

Public Policy Engagement

During an Election Year

Political elections create both challenges and opportunities for foundations seeking to inform and influence the public policy process. Philanthropic organizations have broad latitude to conduct or sponsor a variety of policy-related activities, and this flexibility includes the ability to promote civic engagement and encourage informed participation in democratic elections. The nature and scope of grantmakers' involvement in these matters, however, are bound by certain legal limitations. Federal law explicitly prohibits charitable organizations exempt from taxation under section 501(c)(3) of the Internal Revenue Code from supporting or opposing candidates for public office and also regulates the degree to which private and public foundations may lobby elected officials, either directly or through grassroots campaigns. Funders organized as 501(c)(4)s (social welfare organizations) face different rules than 501(c)(3) organizations and have greater freedom to engage in political activities (see box).

While health funders have become increasingly adept at differentiating restricted lobbying activities from unrestricted investments in policy advocacy, many remain wary of election-related grantmaking. Unlike federal lobbying rules, the

prohibition against campaign intervention lacks a "bright line" test. The Internal Revenue Service (IRS) determines compliance through a more ambiguously defined analysis of all surrounding facts and circumstances. Foundations often find it difficult to navigate these muddy waters – particularly when confronted by the charged partisan atmosphere that permeates every election cycle.

Such caution is warranted, as the penalties for violations are severe. In contrast to the relatively small financial penalties incurred when public foundations overstep lobbying limits, electioneering violations put a foundation's tax-exempt status at risk. Some foundations have opted to play it safe and steer clear of any policy activity that even remotely relates to, or coincides with, elections for public office. Others are actively exploring legitimate roles for philanthropy before, during, and after an election.

The philanthropic community is acutely aware of laws that restrict lobbying and prohibit electioneering by 501(c)(3) foundations, but many funders do not fully understand the full range of activities that are permissible under federal rules. Although federal tax law prohibits 501(c)(3) organizations from engaging in partisan politics, public and private

RULES FOR 501(C)(4) ORGANIZATIONS

Health foundations organized as social welfare organizations under Internal Revenue Code 501(c)(4) do not face the same restrictions regarding political activity as 501(c)(3) foundations. 501(c)(4) organizations are permitted to participate in some forms of campaign intervention if candidate support/opposition is not the organization's primary function. The Supreme Court decision *Citizens United v. Federal Election Commission* found that all corporations, including 501(c)(4) corporations, may make independent expenditures that encourage the public to support or oppose federal and state candidates. These independent communications may not be coordinated with or made at the request of a candidate or political party. While federal law prohibits corporate entities, including 501(c)(4)s, from making cash or in-kind contributions to any federal candidates, some states permit corporations to make these types of political contributions. Social welfare organizations may be taxed on political activities conducted, with assessments based on either the expenses associated with the political activity or the organization's investment income (whichever is less).

501(c)(3) foundations can work collaboratively with 501(c)(4)s on elected-related activities. Public foundations can make grants to 501(c)(4)s to fund any activity the foundation would be permitted to conduct directly, including voter registration. Private foundations can make grants to social welfare organizations for any charitable purpose; however, grants earmarked for voter registration and lobbying are not permitted. Both public and private foundations can also work in coalitions with 501(c)(4)s if joint activities are nonpartisan in nature.

foundations are not required to suspend their involvement in public policy as soon as political campaigns start gearing up. The following briefly summarizes guidance developed by [Alliance for Justice](#) to educate foundations about the “dos and don’ts” of election-related grantmaking. These guidelines are general in nature and do not represent legal advice. Alliance for Justice provides additional resources on these topics, including information related to state law and technical assistance to help foundations address their specific circumstances and legal questions.

► **Issue Advocacy**—Foundations are permitted to engage in issue advocacy, within relevant lobbying restrictions, regardless of whether or not an election is imminent. Policy advocacy and lobbying activities, however, may not attempt to instruct or influence the audience regarding how they should vote for a particular candidate or group of candidates. Public and private foundations organized under 501(c)(3) may communicate their views on a policy issue, but they should avoid comparing their positions with those held by candidates. IRS guidance indicates that such comparisons may be viewed as campaign intervention even if a particular candidate or political party is not identified by name.

