

**Illinois Health and Hospital
Association**

**POLITICAL CAMPAIGN ACTIVITY BY TAX-
EXEMPT HOSPITALS: LEGAL GUIDELINES**

2017

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The legal issues discussed in this guide are complex. Thus, this guide should not be construed as legal advice on specific factual questions. Additionally, while this guide focuses on requirements imposed by the Internal Revenue Code, these activities may also raise questions under federal and state campaign finance laws. Organizations planning to conduct activities discussed in this guide are advised to consult an attorney for specific legal advice.

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Introduction

In state or federal election years, it is important to remember the requirements imposed on the political activities of tax-exempt hospitals by the Internal Revenue Code (“*Code*”). While the Code imposes substantial restrictions, there are meaningful opportunities for hospitals and their supporters to participate in the electoral process.

The purpose of these guidelines is to provide a basic understanding of the practical impact that the *Code* has on the political activities of charitable and educational tax-exempt organizations (“exempt organizations”). It should be remembered that other statutes and regulations also govern political activity – such as state and federal election and campaign laws.

I. The Internal Revenue Code.

Section 501(c)(3) of the Code exempts a charitable organization from federal income tax, and permits it to accept contributions tax-deductible as charitable contributions, so long as it does not “participate in, or intervene in any political campaign on behalf of (or in opposition to) any candidate for public office.” The regulations implement this restriction by stating that “action organizations” do not qualify for exemption under section 501(c)(3). An “action organization” includes one that participates or intervenes, directly or indirectly, in any political campaign on behalf of, or in opposition to, any candidate for public office. Treas. Reg. Sec. 1.501(c)(3)-1(c)(3)(iii). See also IRS Revenue Ruling 2007-41 [www.irs.gov/pub/irs-drop/rr-07-41.pdf].

Importantly, this rule against political activity is an *absolute* prohibition – *any* prohibited conduct could result in loss of exempt status. This is different from the restriction on lobbying activity (i.e., the attempt to influence legislation) which provides that an exempt organization may not have a “substantial” part of its activities devoted to lobbying.

While engaging in political activity is generally prohibited, the IRS has recognized that certain voter education and registration activities are permissible and may even be conducted during an election year. Unfortunately, drawing a bright line between prohibited political activity and permissible voter education is often difficult. As a general matter, the IRS is concerned with the use of the organization’s *name* or *resources* (including funds, facilities, mailing lists, staff) to influence voters.

II. Political Activity – Prohibited.

Determining whether an activity constitutes political activity, and is therefore prohibited is often difficult. Also, a distinction must be made between political activity that is undertaken using the resources of the exempt organization and those activities that are undertaken by individuals using their resources and on their own time, and without acting in the name of the exempt organization.

The following activities, if undertaken using the resources of an exempt organization, are clearly **prohibited**:

A. Endorsements – Prohibited.

Exempt organizations (or individuals acting in the name of the organization) may not make any statements that either directly or indirectly support or oppose any candidate for public office or political party. Thus, such organizations may not encourage votes for or against a candidate or party. Exempt organizations should inform their employees and volunteers about the organization's policy of not supporting or opposing candidates.

B. Financial and Other Support – Prohibited.

Exempt organizations may not provide financial support to any candidate, political action committee (PAC) or political party. (A PAC is a non-candidate political committee whose purpose is to influence the election of any individual to public office.) Additionally, organizations may not make in-kind contributions to candidates, PACs or political parties. In-kind contributions would include:

- Free or below market value mailing, donor or employee lists for fundraising;
- Free or below market value use of office space or facilities;
- Staff time; or
- Organizing volunteers to support a political campaign.

C. Campaign Solicitations – Prohibited.

Solicitation of financial contributions to a candidate, party or PAC *using the resources of the exempt organization* is also prohibited. For example, letters to hospital employees soliciting contributions for a candidate or PAC should be on personal stationery rather than on hospital letterhead.

