

Charities, Lobbying, and Politics: A Reminder to Stay Nonpartisan During This Election Cycle

By Celeste E. Arduino

Background

In 1954, Congress adopted an amendment to section 501(c)(3) of the Internal Revenue Code that prohibits all 501(c)(3) organizations from participating or intervening in “any political campaign on behalf of (or in opposition to) any candidate for public office.”¹ This provision is sometimes referred to as the “Johnson Amendment” because it was introduced by then-Senator Lyndon B. Johnson. Despite relatively recent efforts to repeal the Johnson Amendment, the ban on political campaign activity remains.

Private foundations (a type of 501(c)(3) organization that is not publicly supported) are also prohibited from engaging in and funding lobbying activity.² Public charities (a term used to refer to 501(c)(3) organizations that are not private foundations), on the other hand, may engage in a limited amount of lobbying.³ Both private foundations and public charities may engage in and fund advocacy activities as long as the advocacy does not constitute political campaign activity or an impermissible amount of lobbying activity.

The rules governing what constitutes lobbying and political activity are detailed and complex. This article contains a brief overview of those rules. It is important to note that whether a particular activity constitutes lobbying or political activity typically depends on all of the facts and circumstances and the context in which the activity is undertaken.

Political Activities

Public charities and private foundations are prohibited from intervening in any political campaign on behalf of or in opposition to any candidate for public office. This prohibition is absolute and may result in loss of tax-exempt status if violated.

The election year provides a good opportunity for 501(c)(3) organizations to participate in civic society, so long as they do so within prescribed limits. A 501(c)(3) or-

ganization may generally engage in certain nonpartisan, election-related activities. The activities must be strictly educational or to encourage civic participation.

*Prohibited Political Activities*⁴

Campaign intervention can include any activity that helps or hurts the chances for election of any particular candidate or group of candidates, regardless of political party affiliation. The following activities are clearly prohibited for 501(c)(3) organizations:

- Endorsing a candidate, whether formally or informally.
- Distributing statements in favor of or opposing a candidate.
- Financial support to a candidate or a political action committee.
- In-kind contributions to a candidate—for example, organizing campaign volunteers, providing office space, or doing research for a candidate.
- Restricting rental of mailing lists and facilities to only certain candidates.
- Increasing the volume or amount of criticism of sitting officials who are also candidates, as election time approaches.
- Highlighting the differences between candidates on a high-profile issue on which the candidates have diverging views.
- Making a positive or critical reference to someone in his or her status as a candidate.
- Asking candidates to sign pledges on any issue.
- Criticizing sitting legislators or other elected officials by attacking their personal characteristics or attacking them in their status as a candidate, rather than focusing on the substance of a policy issue.
- Engaging in issue advocacy if a clear, nonelectoral purpose for the

activity or communication cannot be articulated.

Permissible Election-Related Activities

Nonpartisan voter education activities are permissible. Examples of permissible voter education activities, if nonpartisan, include (with certain restrictions):

- Candidate questionnaires and voter guides.
- Issue education, such as advertisements or conferences.
- Public surveys and polling on issues.
- Nonpartisan candidate debates or public forums.
- Educational training workshops on the electoral process.
- Issue briefings for candidates as long as they are provided to all candidates.

A public charity may also conduct a nonpartisan get-out-the-vote or voter registration drive, subject to the following guidelines: (1) the registration drive may discuss issues, but should not mention candidates or political parties; (2) the organization may distribute voter registration forms by mail, canvassing, booths at shopping centers, and so forth, but may not coordinate activities with a candidate or political party; and (3) a voter registration drive may target particular groups that have been underrepresented in voting. Private foundations are subject to more stringent rules.

Lobbying

Private foundations will incur a taxable expenditure (and, in some cases, may also lose tax-exempt status) if they engage in, or fund, any amount of lobbying activity.⁵ Public charities, on the other hand, may engage in a limited amount of lobbying. The amount of lobbying that a public charity may engage in depends on whether it is subject to the “substantial part test” or the “expenditure test.” In most cases, a public charity that engages in lobbying will benefit by making the election to have its lobbying activity measured under the more objective expenditure test.⁶ This election is commonly referred to as the “501(h) election” because it is made pursuant to section 501(h) of the Internal Revenue Code.

