

Election Year Advocacy for Nonprofits: Do's and Don'ts for the Coming Months

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PRESENTED BY

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Our Agenda Today

Federal Tax Law and Nonprofit Advocacy

- Nonprofits and lobbying
- Nonprofits and political activities



Case studies



ad ● vo ● ca ● cy:
the act or process of supporting a
cause or proposal

Nonprofits and Lobbying

A black and white photograph of a street sign and traffic light. The sign reads "K ST NW" and "1900". The traffic light is visible on the right side of the frame. The background shows a building with windows.

K ST NW
1900

Lobbying Overview

Two sets of rules for section 501(c)(3) organizations:

No limitation on section 501(c)(4) or 501(c)(6) organizations, provided it furthers their exempt purposes

Private foundations are prohibited from attempting to advocate for or against specific legislation (“lobbying”), with limited exceptions.

- May make grants to public charities that engages in lobbying if the grant is: (i) for the general support of the grantee, or (ii) for a project with a non-lobbying budget in excess of the grant.

Public charities may lobby, so long as:

- Lobbying is not a “substantial part” of their activities; or
- A Section 501(h) election is in effect allowing spending on lobbying up to certain percentages of the charity’s operating budget.

What is lobbying?



- In general
- Carrying on propaganda; or
- Otherwise attempting to influence legislation
- Under section 501(h)
- Specifically defines what communications constitute direct or grassroots lobbying communications for public charities

What is legislation?



- Any act, bill, or resolution of a legislative body (including foreign legislative bodies)
 - Includes any specific legislative proposal, whether or not introduced
- Any action by the public on a referendum, constitutional amendment, or ballot initiative
- Legislative action on a proposed treaty or executive branch nominees
- Legislation does not include actions by an administrative agency or other executive body

Direct v. Grassroots Lobbying

Direct lobbying – communication with anyone involved in formulating legislation, in which:

- Reference is made to specific legislation and
- A view on that legislation is expressed

Grassroots lobbying – efforts to affect the opinions of the general public, where the communication:

- Refers to specific legislation
- Reflects a view on it and
- Includes a “call to action”

Grassroots Lobbying: What is a Call to Action?



- A call to action is one of the following:
 - Telling the recipient to contact a legislator on the bill;
 - Listing the address, telephone number or similar information of a legislator or staff;
 - Providing a petition, postcard (can be digital or hard copy), for contacting a legislator or their staff; or
 - Identifying legislators who will vote on the legislation and their position on the matter
- Without a call to action, advocacy to the public on specific legislation (e.g., in an op-ed) is not grassroots lobbying!

Direct v. Grassroots Lobbying

- For an initiative or referendum, the public is the legislature
- A communication to the public that expresses a view on an initiative/referendum is direct lobbying



Exceptions to Lobbying

- Nonpartisan analysis, study, or research
 - An independent and objective exposition of a particular subject matter
 - Can advocate a position, provided there is a sufficiently full and fair exposition of the facts to enable persons to form independent opinions
 - Cannot directly encourage recipients to take action
 - Must be distributed in a nonpartisan manner
- Examination or discussion of broad social, economic, and similar policy issues
 - Cannot address merits of a specific legislative proposal
 - Cannot encourage action on legislation



Exceptions to Lobbying

- Self-defense – communications with anyone involved in formulating legislation in connection with governmental action that might affect:
 - The existence of the charity;
 - Its powers and duties;
 - Its tax-exempt status; or
 - The deductibility of gifts to it
- Technical advice
 - Requires a written request on behalf of a government body requesting technical advice or assistance



Section 501(h) Expenditure Test

- Under the expenditure test:
 - An electing public charity can spend 20% of the first \$500,000 of “exempt purpose expenditures” on lobbying
 - Permissible percentage declines as exempt purpose expenditures increase with a maximum “lobbying nontaxable amount” of \$1 million
 - Grassroots lobbying limit = 25% of total limit

If the amount of exempt purpose expenditures is:	Lobbying nontaxable amount is:
≤ \$500,000	20% of the exempt purpose expenditures
>\$500,00 but ≤ \$1,000,000	\$100,000 plus 15% of the excess of exempt purpose expenditures over \$500,000
> \$1,000,000 but ≤ \$1,500,000	\$175,000 plus 10% of the excess of exempt purpose expenditures over \$1,000,000
>\$1,500,000 but ≤ \$17,000,000	\$225,000 plus 5% of the exempt purpose expenditures over \$1,500,000
>\$17,000,000	\$1,000,000

Section 501(h) Expenditure Test

- Penalties under the expenditure test:
 - 25% excise tax imposed on “excess lobbying expenditures”
 - Revocation if electing public charity “normally” makes lobbying or grassroots expenditures in excess of applicable “ceiling amounts”
 - 4-year rolling test period;
 - Ceiling amounts = 150% of lobbying nontaxable amounts



Private Foundation Grantmaking: When a Grant Might Involve Lobbying

Does the grant involve lobbying?

