

Nonprofits & Elections: Where the Legal Lines Are Drawn

Translation of Federal Tax Law into English

Do's	Don'ts
• Do → Voter Registration ... if nonpartisan ✓ Cannot be biased for or against any candidate (<i>e.g.</i>, can't target likely Democrats or Republicans, conservatives or liberals) ✓ But can target in nonpartisan ways: ✓ areas or people the nonprofit serves ✓ low-turnout areas (including low-income populations, minority populations, students) • Do → Voter Education ... if nonpartisan ✓ Can educate the public about issues, and even the issues of importance to the nonprofit ✓ Can educate candidates, too ✓ Can conduct <i>nonpartisan</i> candidate debates ✓ Can publish results of <i>nonpartisan</i> candidate questionnaires • Do → Voter Participation ... if nonpartisan ✓ Get-out-the-vote drives, information about polling locations, importance of voting, etc. – same as with voter registration • Do → normal activities ✓ Nonprofit may continue to lobby and engage in its other regular advocacy activities ✓ Nonprofit may continue to rent its space or sell its mailing lists to all who ask (including candidates – but only at full market value and if made available to all candidates) • Do → seek legal advice if you have questions ✓ Consult a <i>nonprofit law attorney</i>	• Don't → endorse (or favor) a candidate or political party ✗ Endorse, publish written or make oral statements supporting, or distribute materials (proactively or passively) supporting a candidate ✗ Rate candidates in any way ✗ Publicize which candidates share the nonprofit's views ✗ Target voters who would support a candidate for registration or turn out the vote • Don't → oppose (or slight) a candidate or political party ✗ Oppose, publish written or make oral statements against, or distribute materials (proactively or passively) against a candidate ✗ Rate candidates in any way ✗ Publicize which candidates don't share the nonprofit's views ✗ Target voters who would support a candidate for registration or turn out the vote • Don't → use nonprofit resources (money, time, facilities, contact lists, coordination of activities, etc.) for/against any candidates ✗ Fundraise for a candidate ✗ Let a campaign use phones for phone banks ✗ Give employees paid time off to campaign
Do Be Neutral & Objective 	Don't Favor or Slight 

The “do’s and don’ts” listed above apply to the organization; individual staff members, board members, and other members of the nonprofit still enjoy their full First Amendment rights to engage in electioneering activities in their capacities as individual citizens when not on the job or representing the nonprofit.

Two Common Intersection Points:

- Staff or board members, wearing their hats as individuals, are asked to endorse a candidate. When doing so, they should put next to their organization’s name, “Name listed for identification purposes only.”
- Board and staff members need to be reminded about the restrictions. For instance, board members cannot urge other board members at a board meeting to “vote for Joe because he’s been our good friend,” and staff members should not wear candidate campaign buttons when performing their jobs for the nonprofit.

How to Support or Oppose Ballot Measures

The prohibition in Section 501(c)(3) against electioneering is directed at “any political campaign on behalf of (or in opposition to) any ***candidate*** for public office.” Therefore, the prohibition does not apply to political campaigns regarding ballot measures – such as public votes on bonds, initiatives and referenda, constitutional or charter amendments, or other “issue” rather than “candidate” elections.

Democracy in America

→ “*Representative Democracy*” = when citizens elect individuals to represent them; for example, on a public decision-making body, such as a school board, city council, state legislature, or Congress

Section 501(c)(3) treats activities trying to influence who will represent the people as prohibited political campaigning; to keep their tax-exempt status nonprofits must remain absolutely neutral in any activities involving elections relating to candidates.

→ “*Direct Democracy*” = when citizens make laws directly by voting on issues, such as whether to approve or reject proposed initiatives or referenda or amendments to a state constitution

Section 501(c)(3) treats “direct democracy” activities not as political campaigning but as lobbying, because the activities are a direct attempt to influence (“lobby”) the ultimate decision-maker: the voters. Therefore, when it comes to supporting or opposing ballot measures, nonprofits must recognize that a separate set of rules applies to their activities.

For Ballot Measures, Federal Tax Law on Nonprofit Lobbying Applies

For too long myths have circulated that nonprofits will lose their tax-exempt status if they lobby (“attempt to influence legislation”). Those harmful myths are absolutely wrong. According to both Congress and the IRS, nonprofits have legal rights to lobby. The question is not whether they can, but how much they can.

Since 1934, nonprofits have faced a limit on how much lobbying they can do. The 1934 law said nonprofits could not spend a “substantial” amount of their activities lobbying – meaning they can spend an “insubstantial” amount of their activities lobbying. But the federal government refused to define what “substantial” or “insubstantial” meant. Not knowing where the limitation lines would be drawn by the IRS after the fact scared many nonprofits away from any lobbying activities. In 1976 Congress gave nonprofits another option: instead of using the vague “substantial part” test, they could fill out a simple form to adopt the “expenditure test” that looks at dollars spent rather than ill-defined “activities.”

If a nonprofit does nothing, then the old 1934 “substantial part” test applies. But now, if a nonprofit fills out a simple quarter-page short form (Form 5768), then it gets clear bright lines on how much it can spend lobbying (using a sliding scale depending on its overall expenditures), generous limits (*e.g.*, 20% of the first half a million in expenditures), friendly definitions that declare many activities as not being lobbying (meaning the expenditures for the activities do not count towards the already-generous limits), and reduction of reporting requirements on Form 990. Because Congress added this option in Section 501(h) of the Tax Code, it often is referred to as the “501(h) election” – or simply the “expenditure test.” [FACT: If a 501(c)(3) nonprofit takes the 501(h) election, it still is a 501(c)(3) nonprofit – it just gains the benefit of getting to use the expenditure test.]

Example: If a PTA wants to support a ballot measure this fall, and in 2008 that PTA will have total expenditures of \$100,000, then if it has elected to use the “expenditure test” it can spend up to \$20,000 on all of its lobbying activities, including supporting the ballot measure. If that same PTA has not taken the 501(h) election to use the expenditure test, then the “substantial part” test is applied automatically as the default, and the IRS would determine after the fact if the PTA had spent too much of its activities in 2008 lobbying (including on the ballot measure).

CAUTION: Be Sure to Check Your State’s Laws Relating to Ballot Measures

In addition to knowing how federal tax laws treat election-related activities, make sure you know how your state’s laws treat activities relating to ballot measures. Although there likely will be no special restrictions on what “nonprofits” can do, there will be laws (such as reporting of expenditures) that everyone must follow, including nonprofits.