



Managing Risk in an Election Year

Considerations for Nonprofits

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Election-Year Considerations for Nonprofits

- Opportunities
 - More attention to issues
 - Activated stakeholders
 - Shape policy debates
 - Defend or promote organizational reputation
- Risks
 - Limits on lobbying, political activity under tax code
 - Lobbying, campaign finance registration, disclosure
 - Laws vary widely
 - Increased scrutiny
 - Potential fines and reputational risk



Agenda

- Legal Framework
- Common Election-Year Activities:
 - Public Education
 - Engaging with Candidates and Officeholders
 - Lobbying Campaigns & Grassroots Mobilization
 - Personal Political Activities of Directors, Employees, & Volunteers
 - PACs



Legal Principles

Legal Framework

Federal tax law

- Governs the extent to which tax-exempt organizations may engage in activities to support or oppose candidates without jeopardizing the organization's tax-exempt status and whether any such activity requires public disclosure or payment of tax

Campaign finance law

- Typically places limits on contributions to candidates and political committees and requires public disclosure of amounts contributed or expended in support of or in opposition to candidates and political committees
- Intended to prevent corruption of public officials and promote transparency in elections



Federal Tax Law Basics

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Tax Code: Limits on Political Campaign Intervention

501(c)(3): Public Charity

Campaign intervention **prohibited**

- No endorsements
- No contributions
- No communications to support or oppose candidates, parties, or groups of candidates

501(c)(4): Social Welfare

501(c)(6): Trade Association

Campaign intervention **limited**

- May not be primary activity
- May endorse candidates
- May contribute to candidates (if allowed under state law)
- May make communications to support or oppose candidates
- May form a PAC

Tax Code: What Is Political Campaign Intervention?

Basic concept—**participation or intervention** in a **political campaign** on behalf of or in opposition to a candidate or group of candidates at the **local, state, or federal** level

- For example, publication or distribution of written statements or the making of oral statements on behalf of or in opposition to a candidate
- Intervention can be direct or indirect

The IRS uses a facts and circumstances test

- Alleged intervention will be evaluated in context
- Specific references to candidates may be considered, as well as scope of content, format, audience, subtext, and other subjective factors
 - *See* IRS Revenue Ruling 2007-41

Additional Tax Law Considerations

Reporting

- Political expenditures and activities must be reported to the IRS on annual Form 990 information return
- Form 1120-POL must be filed with the IRS to report tax liability under Code Section 527(f)

527(f) Tax

- Expenditures on political activities are taxable under section Code Section 527(f) (unless paid for from segregated fund registered as political organization with state, FEC, or IRS)
- Tax is 21%, paid on lessor of net investment income or political expenditures

Dues Nondeductibility

- Expenditures on political activities are non-deductible under Code Section 162(e)
- Association must include political activity expenditures with “lobbying expenses” in annual calculation and reporting of percentage of dues that are non-deductible by members (unless 527(f) tax paid)



Campaign Finance Law Basics

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Campaign Finance Law Framework

- **Contribution Limits & Source Restrictions:** Contributions are generally subject to limits and certain entities (incl. all corporations) may not make contributions directly to candidates, parties, and certain PACs.
- **Political Committee Registration:** Entities that make a certain number of contributions or expenditures may be required to register as political committees and disclose all contributions and expenditures
- **Political Reporting:** Even if not a political committee, contributions or expenditures may need to be disclosed
- **Donor Disclosure:** Whether or not an entity is a political committee, donors may be disclosed if making expenditures for regulated communications (e.g., independent expenditures or electioneering communications)
- **Political Disclaimers:** Expenditures for political communications may trigger disclaimer requirements (“Paid for by...” “Not authorized by any candidate or candidate committee”)

Contributions versus Expenditures

Contributions

- **Monetary support** given to candidate, PAC, or party
- **In-kind support** (discounts, etc.) given to candidate, PAC, or party
- In-kind activity for the benefit of a candidate, PAC, or party done **in coordination with** the candidate or party

Expenditures

- Spending money to **expressly advocate** for or against candidates or parties, done **without coordinating** with the benefitting candidate, party, or their supporters
 - If an expenditure is coordinated, it becomes a contribution to the benefitting candidate or party

Contributions—Examples

The following activities, if performed for a candidate or political committee for free, are considered something of value (e.g., the cost of staff or vendor time to do the work) and are treated as prohibited in-kind contributions:

