

How Nonprofits Can Engage in Political Activity During This Election Cycle

By Mary Catherine Wilcox

Introduction

The excitement of a presidential election will entice many nonprofits to make themselves heard this election season. But nonprofits should be aware of the complex regulatory schemes that govern their political activity, including federal tax law and state and federal campaign finance laws. The Michigan Nonprofit Corporation Act, MCL 450.2101 *et seq.*, provides for the incorporation of nonprofit organizations in Michigan and governs their corporate activities. Nonprofit corporations may be considered tax-exempt under federal tax law, which applies restrictions on nonprofit political activity depending on the type of tax exempt organization. State or federal campaign finance laws may also apply to a nonprofit that is attempting to influence an election. This article will provide a basic overview of these laws and generally discuss permissible political activities and compliance requirements.

Tax Exempt Organizations Governed by the Internal Revenue Service

Permissible Political Activity

In General

The level of political activity that a nonprofit can engage in depends on the section of the Internal Revenue Code (IRC) under which it qualifies for tax exemption. Nonprofit corporations are commonly recognized as tax exempt under IRC 501(c)(3), (c)(4), (c)(5), (c)(6), and 527. The tax law restrictions on the political activities of these organizations are generally discussed below.

Charitable Organizations Under Section 501(c)(3)¹

Overview

Sections 501(c)(3) organizations are the most limited in terms of permissible political activity because they must be organized and operated *exclusively* for one of the exempt purposes set out in section 501(c)(3).² The Internal

Revenue Code prohibits charities from participating or intervening in a political campaign on behalf of (or in opposition to) any candidate for public office.³

Organizations that engage in political campaign activity are considered “action” organizations.⁴ The income tax regulations state that action organizations are not operated exclusively for exempt purposes, and thus, are not considered to be tax exempt under section 501(c)(3).⁵ Charities who do not follow these regulations risk being subject to certain excise taxes under IRC 4911, 4912, and 4955 and losing their tax exempt status.⁶

Prohibited campaign activity includes providing or soliciting financial support for candidates or political organizations, or establishing a political action committee (“PAC”).⁷ Charities also cannot make or distribute written (including those prepared by others) or oral statements supporting or opposing candidates.⁸ This includes endorsing candidates in writing or verbally, rating candidates (even on a non-partisan basis), and distributing partisan campaign literature.⁹

Permissible vs. Prohibited Political Activity

This does not mean that charities are prohibited from participating in *all* political activity. Although political campaign activity is absolutely prohibited, some legislative lobbying is permissible.¹⁰ A facts and circumstances test is applied to determine whether an activity is political campaign activity or permissible political activity.¹¹ The following paragraphs demonstrate the application of this test to distinguish permissible from prohibited political activities.

Issue Advocacy

General advocacy, which includes influencing public opinion on issues, influencing non-legislative governing bodies (the executive branch and regulators), and encouraging voter participation, is permitted as an educational activity.¹² If a charity chooses to engage in “issue advocacy,” it should be careful that it does not become participation

or intervention in a political campaign by including a message that favors or opposes a candidate.¹³ The fundamental test for determining whether an issue advertisement is political campaign activity is “whether support for or opposition to a candidate is mentioned or indicated by a particular label used as a stand-in for a candidate” (i.e., whether the organization is actually commenting on a candidate rather than speaking about an issue).¹⁴ The IRS considers a number of factors in making this determination.¹⁵

Voter Education

Certain voter education activities, including preparing and distributing voter guides, presenting public forms, and voter registration and “get-out-the-vote” drives are permissible if conducted in a *nonpartisan* manner.¹⁶ If they show a bias against or preference for the views of a particular candidate, however, they constitute prohibited participation or intervention.¹⁷

Individual Leaders’ Activity/Candidate Appearances

It is important to note that leaders of organizations may engage in partisan political activities in their individual capacities.¹⁸ They are prohibited, however, from making partisan comments in official organization publications or at official functions of the organization.¹⁹ Candidate appearances at official functions of the organization must also be analyzed to ensure compliance with tax laws.²⁰ Candidates may also appear or speak at organization events in a non-candidate capacity.²¹

Business Activity/Websites

Some business activity, such as selling mailing lists or renting office space, is permissible if certain guidelines are met.²² Charities must also be mindful of what they post on their websites. Postings that favor or oppose a candidate for public office are prohibited, including links to other sites, even if the charity does not have control over the content of the linked site.²³

Other 501(c) Organizations

Social Welfare Organizations — 501(c)(4)

Social welfare organizations must be organized as nonprofit organizations and be operated *exclusively* for the promotion of social welfare, which includes promoting the common good and the general welfare of the people in a particular community.²⁴ This is accomplished by bringing about civic betterment and social improvements.²⁵

Lobbying for legislation related to the organization’s programs is a permissible social welfare purpose. Thus, a social welfare organization may further its exempt purposes through lobbying as its primary activity without jeopardizing its exempt status. If an organization that collects dues from members engages in lobbying, however, it may be required to either provide notice to its members regarding the percentage of dues paid that are applicable to lobbying activities or pay a proxy tax.

