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Tax-Exempt Organizations Under Internal Revenue Code Section 501(c): Political Activity Restrictions

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SUMMARY

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Tax-Exempt Organizations Under Internal Revenue Code Section 501(c): Political Activity Restrictions

The ability of tax-exempt organizations under 26 U.S.C § 501(c) to engage in political activity, such as campaign activity and lobbying, depends on the nature of the organization. For example, the charitable organizations described in § 501(c)(3) may not engage in any campaign activity and may only conduct a limited amount of lobbying. Meanwhile, § 501(c)(4) social welfare organizations, § 501(c)(5) labor unions, and § 501(c)(6) trade associations may engage in campaign activity (so long as such activity is not their primary activity) and an unlimited amount of lobbying. Other types of § 501(c) organizations appear either to be subject to restrictions like those imposed on § 501(c)(3) organizations or treated similarly to § 501(c)(4), (c)(5), and (c)(6) organizations.

While some types of organizations are permitted to engage in campaign and lobbying activities under the Internal Revenue Code (I.R.C.), § 501(c) organizations are subject to tax for making certain political expenditures. If a § 501(c) organization engages in prohibited political activity, it can lose its tax-exempt status.

Finally, § 501(c) organizations must report information regarding their political activities to the Internal Revenue Service (IRS) on Schedule C of the Form 990. The organization and the IRS must make this information publicly available. Information about substantial donors also must be reported to the IRS on Form 990's Schedule B, but any identifying information about those donors generally is not publicly disclosed.

This report discusses restrictions on political activity of § 501(c) organizations, taxes on their political activity, and reporting of political activity to the IRS.

This version of the report updates and supersedes previous versions authored by Erika K. Lunder.

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There are approximately thirty types of organizations that qualify for federal tax-exempt status under § 501(c) of the Internal Revenue Code (I.R.C.). Whether a § 501(c) organization may engage in political activity, such as lobbying or campaign activity, depends on the provision of § 501(c) under which it receives tax exemption. The most common types of § 501(c) entities, and the ones with the most explicit limits on political activity are,

- § 501(c)(3) charitable organizations;
- § 501(c)(4) social welfare organizations;
- § 501(c)(5) labor unions; and
- § 501(c)(6) trade associations.

This report analyzes the I.R.C. limitations on political activity by tax-exempt organizations, focusing on these four categories.[1] It ends with a discussion of the I.R.C. reporting and disclosure requirements.[2]

Political Activity by I.R.C. § 501(c)(3) Organizations

Organizational Definition in I.R.C. § 501(c)(3)

Entities entitled to tax-exempt treatment under I.R.C. § 501(c)(3) are commonly referred to as "charitable organizations." The I.R.C. defines these organizations as

> organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.[3]

There are two types of § 501(c)(3) organizations, distinguished primarily by the level of public involvement in their activities and funding: public charities and private foundations.[4] Public charities receive contributions from a variety of sources, whereas private foundations receive contributions from limited sources. A § 501(c)(3) organization is presumed to be a private foundation unless it requests, and qualifies for, a determination as a public charity, which

[1] Congress has held a number of hearings on this topic. *See, e.g., Hearing on Growth of the Tax-Exempt Sector and the Impact on the American Political Landscape Before the Subcomm. on Oversight of the H. Comm. on Ways and Means*, 118th Cong. (Dec. 13, 2023); *Hearing on Laws and Enforcement Governing the Political Activities of Tax Exempt Entities Before the Subcomm on Taxation and IRS Oversight of the S. Comm on Finance*, 117th Cong. (May 4, 2022).

[2] While this report discusses the political activity limitations in the I.R.C., organizations must also comply with applicable election and lobbying laws, which are beyond the scope of this report. For analyses of the intersection between tax and campaign finance policy. *See* CRS Report R41542, *The State of Campaign Finance Policy: Recent Developments and Issues for Congress*, by R. Sam Garrett (2023); CRS In Focus IF11005, *Donor Disclosure: 501(c) Groups and Campaign Spending*, by R. Sam Garrett (2018); CRS In Focus IF11034, *Campaign Finance: Key Policy and Constitutional Issues*, by R. Sam Garrett and L. Paige Whitaker (2018); and CRS In Focus IF10277, *Candidates, Groups, and the Campaign Finance Environment: A Brief Overview*, by R. Sam Garrett (2016).

[3] 26 U.S.C § 501(c)(3).

[4] 26 U.S.C. § 509.

generally involves proving public support or activity.[5] To prevent abuse, private foundations are subject to stricter regulation than public charities. This includes additional restrictions on their political activities, as discussed below.

Summary of the Definition's Restrictions on Political Activity

The organizational definition in § 501(c)(3) restricts the ability of a charitable organization to participate in political activity in two ways: (1) lobbying cannot be a substantial part of its activities and (2) it may not intervene in political campaigns. An organization that violates either restriction may lose its tax-exempt status and the eligibility to receive deductible contributions, among other consequences.[6] The lobbying restriction and political campaign prohibition are discussed in detail below.

Legislative History of the Political Activity Restrictions

Congress enacted the lobbying limitation in 1934 and the political campaign prohibition in 1954. The legislative history of each provision is sparse.

In 1919, the U.S. Department of the Treasury (Treasury) took the position that organizations "formed to disseminate controversial or partisan propaganda" were not "educational" for purposes of qualifying for tax-exempt status under the precursors to § 501(c)(3).[7] One consequence of this rule was that contributions to these organizations were not deductible. Several lawsuits were brought that challenged this treatment, but no clear standard emerged from the court decisions: some courts denied the deduction if the organization advocated for any type of change, whereas others looked at factors such as how controversial the advocacy was or if the organization's actions were intended to influence legislation.[8] In what is generally recognized as the seminal case, *Slee v. Commissioner*,[9] the U.S. Court of Appeals for the Second Circuit used another rationale. In that decision, the court held that contributions to an organization were not deductible because it did not appear that the lobbying was limited to causes that furthered the organization's charitable purpose.[10]

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[5] *Id.*; Treas. Reg. § 1.509(a)-3. The test used to determine whether a § 501(c)(3) organization is a public charity is called the "public support test." *See, e.g., EO Operational Requirements: Private Foundations and Public Charities*, INTERNAL REVENUE SERVICE, https://www.irs.gov/charities-non-profits/eo-operational-requirements-private-foundations-and-public-charities (last visited April 8, 2024); *Exempt Organizations Annual Reporting Requirements - Form 990, Schedules A and B: Public Charity Support Test*, INTERNAL REVENUE SERVICE, https://www.irs.gov/charities-non-profits/exempt-organizations-annual-reporting-requirements-form-990-schedules-a-and-b-public-charity-support-test (last visited April 8, 2024); *Public Charities*, INTERNAL REVENUE SERVICE, https://www.irs.gov/charities-non-profits/charitable-organizations/public-charities (last visited April 8, 2024).

[6] *See, e.g.*, Regan v. Taxation With Representation of Washington, 461 U.S. 540 (1983); Ass'n of the Bar of the City of New York, 858 F.2d 876; Rev. Rul. 67-71, 1967-1 C.B. 125.

[7] Treas. Reg. 45, art. 517, T.D. 2831, 21 Treas. Dec. Int. Rev. 285 (1919).

[8] For a discussion of the Treasury position and these cases, see William J. Lehrfeld, *The Taxation of Ideology*, 19 CATH. U. L. REV. 50 (1969); Tommy F. Thompson, *The Availability of the Federal Educational Tax Exemption for Propaganda Organizations*, 18 U.C. DAVIS L. REV. 487 (1985); Laura B. Chisholm, *Exempt Organizations Advocacy: Matching the Rules to the Rationales*, 63 IND. L.J. 201 (1988); Miriam Galston, *Lobbying and the Public Interest: Rethinking the Internal Revenue Code's Treatment of Legislative Activities*, 71 TEX. L. REV. 1269 (1993); Oliver A. Houck, *On The Limits of Charity: Lobbying, Litigation, and Electoral Politics by Charitable Organizations under the Internal Revenue Code and Related Laws*, 69 BROOK. L. REV. 1 (2003).

[9] 42 F.2d 184 (2d Cir. 1930).

