

# advocacy essentials

LGBTQ TOOLKIT



## About Alliance for Justice and Bolder Advocacy

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**Alliance for Justice (AFJ)** is a national association of more than 130 organizations united by a commitment to a fair, just, and free America, where everyone has equal access to justice and can fully participate in our democracy. Learn more at [afj.org](https://afj.org).

For over 35 years, AFJ has promoted active engagement in the democratic process by giving nonprofits and foundations the confidence to advocate effectively. Within AFJ, **Bolder Advocacy** helps foundations and their nonprofit grantees understand the complex rules governing advocacy and advance their mission. Bolder Advocacy offers resources, best practices, tools, coaching, and Technical Assistance Hotline (866-NP-LOBBY). Bolder Advocacy also works to protect and expand the right of nonprofits and foundations to advocate. Learn more at [bolderadvocacy.org](https://bolderadvocacy.org).

## About this resource

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This publication, designed for LGBTQ groups, is a short overview of the laws and regulations that apply to 501(c)(3) public charities when they engage in lobbying and advocacy, including how to shape advocacy during an election time. This resource should be considered an overview of the rules that apply to advocacy. For more in-depth information, please visit Bolder Advocacy's [website](https://bolderadvocacy.org) where you can find an extensive library of resources, including fact sheets and in-depth publications.



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# What is Advocacy?

The term “advocacy” encompasses a broad range of activities intended to influence public policy. From research and public education to lobbying and voter education, advocacy is the number one way nonprofits can advance the issues they care about and help bring about systemic, lasting change.

Effective advocacy enables members of the LGBTQ community to shape the public discourse on all issues of public life surrounding sexual orientation and gender identity.

## How is advocacy different from lobbying?

Lobbying is only one kind of advocacy. There are many avenues of advocacy in which nonprofits can engage that do not constitute lobbying. Federal tax law defines lobbying only; much public policy work does not meet the definition of lobbying.

### *Assess: Advocacy Capacity Tool (ACT)*

Use our [Advocacy Capacity Tool \(ACT\)](#) to assess your advocacy skills, identify gaps and strategic opportunities, focus resources to strengthen your organization and achieve the best results possible.

## What kind of work goes into advocacy?

Want to know what advocacy looks like in the field? Here are some definitions and examples from LGBTQ organizations.

### *Organize: Build power at the base.*

[Advocates for Youth](#) trains and supports over 2000 youth activists each year to help them reach their peers. They provide them with information and advocacy on inclusive reproductive and sexual health issues, including an LGBT inclusive sex ed curriculum for schools to use.

### *Educate legislators: Provide information on issues.*

The #BornPerfect advocacy campaign lead by the [National Center for Lesbian Rights](#) was created to secure legislation protecting LGBTQ youth from conversion therapy in all 50 states. The campaign created a toolkit for lawmakers and activists, state by state tracking of laws and legislation, curated stories from survivors, and even engaged in impact litigation defending laws that ban conversion therapy.

### *Educate the public on their legal rights*

The [National Center for Transgender Equality](#) published a [factsheet](#) for students, parents, and teachers on students’ rights under Title IX, that prohibits sex discrimination in schools that receive public funds. They also maintain a state specific interactive [site](#) explaining the requirements for updating one’s name and gender marker documents.

### *Educate the public on legislative initiatives and introduce the community to lawmakers*

The Human Rights Campaign published a video explaining the need for and statistics surrounding public support for the federal Equality act. You can see the video [here](#).

[Equality Illinois](#) planned an Advocacy Day complete with lobbying training, transportation, box lunch, and meetings with state lawmakers. Depending upon the content of the meetings, this activity may constitute lobbying. Equality Illinois is a 501(c)(4) organization. But educational lobbying efforts can be 501(c)(3) permissible.



