



## Staying Legal While Engaging in Election-related Activities

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*Contrary to what some think, charities can legally advocate their causes by engaging in election-related activities — but restrictions apply.*

Every day, our elected officials make changes in federal, state, or local public policy that can make the difference between success and failure in achieving your organization’s goals. You know you should be advocating your cause and, now that we have entered another presidential election year, you are tantalized by the opportunity to make your organization’s concerns central to electoral debate. But, as a board member, you certainly don’t want your organization to break the law. Never fear! The law lets charities get in on election-related activities — albeit within certain boundaries.

### Deciphering the code

Different types of tax-exempt organizations are permitted under federal tax law to engage in different kinds of legislative and electoral advocacy. Understand what type of nonprofit you serve and you’ll know how much and what kinds of advocacy it can do.

| Type of Organization  | Electoral Activity                  |
|---|-------------------------------------|
| 501(c)(3) (charity)   | Nonpartisan only                    |
| 501(c)(3) (foundation)  | Nonpartisan only                    |
| 501(c)(4) (social welfare)<br>501(c)(5) (unions)<br>501(c)(6) (trade association) | Nonpartisan OK;<br>limited partisan |
| 527 (political committee, etc.)   | Limited only by election law        |

### 501(c)(3)s – Keep it nonpartisan!

Most tax-exempt organizations are exempt under section 501(c)(3) of the Internal Revenue Code. These organizations include healthcare facilities, human service providers, houses of worship, private schools and colleges — all described as “public charities” — and so-called “private foundations,” which typically are grantmaking entities supported by the generosity of a particular individual philanthropist or public-spirited business.

Among all the tax-exempt organizations, charities face the most significant restrictions on election-related activities, but it is a mistake (and an all-too-common one) to think that 501(c)(3)s are totally prohibited from such activities. The bottom line: They may engage in unlimited nonpartisan activities, but they are **absolutely prohibited** from any effort to support or oppose any candidate for public office.

Thus, 501(c)(3)s may educate voters or candidates on the issues, provide opportunities for voters to hear the candidates' positions, encourage citizens to register to vote, and get registered voters to go to the polls on election day, provided they engage in these activities without favoring one candidate over another. (Private foundations faces some special rules when it comes to supporting voter registration efforts that don't apply to other 501(c)(3)s, but foundations can support nonpartisan voter registration.) 501(c)(3)s may not, however, endorse candidates, rate candidates, contribute to candidates, or do anything else that, on balance, appears to help or hurt a candidate.

**Special Rule: Ballot Measures**  
 In contrast to the rule for candidate elections, a 501(c)(3) may support or oppose an initiative, referendum, or similar ballot measure going before the voters. However, 501(c)(3)s must treat such activities as part of the limited amount of lobbying they may do under federal tax law, and 501(c)(3)s engaged in ballot measure work may be subject to registration and reporting requirements under state election laws.

The border between permissible election-related activity and prohibited "electioneering" by 501(c)(3)s is not always clear. The law prohibits not only direct but also indirect support for a candidate: A 501(c)(3) may violate the restriction even if the organization does not expressly urge a vote for or against a particular candidate. (As a result, the set of activities that will be considered impermissibly "political" for a 501(c)(3) is much broader than those activities typically regulated under federal or state election laws.)

To determine whether or not any 501(c)(3) activity indicates support for or opposition to a candidate, the IRS examines all the relevant "facts and circumstances," including not only the 501(c)(3)'s communication or activity but also the context of that communication or activity. Over the years, the IRS has provided guidance that highlights some of the factors that the agency finds particularly important in evaluating whether a particular activity is impermissible electioneering:

| <b>"Good Facts"</b>   | <b>"Bad Facts"</b>   |
|---|--|
| <i>A 501(c)(3)'s public communication or activity is more likely to be seen by the IRS as a permissible communication or activity if the communication or activity:</i>   | <i>A 501(c)(3)'s public communication or activity is more likely to be seen by the IRS as impermissible political campaign intervention if the communication or activity:</i>  |
| <ul style="list-style-type: none"> <li>• Does not refer to a candidate, the election, or voting</li> <li>• Describes the candidates' positions on a broad range of issues</li> <li>• Is motivated by non-campaign events beyond the control of the organization (e.g., an imminent legislative vote)</li> <li>• Is similar to previous non-electoral communications or activities by the 501(c)(3)</li> </ul> | <ul style="list-style-type: none"> <li>• Is deliberately timed to coincide with the election</li> <li>• Focuses on a "wedge issue" that divides the candidates</li> <li>• Is targeted to an audience selected for its relevance to the election (e.g., likely Democratic supporters)</li> <li>• Compares the 501(c)(3)'s preferred policy position to the position of a candidate or multiple candidates (including rating or scoring the candidates' positions)</li> <li>• Is done at the request or suggestion of a political candidate, campaign, or party</li> </ul> |

In recent years, the IRS has demonstrated a particular interest in enforcing the restriction on 501(c)(3) intervention in political campaigns. In every federal election year since 2004, the IRS has put a special project in place (the Political Activities Compliance Initiative or PACI) to act promptly on complaints alleging electioneering by 501(c)(3)s. The media has reported some high-profile IRS investigations under

this program, notably the audits of the NAACP and All Saints Episcopal Church in Pasadena, California. Nervous 501(c)(3) board members may take some comfort, however, in the fact that the IRS resolved almost all of these examinations — including the two noted above — without any penalty to the organization in question. Nonetheless, some PACI audits have resulted in fines or the loss of the organization’s tax-exempt status, so all 501(c)(3)s should take care to avoid violating the laws governing their election-related activities.