[10] *See id.* at 185.

With this background, Congress enacted the lobbying limitation as part of the Revenue Act of 1934.[11] There is very little legislative history for the provision, but it appears that Congress was concerned with organizations that lobby also being able to receive tax-deductible contributions.[12] While discussing the provision on the Senate floor, one Member criticized the deductibility of donations that were made for "selfish" reasons, while at the same time expressing concern that the limitation also appeared to restrict organizations that acted without "selfish motives."[13] Other Members argued that all contributions to organizations that lobby should be nondeductible because of the difficulty in trying to distinguish between organizations that deserve the benefit and those that do not.[14] It has also been suggested that Congress enacted the provision to codify the *Slee* decision.[15] Although this statement of historical purpose may have been accurate, the *Slee* test and the lobbying provision are not identical. This asymmetry results because the focus of the test under *Slee* is whether the lobbying furthers the organization's tax-exempt purpose, whereas the focus of the lobbying provision as enacted is whether the lobbying is a substantial part of the organization's activities.

The 1934 Act had also included a provision that would have restricted the ability of charities to participate in partisan politics. That limitation was removed in conference, however, apparently out of concern that it was too broad.[16]

Congress enacted the political campaign prohibition for § 501(c)(3) organizations as part of the I.R.C. of 1954.[17] Senator Lyndon Johnson added the provision as a floor amendment, resulting in the prohibition subsequently being referred to as the "Johnson Amendment."[18] Senator Johnson analogized the political campaign prohibition to the lobbying limitation, mistakenly characterizing the latter as denying tax-exempt status to all organizations that lobbied, when it did so only for those organizations that engaged in substantial lobbying.[19] The legislative history contains no further discussion of the prohibition.

Lobbying by § 501(c)(3) Organizations

The organizational definition in I.R.C. § 501(c)(3) states that "no substantial part" of the activities of an organization that receives tax exemption under that provision may be the "carrying on [of] propaganda, or otherwise attempting, to influence legislation" (i.e., lobbying).

What Is Lobbying?

Lobbying includes activities that attempt to influence legislation by (1) contacting, or urging the public to contact, legislators about proposing, supporting, or opposing legislation and (2)

[11] Revenue Act of 1934, Pub. L. No. 73-216, ch. 277, 48 Stat. 680, 690, 700, 760.

[12] *See* 78 CONG. REC. 5959 (1934) (statement by Sen. Harrison).

[13] 78 CONG. REC. 5861 (1934) (statement by Sen. Reed).

[14] *See* 78 CONG. REC. 5861, 5959 (1934) (statements by Sens. Harrison and La Follette).

[15] *See e.g.*, I.R.S. Gen. Couns. Mem. 34289 (May 3, 1970). General Counsel Memoranda contain legal interpretations of the I.R.C. by the IRS. They have no precedential value. They are available through such services as Lexis and Westlaw.

[16] *See* 78 CONG. REC. 7,831 (1934) (statement by Rep. Hill).

[17] The I.R.C. did not impose the same explicit prohibitions against engaging in political activities on § 501(c)(4), (c)(5), and (c)(6) organizations. Internal Revenue Code of 1954, Pub. L. No. 83-591, 68 Stat. 3; 26 U.S.C. § 501.

[18] *See* 100 CONG. REC. 9604 (1954).

[19] *See id*.

advocating for or against legislation.[20] Thus, it includes direct lobbying (contacting governmental officials) and grassroots lobbying (appeals to the electorate or general public).[21] "Legislation" includes action by any legislative body and by the public through such things as referenda and initiatives.[22] "Action" by a legislative body includes the introduction, amendment, enactment, defeat, or repeal of such things as acts, bills, and resolutions.[23] It also appears to include Senate confirmation of judicial and executive branch nominations.[24] An organization's advocacy activities may be lobbying even if specific legislation is not mentioned.[25] For example, publishing articles appealing to the public to react to certain general policy positions, without mentioning specific legislation, can be lobbying.[26] An organization also may be treated as lobbying if it does such things as make a contribution or lend money on favorable terms to an entity that lobbies.[27]

Lobbying generally does not include providing testimony in response to an official request by a legislative body.[28] It also does not include contacting executive, judicial, and administrative bodies on matters other than legislation, for example, making an office appointment.[29] Additional examples of activities that may not be lobbying include conducting and publishing nonpartisan analysis, study, or research; discussing broad social issues, so long as specific legislation is not discussed; and contacting legislative bodies about legislation that relates to the organization's existence or status (i.e., "self-defense" lobbying).[30]

What Does "No Substantial Part" Mean?

To determine whether lobbying is a substantial part of an organization's activities, a § 501(c)(3) organization can be subject to either the "expenditure test" or the "no substantial part test." Under the "expenditure test," some organizations may elect under I.R.C. § 501(h) to measure their lobbying expenditures against objective, numerical standards.[31] Electing organizations can then be taxed on certain levels of lobbying expenditures without losing their exempt status.

Most organizations do not elect the expenditure test,[32] and some, including churches and private foundations, are not allowed to use it.[33] In those cases, the § 501(c)(3) organization is subject to

[20] *See* Treas. Reg. § 1.501(c)(3)-1(c)(3)(ii).

[21] *See* Treas. Reg. § 1.501(c)(3)-1(b)(3).

[22] *See* Treas. Reg. § 1.501(c)(3)-1(c)(3)(ii). Legislation applies to actions by all levels of government, i.e., federal, state, and local.

[23] *See* 26 U.S.C. § 4911(e)(3); I.R.S. Gen. Couns. Mem. 39694 (Jan. 22, 1988).

[24] *See* I.R.S. Notice 88-76, 1988-2 C.B. 392; I.R.S. Gen. Couns. Mem. 39694 (Jan. 22, 1988).

[25] *See e.g.*, Christian Echoes Nat'l Ministry Inc. v. United States, 470 F.2d 849, 855 (10th Cir. 1972); Fund For Study of Economic Growth and Tax Reform v. IRS, 997 F. Supp. 15, 22 (D.D.C. 1998), *aff'd*, 161 F.3d 755 (D.C. Cir. 1998).

[26] Christian Echoes, 470 F.2d at 855.

[27] I.R.S. Tech. Adv. Mem. 91-17-001 (Apr. 26, 1991).

[28] *See* Rev. Rul. 70-449, 1970-2 C.B. 112.

[29] *See* Treas. Reg. § 1.501(c)(3)-1(c)(3)(ii).

[30] *See* 26 U.S.C. § 4945(e); Treas. Reg. § 53.4945-2(d); Rev. Rul. 64-195, 1964-2 C.B. 138; I.R.S. Gen. Couns. Mem. 36127 (Jan. 2, 1975).

[31] 26 U.S.C. § 501(h)(4). Congress enacted § 501(h) as part of the Tax Reform Act of 1976, Pub. L. No. 94-455.

[32] Jill S. Manny, *Nonprofit Legislative Speech: Aligning Policy, Law, and Reality*, 62 CASE W. RSRV. L. REV. 757, 760 n.8 (2012) ("[L]ess than 2 percent of eligible charities have actually made the election.")