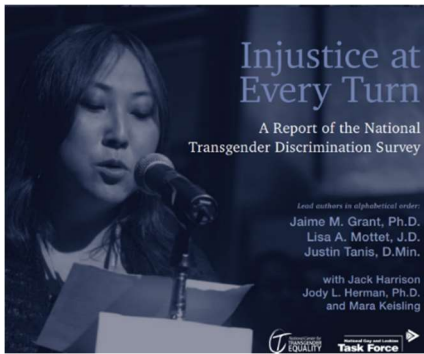
### *Educate the public on where elected officials stand on the issues*

The Human Rights Campaign published a [blog](#) post [about](#) where the Trump administration stands on LGBTQ issues, and a [Congressional Scorecard](#) after the latest Congressional session. Both communications are permissible if 501(c)(3) organizations follow certain precautions.

### *Research: Produce resources that reflect the real story of our community*

The National Center for Transgender Equality conducted and published a [Transgender Discrimination Survey](#). The survey was full of facts and figures to inform the public, media, activists, judges, and policymakers on the well-being, discrimination, and violence faced by transgender individuals in the US. Activists have been successful in using these statistics to persuade judges to seal the records of clients seeking a name or gender change to protect their safety from an increased risk of physical harm due to their identity.





### ***Mobilize a rally: Mobilize for your cause.***

Out Youth in Austin, TX, created a campaign called #TakeMyHandTexas and a button that allies could wear to let transgender youth know the wearer would accompany the youth into any gendered space, or even out for a cup of coffee. This campaign has enabled allies to join the cause and start conversations.



The Transgender Law Center has created a Twitter campaign #ACAPositive to bring awareness to discussions on transgender members living with HIV and the life and death consequences of access to health care.

### ***Regulatory Advocacy: Take action at the agencies.***

To ensure all voices have a role in shaping health care plans, [Raising Women's Voices](#) provides funding and technical assistance to place women and LGBT members of the community on policy making panels for ACA marketplace health plans. Their main focus has been to ensure health plans explicitly do not discriminate against women and LGBT patients and have adequate, culturally competent, inclusive providers in each network. Although RWV is a for-profit corporation, they are certified socially responsible by a group of nonprofits, and this type of activity is 501(c)(3) appropriate.

### ***Voter Outreach: Voter registration drives, canvassing, GOTV activities, voter protection activities, candidate questionnaires, debates, and forums.***

[The National Center for Transgender Equality](#) has created a Voting While Trans Checklist to

provide resources to transgender voters about voting and name/gender markers on identification documents and poll lists.

### ***Trainings and Conferences: Host a webinar or in-person training/conference.***

[Beyond Bold and Brave](#) was founded to increase the visibility of Black/African Descent Lesbians in our communities, and each year hosts an annual conference for community members and allies. A conference presents unique opportunities to engage supporters, network, and partner with coalitions or sponsors to help offset the cost of the event and support the important work your organization conducts.

### ***Write an op-ed: Share our expertise on the issue with media***

NCTE and The Leadership Conference jointly wrote an [op-ed](#) on President Trump's judicial nominees and the threat they pose to LGBT equality.

### ***Litigation: Win in court for your community***

The LGBT Bar Association updates followers on legal victories through tweets and their website.



NCLR and GLAD filed a [lawsuit](#) challenging the President's executive orders banning transgender members from serving in the military.

### ***Draft a petition or create a campaign: Demand change by lawmakers or companies.***

MoveOn is circulating a [petition](#) to ask Congress to support the Equality Act, which would add the terms "gender identity" and "sexual orientation" into federal laws that protect against discrimination in housing, public accommodations, employment, education, federal funding, credit decisions, and juries. MoveOn Civic Action is a 501(c)(4) organization, but petitions can be 501(c)(3) permissible too.

[The Family Equality Council](#) has created an Inclusive Schools campaign to ensure inclusive schools for LGBTQ families. To further their campaign, they have created the following tools for their members to use within their communities: Back to School Tool; Creating Transgender Inclusive Schools manual; Letter templates to Elementary and Middle/High Schools for families to raise the issues surrounding inclusive schools; and Book Nook, a resources to recommend LGBTQ inclusive books within school classrooms and libraries.