Foundations should be particularly careful about how they discuss high-profile issues, such as health care reform, which may be used by candidates, the media, and others to highlight differences among candidates. Such policy discussions should be consistent with an organization’s established approach to issue advocacy and should not appear to change in tone, style, content, or intensity because of election cycle timing. For example, if a foundation has a record of holding elected officials accountable on a given policy issue, the organization may praise or criticize elected officials for policy decisions regardless of whether or not that official is also a candidate for office. However, if the 501(c)(3) appears to increase its scrutiny of, or attention to, a legislator’s record during an election season, these activities may be viewed as prohibited campaign intervention by regulators. Assessments of policymakers’ actions must focus exclusively on the legislative or executive record of elected officials while serving in office. Foundations may not express views on candidates’ campaign promises or ideological position.

► **Candidate Questionnaires**—Foundations may engage in nonpartisan voter education activities and may use candidate questionnaires and voter guides to raise public awareness of candidates’ views on issues. For example, in

advance of California’s 2010 gubernatorial election, the Lucile Packard Foundation for Children’s Health surveyed major party candidates on their views regarding children’s health needs, including questions that probed how candidates would improve quality of care for children with special health care needs if elected. Surveys were sent to candidates running for Governor, Lieutenant Governor, Insurance Commissioner, Superintendent of Public Instruction, U.S. Senate, and open U.S. House and California Assembly and Senate seats. [Survey responses](#) were later posted on the foundation’s website.

This example demonstrates practices foundations should implement when fielding candidate questionnaires. Questions must be distributed to all candidates, must be posed in an unbiased fashion, must not include pledges, should explore a broad range of relevant topics, and should allow for open-ended (yet word-limited) responses that provide candidates with an equal opportunity to explain their views. All responses should be published in full using an impartial format and should be made widely available to the public. Foundations may also wish to include a disclaimer that explicitly states that the organization neither supports nor opposes any candidate or political party for office. Materials may not demonstrate how candidates’ policy positions compare with those held by the foundation. If some candidates within a field do not respond to the questionnaire, the foundation should exercise caution in deciding whether or not to publish results. If only one candidate responds, questionnaire results should not be published.

► **Candidate Forums**—Public and private foundations may host or sponsor events that feature candidates for public office as speakers or panelists. For example, in 2007 before the Iowa party caucuses, the Center for Community Change, an Atlantic Philanthropies grantee, hosted a forum with the leading democratic presidential candidates focused on a range of issues important to low-income voters, including race and immigration, the economy, predatory lending, and health care. (Republican candidates were also invited, but none accepted the invitation before the deadline.)

Foundations seeking to sponsor candidate forums should be mindful of certain cautions. If candidates are invited to make appearances at a foundation-sponsored event *because* of their candidacy, then no form of political fundraising may occur at the event, and foundations must exercise great caution to ensure that no indication of support for or opposition to the candidates is shown. All candidates for

¹ The rules for candidate appearances and debates are governed not just by federal tax law, but also by federal and state election law. Under federal election law, for instance, at least two candidates must participate and meet face-to-face, among other requirements.

the office in question must be given an opportunity to appear.¹ While candidates may appear at different times during an event (or even at different events), these opportunities must be comparable and not show signs of favoritism.

If candidates are invited to appear at a foundation-sponsored event in some capacity unrelated to their candidacy (such as to share professional expertise or experience), there is no requirement to provide equal opportunities to other candidates. Speakers should be advised in writing, however, that the foundation is prohibited from opposing or endorsing any candidate for public office and the foundation's reasons for extending the speaking invitation should be clearly specified. The foundation should explicitly advise the speaker that his or her candidacy and/or incumbency is not the basis for the invitation and the speaker should not mention his or her candidacy during the address or presentation. Such appearances should not be timed to coincide with an election. The closer an appearance is to the election, the greater the likelihood that it could be interpreted as a form of campaign intervention.

- **Candidate Education**—Foundations may engage in candidate education but must be careful to ensure that these activities do not constitute campaign intervention or violate the organization's lobbying restrictions. Whether information is provided at a foundation's initiative or at the request of a candidate, the foundation should provide or offer to provide the same materials to all candidates in a field in order to avoid the appearance of supporting a particular candidate in his or her campaign. Similarly, a foundation should not prepare new materials in response to a request from a candidate. If materials provided express a foundation's view on specific legislation, the foundation should understand that the provision of these materials to an incumbent represents restricted lobbying activity.
- **Voter Registration**—Public foundations may fund or conduct nonpartisan voter registration drives, but private foundations cannot earmark grant funds for these types of activities unless certain conditions are met. Private foundations can earmark grant funds for voter registration activities only if the grantee meets the requirements of section 4945(f) of the Internal Revenue Code (see box).²