[33] 26 U.S.C. § 501(h)(5). Some churches lobbied not to be eligible for the election because they were concerned that their inclusion would be interpreted as congressional approval of *Christian Echoes Nat'l Ministry, Inc. v. United States*, 470 F.2d 849 (10th Cir. 1972), in which the court held that the lobbying limitation did not violate a church's rights under the First Amendment. The legislative history of the election provision explicitly states that its enactment does not (continued...)

the "no substantial part" test, which has no bright-line standards and is instead based on the facts and circumstances of the organization's operations.[34] Non-electing organizations are taxed differently on their lobbying expenditures depending on whether they are a public charity or private foundation.[35]

Test 1: The "Expenditure Test" and Associated Excise Tax on Excess Lobbying Expenditures

Organizations that elect, under § 501(h), to apply the "expenditure test" measure their permissible level of lobbying activities against the limits in I.R.C. § 4911(c) for taxing "excess" lobbying expenditures. Section 4911 imposes a 25% excise tax on excessive lobbying and grassroots expenditures.[36] To avoid tax for excessive lobbying, an organization must limit spending on such activities to the sum of (1) 20% of its first $500,000 of expenditures;[37] (2) plus 15% of its second $500,000 of expenditures; (3) plus 10% of its third $500,000 of expenditures; and (4) plus 5% of its remaining expenditures, with no more than $1 million total on lobbying expenditures for the year being nontaxable.[38] To avoid tax for excessive grassroots lobbying, the organization may not spend on such efforts more than the sum of (1) 5% of its first $500,000 of expenditures; (2) plus 3.75% of its second $500,000 of expenditures; (3) plus 2.5% of its third $500,000 of expenditures; and (4) plus 1.25% of its remaining expenditures; with no more than $250,000 spent in total on grassroots expenditures being nontaxable for the year.[39] The 25% excise tax can be triggered by either excessive (i.e., greater than the nontaxable amount) lobbying or grassroots expenditures, with the tax applied to the greater of those two.[40]

Electing organizations lose their tax exemption if the organization "normally" makes expenditures in excess of 150% of either of the nontaxable amounts in I.R.C. § 4911(c) on lobbying or grassroots expenditures.[41] To determine an organization's normal lobbying expenditures, the IRS generally looks to lobbying expenditures in the determination year and the three taxable years immediately preceding the determination year.[42] Thus, depending on its activities in prior years, an electing organization could conduct lobbying in the current year that is significant enough to be subject to tax, but not lose its tax-exempt status.

indicate congressional approval or disapproval of the *Christian Echoes* decision. *See* Joint Committee on Taxation, *General Explanation of the Tax Reform Act of 1976*, JCS-33-76, at 416 (1976).

[34] *See* Treas. Reg. § 1.501(c)(3)-1(c)(3)(ii).

[35] 26 U.S.C. §§ 4912, 4945.

[36] 26 U.S.C. § 4911(a)(1), (c). "Lobbying expenditures" is defined as "expenditures for the purpose of influencing legislation" and encompasses direct and grassroots lobbying. *Id*. § 4911(c)(1), (d). "Grassroots expenditures" excludes expenditures on direct lobbying. *Id*. § 4911(c)(3), (d).

[37] This amount reflects the total of "exempt purpose expenditures," not just lobbying expenditures. *Id*. § 4911(e)(1).

[38] *Id*. § 4911(c)(2); Treas. Reg. § 56.4911-1(c)(1). The sum is called the "lobbying nontaxable amount."

[39] 26 U.S.C. § 4911(c)(4); Treas. Reg. § 56.4911-1(c)(2). The sum is called the "grass roots nontaxable amount."

[40] 26 U.S.C. § 4911(a), (b); Treas. Reg. § 56.4911-1(b).

[41] *Id.* § 501(h)(2)(B); Treas. Reg. § 1.501(h)-3(b).

[42] Treas. Reg. § 1.501(h)-3(e). The determination year and the three taxable years immediately preceding the determination year are referred to collectively as "base years." The base years, however, do not include any taxable year preceding the taxable year for which the organization is treated as a § 501(c)(3) organization. *Id*. § 1.501(h)-3(c)(7).

Test 2: The "No Substantial Part Test" and Associated Excise Tax on Lobbying Expenditures

For organizations that do not make the election and those that cannot (e.g., private foundations and churches), the determination as to whether they have conducted more than the permissible amount of lobbying depends on the facts and circumstances of each case. There is no bright-line test and the percentage of expenditures spent on lobbying is not necessarily determinative.[43] Rather, courts have examined the lobbying in the broad context of the organization's purpose and activities by looking at such things as how important lobbying is to the organization's purpose, the amount of time devoted to lobbying as compared with other activities, and the extent to which the organization is continuously involved in lobbying.[44]

Unlike electing organizations, non-electing public charities are subject to an excise tax on their lobbying expenditures only when they lose their exempt status because of substantial lobbying.[45] The tax equals 5% of the organization's lobbying expenditures, and the same tax may also be imposed on the organization's managers if they agree to expenditures they know would result in loss of exempt status.[46] Some public charities, including churches, are not subject to the tax.[47]

Private foundations, on the other hand, must generally pay an excise tax on any lobbying expenditures they make.[48] The tax equals 20% of the expenditures.[49] Additionally, a foundation manager who agrees to the expenditure knowing that it is taxable may individually be subject to a tax equal to 5% of the expenditure, with the tax limited to $10,000.[50] If the foundation fails to timely correct the expenditure, it is subject to an additional tax equal to 100% of the expenditure and the manager may be subject to an additional tax equal to 50% of the expenditure, limited to $20,000, if the manager refuses to correct the expenditure.[51]

Regan v. Taxation With Representation of Washington

In 1983, the Supreme Court ruled in *Regan v. Taxation With Representation of Washington* that the lobbying limitation is constitutional.[52] In that case, the IRS denied the application of Taxation With Representation of Washington (TWR) for § 501(c)(3) status because a substantial amount of

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[43] *See* Christian Echoes Nat'l Ministry, Inc. v. United States, 470 F.2d 849, 855 (10th Cir. 1972); Fund For Study of Econ. Growth & Tax Reform v. I.R.S., 997 F. Supp. 15, 18 (D.D.C.), *aff'd sub nom*. Fund for the Study of Econ. Growth & Tax Reform v. I.R.S., 161 F.3d 755 (D.C. Cir. 1998); Haswell v, United States, 500 F.2d 1133, 1142 (Ct. Cl. 1974); Krohn v. United States, 246 F. Supp. 341, 347–48 (D. Colo. 1965); *see also*, I.R.S. Gen. Couns. Mem. 36,148 (Jan. 28, 1975). Courts have found 'no substantial part' when lobbying expenditures have been between 5% and 20% of the organization's expenditures. *See, e.g.*, Seasongood v. Comm'r, 227 F.2d 907, 912 (6th Cir. 1955); *Haswell*, 500 F.2d at 1146–47.

[44] *See* Christian Echoes, 470 F.2d at 855–86; Fund For Study of Econ. Growth & Tax Reform v. I.R.S., 997 F. Supp. at 20–21; Haswell, 500 F.2d at 1145; Krohn, 246 F. Supp. at 348–49.

[45] 26 U.S.C. § 4912.

[46] *Id.* § 4912(a), (b). Managers can avoid the tax if their agreement to the expenditures is not willful and is due to reasonable cause.

[47] *Id.* § 4912(c)(2)(B).

[48] *Id.* § 4945. Congress enacted this section as part of the Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 512.

[49] 26 U.S.C. § 4945(a)(1).

[50] *Id.* § 4945(a)(2), (c)(2).

[51] *Id.* § 4945(b), (c)(2). The foundation must correct the expenditure within the "taxable period" to avoid the additional tax.

[52] 461 U.S. 540 (1983).

the group's activities would be lobbying.[53] TWR argued that the lobbying limitation violated its right to freedom of speech under the First Amendment.[54] The group also argued that it was being denied equal protection under the Fifth Amendment because § 501(c)(19) veterans' organizations were allowed to lobby substantially and still qualify for tax-exempt status and to receive tax-deductible contributions.[55]

The Supreme Court rejected both claims. With respect to the First Amendment, the Court found that Congress had not prevented TWR from speaking, but had simply chosen not to subsidize it by means of the tax exemption and tax-deductible contributions.[56] The Court also explained that TWR could qualify for exemption under § 501(c)(4) and receive deductible contributions for its non-lobbying activities by setting up a separate § 501(c)(3) organization.[57] With respect to the Fifth Amendment, the Court stated that the test to determine whether the classification was constitutionally permissible was whether it bore a rational relationship to a legitimate governmental purpose.[58] Writing that legislatures have broad discretion when it comes to making classifications for tax purposes, the Court found that it was not irrational for Congress to decide not to extend the taxpayer-funded benefit of unlimited lobbying to charities because of concerns they may lobby for their members' benefit.[59] The Court also stated that distinguishing charities from veterans organizations was permissible because the United States "has a longstanding policy of compensating veterans for their past contributions by providing them with numerous advantages."[60]

Political Campaign Activity by § 501(c)(3) Organizations

The organizational definition in I.R.C. § 501(c)(3) prohibits these organizations from "participating in, or intervening in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office," but does not further elaborate on the prohibition. Treasury regulations define candidate 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."[61] As to what types of activities are prohibited, the regulations add little besides specifying that they include "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."[62]

Thus, the statute and regulations do not offer much insight as to what activities are prohibited. They do make clear, however, that § 501(c)(3) organizations may not do such things as make

[53] *See id.* at 542.