- Does it involve specific legislation?
- Does the work fall within one of the exceptions to lobbying?

If the grant does involve lobbying:

- **General Support Grant:** Can the foundation make a general support grant? OR
- **Project Grant:** Does the grantee have a budget where the foundation's grant does not exceed non-lobbying portion of the project budget? OR
- **Revise Proposal:** Ask grantee to revise the proposal OR
- **Prohibit Use:** Can prohibit use of grant funds for lobbying

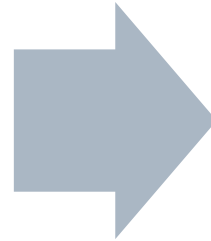


Nonprofits and Political Activities

Political Activities Overview

Absolute prohibition on section 501(c)(3) organizations:

- All private foundations and public charities are prohibited from engaging in any campaign for or against *a candidate for political office*
- Prohibitions applies to both explicit and implicit support or opposition
- Failure to abide by restriction may result in revocation of tax-exempt status and penalty excise taxes



Permissible for section 501(c)(4) or 501(c)(6) organizations, but cannot be primary purpose

- Must still comply with federal and state election laws
- May result in political organization taxable income

Identifying Political Activities

Facts and circumstances analysis with few bright line rules



Key elements

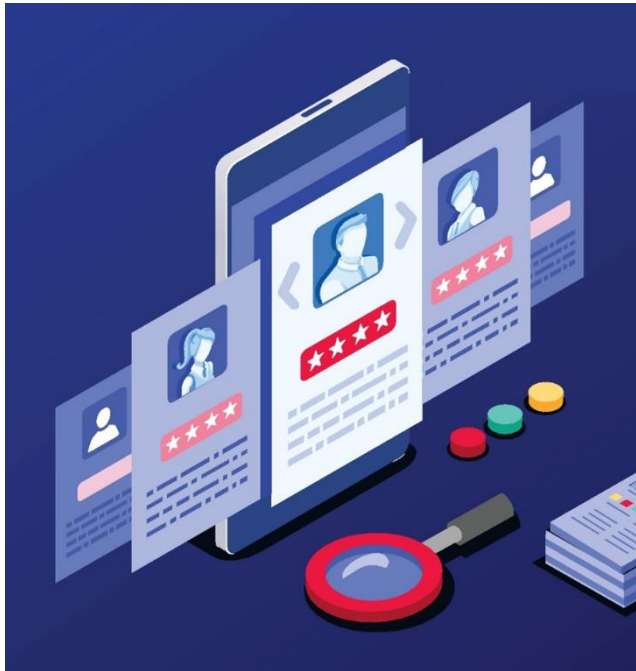
Candidate

- Someone who holds them self, or is proposed by others, as a candidate for an elective public office; need not actually be declared

Public Office

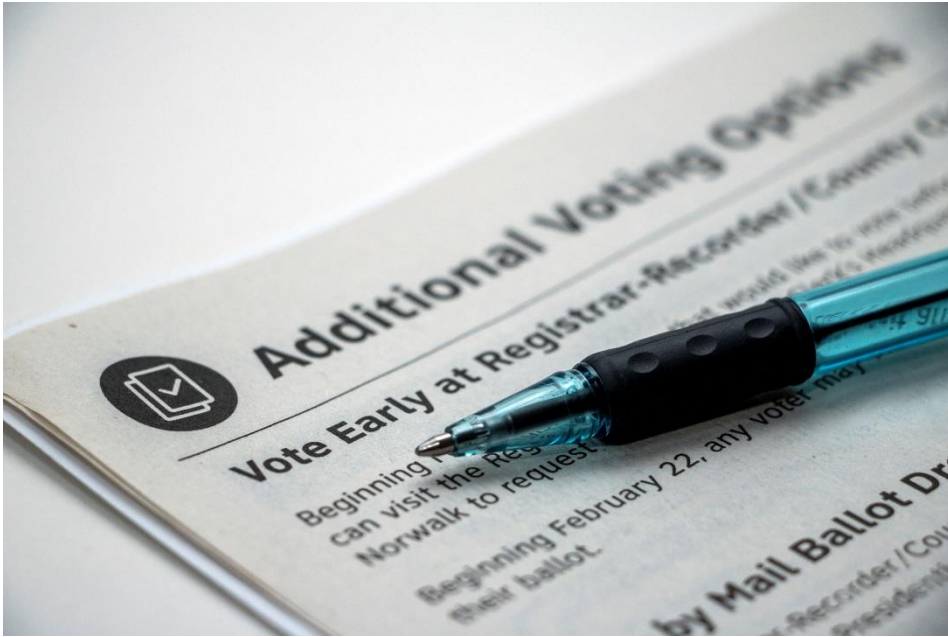
- Characteristics of a public office: created by statute, continuing, fixed term, oath of office

