

Presentation for AAMSE  
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October 21, 2010  
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# Managing Your Society During This Election Cycle

A Primer on Political Activities of Nonprofits

## **This presentation will cover:**

1. Restrictions on 501(c)(3) orgs (“Charities”)
2. Special considerations for 501(c)(4) & (c)(6) entities

## **Principles covered will include:**

- ▶ Principle #1: A Charity may not support or oppose political candidates
- ▶ Principle #2: Charities can engage in only limited legislative lobbying
- ▶ Principle #3: Affiliate relationships must be at arm’s length
- ▶ Principle #4: Lobbying expenses cannot be directly or indirectly deductible
- ▶ Principle #5: Other laws may apply!

## **Principle #1: A Charity may not support or oppose political candidates**

- ▶ An organization that engages in any amount of campaign activity may lose its § 501(c)(3) status and eligibility to receive tax-deductible contributions.
- ▶ It may also be subject to a tax equal to 10% of the expenditures, with an additional tax equal to 100% of the expenditures imposed if the expenditures are not promptly corrected
- ▶ The organization's managers may also be subject to tax.

## What is Prohibited Campaign Activity?

- ▶ Supporting or opposing any candidate for elected federal, state or local office is prohibited. Note: appointed officers are not “candidates.”
- ▶ The prohibition includes “the publication or distribution of written or printed statements or the making of oral statements on behalf of or in opposition to such a candidate.”
- ▶ Charities may engage in certain election-related activities so long as the activities do not indicate a preference for or against any candidate.

### Tips and Traps:

- ▶ Scenario #1: Individuals Speaking Out
  - Individuals are free to speak, publish ads, etc. in support or opposition of a candidate.
  - But what if the individual is your CEO, Board Chair, etc.?
  - Guideline: If the individual is identified as your CEO, Board Chair, etc., state: “These are my personal views and not necessarily those of ABC Medical Society Foundation.”
  - The best way to protect your charity is to have a training or communication to your board and officers about this rule.

▶ Scenario #2: Voter Guides

The Charity can publish a “Voter Guide” about candidates only if it is strictly impartial. The IRS says:

- Bias is shown if the guide does not include all candidates on an equal basis.
- The charity cannot compare its position on issues with those of the candidates.
- The guide cannot be limited to issues that are important to the charity.

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### ▶ Voter Guides (Cont'd)

If a guide consists of candidates' answers to questions:

- The questions must be clear and unbiased;
- The questions provided to the candidates must be identical to those included in the guide;
- The candidates' answers may not be edited;
- The guide must put the questions and appropriate answers in close proximity to each other;
- The candidates must have a reasonable amount of time to respond to the questions;
- If the candidates are given limited choices for an answer to a question (e.g., yes/no, support/oppose), they must have a reasonable opportunity to explain their positions

### ▶ Scenario #3: Hosting Candidates

The Charity can host candidate presentations:

- A “Candidates’ Forum, if all candidates are invited, given equal time, and equal treatment.
- An individual candidate’s speaking event, if each candidate is given a similar event opportunity.
- An individual candidate’s speaking event if he or she is speaking in a non-candidate capacity, does not address campaign issues, and does not engage in fundraising.
- The same principles should apply to written publications, e.g., hosting a candidate’s article in the Charity’s newsletter.

### ▶ Scenario #4: Voter Registration

The Charity can conduct voter registration drives, provided:

- Candidates are named or depicted on an equal basis;
- No political party is named except for purposes of identifying the party affiliation of each candidate;
- The activity is limited to urging individuals to register and vote and to describing the time and place for these activities; and
- All services are made available without regard to the voter's political preference.

### ▶ Scenario #5: Issue Advocacy

The Charity can publish its views on political issues if it is candidate-neutral. Factors:

- The communication does not identify any candidates for a given public office;
- The communication does not express approval or disapproval for any candidate's positions and/or actions;
- The communication is not delivered close in time to an election;
- The communication does not refer to voting or an election;
- The issue addressed in the communication has not been raised as an issue distinguishing the candidates;
- The communication is part of an ongoing series by the organization on the same issue and the series is not timed to an election;
- The identification of the candidate and the communication's timing are related to a non-electoral event.