### ***Lobbying: Advocate for or against specific legislation or ballot measures***

*Working on Ballot Measures* – In April 2018, voters in Anchorage, Alaska rejected a discriminatory referenda that would prohibit transgender residents and visitors from existing in public spaces. The key to the campaign's success was to center transgender individuals at the heart of the campaign in leadership, ads, and messaging. A coalition of nonprofits, individuals, and businesses joined together to form Fair Anchorage. You can read about their advocacy success [here](#).

*Working on Judicial Nominees* – Equality Texas Foundation (a 501(c)(3)) and their coalition partners won a huge victory for all Americans when their research and advocacy brought about the withdrawal of President Trump's nominee, Jeff Mateer, to the federal bench. An example of their advocacy tweets can be seen below.



Follow

For Immediate Release: Federal Judge Nominee Unfit for Federal Bench – Mateer Targets Innocent Children with Inflammatory Remarks That Prove He is Incapable of Being Fair and Impartial [bit.ly/2AHdiZX](https://bit.ly/2AHdiZX)



8:44 AM - 14 Nov 2017

*Lobby for or against specific bills* – [HRC](#) has partnered with other equality groups around the country to launch a campaign to pass legislation banning conversion therapy in every state. The campaign consists of educating the public, lawmakers, and actively lobbying. Hawaii just became the 12<sup>th</sup> state to pass [legislation](#).

# HOW CAN YOUR ORGANIZATION GET MORE INVOLVED IN ADVOCACY?

## Educate

Inform your organization's supporters about the current policies and problems affecting your community.

## Evaluate

Evaluate your organization's mission and goals, and examine whether current programs involve advocacy as a means to address problems or grievances in the community. If not, how could advocacy play a larger role in your organization's programs?

## Collaborate

Work in coalitions with groups whose vision and goals resonate with yours. Together, with pooled staff and resources, parties in the coalition will be better equipped to take on campaigns and work for change.

## Assess

Use AFJ's free online [Advocacy Capacity Tool](#) to assess your advocacy skills, identify specific gaps and strategic opportunities, focus resources to strengthen your organization, and achieve the best advocacy results possible.

# Lobbying

## Influencing local, state, and federal legislation

There are times when lobbying is essential in order to create policy change. Under federal law, lobbying generally consists of communications that are intended to influence specific legislation. Nonprofits can and should lobby, but 501(c)(3) public charities need to stay within their annual lobbying limits.

## Public charities *can* lobby

Much advocacy work, including efforts to influence executive branch actions, does not constitute lobbying. Yet contrary to popular misconception, 501(c)(3) public charities—including houses of worship and community foundations—can lobby. In fact, the Internal Revenue Service has stated that public charities “may lobby freely” so long as lobbying is within generous specified limits.

How much lobbying your organization can engage in depends on the test it uses to calculate its limit - the optional “501(h) expenditure” test or the default “insubstantial part” test.

## WHAT COUNTS AS LOBBYING?

Federal tax law controls how much lobbying 501(c)(3) organizations can do. Public charities measure their lobbying under either the insubstantial part test or the 501(h) expenditure test. While lobbying is not as clearly defined under the insubstantial part test as it is under the expenditure test, your organization can still lobby. The following provides an overview of how lobbying is defined for organizations that measure their lobbying under the 501(h) expenditure test.

### DIRECT LOBBYING

Communication with a legislator that expresses a view about specific legislation

### GRASSROOTS LOBBYING

Communication with the public that expresses a view about specific legislation and includes a call to action

In order for an action to be considered direct lobbying or grassroots lobbying it must contain the elements below. It is not lobbying if one or more of the required elements is missing. Understanding the meaning of each element is key.

#### Communication

A conversation (in person or by phone), letter, email, fax, social media post, or other creative mechanism to convey a message.

#### Legislator

A member of a legislative body or her staff. In addition, executive branch officials who participate in the formulation of legislation are considered legislators (such as the governor or mayor when vetoing, signing, or proposing a bill). Members of administrative bodies, however, such as school boards, housing authorities, and other special purposes bodies, whether elected or appointed, are not considered legislators.