A public charity interested in sponsoring voter registration may seek an advance ruling from the IRS documenting that

SECTION 4945(f) REQUIREMENTS FOR PRIVATE FOUNDATIONS

- Organizations sponsoring or conducting the voter registration must be a 501(c)3.
- Registration activities must be nonpartisan, conducted in five or more states, and occur over more than one election cycle.
- Contributions may not stipulate conditions requiring use in a specific state (or political subdivision) or in a specific election cycle.
- At least 85 percent of the sponsoring organization's income must be directly spent on activities relating to the purpose for which it was organized and operated.
- At least 85 percent of the sponsoring organization's support, other than gross investment income, must be contributed by exempt organizations, the general public, or government units; no more than 25 percent of its support may come from any one exempt organization; and no more than 50 percent of its support may come from gross investment income (interest, dividends, or other investment-related income).

it meets the conditions of section 4945(f). Private foundations may wish to limit earmarked grants for voter registration to grantees that have secured this precertification from the IRS. Grants awards earmarked for voter registration that are not 4945(f)-compliant will be treated as taxable expenditures.

- **Voter Participation**—Public and private foundations may conduct or fund efforts to encourage registered voters to participate in elections (sometimes referred to as "get-out-the-vote" activities). Like voter registration activities, efforts to increase voter participation must be conducted in a strictly nonpartisan fashion. Grantmaking by private foundations related to voter participation, however, is not subject to the section 4945(f) restrictions described above. The audience for both get-out-the-vote campaigns and voter registration drives may be the general public or specific, targeted populations, such as traditionally underrepresented groups or the sponsoring organization's natural constituency. However, targeting efforts may not be based on political or ideological criteria.

² These requirements only apply to earmarked grants. A private foundation may make general support grants to organizations that conduct voter registration activities provided grantees do not exclusively or primarily engage in voter registration and the amount of the award does not exceed grantees expenditures for nonvoter registration activities.

For example, beginning in 2002 The Boston Foundation launched a six-year, multifunder collaborative effort to increase voter registration and participation in communities of color. The Civic Engagement Initiative (CEI) funded established community groups to build relationships with voters and keep them engaged before, during, and after elections. Voter registration in CEI-targeted precincts increased over 33 percent, and voter turnout has consistently outpaced participation rates in non-targeted precincts.

- **Ballot Measures**—Public foundations may support or oppose ballot measures (with the exception of recall votes). Ballot measures are considered a form of direct lobbying because voters act as legislators in enacting or rejecting them. Therefore, activities related to ballot advocacy will be subject to the foundation’s lobbying limits as determined by the “insubstantial part” test or the 501(h) expenditure test. Within these limits, public foundations may publicly endorse or oppose ballot measures, propose ballot measures, participate in ballot measure campaigns, register people to vote, and encourage them to vote for or against a ballot measure. For example, the Health Care Foundation of Greater Kansas City is participating in a coalition-sponsored ballot initiative to raise Missouri’s tobacco tax. Foundations may not support or oppose candidates on the same ballot and should be cautious if a candidate is a leading proponent of a particular ballot measure. Some states regulate ballot measure activities. Resources on state laws can be found at <https://bolderadvocacy.org/resource-library/>.

Private foundations may not make earmarked grants for ballot measure advocacy. They may, however, sponsor objective analyses and public education related to particular ballot measures provided such work does not reflect a bias or demonstrate support or opposition. For example, in 2009 The California Endowment sponsored a panel discussion focused on ballot provisions included in the state’s May 19th special election³. The forum considered the state’s budget crisis and its impact on safety net providers across the state and discussed how the measures on the ballot would address budgetary shortfalls.

- **Activities of Individuals Associated with Foundations**—Trustees, officers, directors, and employees of public and private foundations may engage in the activities of political campaigns if they are acting within their individual capacity as citizens and not as representatives of the foundation. Individual political activities must not utilize foundation resources (for example, facilities, equipment, personnel,

supplies) or be conducted during work hours unless leave time is used. For example, a foundation employee may not wear a political button at a public or private event (such as a professional conference) when acting on behalf of the foundation. Organizations can protect themselves from violations by requiring representatives engaged in partisan activities to clearly indicate that their involvement is not on behalf of the foundation. Foundations should also issue written, timely disavowals of any partisan actions by representatives that have the appearance of being authorized by the foundation.

³ Given the important role ballot measures play in California’s public policy process, Northern California Grantmakers has developed a [guide for private foundations](#) that reviews legal considerations under both federal and California law.