For public charities that make the 501(h) election, there are two types of lobbying—direct and grass roots.⁷ These lobbying definitions also apply for purposes of whether a

private foundation has made an impermissible lobbying expenditure.⁸

Direct Lobbying

Direct lobbying is an attempt to influence legislation through a communication with a legislator (federal, state or local, or similar international body) that refers to and reflects a view on specific legislation. Direct lobbying also includes attempts to influence the general public on a measure that is the subject of a ballot initiative, referendum or similar procedure. Examples of direct lobbying include:

- meeting with legislators or their staff to discuss specific legislation;
- a letter or email message to legislators or their staff addressing specific legislation;
- drafting or negotiating the terms of a bill;
- discussing potential contents of legislation with legislators or staff;
- meeting with officials of the executive branch to influence testimony on a legislative proposal; and
- urging a presidential veto.

Grass Roots Lobbying

Grass roots lobbying is an attempt to influence legislation through a communication with the public. A communication will be considered grass roots lobbying if it refers to and reflects a view on specific legislation and also encourages the recipient to take action with respect to such legislation—that is, it includes a “call to action.”

A communication will be considered to include a “call to action” if it: (1) states that the recipient should contact a legislator, if the principal purpose of the contact is lobbying; (2) states the address, telephone number, or similar information of a legislator; (3) provides a petition, tear-off postcard, or similar material for the recipient to communicate with any legislator; or (4) specifically identifies one or more legislators who will vote on the legislation as opposing the organization’s view, being undecided, being the recipient’s representative in the legislature, or being a member of the legislative committee that will consider the legislation.

Examples of grass roots lobbying include:

- an action alert urging recipients to contact their legislators about a pending bill;
- attending a coalition meeting to help plan a grassroots lobbying communication addressing a pend-

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ing bill; or

- a paid mass media advertisement that occurs within two weeks before a vote, concerns highly publicized legislation, reflects a view on the general subject of the legislation, and either refers to the highly publicized legislation or encourages the public to contact a legislator, even if it does not contain any call to action.

Exceptions to Lobbying

In general, there are four exceptions to lobbying – nonpartisan analysis, study or research; technical advice or assistance; governmental decisions affecting the organization (or self-defense); and examination of broad social issues.⁹

- **Nonpartisan analysis, study or research.** A communication that refers to and reflects a view on specific legislation, but does not include a direct call to action, is not lobbying if: (1) it provides a sufficiently full and fair exposition of the underlying facts to enable a member of the general public to form an independent opinion or conclusion about the subject; and (2) the communication is widely distributed (not only to persons interested in one side of the issue). Examples of nonpartisan analysis, study, or research might be found in speeches, legislative testimony, reports, and booklets. On the other hand, mass media communications (e.g., TV and radio ads) are unlikely to present a sufficiently detailed and complex discussion of the topic to qualify under this exception.
- **Technical advice or assistance.** A communication to a governmental body, committee or subdivision of either in response to a request for technical advice or assistance is not lobbying if: (1) the request is in writing and from the body requesting the advice; (2) the organization's response is made available to the whole body making the request; and (3) any opinions or views on legislation are specifically related to the request.
- **Governmental decisions affecting the organization (self-defense).**

Communications with a legislative body are not lobbying if the communication is regarding possible actions of that body which could affect: (1) the existence of the organization; (2) its powers and duties; (3) its tax-exempt status; or (4) the deductibility of contributions to the organization.

- **Examination of broad social issues.** Communications that address the public, members of a legislative body, or government employees on general topics of importance to the public are not lobbying communications if: (1) the discussion does not address a specific legislative proposal; and (2) the discussion must not include a direct call to action.

Advocacy Activities

Advocacy is a broad term covering a range of activities that seek to bring about systemic social change. One form of advocacy is lobbying, but advocacy also includes other avenues such as issue organizing and nonpartisan voter engagement. All 501(c)(3) organizations may engage in and fund advocacy activities as long as the advocacy does not constitute political campaign activity or an impermissible amount of lobbying activity.