[54] *See id.* at 545.

[55] *See id.* at 546–47.

[56] *See id.*

[57] *See id.* at 544.

[58] *See id.* at 547.

[59] *See id.* at 547, 550.

[60] *Id.* at 551.

[61] Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii).

[62] *Id.*

statements that endorse or oppose a candidate, publish or distribute campaign literature, or make any type of contribution,[63] monetary or otherwise, to a political campaign.[64]

On the other hand, § 501(c)(3) organizations are allowed to conduct activities that are political in nature but are not related to elections, such as lobbying for or against legislation[65] and supporting or opposing the appointment of individuals to nonelective offices.[66] Additionally, § 501(c)(3) organizations may engage in certain election-related activities so long as the activities do not indicate a preference for or against any candidate. Whether such an activity constitutes campaign intervention depends on the facts and circumstances of each case. The following examples show some of the ways in which the IRS has indicated that an activity might be biased. As will be seen, some biases can be subtle and it is not necessary for the organization to expressly mention a candidate by name.

Examples of Political Campaign Activities

Voter Guides

Section 501(c)(3) organizations may create and/or distribute voter guides and similar materials that do not indicate a preference for any candidate.[67] The guide must be unbiased in form, content, and distribution.[68] According to the IRS, there are numerous ways in which a guide may be biased, and the determination will depend on the facts and circumstances of each case.[69] For example, a guide could display a bias by not including all candidates on an equal basis.[70] Another way a guide could be biased is by rating candidates, such as evaluating candidates and supporting a slate of the best-qualified candidates, even if the criteria are nonpartisan (e.g., based on professional qualifications).[71] A voter guide could also indicate a bias by comparing the organization's position on issues with those of the candidates.[72] A more subtle way in which a guide may show bias is by only covering issues that are important to the organization, as opposed to covering a range of issues of interest to the general public.[73]

Some guides consist of candidate responses to questions provided by the organization. According to the IRS, factors that tend to show that such guides are candidate-neutral include the following:

- the questions and descriptions of the issues are clear and unbiased;
- the questions provided to the candidates are identical to those included in the guide;

[63] A loan by a 501(c)(3) organization to a political organization, where the 501(c)(3) organization does not control the use of the loan, is a political contribution. I.R.S. Tech. Adv. Mem. 9812001 (Mar. 20, 1998).

[64] 26 U.S.C. §§ 501(c)(3), 4955(d)(1) ("The term 'political expenditure' means any amount paid or incurred by a section 501(c)(3) organization in any participation in, or intervention in . . . any political campaign on behalf of (or in opposition to) any candidate for public office.").

[65] As explained above, however, "no substantial part" of a § 501(c)(3) organization's activities may be lobbying.

[66] *See*, I.R.S. Notice 88-76, 1988-2 C.B. 392; I.R.S. Gen. Couns. Mem. 39,694 (Jan. 22, 1988).

[67] *See* Rev. Rul. 78-248, 1978-1 C.B. 154.

[68] *See id.*

[69] *See id.*

[70] *See* I.R.S. FS-2006-17 (Feb. 2006).

[71] *See* Ass'n of the Bar of the City of New York v. Comm'r, 858 F.2d 876 (2d Cir. 1988); Rev. Rul. 67-71, 1967-1 C.B. 125.

[72] *See* I.R.S. FS-2006-17 (Feb. 2006).

[73] *See* Rev. Rul. 78-248, 1978-1 C.B. 154.

- the candidates' answers have not been edited;
- the guide puts the questions and appropriate answers in close proximity to each other;
- the candidates are given a reasonable amount of time to respond to the questions; and
- if the candidates are given limited choices for an answer to a question (e.g., yes/no, support/oppose), they are given a reasonable opportunity to explain their positions.[74]

Other factors that may be important include the timing of the guide's distribution and to whom it is distributed.[75] For example, the IRS ruled that a § 501(c)(3) organization could include a compilation of Members' voting records on issues important to it and its position on those issues in the edition of its monthly newsletter published after the close of each Congress.[76] The newsletter was sent to the usual small number of subscribers and not targeted to areas where elections were occurring. In this specific situation, the IRS stated that the publication was permissible because it was not timed to an election or broadly distributed.

Conducting Public Forums

Section 501(c)(3) organizations may conduct unbiased and nonpartisan public forums where candidates speak or debate. According to the IRS, factors that tend to show a public forum is unbiased and nonpartisan include the following:

- all legally qualified candidates are invited;
- the questions are prepared and presented by a nonpartisan independent panel;
- the topics and questions cover a broad range of issues of interest to the public;
- all candidates receive an equal opportunity to present their views; and
- the moderator does not comment on the questions or imply approval or disapproval of the candidates.[77]

Inviting Candidates to Speak

A § 501(c)(3) organization may invite a candidate to speak at its functions without it being prohibited campaign activity. According to the IRS, factors that tend to indicate the event was permissible include that

- the organization provided an equal opportunity to speak at similar events to the other candidates;
- the organization did not indicate a preference for or against any candidate; and
- no fund-raising occurred at the event.[78]

[74] *See* I.R.S. FS-2006-17 (Feb. 2006); Rev. Rul. 78-248, 1978-1 C.B. 154.

[75] *See* I.R.S. FS-2006-17 (Feb. 2006); Rev. Rul. 78-248, 1978-1 C.B. 154.

[76] *See* Rev. Rul. 80-282, 1980-2 C.B. 178.

[77] *See* Rev. Rul. 86-95, 1986-2 C.B. 73; Rev. Rul. 2007-41, 2007-1 C.B. 1421.

[78] *See* Rev. Rul. 2007-41, 2007-1 C.B. 1421.

Section 501(c)(3) organizations may also invite candidates to speak in their non-candidate capacity.[79] Factors indicating that no campaign intervention occurred include the following:

- the individual was chosen to speak solely for non-candidacy reasons;
- the individual spoke only in his or her non-candidate capacity;
- no reference to the upcoming election was made;
- no campaign activity occurred in connection with the individual's attendance;
- the organization maintained a nonpartisan atmosphere at the event; and
- the organization's communications announcing the event clearly indicated the non-candidate capacity in which the individual was appearing and did not mention the individual's candidacy or the election.[80]

Voter Registration

Section 501(c)(3) organizations may conduct nonpartisan voter registration and get-out-the-vote drives.[81] Again, the activities may not indicate a preference for any candidate or party. According to the IRS, factors indicating that these activities are neutral include the following:

- 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.[82]

Issue Advocacy Compared to Campaign Activity

Section 501(c)(3) organizations may take positions on policy issues. Because there is no rule that campaign activity occurs only when an organization expressly advocates for or against a candidate,[83] the line between issue advocacy and campaign activity can be difficult to discern. According to the IRS, key factors that indicate an issue advocacy communication does not cross the line into campaign intervention include the following:

- the communication does not identify any candidates for a given public office, whether by name or other means, such as party affiliation or distinctive features of a candidate's platform;
- 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;

[79] *See id.* A violation is possible even when a candidate attends an organization's event as a non-candidate and does not speak if the organization makes statements showing preference for the candidate at the event.

[80] *See id.*

[81] *See id*. Private foundations making expenditures for these activities may be subject to tax. *See* 26 U.S.C. § 4945(d)(2).

[82] *See* Rev. Rul. 2007-41, 2007-1 C.B. 1421; JUDITH E. KINDELL AND JOHN FRANCIS REILLY, ELECTION YEAR ISSUES, I.R.S. 2002 EO CPE TEXT, 448–51 (2002) [hereinafter 2002 EO CPE TEXT].

[83] *See* Rev. Rul. 2007-41, 2007-1 C.B. 1421.