Identifying Political Activities



- Intervention includes:
 - Publicly endorsing a candidate or rating a candidate's fitness for office
 - Financial contributions to or in-kind support of a candidate
 - Biased educational activities or candidate forums
 - Any other action that has the effect of promoting or opposing a candidate
- Intervention does not include:
 - Nonpartisan voter registration drives
 - Note: Very specific requirements must be met for a private foundation to make a grant earmarked for voter registration activities.
 - Nonpartisan educational activities

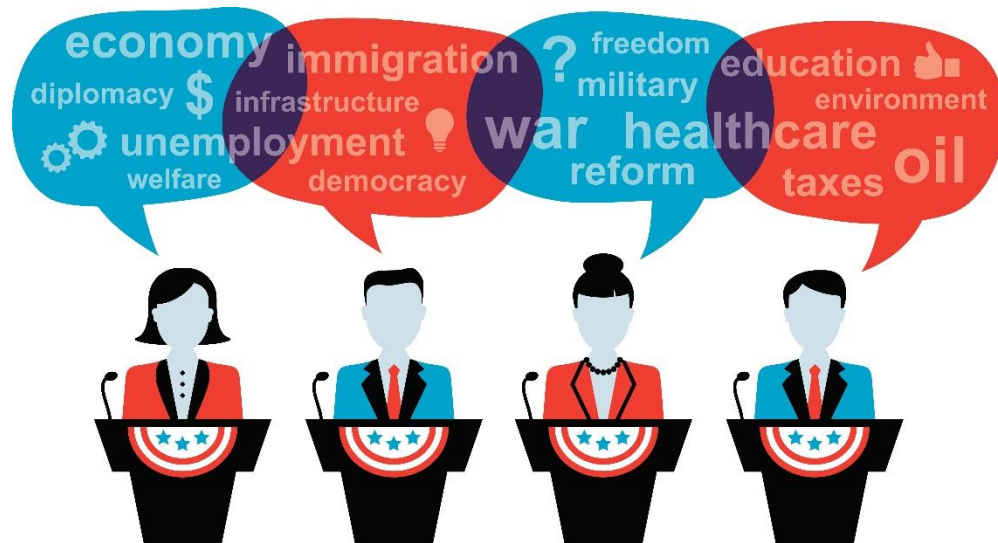
Nonpartisan Voter Education



- Nonpartisan, neutral voter education programs that do not evidence bias for or against particular candidates
- If done correctly, this may include:
 - Voters guides
 - Candidate questionnaires
 - Publication of voting records
 - Candidate forums

Issue Advocacy and Political Activities

- Issue advocacy can constitute political activity



- Factors to consider

- Whether the communication identifies a candidate
- Whether the communication expresses approval of a candidate
- Whether the communication makes reference to voting or the election
- Whether the communication is delivered close in time to the election
- Whether the issue distinguishes candidates
- Whether the communication is part of an ongoing series of communications independent of election
- Whether the timing of communication relates to non-electoral event