▶ Scenario #6: Selling Mailing Lists or Other Resources

The Charity can sell its mailing list or other resources to a candidate's campaign, on a neutral basis. Factors:

- The selling or renting activity is an ongoing business activity of the organization;
- The resources are available for sale/rental to the general public;
- The fees charged are the organization's customary and usual rates; and
- The goods, services, or facilities are available to all candidates on an equal basis.

## How Does *Citizens United* Affect Nonprofits?

Earlier this year, the USSC invalidated FECA limits on these actions of corporations:

- Independent expenditures (communications expressly advocating the election or defeat of a clearly identified candidate that are not coordinated with any candidate or party)
- Electioneering communications (broadcast, cable or satellite transmissions that refer to a clearly identified federal candidate and aired within 60 days of a general election or 30 days of a primary).

In other words, these actions are no longer prohibited by federal election laws.

### ***Citizens United*** (continued):

- For 501(c)(3) charities: The Internal Revenue Code continues to prohibit most of these activities (as discussed above).
- For other nonprofits (notably 501(c)(4) and 501(c)(6)), there is no longer a federal prohibition of these activities. But note:
  - Disclaimer and disclosure requirements remain in place.
  - So do the limits on direct corporate contributions to candidates.
  - Partisan political expenditures by 501(c) organizations will still be limited by the tax law requirement that such organizations have a primary purpose other than engaging in electioneering activity.
  - There is a 35% tax on “exempt function” activities supporting or opposing a campaign.

## **Principle #2: Charities can engage in only limited legislative lobbying**

- ▶ The IRC historically prohibited the spending of any “substantial amount” of a Charity’s resources on legislative lobbying.
- ▶ Section 501(h) was added to the Code to provide a safe-harbor calculation for permitted expenditures.

## What is “legislative lobbying”?

- ▶ In general, you are lobbying when you state your position on specific legislation to legislators or other government employees who participate in the formulation of legislation, or urge your members to do so (**direct lobbying**).
- ▶ In addition, you are lobbying when you state your position on legislation to the general public and ask the general public to contact legislators or other government employees who participate in the formulation of legislation (**grassroots lobbying**).

## What is NOT “legislative lobbying”?

- ▶ Examination and discussion of broad social problems.
- ▶ Technical advice to legislators.
- ▶ Member communications (that do not request members to lobby).
- ▶ Self-defense communications.
- ▶ The portion of mixed-purpose member or public communications that does not represent lobbying.

## How does the 501(h) election work?

- ▶ The election is available only to 501(c)(3) organizations that are “public charities.”
- ▶ A §501(c)(3) organization files IRS Form 5768, a one-page check-the-box form, to make a Code §501(h) election.
- ▶ Filing the form does not affect the §501(c)(3) organization’s Code §501(c)(3) status in any way.
- ▶ Once filed, the election remains in effect for the subsequent year and indefinitely, unless the §501(c)(3) organization revokes the election. A revocation is effective for the first tax year after the year in which the revocation is filed, also using Form 5768. A §501(c)(3) organization can elect, revoke, and reelect as often as it wishes.

### **The 501(h) election (continued):**

- ▶ Code §501(h) establishes a sliding scale of permissible lobbying expenditures.
- ▶ The Charity must first ascertain its “exempt purpose expenditures.” Exempt purpose expenditures are the total of all amounts paid or expenses incurred by the §501(c)(3) organization to accomplish its charitable purposes. These expenses include administrative expenses and the lobbying expenditures themselves, but they exclude payments to vendors primarily for fundraising or costs associated with a separate fundraising unit within the §501(c)(3) organization, costs associated with generating unrelated business income, capital expenditures, including land acquisitions (but depreciation may be included), and investment management expenses.

## **The 501(h) election (continued):**

The lobbying limit is:

- 20 percent of the first \$500,000 in exempt purpose expenditures,
- 15 percent of the next \$500,000,
- 10 percent of the next \$500,000, and
- 5 percent of all exempt purpose expenditures over \$1,500,000 to a maximum limit of \$1,000,000.

There is a significantly smaller limit, equal to 25% of the above limit calculation, applicable to “grass roots lobbying.”