- 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; and
- the identification of the candidate and the communication's timing are related to a non-electoral event (e.g., a scheduled vote on legislation by an officeholder who is also a candidate).[84]

Selling Mailing Lists and Other Business Activities

Under certain circumstances, § 501(c)(3) organizations may sell or rent goods, services, and facilities to political campaigns. This includes selling and renting mailing lists and accepting paid political advertising. According to the IRS, factors that tend to indicate the activity is not biased towards any candidate or party include the following:

- the activity is an ongoing business activity of the organization;
- the goods, services, and facilities are available 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.[85]

Website Links

A § 501(c)(3) organization might be deemed to have engaged in campaign activity by linking its website to another website that has content showing a preference for or against a candidate.[86] When an organization establishes a link to another web site, the organization can be responsible for the consequences of establishing and maintaining that link, even if the organization does not have control over the content of the linked site.[87] Whether the linking is campaign intervention depends on the facts and circumstances of each case. Factors the IRS will look at include the context of the link on the organization's website, whether all candidates are represented, whether the linking serves the organization's exempt purpose, and whether the organization's website directly links to the page at the other site with the biased material.[88]

Activities of the Organization's Officials

A § 501(c)(3) organization acts through individuals such as its officers, directors, and trustees.[89] Such officials may participate in campaign activity in their private capacity. The organization

[84] *See id*.; *see also* 2002 EO CPE TEXT, *supra* note 82, at 376−77.

[85] *See* Rev. Rul. 2007-41, 2007-1 C.B. 1421; *see also*, 2002 EO CPE TEXT, *supra* note 82, at 383−84.

[86] *See* Rev. Rul. 2007-41, 2007-1 C.B. 1421. Due to possible constitutional concerns stemming from the Supreme Court's decision in *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983), the IRS indicated that it would not pursue cases involving a link between the website of a § 501(c)(3) organization and the home page of a related § 501(c)(4) organization. *See* Memorandum from Marsha A. Ramirez, Director, Exempt Organizations, Examinations, to All EO Revenue Agents (July 28, 2008), http://www.irs.gov/pub/irs-tege/internetfielddirective072808.pdf (last visited April 8, 2024).

[87] *See* Rev. Rul. 2007-41, 2007-1 C.B. 1421.

[88] *See id.*

[89] *See* 2002 EO CPE TEXT, *supra* note 82, at 364.

cannot support the activity in any way.[90] For example, these individuals may not express political views in the organization's publications or at its functions (this is true even if the individual pays the costs associated with the statement),[91] and the organization may not pay expenses incurred by the individual in making the political statement, such as paying for a newspaper advertisement with such a statement.[92] Individuals may be identified as being associated with an organization, but there should be no intimation that their views represent those of the organization.[93]

Consequences of Engaging in Political Campaign Activity: Loss of Tax-Exemption and Excise Tax on Political Expenditures

A § 501(c)(3) organization that engages in any amount of campaign activity may lose its tax-exempt status and eligibility to receive tax-deductible contributions.[94] It may also be taxed on its "political expenditures,"[95] either in addition to or in lieu of revocation of § 501(c)(3) status.[96] The tax equals 10% of the expenditures, with an additional tax equal to 100% of the expenditures if they are not corrected in a timely manner, i.e., within the "taxable period."[97] A correction occurs when the expenditures are recovered and safeguards are established to prevent future ones.[98]

The organization's managers[99] may also be subject to tax. A tax equal to 2.5% of the expenditures (limited to $5,000 with respect to any one expenditure) is imposed on the organization's managers who agreed to the expenditures knowing they were political expenditures, unless the agreement is not willful and is due to reasonable cause.[100] Any managers who refuse to agree to correct the expenditures are subject to an additional tax equal to 50% of the expenditures (limited to $10,000 with respect to any one expenditure).[101]

For flagrant violations of the prohibition, the IRS may immediately determine and assess all taxes due and/or seek an injunction and other relief to stop the organization from making additional political expenditures and to preserve its assets.[102]

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[90] *See* Rev. Rul. 2007-41, 2007-1 C.B. 1421; *see also* 2002 EO CPE TEXT, *supra* note 82, at 364.

[91] *See* Rev. Rul. 2007-41, 2007-1 C.B. 1421.

[92] *See id.*

[93] *See id.*

[94] Ass'n of the Bar of the City of New York v. Comm'r, 858 F.2d 876 (2d Cir. 1988).

[95] *See* 26 U.S.C. § 4955. Campaign expenditures of both public charities and private foundations may be taxed under § 4955. The lobbying and campaign expenditures of private foundations also may be taxed under I.R.C. § 4945, although taxes under that provision are not assessed if the § 4955 tax is assessed on the same expenditure. *Id*. §§ 4945(d)–(e), 4955(e). *See supra* page 6 for discussion of the § 4945 tax on private foundations. Section 4945 gives the government more options to tax private foundations because what is taxable under § 4945 is broader than that in § 4955. *Id*. §§ 4945(d)–(e), 4955(d). The tax rates in § 4945 are also higher than those in § 4955. *Id*. §§ 4945(a)–(b), 4955(a)–(b).

[96] *See* Treas. Reg. § 53.4955-1(a); H.R. REP. NO. 100-391(II), at 1623–24 (1987).

[97] 26 U.S.C. § 4955(a)(1), (b)(1), (f)(3); Treas. Reg. § 53.4955-1(e).

[98] 26 U.S.C. § 4955(a)(1), (b)(1), (f)(3); Treas. Reg. § 53.4955-1(e).

[99] An organization's managers include any officer, director, or trustee, and any employee with authority over the expenditure. 26 U.S.C. § 4955(f)(2).

[100] 26 U.S.C. § 4955(a)(2), (c)(2); Treas. Reg. § 53.4955-1(b).

[101] 26 U.S.C. § 4955(b)(2), (c)(2).

[102] *See* 26 U.S.C. §§ 6852, 7409.

Political Activity by § 501(c)(4), (c)(5), and (c)(6) Organizations

Organizational Definitions

I.R.C. § 501(c)(4)

The organizations described in § 501(c)(4) include those that are commonly referred to as social welfare organizations. The section describes:

> [c]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes. [This paragraph] shall not apply to an entity unless no part of the net earnings of such entity inures to the benefit of any private shareholder or individual.

Treasury regulations clarify that "[a]n organization is operated exclusively for the promotion of social welfare if it is primarily engaged in promoting in some way the common good and general welfare of the people of the community."[103]

I.R.C. § 501(c)(5)

Section 501(c)(5) organizations are described as "labor, agricultural, or horticultural organizations." These include labor unions.

I.R.C. § 501(c)(6)

The organizations described in § 501(c)(6) are generally thought of as trade associations and chambers of commerce. The section describes these organizations as

> [b]usiness leagues, chambers of commerce, real estate boards, boards of trade, or professional football leagues ... not organized for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual.

Lobbying by § 501(c)(4), (c)(5), and (c)(6) Organizations

The organizational definitions for §§ 501(c)(4), (c)(5), and (c)(6) do not contain any explicit limitations on lobbying. The organizations described in these three sections may participate in an unrestricted amount of lobbying so long as the lobbying furthers the purpose for which the organization is exempt.[104] Organizations whose sole activity is lobbying may be recognized under

[103] Treas. Reg. § 1.501(c)(4)-1(a)(2)(i). The purposes described in I.R.C. §§ 501(c)(3) and (c)(4) overlap, so that an organization may be able to qualify under either section. A § 501(c)(3) organization is eligible to receive tax-deductible contributions, while a § 501(c)(4) organization generally is not. A § 501(c)(3) organization is more limited, however, in the amount and types of political activity it may undertake. Thus, an organization that could qualify under either section will generally choose based on which is more important: receiving tax-deductible contributions or participating in political activity. With the exception of churches and related organizations, an organization that loses its § 501(c)(3) status because of political campaign activity or substantial lobbying may not then seek recognition as a § 501(c)(4) organization. *See* 26 U.S.C. § 504.