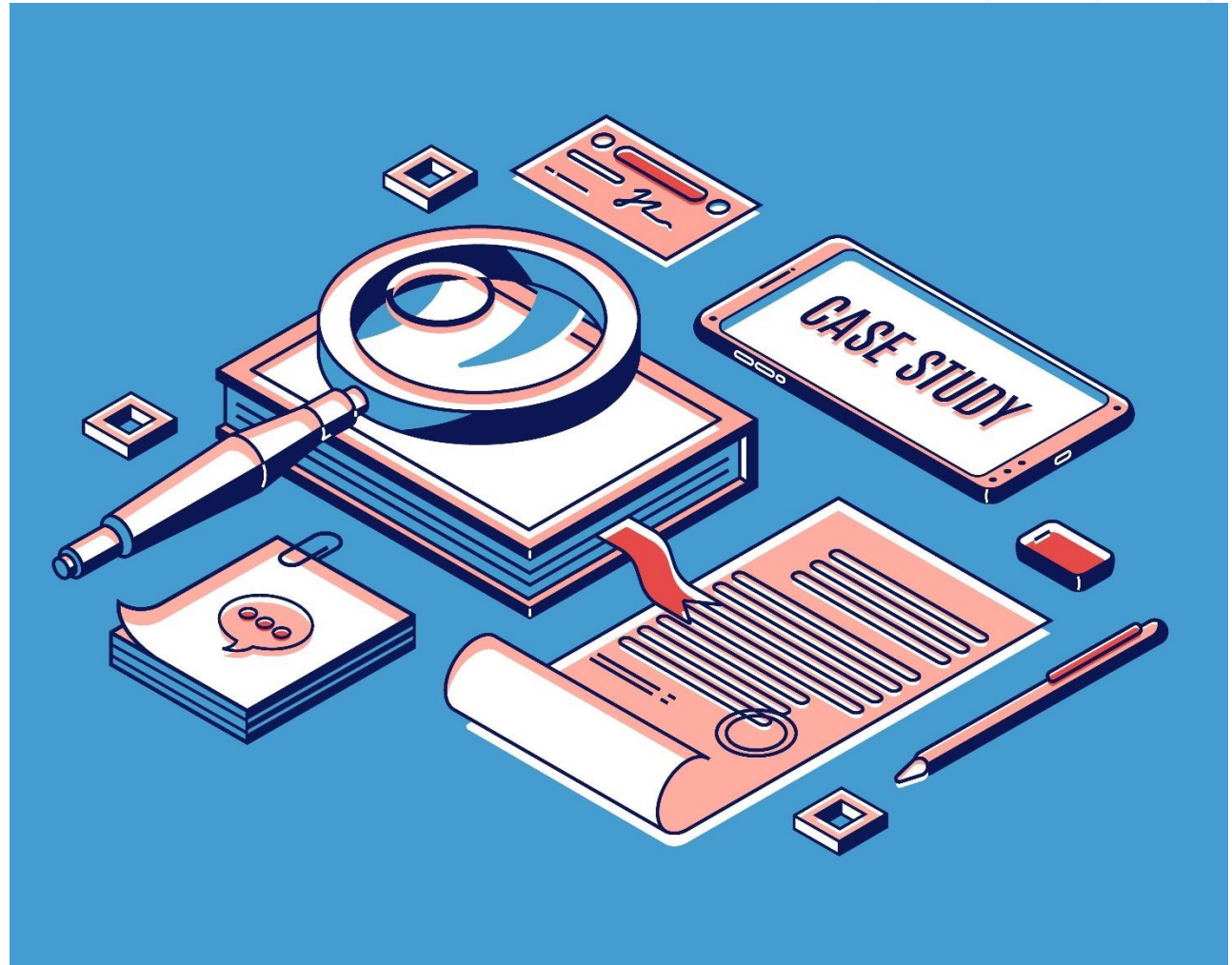
Individual v. Organizational Activities

- The prohibition against political activities does not apply to staff or directors acting in their individual capacities



- **Caution:** Cannot use the organization’s financial resources, facilities, intellectual property, or personnel for individual political activities
 - Not on company time
 - Individuals must make clear that actions taken or statements made are their own and not those of the organization
 - Be mindful of email and social media accounts
 - “Organizational affiliation for identification purposes only”

Case Studies



Case Study #1

Police Funding Initiative

- PC, a 501(c)(3) public charity working to advance social justice causes, helped author and place on the ballot an initiative prohibiting the use of state police funding to purchase surplus military equipment. It is holding a rally in support of the initiative in front of local police headquarters from 3:00 to 5:00 p.m. in accordance with its permit. The two candidates for mayor in this locale are divided on this initiative, but it is not a defining issue in the campaign.
- *Lobbying and, if so, direct or grassroots?*
- *Political campaign intervention?*



Case Study #1

Police Funding Initiative

- PC holds a second late night rally in support of the initiative in front of local police headquarters without a permit and in contravention of a local curfew imposed in light of recent social unrest. The rally coincides with ongoing nightly protests that regularly result in clashes with the police and forcible dispersion of the protesters. The protest and rally devolve into violence and property damage, with many participants being arrested and others being injured.
- *Still direct lobbying and not political campaign intervention.*
- *Other tax exemption issues?*