Political campaign activity, however, is not a social welfare purpose.²⁶ Unlike charities, social welfare organizations may engage in political campaign activity as long as it is not its primary purpose.²⁷ If political campaign and other non-exempt activity becomes an organization’s primary activity, revocation of tax exempt status is possible. Political expenditures may be subject to taxation under section 527(f). Membership organizations will also have to decide whether to provide notices to members with a reasonable estimate of the amount of dues allocable to nondeductible lobbying and political campaign expenditures or pay a proxy tax under 6033(e).

Labor, Agricultural, or Horticultural Organization — 501(c)(5) and Business Leagues — 501(c)(6)

Labor, agricultural, and horticultural organizations must be operated to better the conditions of people engaged in a particular pursuit, but the earnings of these organizations cannot inure to the benefit of the organizations’ members.²⁸ Unions, farm bureaus, and breeding associations are all examples of section 501(c)(5) organizations.

Business leagues are associations of persons who have a common business interest and which promote that common interest.²⁹ However, these organizations may not conduct a regular trade or business for profit.³⁰ Rather, they must engage in activities that promote the common interest of their members.³¹ Chambers of commerce, trade associations, and real estate boards are all examples of section 501(c)(6) organizations.

Like social welfare organizations, section 501(c)(5) and (c)(6) organizations can engage in an unlimited amount of lobbying activities, as long as it is related to their exempt purpose.³² These organizations are also permitted to engage in certain political campaign activity as long as it does not constitute their primary activity.³³ The same taxes and

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risks that apply to social welfare organizations also apply to these organizations.

Political Organizations—527

Political organizations must be organized and operated primarily for the purpose of “directly or indirectly accepting contributions or making expenditures to influence the selection, nomination, election or appointment of any individual to federal, state, or local public office, office in a political party, or presidential and vice-presidential electors.”³⁴ This includes candidate committees, political parties, and PACs that report to federal or state authorities. Unlike 501(c) organizations, political campaign activity is permitted as an exempt activity for political organizations.³⁵ A limited amount of lobbying and general advocacy is also permitted.³⁶

Affiliated Entities

Given the limitations on tax exempt organizations, nonprofits may decide to create an affiliated tax exempt entity to engage in political activity. The following combinations of organizations demonstrate how this can be accomplished:

- A 501(c)(3) organization establishing a 501(c)(4) organization to conduct lobbying;
- A 501(c) organization establishing a 527 organization;³⁷
- A 501(c)(3) organization whose officials, as permitted, establishing a 527 organization in their capacity as individuals; and³⁸
- A triad arrangement with a 501(c)(3) organization that usually conducts educational advocacy, another 501(c) organization (usually a 501(c)(4)) that conducts lobbying, and a 527 organization that conducts political intervention.³⁹

Except for a 527 organization, creating new affiliated entities would require establishing a new Michigan nonprofit corporation.

If a 501(c) organization (not a 501(c)(3)) decides to establish a “separate segregated fund” under section 527(f)(3), it can either create an internal fund to support or oppose candidates, but it would be subject to tax under section 527(f). Alternatively, the fund could be treated as a separate taxable entity under section 527. Under section 527, a 501(c) organization is generally encouraged to choose the latter option because it may pay for the indirect expenses of a section 527 or-

ganization without incurring tax under section 527(f).⁴⁰

IRS Reporting Requirements for Political Activity

In general, tax exempt organizations must file an annual information return (Form 990, 990-EZ, or 990-N) with the IRS. Political campaign and lobbying activity is reported in Schedule C of Form 990 and 990-EZ. Section 527 organizations and certain 501(c) organizations must also file Form 1120-POL to report their political organization taxable income and income tax liability under section 527.

A 527 organization may be required to file Form 8871, which gives notice to the IRS that it is to be treated as tax exempt. This notice must be filed within twenty-four hours of establishment of the organization. Exceptions include:

- Organizations that are required to report under the Federal Election Campaign Act (“FECA”) as a political committee;⁴¹
- Organizations that reasonably anticipate that they will not have gross receipts of \$25,000 or more for any taxable year; and
- Organizations described in section 501(c) that are subject to section 527(f)(1) because they have made an “exempt function”⁴² expenditure.⁴³

A political organization may be required to periodically report on Form 8872 contributions to the organization and expenditures made by the organization.⁴⁴ Political committees required to file with campaign finance regulatory authorities are discussed in the next part.