### **The “Facts and Circumstances” test in action**

How does the facts and circumstances test work in practice? Consider these hypothetical examples:

#### *1. The Candidate Visit*

One day in April, your 501(c)(3) health clinic gets a call from the campaign of the candidate who is challenging the incumbent mayor of your town in the upcoming fall elections. The campaign asks if the candidate can visit the health clinic to learn more about how your clinic is addressing the healthcare needs of your community. Would such a visit violate your 501(c)(3) status?

It’s probably fine – if you’re careful. Make sure that the candidate understands that this is not a campaign event: She isn’t there to make a campaign speech, she shouldn’t distribute campaign literature or fundraising materials, and the public isn’t invited (although her staff may attend). Once she is off the clinic’s property, of course, the candidate is free to tout her position on healthcare (or criticize that of her opponent). To be on the safe side, your clinic should also extend an invitation to the mayor to likewise visit your clinic. Finally note that federal and state government rules for certain programs forbid recipients of that program’s funding from hosting candidates, so make sure whether your clinic has such a restriction before you host a candidate.

#### *2. Commenting on Candidate Positions*

You’re the executive director of a 501(c)(3) community development organization. You get a call from a reporter from the local newspaper: Your state’s governor, who is in the midst of a tough reelection campaign, is set to release a major policy proposal on affordable housing. What do you think?

What you think is that you’d better make sure you don’t implicitly endorse the governor’s candidacy! Try to talk about the specifics of what makes a successful housing policy, focusing on what your organization recommends, rather than what the governor’s proposal includes or fails to include. Try not to refer to the governor as a candidate or mention the upcoming election, or, if you do, talk about the things you would hope and expect either of the candidates to do if elected. The fact that your organization wasn’t involved in the timing of the proposal’s release and didn’t initiate the contact with the reporter are both “good facts” that help to show your 501(c)(3) is not intervening in the campaign.

(For more helpful examples of what is and isn’t permissible for 501(c)(3) election-year activities – examples that, unlike those above, come from the IRS itself – take a look at Revenue Ruling 2007-41, available online at: <http://www.irs.gov/pub/irs-drop/rr-07-41.pdf>.)

## **501 (c)(4)s, 501 (c)(5)s, and 501(c)(6)s and political activities**

These types of nonprofits, which include trade associations (501(c)(6)s), labor organizations (501(c)(5)s), and so-called “social welfare” organizations (501(c)(4)s, which are basically organizations that spend most, but not all, of their time and resources engaged in activities that could have been done by a 501(c)(3)), may engage in some partisan political activities without jeopardizing their tax-exempt status, provided those partisan activities do not become the primary activity of the organization. It is a bit of an oversimplification, but if an activity is too political to have been conducted by a 501(c)(3) then that activity will count against the 501(c)(4), 501(c)(5), or 501(c)(6) in this “primary purpose” analysis. For example, a 501(c)(4) is probably violating its tax-exempt status if it spends most of its time and money on advertisements that praise the views of political candidates who share the organization’s policy vision.

Because they may engage in more partisan activity than permissible for 501(c)(3)s, these types of 501(c) organizations have to worry a lot more about complying with federal, state, and local election laws. For example, the Federal Election Campaign Act (FECA) prohibits corporations — even nonprofit corporations — from contributing to federal candidates. (Until recently, FECA also prohibited corporations from making independent public communications that “expressly advocate” for the election or defeat of a federal candidate, but the Supreme Court overturned that restriction in the case *Citizens United v. Federal Election Commission*, and now nonprofit and for-profit corporations are allowed to expressly advocate for or against federal candidates.) All of the states (and some local jurisdictions) have additional election laws with which 501(c)s must comply. These laws may mirror the FECA restrictions — some, but not all, states also ban corporate contributions, for example — or they may impose other restrictions or regulation of activities related to state or local elections. This is a tricky and still-evolving area of law, and a prudent nonprofit will seek knowledgeable legal help before engaging in partisan electoral activities.

### **The right tool for the job**

Each of these different types of organizations is suited to do different types of electoral advocacy work. Frequently, 501(c)s of various types will work on the same general issue, with each engaged in activities particularly appropriate for that type or organization. When a different strategy is needed to accomplish an organization’s purposes, it may create an affiliated entity: A 501(c)(3) may create a 501(c)(4) when an issue demands more lobbying than the amount permitted under the 501(c)(3)’s lobbying limits, or a 501(c)(4) might create a PAC to create change at the ballot box when the 501(c)(4)’s legislative efforts fail.

Achieving your organization’s goals may require you to pursue multiple strategies and involve different types of tax-exempt entities with diverse skills and capacities. Through careful attention to the necessary legal constraints, these different types of tax-exempt organizations can be important tools to help you accomplish your mission.