[104] Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii) ("A social welfare organization . . . may qualify under section 501(c)(4) even though it is an *action* [i.e., lobbying] organization . . . if it otherwise qualifies under this section.") (emphasis in (continued...)

these sections so long as they serve the appropriate tax-exempt purpose.[105] For example, a business association whose only activity is lobbying for and against legislation according to its members' interests may qualify for § 501(c)(6) status.[106]

If an organization engages in lobbying, it can impact the deductibility of any dues paid by its members. While dues are potentially deductible under I.R.C. § 162 as a trade or business expense,[107] that section disallows a deduction for the portion of dues that represents lobbying and political expenditures.[108] In general, the organization must either notify its members of the amount that is nondeductible or pay a tax on its lobbying expenditures.[109]

Political Campaign Activity by § 501(c)(4), (c)(5), and (c)(6) Organizations

The organizational definitions in §§ 501(c)(4), (c)(5), and (c)(6) do not contain any explicit restrictions on political campaign activity. Thus, these organizations may engage in such activity under the tax laws, although it cannot be the organization's primary activity (along with any other activities that do not further an exempt purpose).[110]

Additionally, because a § 501(c)(4) organization must be "primarily engaged in promoting in some way the common good and general welfare of the people of the community,"[111] it cannot qualify for § 501(c)(4) status if it primarily provides private benefits.[112] Thus, it appears an organization that primarily benefits partisan interests could jeopardize its § 501(c)(4) status.[113]

Whether an organization is "primarily engaged" in promoting social welfare depends on the facts and circumstances of each case, looking at a variety of factors, not merely the amount of

original); Rev. Rul. 2004-6, 2004-1 C.B. 328 (2003) ("Organizations that are exempt from federal income tax under § 501(a) as organizations described in § 501(c)(4), § 501(c)(5), or § 501(c)(6) may, consistent with their exempt purpose, publicly advocate positions on public policy issues. This advocacy may include lobbying for legislation consistent with these positions.").

[105] *See* Rev. Rul. 61-177, 1961-1 C.B. 117; Rev. Rul. 71-530, 1971-2 C.B. 237.

[106] *See* Rev. Rul. 61-177, 1961-1 C.B. 117.

[107] The deduction under I.R.C. § 162 is suspended for individuals through 2025 as a miscellaneous itemized deduction. 26 U.S.C. § 67(g).

[108] 26 U.S.C. § 162(e).

[109] *See* 26 U.S.C. § 6033(e).

[110] *See* Treas. Reg. § 1.501(c)(4)-1(a)(2) ("An organization is operated exclusively for the promotion of social welfare if it is primarily engaged in promoting in some way the common good and general welfare of the people of the community. . . The promotion of social welfare does not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office"); Rev. Rul. 81-95, 1981-1 C.B. 332 (ruling that lawful participation in campaign activity would not affect the § 501(c)(4) status of an organization whose primary activity was promoting social welfare); Rev. Rul. 67-368; 1967-2 C.B. 194 (ruling that an organization whose primary activity was rating candidates using non-partisan criteria did not qualify for § 501(c)(4) status); I.R.S. Gen. Couns. Mem. 34233 (Dec. 30, 1969).

[111] Treas. Reg. § 1.501(c)(4)-1(a)(2).

[112] *See* Contracting Plumbers Cooperative Restoration Corp. v. United States, 488 F.2d 684 (2d Cir. 1973).

[113] *See* Am. Campaign Acad. v. Comm'r, 92 T.C. 1053 (1989) (ruling that an organization that operates for the benefit of private interests, such as members and entities of one political party, on a more than insubstantial basis may not qualify for § 501(c)(3) status); *see also* Democratic Leadership Council v. United States, 542 F. Supp. 2d 63 (D.D.C. 2008) (ruling that the retroactive revocation of group's § 501(c)(4) status was improper because case did not meet circumstances required for retroactive revocation; IRS had revoked the group's § 501(c)(4) status after determining the group had impermissibly benefitted private interests, specifically Democratic elected officials); I.R.S. Priv. Ltr. Rul. 12-21-025 (March 2, 2012).

expenditures.[114] Relevant factors include the manner in which the organization's activities are conducted; the resources used in conducting the activities (e.g., buildings and equipment); the time devoted to activities by employees and volunteers; the purposes furthered by various activities; and the amount of funds received from and devoted to particular activities.[115]

As to what activities constitute campaign activity, IRS guidance interpreting the similar "campaign intervention" language in § 501(c)(3), explained above, is instructive for other 501(c) organizations.[116] In 2013, the IRS proposed new regulations with the goal of providing more definitive rules regarding a § 501(c)(4) organization's political activities to reduce the need for facts and circumstances determinations.[117] The proposed regulations would have created a new category of "candidate-related political activity" distinct from the political campaign activities in which § 501(c)(3) organizations are prohibited from engaging.[118] The IRS did not finalize the proposed regulations after a record number of public comments. Appropriations acts have since prevented the IRS from using funds to make new regulations on determining whether § 501(c)(4) organizations are operated exclusively for their exempt purpose.[119]

Political Activity by Other Types of § 501(c) Organizations

While the majority of § 501(c) organizations fall into one of the categories discussed above, the I.R.C. describes numerous other types of organizations. The limitations the I.R.C. places on the ability of these organizations to participate in political activity are often less clear, and there is minimal IRS guidance on the topic.

The other types of § 501(c) organizations fall into two categories. The first are those that are likely prohibited from participating in most, if not all, types of political activity. This category might include the § 501(c) trusts whose funds must be dedicated to their exempt purpose (e.g., § 501(c)(17) supplemental unemployment benefit trusts, § 501(c)(21) black lung benefit trusts, and 501(c)(22) multi-employer pension plan trusts). It also likely includes the organizations that the IRS has indicated in unofficial guidance may not participate in political activities "because the subparagraph in which they are described limits them to an exclusive purpose (for example, I.R.C. § 501(c)(2) title holding companies, I.R.C. § 501(c)(20) group legal services plans)."[120] This rationale could also prohibit § 501(c)(10) domestic fraternal societies, for example, from participating in political activities, because their net earnings must be devoted exclusively to certain purposes.

[114] *See, e.g.*, Rev. Rul. 74-361, 1974-2 C.B. 159; Rev. Rul. 68-45, 1968-1 C.B. 259; I.R.S. Priv. Ltr. Rul. 12-24-034 (March 21, 2012).

[115] I.R.S. Priv. Ltr. Rul. 12-24-034 (March 21, 2012).

[116] *See* Rev. Rul. 81-95, 1981-1 C.B. 332 (citing IRS guidance on § 501(c)(3) organizations when considering political campaign activities of § 501(c)(4) organizations).

[117] Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities, 78 Fed. Reg. 71535 (Nov. 29, 2013).

[118] *Id*. at 71536–37

[119] *See, e.g.*, Consolidated Appropriations Act, 2023, Pub. L. No. 117, div. E, tit. 1, § 123, 136 Stat. 4459, 4659.

[120] 2002 EO CPE TEXT, *supra* note 82, at 434. Some might argue this rationale is suspect because § 501(c)(3) requires those organizations to be organized and operated "exclusively" for an exempt purpose, but the IRS has interpreted the term to mean "primarily" in this context and permits them to engage in nonpartisan political activity. *See* Treas. Reg. § 1.501(c)(3)-1(c)(1).

The second category are those § 501(c) organizations that the IRS has indicated can participate in some political activity. Examples would appear to include § 501(c)(7) social and recreational clubs,[121] § 501(c)(8) fraternal benefit societies and associations,[122] and § 501(c)(19) veterans' groups.[123]

Tax Under I.R.C. § 527(f)

Even though certain § 501(c) organizations may engage in campaign or lobbying activity, they are subject to tax if they make an expenditure for a § 527 "exempt function."[124] An "exempt function" is the "influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice-Presidential electors . . ."[125] In addition to campaign activity, the definition of "exempt function" encompasses some "lobbying" activities because lobbying can include advocating for appointment of non-elected positions.[126]

The tax is imposed at the corporate income tax rate (21%) on the lesser of the organization's net investment income or the total amount of "exempt function" expenditures.[127] Thus, for organizations with little or no net investment income or those making low-cost expenditures, the tax is of minimal import. For others groups, however, it might serve as a disincentive to directly engage in the activities giving rise to the taxable expenditures.