- Conducting research
- Writing speeches or white papers, or preparing talking points
- Sharing polling information and other non-public data
- Sharing email lists or other valuable intellectual property
- Hosting campaign events
- Soliciting contributions
- Providing other services or materials to a federal candidate or political committee

If candidate pays fair market value for goods, services, or other materials, no contribution results (but might give rise to campaign intervention for 501(c)(3)s)

Independent Expenditures

Expenditures for communications that **expressly advocate** the election or defeat of a clearly identified candidate and that are **not coordinated** with a candidate, political party, or their agents

Express advocacy

- “magic words” and functional equivalent
- “vote for,” “elect,” “support,” “cast your ballot for,” “Smith for Congress,” “vote against,” “defeat,” “reject”

No limits on

- amount individuals or groups (including corporations) may spend independently to support or oppose candidates or parties (*Citizens United*)
- amount individuals or groups may contribute to independent expenditure-only political committees (i.e., Super PACs)

Require disclaimers (“Paid for by” “not authorized by any candidate or candidate’s committee”)

Electioneering Communications

An electioneering communication:

- Broadcast/radio/cable
- Refers to clearly identified candidate
- 30 days before primary or 60 days before general
- Targeted to relevant electorate

Require FEC disclaimers (e.g., “Paid for by, not authorized by”)

May not be coordinated with candidates

24-hour reporting: ECs aggregating over \$10,000 in the calendar year must be reported to the FEC on [Form 9](#) within 24 hours.

- Disclose donors of \$1,000 or more who gave for the purpose of furthering ECs

Possible for 501(c)(3)s to make ECs (express advocacy not required)!

Political Committees

If a nonprofit must register as a political committee, it may be required to file political committee reports disclosing all receipts and disbursements to the organization

Federal: Any group of persons that:

- Receives contributions totaling more than \$1,000/year *or* makes expenditures totaling more than \$1,000; *and*
- Has “**major purpose**” of influencing federal elections
 - *Buckley:* An organization can only be deemed a “political committee” (and thereby become subject to enhanced reporting requirements) if it is:
 - Under the control of a candidate; or
 - Has major purpose of nominating or electing a candidate

States: Definitions vary widely

- Dollar thresholds vary
- Not all jurisdictions observe major purpose requirement (but has been imposed judicially in certain circuits)

State and Local Campaign Finance Laws

Contributions from a nonprofit corporation may be permitted by state or local law

- May be unlimited
- May be subject to monetary limit per election, per election cycle
- Limits may vary by office

State or local political committees may be required before engaging in activity

No limits on amount that may be spent on independent expenditures at the state or local level (though registration and reporting may be required)

May be able to use federal PACs to make contributions or independent expenditures in state or local races

Donor disclosure at the state/local level is an emerging trend; focus on “dark money”

- Examples: CA, NY, NJ, MD



Common Election Year Activities and Considerations

1. Public Education

- Issue advocacy
- Voter registration & GOTV
- Voting records

Public Education

Traps for the Unwary:

- Line between issue advocacy and lobbying
- Line between issue advocacy and campaign intervention (tax purposes)
- Line between issue advocacy and express advocacy (campaign finance purposes)
- Electioneering communications laws?
- Disclaimer requirements?



501(c)(3) Election Activity Must Be Nonpartisan and Unbiased with Respect to Candidates

Voter Registration and GOTV

- Nonpartisan
- No mention of candidates or mention all candidates in given race
- Must not target voters of certain party, directly or indirectly

Candidate Questionnaires & Voter Guides

- All candidates for office sent questionnaire
- Unbiased structure
- No endorsement
- No pledge of support
- No grading responses (+/-)

Legislative Voting Records

- Must be regular activity of org, not timed with election (e.g., end of each legislative session)
- Track variety of issues
- Include all legislators, do not include non-incumbent candidates
- Avoid editorializing

2. Lobbying & Grassroots Mobilization

- Examples:
 - Praising or criticizing incumbents during an election year
 - Advocating for or against legislative or administrative action that is also the subject of ongoing campaigns

Lobbying & Grassroots Mobilization

Traps for the Unwary:

- Consider:
 - Line between issue advocacy/lobbying and campaign intervention (tax purposes)
 - Line between issue advocacy and express advocacy (campaign finance purposes)
 - Electioneering communications laws?
 - Disclaimer requirements?
 - Lobbying registration/reporting

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Praising or Criticizing Incumbents in Election Year

