

**Association of Corporate Counsel
National Capital Region and ACC Nonprofit Organizations Network**

NONPROFITS NAVIGATING ELECTIONS

November 5, 2019

Presenters

Jonathan Blum, Shareholder, Polsinelli
Anita Drummond, Assistant General Counsel, American Cancer Society
Julius Hobson, Senior Policy Advisory, Polsinelli
Ann Springer, Deputy General Counsel, American Psychological Association

Location

Polsinelli
1401 Eye ("I") Street, NW
Washington, DC 20005
www.polsinelli.com

Table of Contents

#1 Summary of Tax-Exempt Organizations' Lobbying and Electioneering Rules
by Anita Drummond, American Cancer Society, and Jonathan Blum, Polsinelli3

#2 Candidate Direct Giving by Traditional Federal PAC & Affiliated PAC
by Ann Springer, American Psychological Association.....12

#1 Summary of Tax-Exempt Organizations' Lobbying and Electioneering Rules

Anita Drummond, American Cancer Society and Jonathan Blum, Polsinelli

The Internal Revenue Code (IRC) places various restrictions on tax-exempt organizations with regarding to political activity. It may take the form of influencing public policy through lobbying or engaging in candidate electioneering in various forms. These activities are overlaid with both state and federal laws regulating lobbying and candidate electioneering.

1. Lobbying Restrictions
2. Engagement in Elections
3. Candidate Electioneering

1. Lobbying

A. Restrictions on lobbying under the IRC vary among different types of tax-exempt organizations.

i. Private Foundation under Section 501(c)(3)¹

For private foundations, Sections 4945(d) and (e) impose excise tax for any expenditures to carry on propaganda, or otherwise to attempt, to influence legislation. Propaganda is grassroots efforts to influence the public. Lobbying includes “communication with any member or employee of a legislative body, or with any other government official or employee who may participate in the formulation of the legislation (except technical advice or assistance provided to a governmental body or to a committee or other subdivision thereof in response to a written request by such body or subdivision, as the case may be), other than through making available the results of nonpartisan analysis, study, or research.” A grant by a private foundation to fund a specific project of a public charity is not a taxable expenditure, even if the public charity engages in lobbying activities as part of the project, if the grant is not earmarked to be used in an attempt to influence legislation; and the sum of all grants made by the foundation for the same project for the same year does not exceed the amount budgeted, for the year of the grant, by the grantee organization for activities of the project that are not attempts to influence legislation.

ii. Public Charity under Section 501(c)(3)

¹ For purposes of this Article, Section references are to the Internal Revenue Code of 1986, as amended.

Section 501(c)(3) public charities can engage in low levels of activities that serve to influence legislation. An organization is regarded as attempting to influence legislation if it contacts or urges the public to contact members of a legislative body for the purpose of proposing, supporting, or opposing legislation. Contacting members of the executive branch of government or administrative agencies is not attempting to influence legislation, nor is publishing nonpartisan research to educate the public on an issue. Under Section 501(c)(3), no substantial part of the activities of a public charity may be carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)). By agreeing to limit spending, a public charity may rely on exceptions to the lobbying definition by making a Section 501(h) election, also called the “expenditure test”. The expenditure test, stated in Section 4911, measures permissible and impermissible legislative activities of charitable organizations in terms of sets of declining percentages of total exempt purpose expenditures. The limits apply to grassroots and direct lobbying. The regulations are critical to understanding the exceptions to lobbying for public charities.² A charitable organization that has made this election and exceeds the limits becomes subject to an excise tax. The IRS Form 5768 for a 501(h) election can be found here: <https://www.irs.gov/pub/irs-pdf/f5768.pdf>.

If an organization engages either in substantial lobbying activities or participates or intervenes directly or indirectly in a political campaign in support or opposition to a candidate, it is considered an “action organization” not entitled to Section 501(c)(3) status.³

iii. Social Welfare Organizations under Section 501(c)(4)

Tax-exempt entities organized under Section 501(c)(4) have no limits on influencing legislation. Contributions are not tax deductible for charitable purposes. Amounts paid for influencing legislation may not be deducted as a business expense.⁴ For that reason, the organization, at the time the dues are assessed or paid, must notify the dues payer that the dues are allocable to nondeductible lobbying and political expenditures.

iv. Business Leagues and Trade Associations under Section 501(c)(6)

Tax-exempt entities organized under Section 501(c)(6) have no limits on influencing legislation. Payments for membership dues may be deductible as a business expense except that amounts paid for influencing legislation may not be deducted as a business expense.⁵ For that reason, the organization, at the time the dues are assessed or paid, must notify the dues payer that the dues are allocable to nondeductible lobbying and political expenditures.

