

Ten Mistakes Nonprofits Should Avoid in an Election Year

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Tax Benefits or Advocacy?

	501(c)(3) "Public Charity" <i>(All for public good)</i>	501(c)(4) "Social Welfare Org." <i>(Most for public good)</i>	527 "Political Org." <i>(Most for political work)</i>
Examples	<ul style="list-style-type: none"> • Sierra Club Found. • Amer. Red Cross • Heritage Foundation 	<ul style="list-style-type: none"> • Sierra Club • Sierra Club • Crossroads GPS 	<ul style="list-style-type: none"> • Sierra Club Pol. Com. • Sierra Club Indep. Act • EMILY's List • American Crossroads
Tax Benefits	<ul style="list-style-type: none"> • Tax-Exemption • Deductible Contribs • Foundation Grants • Gift Tax Exemption 	<ul style="list-style-type: none"> • Tax-Exemption • <i>IRS has halted gift tax enforcement for 501(c)(4) donors</i> 	<ul style="list-style-type: none"> • Tax-Exemption • Gift Tax Exemption
Lobbying	Limited	Unlimited	Rare (and usually taxable)
Election-Related Activity	Can't support or oppose candidates. Nonpartisan activities OK	Partisan activity can't be primary activity. May be taxable	Primary purpose is partisan activity

Basic Rule for 501(c)(3)s

May not "participate in or intervene in any political campaign on behalf of (or in opposition to) any candidate for public office"

=

May not support or oppose a candidate for public office

=

No "electioneering"

What is Electioneering?

Electioneering

- Expressly support or oppose candidates
- Endorse candidates
- Contribute to candidates
- Rate or score candidates on the issues
- Compare organization's position to candidate's
- Provide other assistance to candidates
- Support other organizations' political activity

Not Electioneering

- Register voters
- Educate voters about candidates
- Take positions on issues
- Legislative scorecards
- Educate candidates
- Get out the vote

But only if you do so in a fashion that doesn't favor one candidate over another...



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The IRS will evaluate based on all the "Facts and Circumstances"

Good Facts

- No reference to candidate or elections
- External factor driving timing
- Broad range of issues
- History of similar work on issue

Bad Facts

- Reference to candidate
- Timing motivated by election
- Politically motivated targeting
- Compare preferred position to candidate position
- "Wedge issues"



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10 Mistakes to Avoid

1. Don't support or oppose candidates when commenting on issues raised in an election...



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Commenting on Candidates' Statements Good Facts and Bad Facts

Good Facts

- Uses opportunity to restate organization's position not to comment on candidate's position
- Issue is central to organization's mission
- Organization consistently comments on similar statements by other candidates and non-candidates
- Comment does not refer to candidate's characteristics or qualifications for office
- No reference to candidate or elections
- Candidate made statement in non-candidate capacity
- Issue is not known to be one in dispute between the candidates
- Pending legislation or similar non-campaign external motivation for timing
- Comment is response to outside inquiry or news developments
- Other indicia of nonpartisanship (e.g. urging all candidates to speak out on issue)

Bad Facts

- Compares preferred position to candidate position
- Issue is tangential to organization's mission
- No history of commenting on similar statements
- Comment refers to candidate's characteristics or qualifications for office
- Reference to candidate or election
- Candidate made statement in candidate capacity
- Issue is a "wedge issue"
- Timing of comment motivated by election
- Comment is on the organization's own initiative
- Other indicia of partisanship (e.g. language such as "holding elected officials accountable" that may, in context, suggest electoral intent)



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10 Mistakes to Avoid

2. Don't sponsor candidate appearances that violate the 501(c)(3) ban on electioneering...



Candidate Appearances

As Candidate

- Invite all candidates
- No favoritism in...
 - Timing
 - Setting
 - Introduction
 - Questions
 - Etc.

Non-Candidate Role

- Equal opportunity not required
- Don't hold too close to the election
- Instruct guest: No campaigning



Candidate Debate & Forums

Think about...

Whom you invite to participate...

- All candidates (or at least all major ones)

What questions to ask...

- Broad range of issues
- Impartial panel of questioners
- Don't suggest "correct" answer

What the rules are...

- Impartial moderator
- Fair to all candidates

Who the audience is...