D. Distributing Campaign Literature – Prohibited.

An exempt organization may not distribute campaign literature that supports or opposes a candidate or political party (e.g., enclosing fliers in employee paycheck envelopes, handing out fliers in the cafeteria.) Additionally, a hospital should avoid permitting the distribution of such literature on hospital premises, since it could invite charges of campaign activity by a disgruntled opponent. However, the distribution of campaign literature on public property adjacent to the hospital (e.g., sidewalk, streets) by independent campaign workers should be permissible, since the hospital does not control access to the public property. Inviting such a distribution, however, could raise complaints about political activity.

III. Voter Education Activities – Permitted.

Nonpartisan voter education activities are generally permissible under the *Code*, since they are not in support of or opposition to a particular political candidate or party. Voter education typically consists of distribution of newsletters or other materials that include candidates' statements or voting records, or the results of candidate polls or questionnaires. The guidelines below describe the general principles for permissible voter education activity.

- *Partisan statements of candidate or party preference are prohibited.* No support or opposition to a candidate or party may appear in written or oral statements.
- *Voter education activities may not be designed to influence voter support or opposition to a candidate or party.* For example, focusing activities in a particular district or a swing area of a district is not permitted.
- *Coordination of activity with a candidate's campaign or a political party, which is intended to influence voters or benefit a candidate or party, is prohibited.* Discussions with campaign staff to arrange a candidate debate or issue briefing are permitted, as are the exchange of questionnaires to solicit statements on policy positions.
- *All voter education materials should include a disclaimer stating that they are not to be construed as the organization's support of or opposition to any candidate or political party.*

However, it is very easy to stray beyond the area of voter education and into the prohibited area of political activity. Whether such materials constitute voter education depends on their content, format, and how they are distributed – materials that might be permissible a year before the election might be ill advised a month before the election. Given the fact specific nature of this subject, hospitals are advised to have knowledgeable legal counsel review the facts and circumstances of their voter education activities.

A. Voting Records – Permitted.

An exempt organization may distribute a voting guide detailing the voting records of incumbent elected officials, provided that the following conditions are met:

- The voting guide includes all incumbents (e.g., all state senators or all state representatives) and does not single out certain legislators or members of one party.
- The guide does not identify candidates for reelection, compare incumbents to their challengers, or relate the voting record to a political campaign.
- It covers a broad range of issues. Clearly, focusing on one issue, such as Medicaid, would be too narrow. However, an analysis of votes on a wide range of

health care issues and related budget legislation should be sufficiently broad. (See below for the rules regarding a more limited distribution.)

- If the document indicates that a legislator's vote agrees or disagrees with the organization's position (e.g., using a plus or minus) or that the organization agrees or disagrees with a legislator's vote, the document is considered "biased." A widely distributed voter guide may not indicate an organization's position on votes. (See below for the rules regarding a more limited distribution.) *In no event may the document include statement's about an incumbent's overall qualification for office.*
- Distribution of the voting guide must not be targeted to areas where elections are occurring or to swing districts or areas that are electorally sensitive.

The IRS has also approved of a more limited distribution of the voting record of incumbents that only addresses issues of importance to the organization and the organization's position on each issue. However, due to both the limited scope of the issues and the fact that the organization made its position on each issue apparent, the following additional conditions were important:

- The voting guide pointed out the limitation of judging the qualifications of an incumbent on the basis of a few selected votes.
- The publication was distributed soon after the close of the legislative session and was not geared towards the timing of any election.
- Most importantly, the distribution of the voting guide was only through the organization's normal newsletter; it did not go beyond its regular readership to distribute the voter guide to a wider audience.

B. Candidate Questionnaires – Permitted.

Preparing a questionnaire to be circulated to *all* candidates running for an office and publishing the responses is permissible under the following circumstances.

- The questionnaire must be sent to all candidates running for the office with a genuine effort made to obtain their responses. If only one candidate responds, the results should not be published because it may appear biased.
- All responses must be published.
- The questionnaire must cover a broad range of issues. The IRS has ruled that concentrating on a narrow range of issues is not permitted. However, it is not clear what would be too narrow. Focusing on one issue, such as Medicaid, would be too narrow. However, an analysis of votes on a wide range of health care issues and related budget legislation should be sufficiently broad.