Side Note: Illegality Doctrine

- Illegal acts are per se unrelated to a section 501(c) organization's exempt purposes
 - Illegal acts will disqualify an organization from exemption if “substantial”
 - Qualitative and quantitative analysis
 - Must determine if the activity is properly attributable to the organization
- Rev. Rul. 75-384: An antiwar protest organization whose primary activity was sponsoring civil disobedience fails to qualify under section 501(c)(3) or 501(c)(4)

Side Note: Illegality Doctrine

- If planning any sort of protest, rally, or demonstration:
- Consider communicating plans to local officials in advance, in addition to obtaining any requisite permits
- Be clear about expected behavior in all communications to participants, including expectations about masks and/or social distancing
- May want to clearly define the timeframe for the sponsored event

Case Study #1

Police Funding Initiative

- SW, a 501(c)(4) social welfare organization with a close working relation with PC, assembles and distributes a voters guide detailing the research and policy positions that support the ballot initiative prohibiting the use of state police funding to purchase surplus military equipment and identifying which candidates for state and local office support the initiative and which oppose it.
- *Political campaign intervention?*



Case Study #1

Police Funding Initiative

- CEO, PC's chief executive and a well known civic leader, pens an op-ed in support of the ballot initiative that runs in the state's most widely distributed newspaper. The byline identifies CEO as serving as PC's chief executive but PC is not otherwise mentioned in the article.
- *Political campaign intervention?*
- Additional facts: CEO wrote the op-ed in their office at PC during business hours and utilized staff time to help research, proof, and format the article.



Case Study #2

Stay At Home Order

- PC, a nonprofit health care organization and 501(c)(3) public charity, has been consistently engaged in efforts to raise awareness regarding the dangers of COVID-19 and ways to flatten the curve since the onset of the pandemic in March. These efforts include public communications in support of the governor's stay at home order.
- *Lobbying and, if so, direct or grassroots?*
- *Political campaign intervention?*



Case Study #3

Stay At Home Order

- PC, another nonprofit health care organization and 501(c)(3) public charity, has been treating COVID-19 patients, but has not engaged in significant public outreach regarding the pandemic. Six weeks prior to election day, PC launches a campaign in support of the governor's stay at home order. The governor is up for re-election, and the governor's chief opponent has been a vocal critic of the stay at home order. The incumbent governor's response to the pandemic is seen as key issue in the upcoming election.
- *Political campaign intervention?*
- Alternative facts: What if the PC didn't launch a campaign and just liked the incumbent governor's tweet reiterating the need to practice social distancing?



Case Study #4

Nonprofit Employer

- PF, a 501(c)(3) private foundation, wants to encourage its employees to vote and to otherwise be civically engaged. To this end, can PF:
- Give all of its employees a paid day off on election day?
- Give all of its hourly employees a paid day off on election day, but not its salaried employees?
- Regularly circulate messages to all employees regarding the importance of voting and information regarding how to register?
- What if these messages emphasized how election day results could impact causes pertinent to the PF's mission?

Tips to Avoiding Political Activities



- Focus on the issues, not the candidates
- Be mindful about the timing of issue-oriented materials vis-à-vis upcoming elections
- Be cautious about linking to external websites and mindful about social media activity
- Review any voter education or planned voter registration or get out the vote activities for bias
- Have known policies in place limiting the use of company time and resources for political activities, including personal political activities

Once the Election is Over...

Permissible Activities:



- Engaging with members of the new administration or transition team about broad policy issues (but be aware that it might be lobbying if specific legislation is involved)
- Recommending individuals for appointment within the new administration or for judicial appointment (but be aware that it might be lobbying if legislative vote is required)
- Commenting on the results of the election, i.e., what happened and why
- Advocating for changes in the election process (e.g., overturning voter identification laws or expanding vote by mail, but be aware that it might be lobbying if specific legislation is involved)
- Lawful, peaceful protest

Once the Election is Over...

Impermissible Activities:



- Supporting or opposing a former candidate or a political party in a way that might carry forward to a future election (rather than, for instance, focusing on what a winning candidate should or should not do while in office)
- Taking credit for an election result, which could suggest intended intervention in the past election that may undermine the organization's nonpartisan status in the future
- Indicating that the organization intends to hold the elected candidate accountable in a way that is susceptible to being interpreted as a reference to a future election.

Q & A



Additional Resources

- Bolder Advocacy website (www.bolderadvocacy.org)
- IRS website (<https://www.irs.gov/charities-non-profits/charitable-organizations/political-and-lobbying-activities>)

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