- Don't distribute tickets in a way that favors one candidate

Federal and some state campaign finance laws also have rules governing candidate debates



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10 Mistakes to Avoid

3. Don't produce a voter guide or legislative scorecard that violates the 501(c)(3) ban on electioneering...



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Voter Guides

(Presenting candidate positions on the issues)

- Include all candidates
- Address broad range of issues
- Don't suggest which position the 501(c)(3) favors on any issue
- Avoid allegations of bias
 - Candidate questionnaire
 - Objective sources



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Legislative Scorecards

(Reporting votes of current elected officials)

Do you want to...?	501(c)(3): send to everyone	501(c)(3): send to members
Rate or score the legislators or their individual votes?	x	✓
Focus only on a few issues of key importance to your organization?	x	✓
Time the release of the scorecard to coincide with the election?	x	x

Safe harbor based on
IRS Revenue Rulings
78-248 and 80-282.



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10 Mistakes to Avoid

4. Don't try to educate voters with a candidate pledge effort...



Candidate Pledges

501(c)(3) may not seek to publicize which candidates pledge to support a particular favored policy or policies if elected

(The concern is the implicit support for candidates who sign the pledge and opposition to those who don't)



10 Mistakes to Avoid

5. Don't run a voter registration or GOTV effort that supports or opposes a candidate for office...



Voter Registration & GOTV

Your goal as a 501(c)(3):
Encourage people to exercise their right to vote



Targeting Voter Reg. & GOTV

Select location and audience based on nonpartisan criteria...

YES:
Disadvantaged or underrepresented group or natural constituency of organization

NO:
Voters likely to support or oppose a particular candidate or party



Targeting Voter Reg. & GOTV

Probably OK

- A church registers the members of its congregation
- A day care center drives its kids' parents to the polls
- An environmental group registers voters at an Earth Day event
- A civil rights group registers African-American voters

Maybe OK

- A healthcare group registers people in a district because it's represented by an unchallenged senator who chairs the committee overseeing the state's Medicaid program
- To demonstrate the political power of its constituency, a group registering new citizens targets a district expected to be a closely fought, high-profile primary in which the candidates have similar views on immigration

Not OK

- A children's group registers parents of young children in a district because it's represented by a senator who opposes Head Start funding
- A student group urges registered Democrats to vote



Voter Reg. & GOTV Message

It's safer if you...

- Discuss a broad range of issues (or no issues)
- Don't suggest a "correct" position
- Don't connect with existing advocacy



Private Foundation Grants for Voter Registration

- Section 4945(f) of the federal tax code generally prohibits private foundations from *earmarking* grants for voter registration
- Foundations may make grants for voter registration to 501(c)(3)s that meet specific requirements, notably:
 - Grantee operates in five or more states over more than one election period
 - None of the funds grantee receives from any source for voter registration work are subject to a condition that they be used in a particular jurisdiction or in a specific election period
 - Grantee can show that funding comes from diverse sources, as defined in regulations
 - At least 85% of grantee's income spent for active conduct of charitable mission
- Grantees may choose to use other grants (e.g. general support) for voter registration within discretion permitted by grant agreement



Voter Registration and State Law

- Many states (and some localities) are increasingly regulating voter registration activities
 - Some of this appears to be motivated less by sound public policy and more by deliberate, strategic efforts to limit participation by some segments of the electorate
- Make sure your effort is aware of and compliant with applicable laws that may govern
 - Completion and submission of voter registration forms
 - Compensation for people engaged in voter registration
 - Use of personal data collected in voter registration efforts
 - Etc.



10 Mistakes to Avoid

6. Don't support political candidates or parties by giving them preferred access to your organization's resources...



Organization Resources

In general, a 501(c)(3) may not provide cash or in-kind support to a political candidate or party

- Cash (501(c)(3) may not make financial contributions to political candidate or parties)
- Facilities (use of office space, meeting rooms, etc.)
- Staff time (paying staff to do work for campaigns)
- Intangible resources (activist/donor lists, research and polling data, etc.)

BUT a 501(c)(3) may make such resources available on the same terms that they are available to others

- Publicly available
- Fair-market value (or free, if generally made available for free)
- Made available previously, not only after a particular candidate asks

In addition to violating federal tax law, 501(c)(3) support for candidates violates federal and some state campaign finance law bans on corporate campaign contributions



10 Mistakes to Avoid

7. When supporting or opposing a ballot measure, don't forget to count it against your lobbying limits, and don't violate state campaign finance laws...