Do

- Focus only on official actions (votes; bills introduced)
- Time communications to coincide with policy actions (specific vote; administrative hearing; bill introduction)
 - Include legislative calls to action (“contact Sen. Smith”)
- Use nonpartisan criteria to choose the incumbents featured and the audience

Avoid

- Referring to the election, voting, or removing someone from office
- Criticizing personal character
- Commenting on incumbents for whom your issue is a defining campaign issue or point of contention among the candidates or comparing opponents

3. Engaging with Candidates and Officeholders

- Examples:
 - Candidate/Officeholder appearances
 - Educating candidates
 - Candidate debates and forums



Engaging with Candidates and Officeholders

- **Traps for the Unwary:**

- When does interaction become support/campaign intervention (tax purposes)?
- When does interaction become something of value/a contribution (campaign finance)?
- Content of event: will candidates advocate for themselves, raise money?
- Are you providing an opportunity or resource solely because the individual is a candidate, or is there a non-electoral reason for including them?
 - Incumbents vs. candidates
- Is the opportunity available to competitors? Must org make opportunity available to competitors? By offer or only upon request?
- Would a candidate otherwise typically pay for the opportunity or resource?
- Audience: members only or broader?

Educating Candidates

May urge candidates to support policies (“lobbying” candidates)

501(c)(3) may not ask candidates to take a pledge (tantamount to endorsement)

May provide policy papers and other materials (preferably available to the public)

Should provide material to all candidates

Should not create content at the request of candidates, unless it will be shared by all

Candidate Appearances—Unrelated to Candidacy

- Appearances unrelated to candidacy are OK!
 - e.g., Incumbent official, expert, community leader
- No mention should be made of the election or candidacy before or during the event by the candidate or sponsoring organization
 - Invitations and introductions should refer to official/non-candidate role only
 - Notify speakers in advance of ground rules
 - Consider disclaimers at event (written materials, announcement)
- Do not work with campaign staff to organize
- Do not allow political fundraising

4. Personal Political Activity

- Org directors, employees, and volunteers do not lose right to engage in personal political activities
- BUT consider:
 - Would observer believe statements/activities are made on behalf of org?
 - Did the leader or employee use organization resources that could be campaign intervention (tax code)?
 - Did the leader or employee use organization resources that could be a contribution (campaign finance)?

Personal Political Activity

- Must act in personal capacity
- Must not use org resources without specific approval
- May use job title and affiliation for identification purposes only (e.g., on an op-ed)
 - Include disclaimers
 - “Titles for identification purposes only.”
 - “Sally Smith is the Executive Director of Neighborhood 501(c)(3). The views presented here are the personal views of Sally Smith, and are not presented on behalf of Neighborhood 501(c)(3).”