Section 501(c) organizations may lawfully avoid the tax by setting up a separate segregated fund under § 527(f)(3) to conduct the taxable activities.[128] Assuming the fund is set up and administered properly, it will be treated as a separate § 527 political organization and the § 501(c) organization will not be subject to tax.[129] A § 501(c) organization may not, however, set up such a fund to accomplish activities the organization itself may not do.[130] Thus, for example, a § 501(c)(3) organization may not use such a fund as a way to get around the prohibition on campaign intervention.[131]

[121] *See* Rev. Rul. 68-266, 1968-1 C.B. 270; *see also* H.R. REP. NO. 391, at 1606–08 (1987).

[122] *See* I.R.S. Priv. Ltr. Rul. 8342100 (July 20, 1983); I.R.S. Priv. Ltr. Rul. 8852037 (October 4, 1988).

[123] *See* Treas. Reg. § 1.501(c)(19)-1(c)(1); Regan v. Taxation with Representation of Washington, 461 U.S. 540, 546 (1983); I.R.S. Priv. Ltr. Rul. 7904064 (October 25, 1978).

[124] 26 U.S.C. § 527(f); Rev. Rul. 2004-6, 2004-1 C.B. 328 (2003). Even if an organization is forbidden from an activity, such as the prohibition on campaign activity by § 501(c)(3) organizations, the organization can still be subject to the § 527(f) tax for engaging in the forbidden activity. Treas. Reg. § 1.527-6(g).

[125] 26 U.S.C. § 527(e)(2); *see also* Treas. Reg. § 1.527-2(c).

[126] *See* I.R.S. Notice 88-76, 1988-2 C.B. 392; I.R.S. Gen. Couns. Mem. 39694 (Jan. 22, 1988).

[127] 26 U.S.C. § 527(b), (f); Treas. Reg. § 1.527-6(a).

[128] *See also*, Treas. Reg. § 1.527-6(f).

[129] Rev. Rul. 2004-6, 2004-1 C.B. 328 (2003). A separate segregated fund under § 527(f)(3), though, is subject to the § 527(i) notice and § 527(j) reporting requirements. Thus, organizations have the choice of either (1) using their own funds and being subject to the § 527(f) tax or (2) creating a separate segregated fund and being subject to the notice and reporting requirements of § 527 political organizations. The restrictions and requirements of § 527 political organizations are otherwise beyond the scope of this report.

[130] *See* Treas. Reg. § 1.527-6(g).

[131] *See id.*

I.R.C. Reporting and Disclosure Requirements

Under the I.R.C., § 501(c) organizations are generally required to file an annual information return (some version of the Form 990) with the IRS.[132] Filing organizations are required to report information regarding their political activities on the Form's Schedule C and substantial donors on the Form's Schedule B.

Political Activity Reporting on Schedule C

On the Schedule C,[133] § 501(c)(3) organizations are required to describe their direct and indirect political campaign activities and report information on their political expenditures, volunteer hours, and any § 4955 excise taxes incurred on political expenditures.[134] Section 501(c)(3) organizations must also report information about their lobbying activities on the schedule.[135] The specific information that must be reported differs depending on whether the organization made the § 501(h) election.[136]

Meanwhile, organizations other than those described in § 501(c)(3) must (1) describe their direct and indirect political campaign activities; (2) report the amount spent conducting campaign activities and the number of volunteer hours used to conduct those activities; (3) report the amount directly spent for § 527 exempt function activities; (4) report the amount of funds contributed to other organizations for § 527 exempt function activities; (5) report whether a Form 1120-POL (the tax return filed by organizations owing the § 527 tax) was filed for the year; and (6) report the name, address, and employer identification number of every § 527 political organization to which a payment was made and the amount of such payments, and indicate whether the amounts were paid from internal funds or were contributions received and directly transferred to a separate political organization.[137] There is also space for § 501(c)(4), (c)(5), and (c)(6) organizations to report information regarding their lobbying activities with respect to the deductibility of dues paid by their members.[138]

Substantial Donors Reporting on Schedule B

The ability of some § 501(c) organizations to engage in political activity has led to concern about who is potentially funding that activity. On the Form 990's Schedule B,[139] § 501(c) organizations must report certain information about significant donors, which are generally individuals who

[132] *See* 26 U.S.C. § 6033.

[133] I.R.S., Schedule C (Form 990): Political Campaign and Lobbying Activities (2023), https://www.irs.gov/pub/irs-pdf/f990sc.pdf (last visited April 8, 2024).

[134] I.R.S., Schedule C (Form 990): Political Campaign and Lobbying Activities (2023), https://www.irs.gov/pub/irs-pdf/f990sc.pdf (last visited April 8, 2024); 26 U.S.C. § 6033(b)(10); Treas. Reg. § 1.6033-2(a)(2)(K).

[135] I.R.S., Schedule C (Form 990): Political Campaign and Lobbying Activities (2023), https://www.irs.gov/pub/irs-pdf/f990sc.pdf (last visited April 8, 2024); 26 U.S.C. § 6033(b)(10); Treas. Reg. § 1.6033-2(a)(2)(K), (M).

[136] I.R.S., Schedule C (Form 990): Political Campaign and Lobbying Activities (2023), https://www.irs.gov/pub/irs-pdf/f990sc.pdf (last visited April 8, 2024); 26 U.S.C. § 6033(b)(8), (10); Treas. Reg. § 1.6033-2(a)(2)(K), (M).

[137] I.R.S., Schedule C (Form 990): Political Campaign and Lobbying Activities (2023), https://www.irs.gov/pub/irs-pdf/f990sc.pdf (last visited April 8, 2024); 26 U.S.C. § 6033(e).

[138] I.R.S., Schedule C (Form 990): Political Campaign and Lobbying Activities (2023), https://www.irs.gov/pub/irs-pdf/f990sc.pdf (last visited April 8, 2024); 26 U.S.C. § 6033(e).

[139] *See* I.R.S., Schedule B (Form 990): Schedule of Contributors (2022), https://www.irs.gov/pub/irs-pdf/f990ezb.pdf (last visited Apr. 8, 2024).

contributed at least $5,000 during the year. Under current IRS regulations in place since 2020,[140] the donor information (i.e., names and addresses) required to be included by tax-exempt organizations in their Schedule Bs differs depending on whether the organization is established under § 501(c)(3) or one of the other provisions of § 501(c). Because they have a statutory requirement to do so, § 501(c)(3) organizations must disclose both the amount of significant contributions and information regarding the source of these contributions (i.e., the donor information).[141] Section 501(c)(4) and other 501(c) organizations are not subject to a similar statutory requirement and do not have to disclose donor information on their Schedule Bs,[142] although they still must report the amount of each substantial contribution. They also must maintain internal records of the names and addresses of their substantial contributors and make those records available for inspection by the IRS on request.[143]

Public Disclosure of Forms 990s and Schedules

The filing organization and the IRS must make the organization's Form 990 and accompanying schedules publicly available.[144] In the case of § 501(c)(3) organizations, however, identifying information (i.e., names and addresses) about the substantial donors reported on the Schedule Bs[145] is not subject to public disclosure, except for donors to private foundations.[146] For all other 501(c)(3) organizations (i.e., public charities), however, the IRS will, and the organizations can, redact donor information on any publicly released Schedule B.[147]

Donor Reporting and Free Speech

Heightened disclosure of donor information at the state level has at times implicated First Amendment free speech concerns.[148] In 2021, the Supreme Court struck down a California

[140] Guidance Under Section 6033 Regarding the Reporting Requirements of Exempt Organizations, 85 Fed. Reg. 31959 (May 28, 2020) (codified at 26 C.F.R. 1, 56). The IRS issued the final rule in 2020 after notice and comment rulemaking. The IRS tried in 2018 to implement substantially the same rules in Revenue Procedure 2018-38. A federal district court set aside the Revenue Procedure for failing to follow Administrative Procedure Act rulemaking requirements. Bullock v. Internal Revenue Serv., 401 F. Supp. 3d 1144 (D. Mont. 2019); *see also* CRS Legal Sidebar LSB10187, *Nonprofit Donor Information Disclosure*, by David H. Carpenter.

