create new materials, significant time passes. In many instances, this process can take several months to a year or more.¹⁴⁴ During that time, the status quo continues. In the case of SoldierStrong, veterans continue to face major gaps in benefits from the G.I. Bill, and VA Hospitals continue to rely on charity to provide much-needed equipment for their patients.¹⁴⁵

Understanding that shaping public policy—working with Congress and the bureaucracy—is a slow and cumbersome process, creating an entity through which to do so on behalf of veterans should not be.

While the technicalities of allowable activities by various entities and the development of the 501(c)(4) section as a sort of “none of the above”¹⁴⁶ home for a varied collection of organizations is important to understand, it is critical not to lose sight of the very real-world consequences on individual lives. In this case, the complications and risks associated with undertaking pure policy advocacy under 501(c)(3) constraints, combined with the quickly growing stigma of being lumped in with the political advocacy now inexorably linked to 501(c)(4),¹⁴⁷ means that individual veterans are not being advocated for or served in

143. Kindell & Reilly, *supra* note 129, at 276.

144. *How Long Does it Take for the IRS to Approve 501(c)(3) Status?*, FOUND. GROUP, <https://www.501c3.org/frequently-asked-questions/how-long-does-it-take-for-the-irs-to-approve-501c3-status/> (last visited Jan. 8, 2018); *How Long Does it Take to Get 501(c)(3) Status?*, HARBOR COMPLIANCE, <https://www.harborcompliance.com/information/how-long-does-it-take-to-get-501c3-status> (last updated Sept. 14, 2014).

145. See SOLDIERSTRONG ACCESS, *supra* note 59; see also *VA Voluntary Service*, U.S. DEP'T VETERANS AFFS., <https://www.volunteer.va.gov/apps/VolunteerNow/default.asp> (last updated Nov. 13, 2014).

146. KOULISH, *supra* note 118, at 1.

147. See Nan Aron & Abby Levine, *In Defense of 'Dark Money,'* PROSPECT (Aug. 3, 2017), <http://prospect.org/article/defense-dark-money>; Abby Levine, *The Best Way to Stop a Bad Gun Lobbyist is with a Good Gun Lobbyist*, CHRON. PHILANTHROPY (Jan. 18, 2013), <https://www.philanthropy.com/article/The-Best-Way-to-Stop-a-Bad-Gun/155563>; *The Restriction of Political Campaign Intervention by Section 501(c)(3) Tax-Exempt Organizations*, INTERNAL REV. SERV., <https://www.irs.gov/charities-non-profits/charitable-organizations/the-restriction-of-political-campaign-intervention-by-section-501c3-tax-exempt-organizations> (last updated Sept. 13, 2016).

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the best possible way. Policy advocacy is as integral a piece of the puzzle to better serving veterans as is the actual provision of hardware and services. Yet that integral piece of the puzzle has been missing as these technical compliance issues are wrestled with. The result: wounded Veterans that may have been better served have not been. In the depth of the technical compliance issues explored above, that simple fact should never be forgotten.

In sum, the current situation offers a policy advocate in the position of SoldierStrong with two unappealing choices. On the one hand, one can enter into the 501(c)(3) allowable advocacy sphere, understanding that with that choice comes not only massive complications in compliance, but essentially the death penalty for the organization if it would be determined after the fact the organization stepped across what are, at best, vaguely defined lines.¹⁴⁸ On the other hand, entering the fully open “wild west” of 501(c)(4) advocacy—notwithstanding the organization has no interest in anything other than pure policy advocacy on behalf of wounded veterans—requires accepting the negative implications of maintaining two distinct entities with their own fundraising, compliance, and operational needs.

While it is beyond the scope of this article to design a comprehensive solution to the practical problems that the SoldierStrong experience has illuminated, it is the hope that this experience, combined with others, might at least begin that discussion. It would seem that discussion could follow two different paths, which are perhaps not mutually exclusive.

First, discussion could be had toward making both compliance and risk factors less burdensome when a 501(c)(3) engages in policy advocacy. While the 501(h) designation was an acknowledgement of the compliance problems in this area, that provision is wanting as a true solution.¹⁴⁹ 501(h) does create “safe harbor” dollar amounts¹⁵⁰ for a 501(c)(3) to operate under, however the mechanisms to calculate costs and expenditures under that provision remain inherently vague and subject to changing interpretation.¹⁵¹ Discussion of mechanisms to achieve significantly more clarity in this area could be fruitful. A “safe harbor” can only truly have that designation if one is certain when they are in it.

148. The term “facts and circumstances” appears eighteen times in a key IRS guidance document on lobbying expenditures. Kindell & Reilly, *supra* note 129, at 261–366.

149. I.R.C. § 501(h)(1)(A)–(B) (2012).

150. *Id.*

151. *See, e.g.*, Kindell & Reilly, *supra* note 129, at 284–313.

Also in this area, the draconian potential penalties¹⁵² might be reconsidered in instances of error with no wrongful intent. In short, honest mistakes should not carry the potential death penalty for an organization like SoldierStrong absent real intent to defraud. While discretion in enforcement actions might be some comfort, the very availability of such a penalty should be limited.

Second, discussion could be had if the developments of the last decade in particular warrant a refinement in the “catch all” 501(c)(4) social welfare organization designation. As reviewed above, the history and current status of this sector is not one of intentional design. Perhaps organizations such as SoldierStrong, with no desire to be involved in political advocacy expenditures and only a desire to engage in policy advocacy to advance social welfare should be in some manner distinguished.

In all of this discussion, the real-world experience of SoldierStrong (one undoubtedly shared by multiple other advocacy organizations) should always be kept in mind. In the end, our tax code should encourage those who wish to take a lead in addressing societal challenges, be it better treatment for our wounded veterans or any other of the countless challenges facing our nation. The legal frameworks and rules should create clear and workable avenues for those that are willing to take on—and fund—these important activities. That should be true even when a critical part of the activities involves public policy advocacy.

152. See I.R.C. § 501(c)(3). *See generally Revoked? Reinstated? Learn More*, INTERNAL REVENUE SERVS., <https://www.irs.gov/charities-non-profits/automatic-revocation-of-exemption> (last updated Nov. 2, 2017) (providing information about the effects of losing tax-exempt status).