Ballot Measures

- 501(c)(3)s may urge people to vote for or against ballot measures (initiatives, referenda, etc.)
- Counts against the 501(c)(3)'s lobbying limits
 - Because voters are “legislators,” 501(h)-electing charities treat activity as direct, not grassroots, lobbying
- Permits more partisan tactics
 - Messages that focus on a single issue and state a position on that issue
 - Targeting communications to voters likely to vote the way the 501(c)(3) wants
 - Single topic events that don’t present both sides of the issue

Warning: State election laws may treat organizations working on ballot measures as “political committees”



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10 Mistakes to Avoid

8. Don’t violate laws regulating “electioneering communications”...



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Electioneering Communications

Federal definition:

- Broadcast, cable, or satellite communication publicly distributed for a fee
- includes the name or likeness of a federal candidate
- 30 days before a primary election, convention, or caucus of a political party or 60 days before a general election
- (for House or Senate candidates) targets the voters of the relevant congressional district or state that the candidate seeks to represent



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Electioneering Communications

Federal rules:

- Corporations (including nonprofit corporations) can't coordinate an electioneering communication with a political candidate, campaign, or party
- Organizations spending more than \$10,000 on electioneering communications must report to the Federal Election Commission
 - Report must include identities of significant donors unless separate account is used

Warning: Many states have enacted similar laws that may define more broadly what communications are subject to restrictions and reporting requirements



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10 Mistakes to Avoid

9. Don't let your related 501(c)(4) organization get your 501(c)(3) in trouble...



501(c)(3)s and Related 501(c)(4)s

- Because 501(c)(4)s may engage in election-related activities prohibited for 501(c)(3), need to avoid any 501(c)(3) subsidy of 501(c)(4) efforts
- 501(c)(4) pays own portion of all shared costs
- 501(c)(3) prohibits use of any resources transferred to 501(c)(4) for electioneering
 - Possible pitfall: Intangible resources, such as lists, polling data, etc.
- Avoid appearance of 501(c)(3) program supporting 501(c)(4) electoral efforts by separating the programs...



Separating 501(c)(3) and 501(c)(4)

Some options to demonstrate better “facts and circumstances”

- Timing: Shut down 501(c)(3) efforts when 501(c)(4) is active in electoral activities
- Targeting: Conduct 501(c)(3) and 501(c)(4)s activities on different turf or targeting different people
- Branding: Make sure that 501(c)(4) materials look different from 501(c)(3) materials – organization name and logo, slogans and other language, color and other design elements, etc.
- Staffing: Designate different staff people to operate 501(c)(3) and 501(c)(4) programs and create a firewall to prevent sharing of information that might suggest 501(c)(3) efforts deliberately supported 501(c)(4) efforts



10 Mistakes to Avoid

10. Don't let your personal activities get your 501(c)(3) in trouble...



Personal Activity

Don't

- Use 501(c)(3) resources to help candidates – offices, computers, email, copiers, phones, contacts, and non-public information
- Display support for candidates while working – t-shirts, buttons, posters in workspace, etc.
- Don't let your personal political activity lead to suggestions that activities by your organization are “coordinated” with a campaign
- Do anything partisan that might suggest you're doing so in your capacity as an employee

Do

- Volunteer on your own time for the candidate of your choice
- Make personal contributions to candidates if you choose
- Take any steps necessary to clarify that any such political activities are in your personal capacity



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Will all of this change...?

In 2013, criticism of the IRS erupted when news broke of significant problems in the agency's handling of applications for recognition of tax-exempt status by 501(c)(3) and 501(c)(4) groups perceived as politically active (particularly those with conservative-sounding names like “tea party” and “patriot”).

In November 2013, the Treasury Department and the IRS proposed new rules to more clearly define political activity for 501(c)(4) organizations. Although many praised the concept of bringing much-needed clarity to this area, the proposed definitions were widely criticized for their overbreadth and for creating confusion by creating special definitions for 501(c)(4) political activity.

Treasury and the IRS have gone back to the drawing board to prepare a revised draft of political activity regulations (which apparently will cover more than just 501(c)(4)s). The new draft is likely to be available for comment this summer, although any final rule is unlikely to take effect before the 2016 elections.



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