Committees Regulated Under Campaign Finance Laws

Federal Laws

The FEC is the independent regulatory agency that administers and enforces the federal campaign finance law, namely, FECA.⁴⁵ FECA applies to campaigns for the U.S. House of Representatives, U.S. Senate, the presidency, and the vice presidency.⁴⁶ It broadly covers the following three categories:

- Public disclosure of funds raised and spent to influence federal elections;
- Restrictions on contributions and

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expenditures made to influence federal elections; and

- The public financing of presidential campaigns⁴⁷

In 2010, the United States Supreme Court famously decided *Citizens United v FEC*, ___ US ___, 130 S Ct 876 (2010), which continues to be the subject of much controversy. In *Citizens United*, the Court struck down a provision of the Bipartisan Campaign Reform Act of 2002 (“BCRA”) that prohibited corporations (including nonprofits) and labor organizations from using their treasury funds to make certain contributions or expenditures in connection with federal elections.⁴⁸ Thus, nonprofit corporations may now use their treasury funds to make independent expenditures (“IEs”) and electioneering communications (“ECs”). The ruling, however, did not affect the ban on corporate and union contributions, and it upheld the disclosure and disclaimer requirements for IEs and ECs.⁴⁹

An independent expenditure is a payment for a communication that expressly advocates the election or defeat of a clearly identified candidate that is made without cooperation or consultation or at the request or suggestion of the candidate.⁵⁰ Examples include newspaper and television advertisements that encourage voters to support or oppose a particular federal candidate, as long as there is no coordination with the candidate’s campaign. Electioneering communications are broadcast, cable, or satellite communications that refer to a clearly identified candidate, are publicly distributed within specified time periods before an election, and are targeted to the relevant electorate.⁵¹ Examples include issue or lobbying advertisements that mention a federal candidate and air in the candidate’s district within 30 days of the primary or 60 days of the general election.

As a result of *Citizens United* and other recent federal cases,⁵² nonprofits have begun to establish independent-expenditure only committees, popularly known as Super PACs.⁵³ Super PACs are popular because they can receive an unlimited amount of contributions to make an unlimited amount of independent expenditures.⁵⁴ Corporations and labor organizations that intend to make IEs or fund ECs should include disclaimers consistent with 11 CFR 110.11 in their communications and disclose IEs and ECs on FEC Forms 5 and 9, respectively.

Nonprofit corporations, other than section 501(c)(3) organizations, may also set up

a PAC to contribute to candidates by registering with the FEC.⁵⁵ Under federal law, there are two types of PACs: separate segregated funds (SSFs) and nonconnected committees. Nonprofit corporations may sponsor an SSF, which collects contributions from a limited class of individuals to then make contributions and expenditures to influence federal elections.⁵⁶ The nonprofit corporation (i.e., the “connected organization”) may pay for the costs of establishing, operating, and soliciting contributions for the SSF.⁵⁷

State Laws

Nonprofits should consider whether their political activities will subject them to the Michigan Campaign Finance Act, MCL 169.201 *et seq.* (“MFCA”). If a group qualifies as a “committee” under the MFCA, it must register and file campaign finance disclosure statements with the Michigan Department of State (the “Department”).⁵⁸ Committees are groups that receive contributions or make expenditures of \$500 or more to influence voters for or against the nomination or election of a candidate, or the qualification, passage, or defeat of a ballot question.⁵⁹ Once the \$500 threshold is reached in a calendar year, a committee is formed and it must register with the Department within ten days.⁶⁰ Reporting requirements vary depending on the category of the committee. The MFCA covers the following types of committees: candidate committees, political and independent committees (“PACs”), ballot question committees (“BQCs”),⁶¹ and political party committees.

In overruling the U.S. Supreme Court case of *Austin v Michigan State Chamber of Commerce*, 494 US 652 (1990), *Citizens United* declared section 54(1) of the MCFA unconstitutional to the extent that it prohibits corporations (including nonprofits) and labor organizations from making independent expenditures.⁶² In a recent case following *Citizens United*, *Michigan Chamber of Commerce v Land*, 725 F Supp 2d 665, 699–700 (WD Mich 2010), the court authorized corporations and labor unions to make contributions to political committees that are formed solely for the purpose of making independent expenditures. Like other committees, “independent expenditure political committees” must register with the Department once the \$500 is threshold is reached. Even if the committee has not yet registered, it must file an Independent Expenditure Report with the De-

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partment if it makes IEs between \$100 and \$499 in a calendar year.