² See 26 CFR 56.4911 *et seq.* See “P. Lobbying Issues by Judith E. Kindell and John Francis Reilly, 1997 Exempt Organization CPE Text.”

³ Reg. §1.501(c)(3)-1(c)(3)(i)–§1.501(c)(3)-1(c)(3)(iii).

⁴ Section 162(e)(2)(A).

⁵ *Id.*

B. Federal and State Laws Regulate Lobbying

i. Federal Lobbying Disclosure Act of 1995 (LDA)

The definition of lobbying is distinctly different from IRC. The LDA, as amended by the Honest Leadership and Open Government Act of 2007, defines lobbying as lobbying contacts with covered officials about federal legislative and executive policy decisions. Specifically, it includes: 1. The formulation, modification, or adoption of Federal legislation (including legislative proposals); 2. The formulation, modification, or adoption of a Federal rule, regulation, Executive order, or any other program, policy, or position of the United States Government; 3. The administration or execution of a Federal program or policy (including the negotiation, award, or administration of a Federal contract, grant, loan permit, or license); or 4. The nomination or confirmation of a person for a position subject to confirmation by the Senate. It excludes activities that would be “propaganda” (grassroots) under the IRC. Registration and expense reporting are required under the law.

ii. Various state and local lobbying laws

Typically, state and local laws include both legislative and executive policy decisions. Laws vary as to whether it includes grassroots activities. Registration and expense reporting may be required under the applicable law.

iii. Campaign finance laws for ballot measures

Supporting or opposing a ballot measure in the form of a referendum or initiative is influencing legislation under the IRC. Tax-exempt organizations engaged in ballot measure at the state or local level are subject to campaign finance laws. Typical considerations are: formation of political committee, reporting expenditures and contributions (including in-kind), disclosure of donors, reporting independent expenditures, and mandatory disclosures in campaign materials.

2. Engagement in Elections

Tax-exempt entities organized under Section 501(c)(3) have some means to engage in elections without going astray of the prohibitions on candidate electioneering. These activities are described for purposes of illustrating permissible activities for charities. Other nonprofits addressed in this guidance have no limits on these activities except those that may be imposed as a result of its tax-exempt purpose or articles of incorporation, as further described below.

A. Debates and Forums

Charity-sponsored candidate debates and forums are permitted if:

- All qualified candidates for a given office are invited to the forum;
- The questions are prepared and presented by an independent nonpartisan panel;
- The discussion covers a broad range of issues of interest to the public (not just the issues of interest to the charity);
- The candidates are not asked to agree or disagree with positions, agendas, platforms or statements of the organization;
- Each candidate is given an equal opportunity to speak; and
- The moderator and the forum's sponsors refrain from commenting on the questions, the answers or the candidates.

B. Voter Guides

Like support for debates and forums, charities that develop voter guides must address a broad range of issues. This requirement essentially prevents most charities from asking and publishing voter guides because of limits on the charity's exempt purpose, such as health care or environmental protection, makes it untenable to submit questions about issues beyond the charity's scope. If questionnaires are sent, they must be sent to all candidates (not just those polling well or major party candidates). Voter guides must be published with the complete responses and may not grade or compare responses among candidates or to the position of the charity.

C. Voter Education and Registration

A charity with an appropriate mission may help people register to vote and participate in an election. A charity may conduct a voter registration or a get-out-the vote drive as long as it does so in an unbiased and non-partisan manner. To minimize the chance for bias, the charity and the people conducting the activities should avoid mentioning the candidates or political parties in written or spoken communications about the activity, including publicity, posters, placards, registration materials and handouts.

D. Education of Candidates

Candidate meetings by a charity to discuss key policy issues is a legitimate means to engage with candidates without engaging in prohibited candidate electioneering. Reasonably equitable efforts should be made to reach out to all candidates and provide educational materials in various ways to maximize the opportunity for education of candidates and their staff.