- Questions should be asked in an unbiased manner, so that there is no clear indication of a right or wrong answer. Any yes-or-no questions should be accompanied by an opportunity for a written response to clarify a candidate's position.
- Responses should not be compared to the exempt organization's positions on the issues.
- Responses should not be edited by the exempt organization.

The results of the questionnaire in an accurate and unbiased manner may be made available to the general public.

C. Nonpartisan Candidate Debates – Permitted.

An exempt organization may invite candidates to a regularly scheduled meeting or hold a special public forum for candidates to express their views and answer questions on issues of interest to the organization, in accordance with the following guidelines.

- All qualified candidates for the office on which the forum is focused must be invited to participate (unless the field is so large that inviting all candidates is impractical – in that case objective, reasonable criteria, such the level of support in independent polling, may be applied to narrow the list of invited candidates). At least two candidates for the office must appear at the forum.
- The forum must address a broad range of issues, that may include issues of interest to the organization and its members.
- Questions of the candidates should be prepared and presented by a nonpartisan, independent panel of individuals knowledgeable about the issues. Since their content cannot be controlled, questions from the audience should not be used in this setting.
- A moderator should be used to ensure that the rules are followed and to clearly state that the views expressed are those of the candidates and not those of the sponsoring exempt organization. Questions should be asked in an unbiased manner so that there is no indication of a right or wrong answer, and the moderator should not make comments that imply approval or disapproval of any of the candidates.
- Each candidate must be given an equal opportunity to speak and answer questions. The candidates should be treated fairly and the moderator should expressly disclaim any preference by the sponsoring organization.
- No campaign literature or materials should be distributed at the debate.

D. Issue Briefings and Candidate Statements – Permitted.

An exempt organization may conduct issue briefings to inform candidates running for office of its position on issues and to encourage them to adopt a similar position. (Meetings with elected officials to discuss issues or legislation outside of the election season do not constitute political activity and are permissible. However, they may constitute lobbying activity, raising other issues under state or federal law, including the Internal Revenue Code.)

- The invitation for the issue briefing must be extended to all candidates running for a particular office and may not favor one candidate over another.
- If, as a result of the briefing, a candidate publishes a statement or position paper on an issue, the candidate may distribute it to the media and general public. The exempt organization however, may not distribute the candidate's statement to either the media, the general public or its membership.

E. Nonpartisan Voter Registration & Get Out The Vote Drives – Permitted.

Exempt organizations may participate in the electoral process in a variety of voter participation projects:

- Publishing articles describing voting rights and urging all individuals to vote.
- Printing and distributing instructional pamphlets on how to work in an election campaign and where to vote on Election Day.
- Providing voter registration materials. Voter registration forms may be distributed to the public by mail, canvassing, at the organization's offices or by maintaining booths at other public locations.
- Providing transportation for voters to get to the polls.
- Urging individuals by phone, street canvassing or public service announcements to remember to vote.

Persons engaged in such activities must not make statements endorsing or opposing any candidate or political party. Avoid any reference, oral or written, to candidates in connection with the drive, unless all candidates are included without favoring any candidate over any other. Avoid any reference to political parties except for noting the party affiliation of any candidates named.

Registration or get out the vote activities must not be coordinated with or designed to assist a candidate or party. No formal or informal coordination with a candidate, party or PAC is permitted.

Written materials should include a disclaimer of any preference or support for a candidate or party, such as: "This voter education project sponsored by _____ is nonpartisan and does not reflect endorsement of any candidate or political party."

Voter registration materials or transportation to the polls must be provided to all individuals without regard to their political views.

These activities must not be targeted at areas because of a particular voter preference or party affiliation.

Subject to the campaign finance laws, lists of registered voters may be given to any candidate, political party or PAC. However, they must then be given on a non-preferential basis to all candidates and parties. Also, if the organization typically charges for such lists giving it to a candidate or political committee for free may constitute an in-kind contribution – even if it is given to all candidates.