#### Public

Anyone but a legislator or member of an organization. Communications to an organization's members are treated more favorably, so a

communication to an organization's members that urges them to contact legislators to express a view about specific legislation is considered to be direct lobbying. For this purpose, a member is someone who has given more than a small amount of time or money to the organization.

#### Specific Legislation

A bill or resolution that has been introduced in a legislative body or a specific proposal to solve a problem. Specific legislation includes budget appropriations and taxes, and attempts to influence the confirmation of judicial and executive branch nominees. A proposal may qualify as specific legislation even if it has not yet been introduced, been written down, or even fully fleshed out. Specific legislation does not include rulemakings or promulgation of regulations, executive orders, litigation, or attempts to enforce existing laws.



### **Call to action**

A specific means of encouraging the communication's recipient to take lobbying action. A call to action must comprise one of the following actions: 1) Tell the recipient to contact a legislator. 2) Provide information on how the recipient can contact his legislator, such as providing the phone number or address. 3) Provide a mechanism for enabling the recipient to contact his legislator, such as a postcard, petition, or email form. 4) Identify a legislator who will vote on the legislation as being opposed to or undecided about the organization's view on the legislation, a member of a legislative

committee who will vote on the legislation, or the recipient's legislator.

Ballot measure activity is considered direct lobbying. Although ballot measures, such as referenda, bond measures, and ballot initiatives, are determined at the voting booth, efforts for or against them are considered direct lobbying, not impermissible electoral activity. Efforts aimed at convincing the public to support or oppose ballot measures are direct lobbying since the voting public serves as the legislature.

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## **LOBBYING EXCEPTIONS**

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There are four statutory exceptions to these definitions. Any communication that meets one of these exceptions does not count as lobbying:

### **Nonpartisan analysis, study, or research.**

The communication must provide a full and fair exposition of the underlying facts and it must be made available to the general public, a segment of the general public, or to governmental bodies or employees. The document should provide enough information to allow readers to draw their own conclusions about the issue, even if the report itself contains a specific conclusion. For example, an organization might write a paper discussing the need for access to healthcare by low-income children, which might conclude with a recommendation for increased funding for state child health insurance.

bill, without counting the expenses toward the organization's lobbying limits.

### **Self defense.**

The communication must be with a legislative body regarding possible actions of that body which could affect the organization's existence, powers, duties, tax-exempt status, or the deductibility of contributions to the organization. For instance, proposed legislation to eliminate the tax-deductibility of contributions to 501(c)(3) organizations would fall within the so-called "self defense" exception.

### **Technical assistance.**

The communication must be in response to a written request by a legislative body, committee, or subcommittee (not an individual legislator), and it must be made available to all members of the requesting body. As an example, the executive director of a public charity, in response to a written request from the chair of a legislative committee, could testify in support of a ban on conversion therapy

### **Examinations and discussions of broad social, economic, and similar problems.**

Communications on general topics which are also the subject of specific legislation must not refer to specific legislation or directly encourage the recipients to take action.

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## **Maximizing your lobbying limit**

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Most organizations will be able to engage in more lobbying by electing to measure their lobbying under Section 501(h) of the Internal Revenue Code.

### **The 501(h) expenditure test provides more generous lobbying limits than the insubstantial part test.**

It defines a clear dollar amount that the electing public charity may spend on lobbying, and

lobbying limits vary depending on the size of the

organization's annual expenditures.

Organizations with overall expenditures of \$500,000 or less per year, for example, can spend as much as 20% of their budget on lobbying.

***An electing public charity may spend up to a quarter of its overall lobbying limit on grassroots lobbying or up to the entire amount on direct lobbying.***

For example, if your organization's overall lobbying limit is \$100,000, you could spend up to \$25,000 on grassroots lobbying and then \$75,000 on direct lobbying or alternatively spend the full \$100,000 on direct lobbying.

# Lobbying under the 501(h) expenditure test

The 501(h) expenditure test provides more generous lobbying limits than the insubstantial part test. It defines a clear dollar amount that the electing public charity may spend on lobbying, and lobbying limits vary depending on the size of the organization’s annual exempt purpose expenditures. Organizations with overall expenditures of \$500,000 or less per year, for example, can spend as much as 20% of their budget on lobbying.