E. Ballot Measures (See 1.B.iii)

3. Candidate Electioneering

A. Internal Revenue Code restrictions on engaging with candidates or election activities.

i. Private Foundation under Section 501(c)(3)

All tax-exempt entities organized under Section 501(c)(3) are prohibited from candidate electioneering, i.e., they must 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.” The term “candidate for public office” means an individual who offers himself, or is proposed by others, as a contestant for an elective public office, whether such office be national, State or local. Activities which constitute participation or intervention in a political campaign on behalf of or in opposition to a candidate include, but are not limited to: (i) publishing or distributing written or printed statements or making oral statements on behalf of or in opposition to such a candidate; (ii) paying salaries or expenses of campaign workers; and (iii) conducting or paying the expenses of conducting a voter-registration drive limited to the geographic area covered by the campaign.⁶

A private foundation is subject to excise tax for such prohibited expenditures under Section 4945(d), that are to influence the outcome of any specific public election, or to carry on, directly or indirectly, any voter registration drive. Some exceptions apply for activities of which are nonpartisan, are not confined to one specific election period, and are carried on in 5 or more States.⁷

ii. Public Charity under Section 501(c)(3)

All tax-exempt entities organized under Section 501(c)(3) are prohibited from candidate electioneering, i.e., they must 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.” Treasury regulation 1.501(c)(3)-1(c)(3)(iii) provides that activities that constitute participation or intervention in a political campaign on behalf or in opposition to a candidate include, but are not limited to, publishing or distributing written or printed statements or making oral statements on behalf of or in opposition to such candidate. In addition, the regulation says the term “candidate for public office” means an individual who offers himself, or is proposed by others, as a contestant for a national, state, or local elective public office.

⁶ Reg. 53.4945-3(a)(2).

⁷ Reg. 53.4945-3(b)(1).

The IRS has specified very limited means for a charity to engage with candidates as described in 2. above. Notably, a charity's officers or executives may be engaged in fundraising or giving for political candidates when acting on such individual's own behalf and not on behalf of the charity. So long as charity resources are not used, such as a charity event or office space, the individual's political activity is permissible. In circumstances where the individual's professional position is disclosed, such as advertising, language should be required to clarify the charity is not taking a position, such as "'Organization shown for identification purposes only; no endorsement by the organization is implied."

iii. Social Welfare Organization under Section 501(c)(4)

A tax-exempt entity organized under Section 501(c)(4) may participate in political campaigns so long as it is not its primary activity. Treasury regulation 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, and as a result, such political campaign activities must not be the organization's primary activity. Amounts paid for intervention or participation in any political campaign may not be deducted as a business expense.⁸ For that reason, the organization, at the time the dues are assessed or paid, must notify the dues payer that the dues are allocable to nondeductible lobbying and political expenditures.

Under Section 527(e)(2), the organization may engage in candidate electioneering with taxable expenditures for "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 Presidential or Vice-Presidential electors, whether or not such individual or electors are selected, nominated, elected or appointed."

However, Section 527(f)(3) provides that if an organization described in Section 501(c) and exempt from tax under Section 501(a) sets up a separate segregated fund (which segregates monies for Section 527(e)(2) exempt function purposes) that fund will be treated as a separate political organization described in Section 527 and, therefore, be subject to tax as a political organization under Section 527(b).⁹

iv. Associations under Section 501(c)(6)

Tax-exempt entities organized under Section 501(c)(6) have no limits on influencing legislation. Payments for membership dues may be deductible as a business expense except that amounts

⁸ Section 162(e)(2)(A).

⁹ See 2 U.S.C. § 441b(b) for definition of segregated fund.

paid for influencing legislation may not be deducted as a business expense.¹⁰ For that reason, the organization, at the time the dues are assessed or paid, must notify the dues payer that the dues are allocable to nondeductible lobbying and political expenditures.

Under Section 527(e)(2), the organization may engage in candidate electioneering with taxable expenditures for "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 Presidential or Vice-Presidential electors, whether or not such individual or electors are selected, nominated, elected or appointed."