[141] 26 U.S.C. § 6033(b); Treas. Reg. § 1.6033-2(a)(2)(ii)(F); Guidance Under Section 6033 Regarding the Reporting Requirements of Exempt Organizations, 85 Fed. Reg. at 31966.

[142] Treas. Reg. § 1.6033-2(a)(2); Guidance Under Section 6033 Regarding the Reporting Requirements of Exempt Organizations, 85 Fed. Reg. at 31966.

[143] Guidance Under Section 6033 Regarding the Reporting Requirements of Exempt Organizations, 85 Fed. Reg. at 31966.

[144] *See* 26 U.S.C. § 6104(b) and (d). The organization is subject to a penalty of $20 per day per return (limited to $10,000) for failing to do so. *See* 26 U.S.C. § 6652(c)(1)(C).

[145] As explained above, other 501(c) organization need not include donor information on the Schedule B.

[146] *See* 26 U.S.C. § 6104(b) and (d); 26 C.F.R. § 301.6104(d)-1(b)(4); Public Disclosure and Availability of Exempt Organizations Returns and Applications: Contributors' Identities Not Subject to Disclosure, IRS, https://www.irs.gov/charities-non-profits/public-disclosure-and-availability-of-exempt-organizations-returns-and-applications-contributors-identities-not-subject-to-disclosure (last visited April 8, 2024).

[147] IRS, Schedule B (Form 990): Schedule of Contributors (2022), https://www.irs.gov/pub/irs-pdf/f990ezb.pdf (last visited April 8, 2024); Public Disclosure and Availability of Exempt Organizations Returns and Applications: Contributors' Identities Not Subject to Disclosure, IRS, https://www.irs.gov/charities-non-profits/public-disclosure-and-availability-of-exempt-organizations-returns-and-applications-contributors-identities-not-subject-to-disclosure (last visited April 8, 2024).

[148] *See, e.g.*, Americans for Prosperity Found. v. Bonta, 141 S. Ct. 2373 (2021); Citizens United v. Schneiderman, 882 F.3d 374 (2d Cir. 2018).

regulation that required organizations to file unredacted Schedule Bs with the state.[149] A congressional action increasing donor disclosure requirements would likely be distinguishable from what California did in that case. First, California was requesting more information than the organizations were required to publicly provide by federal law and which the state did not need in order to carry out its enforcement purposes. California was requesting unredacted Schedule Bs with the names and addresses of major donors, which are kept confidential for most 501(c) organizations.[150] Second, California made filing unredacted Schedule Bs a requirement for registration status, which allows the organization to operate and solicit funds in the state. A congressional action would likely be constitutionally supported by Congress's taxing power and make the additional information a requirement for tax exemption, a voluntary government subsidy. The Court's decision and the United States in an amicus filing discuss this distinction, both citing *Regan*[151] for Congress's power to set conditions of federal tax-exempt status.[152]

[149] Bonta, 141 S. Ct. at 2389. *See also*, CRS Legal Sidebar LSB10621, *Supreme Court Invalidates California Donor Disclosure Rule on First Amendment Grounds*, by Victoria L. Killion (2021).

[150] 26 U.S.C. § 6104(d)(3)(A).

[151] Regan v. Taxation With Representation of Washington, 461 U.S. 540 (1983). *See also*, *supra* page 6–7.

[152] *Bonta*, 141 S. Ct. at 2389; Brief for the United States as Amicus Curiae Supporting Vacatur and Remand, Americans for Prosperity Found. v. Bonta, 141 S. Ct. 2373 (2021); 2021 WL 877687, at *24.

Table 1. Summary of Lobbying Activity Allowed for Section 501(c)(3) and 501(c)(4), (c)(5), and (c)(6) Organizations

<table>
<tr><th></th><th colspan="3">§ 501(c)(3)</th><th>§ 501(c)(4), (c)(5), and (c)(6)</th></tr>
<tr><td>Lobbying Activity Allowed</td><td colspan="3">Limited</td><td>Unlimited, if related to exempt purpose</td></tr>
<tr><td rowspan="4">Tax on organization</td><td colspan="4">If lobbying expenditures are not from a segregated fund, 21% of the lesser of the organization's net investment income or the total amount of "exempt function" expenditures. 26 U.S.C. § 527(f)</td></tr>
<tr><td>501(h) electing</td><td colspan="2">Non-501(h) electing</td><td rowspan="3"></td></tr>
<tr><td rowspan="2">25% of excess lobbying or grassroots expenditures. Id. § 4911</td><td>Public Charities</td><td>Private foundations</td></tr>
<tr><td>5% of lobbying expenditures upon loss of exempt status for making disqualifying lobbying expenditures. Id. § 4912(a)</td><td>20% on any lobbying expenditures. Id. § 4945(a)(1)

Additional tax of 100% of any lobbying expenditures for failure to timely correct. Id. § 4945(b)(1)</td></tr>
<tr><td>Tax on managers</td><td>None</td><td>5% of lobbying expenditures upon loss of exempt status for making disqualifying lobbying expenditures. Id. § 4912(b)</td><td>5% of any lobbying expenditures, limited to $10,000. Id. § 4945(a)(2)

Additional tax of 50% of any lobbying expenditures for failure to timely correct, limited to $20,000. Id. § 4945(b)(2)</td><td>None</td></tr>
</table>

Source: 26 U.S.C. §§ 501(c)(3), (4), (5), (6); 501(h); 527(f); 4911; 4912; 4945; Treas. Reg. § 1.501(c)(3)-1; Treas. Reg. § 1.501(c)(4)-1.

Table 2. Summary of Campaign Activity Allowed for Section 501(c)(3) and 501(c)(4), (c)(5), and (c)(6) Organizations

	§ 501(c)(3)	§ 501(c)(4), (c)(5), and (c)(6)
Campaign Activity Allowed	None	Must not be its primary purpose
Tax on organization	If campaign expenditures are not from a segregated fund, 21% of the lesser of the organization's net investment income or the total amount of "exempt function" expenditures. 26 U.S.C. § 527(f)	
	10% of any campaign expenditures. *Id.* § 4955(a)(1)[a] Additional tax of 100% of campaign expenditures for failure to timely correct. *Id.* § 4955(b)(1)	
Tax on managers	2.5% of campaign expenditures, limited to $5,000 with respect to any one expenditure. *Id.* § 4955(a)(2) Additional tax of 50% of campaign expenditures, limited to $10,000 with respect to any one expenditure, if manager refuses to correct. *Id.* § 4955(b)(2)	None

Source: 26 U.S.C. §§ 501(c)(3), (4), (5), (6); 501(h); 527(f); 4955; Treas. Reg. § 1.501(c)(3)-1; Treas. Reg. § 1.501(c)(4)-1.

a. Campaign expenditures of both public charities and private foundations may be taxed under § 4955. The lobbying and campaign expenditures of private foundations also may be taxed under I.R.C. § 4945, although taxes under that provision are not assessed if the § 4955 tax is assessed on the same expenditure. 26 U.S.C. §§ 4945(d)–(e), 4955(e). *See supra* page 6 for discussion of the § 4945 tax on private foundations. Section 4945 gives the government more options to tax private foundations because what is taxable under § 4945 is broader than that in § 4955. *Id.* §§ 4945(d)–(e), 4955(d). The tax rates in § 4945 are also higher than those in § 4955. *Id.* §§ 4945(a)–(b), 4955(a)–(b)

Table 3. Summary of Donor Disclosure Requirements on IRS Schedule B (Form 990) for Section 501(c)(3) and 501(c)(4), (c)(5), and (c)(6) Organizations

	§ 501(c)(3)		§ 501(c)(4), (c)(5), and (c)(6)
	Private Foundation	**Public Charity**	
Is the amount of significant contributions reported?	Yes	Yes	Yes
Is donor information (i.e., name and address) reported?	Yes	Yes	No
Is donor information released to the public?	Yes	No	N/A (Not reported in the first instance.)

Source: 26 U.S.C. §§ 6104, 6033; Treas. Reg. § 1.6033-2(a)(2)(ii)(F); Guidance Under Section 6033 Regarding the Reporting Requirements of Exempt Organizations, 85 Fed. Reg. 31959, 31966 (May 28, 2020) (codified at 26 C.F.R. § 1).

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