

# CLIENT ALERTS

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## It's Election Season Again (Not That You Could Avoid it!) and Time to Revisit the Rules on Tax-Exempt Organizations Participating in Public Policy and Political Activities

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In an election year, it's worth nonprofit organizations reviewing the rules about public policy, lobbying, and political activities. Tax exempt nonprofit organizations must be careful about the types of public and political activities they undertake, but a nonprofit organization doesn't have to give up the ability to take positions on public issues or to take action to influence public policy merely because of its exempt status. Federal tax limits on the political activities of tax-exempt organizations are, in fact, often narrower than many people lawyers think. Tax-exempt organizations have the right to engage in public debate and make their positions on important issues known, and even 501(c)(3) charities, which are the most heavily regulated, may engage in some political activities that further their tax-exempt, charitable purposes.

The main restrictions on the political activities of tax-exempt organizations involve lobbying (trying to convince Congress or a legislature to enact or reject specific legislation) and intervening in political campaigns (supporting or opposing candidates for election to office). But even when these restrictions apply, they leave a great deal of room for nonprofit organizations to participate in the public policy activities. Many tax-exempt organizations engage in non-partisan activities such as sponsoring candidate debates, sponsoring public officials to speak to their conventions or other gatherings, issuing position papers or legislative policy agendas, or educating the public about current events and issues.

Tax-exempt organizations, especially charities, must still observe restrictions that do not apply to other organizations or individuals. Part of the difficulty exempt organizations face is that these restrictions are very subjective—the IRS rules apply a “fact and circumstances” test, and there are terms such as “no

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substantial part of activities” that can come into play.

Over the years, many nonprofit organizations and legal professionals have criticized the IRS’s approach as being too vague and too difficult to properly enforce. A number of national exempt organizations have been advocating for clearer rules, and in late 2013 the IRS first proposed some regulations for certain types of organizations. However, the proposed regulations met with much criticism and opposition, and in 2015 the IRS withdrew them.

So exempt organizations are left with trying to deal with the current subjective standards. To do so, it’s important to distinguish among education and advocacy for policies (generally permitted); lobbying for or against specific legislation or referenda (which may be permitted but is more closely scrutinized)<sup>1</sup>; and directly engaging in campaign activities or endorsements (never permitted for charities, but may be possible for other types of exempt organizations so long as they are not “primarily” engaged in election campaigning.). Because the rules may apply differently to different types of tax-exempt organizations, the first step is to understand what category of tax exemption is involved. The most common categories are under Sections 501(c)(3), (c)(4), (c)(5), and (c)(6), but there are many others.

Now is a good time for tax-exempt organizations to review their policies and practices. Organizations that know and understand the rules of the road can actively participate in the political process without undermining their tax exempt status. In our next client alert, we will lay out some simple rules that tax-exempt organizations (including charities, which are the most strictly regulated) can follow if they plan to be politically active.

If you have questions regarding the rules on lobbying and political activity for your tax-exempt organization, please contact your regular Butzel Long attorney, a member of the Butzel Long Nonprofit Organizations group, or the authors of this alert.

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<sup>1</sup> Nonprofit organizations that lobby are sometimes required to register as lobbyists, but these restrictions don’t usually apply to most nonprofit organizations. However, other rules may apply to organizations that receive governmental grants or funding. If your organization hires a lobbyist, pays an employee to influence the government, makes significant expenditures to influence government decisions, or receives grants or other assistance from the government, you should consult with counsel to determine what other restrictions apply to your organization.

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