However, Section 527(f)(3) provides that if an organization described in Section 501(c) and exempt from tax under Section 501(a) sets up a separate segregated fund (which segregates monies for Section 527(e)(2) exempt function purposes) that fund will be treated as a separate political organization described in Section 527 and, therefore, be subject to tax as a political organization under Section 527(b).¹¹

B. Federal and State Campaign Laws

i. Federal Election Commission (FEC)

Political committees associated with 501(c)(4) or (6) organizations are regulated under Title 11 of the Code of Federal Regulations. Specifically, "political committees other than authorized committees" are required to report to the FEC expenditures and donations on FEC Form 3-X. Independent expenditures by a committee are those activities that are not coordinated with a candidate.¹² Certain communications directly with members is reported on Form 7. Segregated funds report expenses allocated among candidates and other activities.¹³

ii. State Campaign Finance Laws

A political committee or segregated covered by the FEC is usually also required to conduct state reporting for activities associated with state candidates.

Examples under various state laws are:

Virginia: Federal Committees that are registered with the Virginia Department of Elections who file their reports with the FEC are not required to file campaign finance reports with the Virginia

¹⁰ Section 162(e)(2)(A).

¹¹ See 2 U.S.C. § 441b(b) for definition of segregated fund.

¹² 52 USC 30104(b).

¹³ 11 CFR Sec. 104.10.

Department of Elections. Candidates for office in Virginia may accept contributions from these types of candidates or political committees.

Maryland: Depending on its campaign finance activity in the State, a federal committee may need to register and file disclosure reports with the State Board. A federal committee may be subject to the independent expenditure reporting requirements.

Resources

IRS Training material on prohibited candidate activity by a Section 501(c)(3) organization.

https://www.stayexempt.irs.gov/se/files/downloads/PoliticalCampaigns_Print.pdf

U.S. Federal Lobbying Disclosure Act Guidance

https://lobbyingdisclosure.house.gov/amended_lda_guide.html

IRS Revenue Ruling 2007-41 on political activity by 501(c)(3) organizations

<https://www.irs.gov/pub/irs-drop/rr-07-41.pdf>

IRS Revenue Ruling 2004-6 on candidate electioneering determination

https://www.irs.gov/irb/2004-04_IRB#RR-2004-6

2003 EO CPE Text

Political Campaign and Lobbying Activities of IRC 501(c)(4), (c)(5), and (c)(6) Organizations

<https://www.irs.gov/pub/irs-tege/eotopicl03.pdf>

Federal Election Commission regulations at Title 11 of the Code of Federal Elections.

<https://www.govinfo.gov/content/pkg/CFR-2019-title11-vol1/pdf/CFR-2019-title11-vol1.pdf>

FEC Separate Segregated Funds

<https://www.fec.gov/help-candidates-and-committees/registering-ssf/>

Learn Foundation Law's Electioneering Rules for Private Foundations and Public Charities online training

<https://learnfoundationlaw.org/electioneering-rules-for-private-foundations-and-public-charities/>

Alliance for Justice's Bolder Advocacy technical assistance and training

<https://www.bolderadvocacy.org/>

#2 Candidate Direct Giving by Traditional Federal PAC & Affiliated PAC

Ann Spring, American Psychological Association

Candidate Direct Giving: Traditional Federal PAC

- Establishing affiliated PAC allows direct contributions to candidates
 - Access to more intimate fundraisers and events (\$5k limit)
 - In-kind contributions to candidates (phone banking, office space, polling data, events, etc; coordination with campaign allowed)
 - Member direct giving to elections (give-or-get, member bundling)
 - Independent expenditures (non-taxable; can't coordinate with campaign).
- Organization of PAC:
 - Setup rules flexible. No required bylaws, board, or separate governance structure
 - Reporting required
 - Registration with FEC; Quarterly and election cycle reporting
 - Contributor Information; Expenditure information (incl. in kind contributions)
 - Name must include affiliated organization name (but can also use dba)
 - Federal contributions are focus (some states allow federal PAC contributions, but very state law dependent.)

Candidate Giving: Affiliated PAC under Sec. 527

- Affiliated organization pays administrative and fundraising costs of PAC
 - Costs of running the PAC absorbed by a 501(c)(4) or (5)
 - Allows PAC money raised to be reserved for direct political giving
- Affiliated PAC Fundraising
 - Solicit money from particular class of affiliated entities
 - Includes members in affiliated organizations (chapters, divisions, related organizations).
 - Multifactor test to determine affiliation
 - Fundraising restricted to this "solicitable class"
 - Contributions not tax deductible to donor
 - Multiple avenues:
 - Member dinners, booths, mailings, events
 - Mandatory disclaimers on solicitations