You can use the chart below or our [online calculator](#) to determine your organization’s lobbying limit.

cannot take advantage of the 501(h) expenditure test.

**Complete Form 5768 to make the 501(h) election.**  
A 501(c)(3) public charity may use the 501(h) expenditure test (commonly referred to as “making the 501(h) election”) by filing the simple Form 5768 with the IRS. All you need is your organization’s basic information, such as address and employer identification number. You only have to file once. Complete the form and the election applies retroactively to the first day of the tax year in which the form is filed. It also applies to all subsequent years. Don’t worry – if you ever want to go back to the insubstantial part test, all you have to do is send in Form 5768 again to revoke the 501(h) election for the next tax year.

Organization’s Expenditures	Overall Lobbying Limit
\$500,000 or less	20%
\$500,000 to \$1 million	\$100,000 + 15% of excess over \$500,000
\$1 million to \$1.5 million	\$175,000 + 10% of excess over \$1 million
\$1.5 million to \$17 million	\$225,000 + 5% of excess over \$1.5 million
Over \$17 million	\$1,000,000

An electing public charity may spend up to a quarter of its overall lobbying limit on grassroots lobbying (such as urging the general public to communicate the organization’s position on legislation to legislators) or up to the entire amount on direct lobbying (such as telling legislators or their staff to support or oppose legislation, or urging the organization’s members to do so). For example, if your organization’s overall lobbying limit is \$100,000, you could spend up to \$25,000 on grassroots lobbying and then \$75,000 on direct lobbying or alternatively spend the full \$100,000 on direct lobbying.

Under the 501(h) election, organizations only consider their lobbying expenditures. Cost-free activities, such as volunteer time, do not count against the organization’s lobbying limits because the organization does not pay for these activities.

You may also allocate the costs of certain activities that have both lobbying and non-lobbying purposes under the 501(h) election. For example, if an executive director flies to Washington, DC, for a four-day trip, of which three days will be spent at an educational conference while the fourth day is spent lobbying, it is usually appropriate to count 25 percent of the costs the organization paid for travel expenses as lobbying costs.

Remember: churches and other houses of worship

It’s good practice to keep a copy of the completed Form 5768 for your records so that 5, 10, or 20 years from now, it’ll be easy to confirm the lobbying test under which your organization is operating.

# Lobbying under the insubstantial part test

The insubstantial part test is the default test that applies if the public charity does not make the affirmative step of electing to use 501(h) —and to churches, which are unable to use 501(h). While the 501(h) election provides a clearer standard for measuring lobbying, public charities that have not taken the 501(h) election should not be deterred from lobbying.

**What is considered an “insubstantial” amount of lobbying?**  
The insubstantial part test requires that “no substantial part of a charity’s activities...be carrying on propaganda or otherwise attempting to influence legislation.” Therefore, a charity’s lobbying must be an “insubstantial” part of its overall activities. The IRS has provided no absolute guidance on how much lobbying is “substantial.” A 1952 federal court

decision states that 5% of an organization's "time and effort" was an insubstantial part of its overall activities. Most tax practitioners generally advise that charities can safely devote 3-5% of their overall activities toward lobbying.

As an example, a 501(c)(3) public charity not normally involved in influencing legislation wishes to sign onto a letter that endorses specific legislation (e.g., support LGBTQ Data Inclusion Act). This activity would be considered lobbying, but because the time spent by the organization to sign onto the letter would not be a substantial part of its overall activities, it is permissible to engage in this type of policy advocacy.

### ***The lobbying limit imposed by the insubstantial part test is based on an organization's overall activities, not just its expenditures.***

The IRS considers not only the funds spent on lobbying by the organization, but will look at factors such as the amount of time and energy devoted to legislative matters regardless of cost. Volunteer lobbying efforts on behalf of the organization will count towards its lobbying limits.