## **The 501(h) election (continued):**

The limit calculated above will apply to:

- ▶ Cash contributed by the Charity to a campaign committee.
- ▶ The Charity's expenditures for any lobbying activities of its own.
- ▶ All out-of-pocket expenses (e.g., travel, printing, long distance telephone charges, payments to lobbyists) as well as internal costs directly associated with the lobbying activities (e.g., staff time for research, drafting, reviewing, distribution), plus an appropriate allocation of overhead (e.g., rent, utilities, employee benefits).

## **The 501(h) election (continued):**

### Consequences of exceeding the limit

- ▶ IRS regulations impose an excise tax equal to 25% of the amount of lobbying expenditures in excess of the limit.
- ▶ If an electing §501(c)(3) organization spends an amount equal to more than 150 percent of either of its lobbying limits aggregated over a four-year period, it automatically loses its Code §501(c)(3) status.

## **The 501(h) election (continued):**

### Reporting

- ▶ Electing §501(c)(3) organizations must annually complete Part VI-A of Schedule A to IRS Form 990.
- ▶ Totals for direct and grass roots lobbying expenditures must be reported, plus calculations of the lobbying limits and any excess lobbying expenditures subject to tax.
- ▶ The form also requires the current year and three years of historical summary information to determine whether the §501(c)(3) organization's exempt status should be automatically revoked.

## **Principle #3: Affiliate relationships must be at arm's length**

- ▶ Unlike IRC 501(c)(3) organizations, **other organizations described in IRC 501(c)** may engage in an unlimited amount of lobbying, provided that such lobbying is related to the organization's exempt purpose.
- ▶ Where a 501(c)(3) entity has an affiliated 501(c)(4) or (c)(6) lobbying entity, it raises issues regarding whether the resources of the Charity are used to subsidize lobbying activities of the affiliate organization, particularly in situations where the two organizations share staff, facilities or other expenses or in which the two organizations conduct joint activities requiring an allocation of income and expenses.

## **Affiliate relationships (continued)**

- ▶ Any allocation of income or expenses between the two organizations must be carefully reviewed to ensure that the allocation method is appropriate and that an arms' length standard is utilized.
- ▶ The determination of whether the method used is appropriate is based upon “all the facts and circumstances.” In other words, there is no formula or safe harbor to follow.

## **Principle #4: Lobbying expenses cannot be directly or indirectly deductible**

- ▶ IRC 162(e) disallows deductions for direct legislative lobbying expenses at the federal and state (but not local) level, and disallows deductions for contacts with certain federal officials.
- ▶ It also disallows deductions for grass roots lobbying and political campaign expenditures.

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To ensure that tax-exempt entities such as a 501(c)(6) organization are not used to circumvent these rules, IRC 162 also provides:

- ▶ The tax-exempt entity must provide an annual notice to its members with an estimate of the amount of dues that are spent overall for 162(e)-type lobbying activities.
- ▶ The member does not receive a deduction for the portion of dues attributable to lobbying.
- ▶ If the tax-exempt entity does not comply with this notice procedure, it must pay a proxy tax on the lobbying expenses, at the highest corporate tax rate in IRC 11 (currently 35%). Also, if the organization underestimates lobbying expenses in its notice to members, it must pay the proxy tax on the overage, or it can roll the overage forward and add it to the next year's estimate.

### Non-circumvention (continued):

- ▶ Detailed IRS regulations provide guidance regarding how to calculate lobbying expenses.
- ▶ There are exclusions for “examination and discussion of broad social problems,” “technical advice,” “member communications” and “self defense.”

## **Principle #5: Other laws may apply!**

- ▶ Federal and state laws governing election activities may require reports and regulate activities.
- ▶ Federal and state laws may regulate lobbying activities.
- ▶ State corporate or tax laws may limit or restrict a nonprofit's political and legislative activities.

### Additional resources:

- Internal Revenue Service website ([www.irs.gov](http://www.irs.gov))
- Worry-Free Lobbying For Nonprofits (Alliance for Justice) (<http://www.afj.org/assets/resources/resources2/Worry-Free-Lobbying-for-Nonprofits.pdf>)
- ASAE website ([www.asae.org](http://www.asae.org))

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