Permissible Types of Advocacy

In general, examples of non-lobbying advocacy activities include:¹⁰

- influencing the adoption of agency regulations that interpret existing laws;
- building relationships with legislators or helping grantees build and sustain these relationships;
- convening nonprofits and decision-makers to discuss a broad topic (e.g., how to balance the economy, development and the preservation of endangered species);
- educating legislators about a broad range of issues, without referencing a specific legislative proposal;
- meeting with legislators to discuss the scope and impact of the organization's work;
- training grantees on how to lobby; and
- influencing school board policies or the policies of any other "special purpose body" that has limited

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jurisdiction (e.g., housing authorities, sewer and water districts, and zoning boards).

Issue Advocacy vs. Political Campaign Intervention

Public charities and private foundations may take positions on public policy issues, including issues that divide candidates in an election for public office. However, they must avoid any issue advocacy that functions as political campaign intervention. Even if a statement does not expressly tell an audience to vote for or against a specific candidate, an organization delivering the statement is at risk of violating the political campaign intervention prohibition if there is any message favoring or opposing a candidate. A statement can identify a candidate not only by stating the candidate's name but also by other means such as showing a picture of the candidate, referring to political party affiliations, or other distinctive features of a candidate's platform or biography. All the facts and circumstances need to be considered to determine if the advocacy is political campaign intervention.¹¹

Key factors in determining whether a communication results in political campaign intervention include the following:¹²

- Whether the statement identifies one or more candidates for a given public office;
- Whether the statement expresses approval or disapproval for one or more candidates' positions and/or actions;
- Whether the statement is delivered close in time to the election;
- Whether the statement makes reference to voting or an election;
- Whether the issue addressed in the communication has been raised as an issue distinguishing candidates for a given office;
- Whether the communication is part of an ongoing series of communications by the organization on the same issue that are made independent of the timing of any election; and
- Whether the timing of the communication and identification of the candidate are related to a non-electoral event such as a scheduled vote on specific legislation by an officeholder who also happens to

be a candidate for public office.

A communication is particularly at risk of political campaign intervention when it makes reference to candidates or voting in a specific upcoming election.

Conclusion

Charities can—and, some would argue, should—participate in civic affairs, including during election cycles. However, the consequences for violating the prohibition on political campaign intervention can be severe. The closer in time to a vote, the greater the risk of an advocacy communication crossing the line to impermissible political campaign intervention. Particularly during an election cycle, it is important for a 501(c)(3) organization to consult with its professional advisors prior to engaging in advocacy activities that may have political implications.

NOTES

1. Section 501(c)(3) of the Internal Revenue Code of 1986, as amended (“IRC”).

2. IRC 4945(d)(1).

3. IRC 501(c)(3).

4. Examples of prohibited political activities and permissible election-related activities from Alliance for Justice, Election Checklist for 501(c)(3) Public Charities: Ensuring Election Year Advocacy Efforts Remain Nonpartisan (June 18, 2018) (available at: <https://afj.org/resource/election-checklist-for-501c3-public-charities-ensuring-election-year-advocacy-efforts-remain-nonpartisan/>, last accessed 4/3/2024).

5. IRC 4945(d)(1).

6. IRC 501(h).

7. IRC 4911 and the regulations promulgated thereunder.

8. Treas. Reg. 53.4945-2(a)(1).

9. Treas. Reg. 53.4945-2(d).

10. Examples of permissible advocacy activities from Bolder Advocacy, Private Foundations May Advocate (June 2018) (available at <https://afj.org/resource/private-foundations-may-advocate/>, last accessed 4/3/2024).

11. Revenue Ruling 2007-41, 2007-25 I.R.B. (June 18, 2007).

12. *Id.*



Celeste E. Arduino is co-chair of the Exempt Organization and Impact Investing Practice Group at Bodman PLC in Troy, Michigan. She represents nonprofit and charitable organizations and the high net worth individuals who support them. Ms. Arduino counsels nonprofits, including family foundations, public charities, religious organizations, and other tax-exempt and charitable organizations, on securing and retaining exempt status, advising on corporate governance issues, and counseling on general operational matters. She also counsels individuals on estate, gift and tax planning matters, charitable gifting, and provides operational and corporate advice in connection with their closely held businesses.