For example, a 501(c)(3) public charity that provides health screenings to LGBTQ individuals is concerned about proposed cuts in the state budget to key health care programs. The 501(c)(3) decides to organize a bus trip for its volunteers and clients to the state capitol to protest the budget cuts. Under the insubstantial part test, the time of the volunteers and clients, the cost of chartering the bus, the cost of meals provided, any additional costs of the trip, and any staff time associated with organizing and attending the trip would be lobbying.

The organization should make a reasonable estimate of the total number of hours that volunteers devote to the organization and then allocate such time between legislative and non-legislative activities to determine the percentage of overall volunteer activities devoted to lobbying. Organizations probably need only track efforts by those who volunteer in some type of organized capacity.

### ***What is considered lobbying?***

Guidance as to what constitutes lobbying under the insubstantial part test is vague. An organization will be regarded as lobbying if it:

- » ***Contacts members*** of a legislative body (local, state, federal, even international) for the purpose of proposing, supporting, or opposing legislation, OR
- » ***Urges the public*** to contact members of a legislative body for the purpose of proposing, supporting, or opposing legislation, OR
- » ***Advocates for the adoption*** or rejection of legislation, OR

» ***Communicates with the general public*** and reflects a view on a ballot initiative.

### ***What is not considered lobbying?***

Communications that discuss only broad principles, as opposed to specific legislation, would not count as lobbying. For example, it would probably not be considered lobbying to run an ad that says "Minnesotans care about protecting transgender students privacy. Congressman Taylor, will you join us?" While 501(c)(3)s are prohibited from supporting and opposing candidates for public office, they can criticize or praise incumbents for their official actions or votes, as long as they follow certain guidelines.

### ***What kind of lobbying records must a nonprofit keep?***

Schedule C of the Form 990 requires charities using the insubstantial part test to report whether the charity lobbied via volunteers, paid staff, advertisements, mailings (to members, legislators, or the public), published statements, grants to others for lobbying, direct contact with legislators, public events, or other means and to report any expenditures for each such activity. Charities using the insubstantial part test must also provide a "detailed description" of any lobbying activities that fall outside of those categories, which the form's instructions clearly state "should include all lobbying activities, whether expenses are incurred or not." Charities need to keep records that are sufficient to report their activities.

## **When does your activity become lobbying?**

If your organization is a 501(h) electing charity, IRS regulations clearly state that costs, such as transportation, photocopying, and other similar expenses, spent in support of lobbying are expenditures for lobbying communications. This includes all staff time and overhead costs that support lobbying.

### ***When does the clock start ticking under the 501(h) election?***

You must begin measuring your lobbying activity when the primary purpose of your preparation or research is to engage in lobbying activity.

**Example:** An organization researches, prepares, and prints a safety code for electrical wiring. The organization sells the code to the public where it is widely used by professionals in the installation of electrical wiring. A number of states codify all, or part, of the code of standards as mandatory safety standards. On occasion, the organization lobbied state legislators for passage of the code of standards for safety reasons.

Because the primary purpose of preparing the code of standards was the promotion of public safety and the standards were specifically used in a profession for that purpose, separate from any legislative requirement, the research, preparation, printing, and public distribution of the code of standards is not an expenditure for a lobbying communication (26 CFR 56.4911-2 – Example 2).

**Example:** The same organization prepares the safety code primarily to have it codified in the state legislature. All of the preparation costs, including staff time spent on research, transportation costs, photocopying, and other similar expenses, incurred in lobbying state legislators for passage of the code of standards into law are reportable direct lobbying expenditures.

#### **When does the clock start ticking under the insubstantial part test?**

Attempting to influence legislation does not necessarily begin at the moment the organization

first addresses itself to the public or to the legislature. All of the facts and circumstances are considered when determining when preparation and research is considered in support of lobbying communications.

Time spent in discussing public issues, formulating and agreeing upon positions, and studying them in preparation of adopting a position all count as lobbying.

**Example:** An organization is active in promoting legislation on education and health issues. The time spent on the lobbying activity counts towards the “insubstantial part” of the organization’s activities. All time spent preparing publications that indicate a position on legislation are included as lobbying preparation. Prior statements or articles setting forth the organization’s general positions that do not relate to any specific legislation is not included as lobbying.