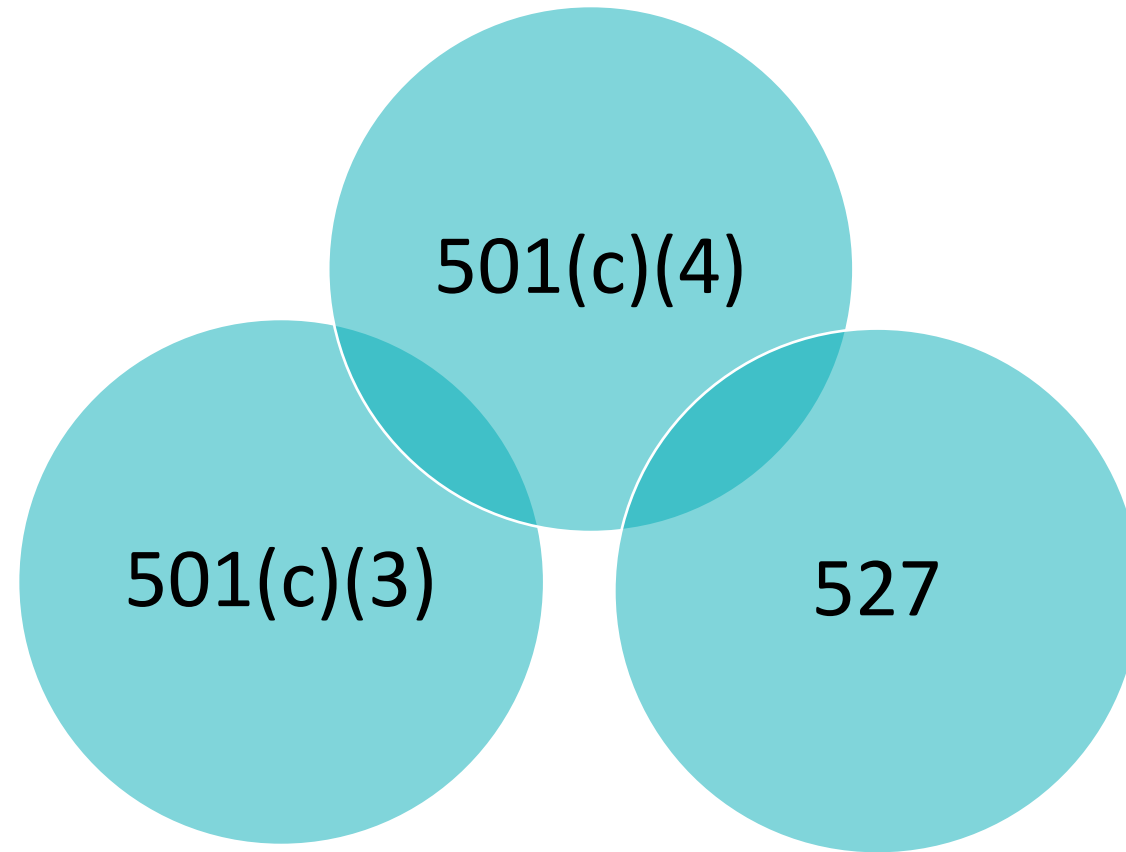
Personal Political Activity

- Consider establishing a policy governing political activities for leaders and staff:
 - No political statements on behalf of the organization
 - Official functions
 - Official newsletters, website, or social media
 - Letterhead
 - No use of the organization's facilities or resources for personal political activities
 - No political activities on work time
 - Computers, telephones, photocopiers, staff support, etc.
 - Other policies depend on mission and culture
- Ability to regulate off-duty activity is governed largely by state employment laws, which vary

Ballot Measure Advocacy

- **Lobbying for Tax Purposes:** Advocacy for or against a ballot measure or referendum is considered lobbying for tax purposes, not political campaign intervention
 - Permissible for 501(c)(3)s
- **Political for Campaign Finance Purposes:** But supporting or opposing ballot measures is regulated under state or local campaign finance laws:
 - Spending money on ballot issue campaigns may trigger ballot committee status or may require reporting
 - Donor disclosure may become an issue and is a growing area of regulation
 - Disclaimers on communications – even social media or emails – may be required
 - Failure to review state/local laws related to raising funds to support or oppose ballot initiatives can be major trap for the unwary
 - Raising any money at all to support or oppose is often a trigger for becoming a ballot committee
 - Severe financial penalties and public perception consequences

Achieving Advocacy Goals with Affiliated Entities



Examples

- 501(c)(3) organization considering increased lobbying activity and political activity
 - Consider forming 501(c)(4) organization to house lobbying campaigns and to engage in some political campaign activity, including potentially direct contributions at state/local level
 - Consider forming new 501(c)(4) organizations to participate in state ballot initiative campaigns as ballot committees
- 501(c)(4)/(c)(6) organization considering federal or state independent expenditures to support or oppose candidates
 - Consider forming new 527 organization registered as state independent expenditure-only committee to address donor disclosure or other branding concerns
- 501(c)(4)/(c)(6) organization considering how to make contributions to federal candidates
 - Consider forming traditional federal PAC (a “separate segregated fund” tax-exempt under IRC section 527)

Managing Affiliated Entities: Compliance Tips

- Maintaining separateness between affiliates is critical
 - Separate organizing documents, separate minutes, separate accounts, separate finances
 - Consider degree of overlap in board and managerial control
 - Shared employees ok; need cost-sharing agreement
 - Arms' length transactions
 - Branding and public perception of the two organizations
 - Separate funding sources
 - (c)(3)s may make grants to (c)(4)s and (c)(6)s, but funds must be used only for charitable purposes (not for political activities)
 - Risk is that 501(c)(4)/(c)(6)'s political activities are imputed to 501(c)(3), causing 501(c)(3) to lose recognition of exempt status

Managing Affiliated Entities: Compliance Tips

- Timekeeping and expense tracking important
 - For any cost-sharing agreement
 - For campaign finance reporting purposes (in-kinds)
 - Ensure appropriate entity is registering and reporting
- Form 990 reporting--relationships with affiliated entities reported on Schedule R

Questions?

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