Still, nonprofit corporations are prohibited from using their general treasury funds to make direct contributions to committees.⁶³ If a nonprofit corporation desires to contribute to a committee, it may establish a separate segregated fund.⁶⁴

NOTES

1. There are two types of section 501(c)(3) organizations: public charities and private foundations. This article describes public charities. Different rules and regulations may apply to private foundations.

2. These can include charitable, religious, educational, scientific, and other purposes. IRC 501(c)(3).

3. IRC 501(c)(3). The term “candidate for public office” is defined as an individual who offers himself, or is proposed by others, as a contestant for an elective public office, whether such office be national, state or local. Treas Reg 1.501(c)(3)-1.

4. Treas Reg 1.501(c)(3)-1.

5. *Id.*

6. See *Id.*

7. Kindell, Judith E. and John Francis Reilly, *Election Year Issues*, 2002 EO CPE Text, p. 344.

8. Rev. Rul. 2007-41.

9. Election Year Issues, p. 344.

10. The federal Lobbying Disclosure Act of 1995, 2 USC 1601 et seq., may apply.

11. Rev. Rul. 2007-41.

12. Kindell, Judith and Justine Lowe, *Rules for Exempt Organizations During a Tax Year*, available at http://www.irs.gov/pub/irs-tege/election_year_phone_forum_slides.pdf.

13. Election Year Issues, p. 344.

14. *Id.* at pp. 345–46.

15. Such factors include:

- 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 on 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. Rev. Rul. 2007-41.

16. *Id.*

17. *Id.*

18. Rev. Rul. 2007-41.

19. *Id.*

20. *Id.*

21. See *id.*

22. See *id.*

23. *Id.*

24. IRC 501(c)(4).

25. Treas Reg 1.501(c)(4)-1.

26. Treas Reg 1.501(c)(4)-1.

27. *Id.*

28. IRC 501(c)(5).

29. IRC 501(c)(6).

30. Treas Reg 1.501(c)(6)-1.

31. *Id.*

32. Rev. Rul. 61-177; Rev. Rul. 67-293.

33. G.C.M. 34233.

34. IRC 527(e).

35. IRC 527.

36. Kindell, Judith and Justine Lowe, *Rules for Exempt Organizations During a Tax Year*, available at http://www.irs.gov/pub/irs-tege/election_year_phone_forum_slides.pdf.

37. A 501(c)(3) organization is prohibited from establishing a 527 organization.

38. This is a complicated issue. For a discussion of the requirements, see Thomas, Ward L. and Judith E. Kindell, *Affiliations Among Political, Lobbying and Educational Organizations*, 2000 EO CPE Text, pp. 262-263.

39. Thomas, Ward L. and Judith E. Kindell, *Affiliations Among Political, Lobbying and Educational Organizations*, 2000 EO CPE Text, p. 263.

40. See Treas Reg 1.527-6(b)(2)–(3).

41. See *infra* Part II.

42. An exempt function means “influencing or attempting to influence the selection, nomination, election or appointment of an individual to a federal, state, or local public office or office in a political organization. . . .” IRC 527.

43. *Id.*

44. All “political committees” under FECA are 527 organizations, but not all 527 organizations are required to file with the Federal Election Commission (“FEC”).

45. Federal Election Commission, *The FEC and the Federal Campaign Finance Law 1* (2011).

46. 14 USC 431(3).

45. Federal Election Commission, *The FEC and the Federal Campaign Finance Law 1* (2011).

47. 130 S Ct at 917.

48. *Id.*

49. 11 CFR 100.16(a).

50. 11 CFR 100.29(a).

51. See *SpeechNow v. FEC*, 599 F.3d 686, 689 (D.C. Cir. 2010); *EMILY’s List v. FEC*, 581 F.3d 1, 10 (D.C. Cir. 2009) (“...individual citizens may spend money without limit (apart from the limit on their own contributions to candidates or parties) in support of the election of particular candidates”).

52. AO 2010-09.

53. *Id.*

54. 11 CFR 102.1(c).

55. 11 CFR 100.6.

56. 11 CFR 114.1(a)(2)(iii). These expenses are exempted from the definition of “contribution” and “expenditure” in the FEC regulations.

57. MCL 169.224.

58. MCL 169.203(4).

59. *Id.*

60. A BQC is a “a committee acting in support of, or in opposition to, the qualification, passage, or defeat of a ballot question but that does not receive contributions or make expenditures or contributions for the purpose of influencing or attempting to influence the action of the voters for or against the nomination or election of a candidate.” MCL 169.202(3). BQCs are, however,

allowed to accept contributions from corporations and labor organizations. MCL 169.254(3).

61. 130 S Ct at 913.
62. MCL 169.254.
63. MCL 169.255.



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