## **LOBBYING DOS AND DON'TS**

Most lobbying meetings are short—perhaps only 15 minutes or less. Be prepared to get the most out of your meeting.

### **DO**

#### **Expect unpredictability.**

If you are lobbying on a day the legislature is in session, don't be surprised if a legislator's schedule changes. Offer to meet the legislator or staff member at a different time or place if an important meeting gets changed.

#### **Have a plan for the meeting.**

You should have a lobbying plan before you meet with a legislator or their staff. Decide in advance who will speak on which topics. Don't allow yourself to be diverted from the purpose of the meeting.

#### **Listen.**

At a lobby visit you are there to get an answer to your ask, and to learn about the legislator's thoughts about your bill or issue. Listen to what the legislator has to say. You can often learn valuable information about the status of a bill.

#### **Have the solution.**

Is the purpose of your meeting to make the legislator aware of a problem? If yes, your position will be significantly stronger if you also can propose a solution. You could draft amendments to a law or proposed legislation, or draft a new law or a resolution that the legislator could consider introducing.

### **DON'T**

#### **Forget your “ask.”**

Every lobby meeting should have an ask. Do you want the legislator to support a bill? If yes, ask for their support. You can also ask a legislator to sponsor or co-sponsor a piece of legislation, to talk to his or her colleagues about supporting the bill, or for help in getting it on a committee or floor agenda.

#### **Overlook the importance of staff.**

Legislative staff act as the eyes and ears for the legislator. Staff will often have more expertise in an issue area than the legislator, especially when legislators are term-limited and only work on an issue temporarily. If you meet with staff, ask them where the legislator stands on the issue and what concerns the legislator may have on it.

#### **Make up answers.**

No one knows everything. If the legislator asks a question you cannot answer, say you will follow up with the information, or offer to connect the legislator with an expert who can answer their question. Either offer leaves a great opening for a follow-up visit.

**Get more lobbying do's and don'ts at [bolderadvocacy.org](http://bolderadvocacy.org)**



# Advocacy in an Election Year

Candidates for public office sometimes say things that are incorrect, or with which nonprofits disagree, and nonprofits may wish to set the record straight. While 501(c)(3) organizations may continue to engage in education and advocacy to promote their issues during

the election season, they are strictly prohibited from supporting or opposing candidates for public office. So how can 501(c)(3) organizations respond to candidates or political parties and remain nonpartisan? By being very deliberate and careful with their statements.

## COMMENTING ON A CANDIDATE OR PARTY IN THE CONTEXT OF AN ELECTION

501(c)(3) organizations that want to comment on candidate or political party statements need to be careful. The IRS has provided little guidance on how to handle such communications. A 501(c)(3) should have a good reason to speak up in these situations—like correcting a factual error—and the subject should be one that is important to the organization.

Below is a short list of what representatives of a 501(c)(3)s should do.

- » *Focus* on what was said (the issue), not who said it (the candidate).
- » *Decide* who will speak publicly on behalf of the 501(c)(3) organization, so that non-designated staff will not inadvertently say something inappropriate.
- » *Script* responses before talking to reporters.
- » *Avoid* talking about a candidate's qualifications or whether someone is a good or bad candidate.
- » *Avoid* discussing a candidate's record; commenting on a candidate's record is very close to commenting on a candidate's qualifications or whether he or she should be elected.
- » *Avoid* talking about voters and making references to the election. For example, instead of saying "Voters will not accept..." say, "Americans won't accept....."
- » *Avoid* identifying the candidate by name. It is better to say: "During the recent Republican debate, statements were made about X. We disagree..."
- » *Be very cautious* if a reporter asks about which candidate is better on the 501(c)(3)'s issues, or whether the 501(c)(3) agrees with a statement a candidate made, or identify which candidates are pro-choice.
- » *Issue a disclaimer* ("As you know, we're a 501(c)(3) and can't endorse candidates") in a one-on-one conversation or in a press release.