When engaging in voter registration or absentee ballot drives, please remember that such activity is regulated by state and local law.

IV. Individual Political Activity – Permitted.

While section 501(c)(3) limits the political activity of an exempt organization, it does not restrict the political activity by a hospital's employees, directors, or volunteers during non-working hours, leave without pay or accrued vacation time. An individual may participate in political activity, so long as he or she does not act or speak in the name of the organization while doing so.

Additionally, employees should not use hospital facilities, equipment, or personnel to carry out their individual political activities. For example, if an employee uses the hospital's copy machine, fax machine, phones or office supplies for his or her political activity, even if done during nonworking hours, this could pose a problem for the hospital. Likewise, a hospital executive should not use his or her secretary to assist with the executive's personal political activity. Finally, a hospital should not direct or organize its employees or volunteers to work on behalf of a candidate.

Within these guidelines, an individual would be able to:

- Endorse or oppose a candidate;
- Hold a fundraiser;
- Solicit contributions to a PAC on non-work time using personal resources (e.g., personal letterhead, envelopes, stamps, etc.); and
- Host a campaign gathering.

For purposes of identifying an individual, a person may be acknowledged or introduced using his or her affiliation with an organization. However, statement should always be included that the affiliation with the exempt organization is included for identification purposes only. For example:

John Smith
Acme Hospital (for identification purposes only)

Finally, if a hospital executive communicates with hospital employees on a political matter (e.g., seeking a contribution to a PAC), the executive should make it clear that he or she is speaking as a private person and not as a representative of the hospital.

V. Use of Exempt Organization's Resources for Political Activity – Permitted.

Certain resources of an exempt organization may be used for political purposes, provided certain guidelines are followed. In general, these resources must be made available to all candidates on a non-preferential basis and for fair market value.

A. Mailing Lists – Permitted.

An exempt organization may rent or exchange its mailing list with political candidates as long as it complies with the following requirements:

- The list must be available upon request to all candidates regardless of party affiliation.
- The organization may arrange the rental or exchange of the list through an independent list broker or directly with the candidate's campaign. If obtained through the candidate directly, the organization should alert other candidates in the race of the availability of the list.
- The organization must receive fair market value for its list and the rate must be consistent for all transactions.
- The organization should make sure that the rental or exchange of the list is in accordance with applicable campaign finance regulations.

B. Rental of Facilities – Permitted.

An exempt organization may make its facilities (e.g., meeting rooms, office equipment) available to candidates on a nonpartisan, non-preferential basis as follows.

- The organization regularly rents out its facilities to other individuals or groups.
- Fair market value is charged and received for the use of the facilities.

C. Use of Publications – Permitted.

An exempt organization may print in its newsletter or other publication, articles written by candidates concerning current issues. When doing so, the exempt organization can take one of two paths.

First, it may treat the opportunity as a written form of candidate debate. In that case:

- All candidates must be invited to submit an article. The candidates must be given equal space and location in the publication. Even if all candidates were invited to submit an article, if only one candidate does so, it should not be printed to avoid appearing partisan.
- No editorial comment should appear with the articles.
- No articles by the exempt organization agreeing or disagreeing with the candidates' views should accompany the candidates' articles.
- The organization should include a statement with the articles that it does not support or oppose any candidate or party.

Second, the exempt organization may print an article written by a candidate *in another capacity*, such as the candidate's capacity as a sitting officeholder. In that case the exempt organization is under no obligation to publish articles from that candidate's competitors; however, the article must not mention the upcoming election or note or advocate for the candidacy of the author.

Use extreme caution if asked to publish an article by a federal candidate. So called "coordinated communication" rules could result in attribution of the costs of such a publication as an in-kind contribution from the organization (which could be a prohibited contribution).

VI. Penalties.

As discussed initially, the ban on political activity by exempt organizations is absolute – even a minimal violation could result in loss of exempt status, which would also result in the loss of deductibility of donations and favorable bond financing rates. In addition, the Internal Revenue Code imposes excise taxes on organizations that engage in prohibited political activity, and on organization managers that agree to the prohibited expenditure.

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