### *It is permissible to monitor information about what candidates say and do during the campaign.*

The risk for 501(c)(3) organizations arises when they communicate something that could be perceived as attempting to influence voters. Organizations can gather information, but must be careful about using that information publicly, including in communications with allies, coalition partners, and members.

### *A 501(c)(3) organization may want to urge all candidates to take a stand or act on an issue, without commenting on specific candidate actions.*

For example, a 501(c)(3) organization may want to urge both major party candidates in the presidential race to take more forceful action on the issue of illegal guns and violence. A 501(c)(3) making this kind of communication should be careful to avoid discussing candidates' positions should focus on the need for all candidates to take action.

# What can 501(c)(3)s do during elections?

Federal tax law explicitly prohibits activity by 501(c)(3) organizations that supports or opposes candidates for public office, but it also recognizes the importance of their participation in the democratic process. The law allows charities to engage in a wide variety of nonpartisan election-related activities, including voter registration and education as well as ballot measure campaigns.

The IRS prohibits what it calls “campaign intervention” by 501(c)(3) organizations. A 501(c)(3) organization may not help or hurt the chances for election of any particular candidate or group of candidates, regardless of political party affiliation. A 501(c)(3)’s role during an election must be educational – and to encourage civic participation. Although there is a lot a 501(c)(3) can do around an election, the organization needs to stop short of directly or indirectly telling people how to vote or for whom to vote.

With certain restrictions, a 501(c)(3) MAY do the following:

- » **Engage** in limited lobbying, including work on ballot measures.
- » **Continue** to advocate for the organization’s issues during an election year.
- » **Educate** all of the candidates on public interest issues within the purview of the organization.
- » **Criticize** sitting elected officials, especially if the organization has a history of doing so.
- » **Publish** nonpartisan legislative scorecards that educate voters on a broad range of issues.
- » **Conduct** nonpartisan public education and training sessions about participation in the political process.
- » **Prepare** candidate questionnaires and create voter guides.
- » **Rent**, at fair market value, mailing lists and facilities to other organizations, legislators, and candidates if an on-going activity and not arranged only for a particular candidate or party.
- » **Conduct** nonpartisan get-out-the-vote and voter registration drives.
- » **Canvass** the public on issues.
- » **Sponsor** candidate debates.
- » **Work** with all political parties to get its positions included on the party’s platform.

- » **Distribute** communications in close proximity to the election that do not expressly advocate for the election or defeat of the candidate, but refer to a candidate (often described as “electioneering communications”).
- » **Conduct** voter protection activities.
- » **Establish** an affiliated 501(c)(4) organization, which can engage in partisan electoral activity as a secondary activity.

The IRS considers ballot measure advocacy to be lobbying, not election activity. A 501(c)(3) public charity can support or oppose ballot measures (and should count the cost against its lobbying limits), but should avoid tying its ballot measure messages to candidates or political parties.

# What 501(c)(3)s cannot do

- » **Endorse** candidates for public office.
- » **Make** any campaign contributions (whether monetary or in-kind).
- » **Make** expenditures on behalf of candidates.
- » **Restrict** rental of their mailing lists and facilities to certain candidates or parties.
- » **Ask** candidates to sign pledges on any issue (for instance, ask candidates if they promise to support the DREAM Act if elected).
- » **Increase** the volume or amount of criticism of sitting officials who are also candidates, as election time approaches.
- » **Publish** or communicate anything that explicitly or implicitly favors or opposes a candidate.
- » **Highlight** the differences between candidates for public office on a high-profile issue on which the candidates in an election have diverging views.
- » **Make** a positive or critical reference to someone in his or her status as a candidate.
- » **Engage** in issue advocacy when your organization cannot articulate a clear non-electoral purpose for the activity or communication.
- » **Criticize** sitting legislators or other elected officials by attacking their personal characteristics or attacking them in their status as a candidate, rather than focusing on the substance of a policy issue.

# PRAISING AND CRITICIZING INCUMBENTS

Public charities play an important role in educating the public about policy issues and actions taken by their elected officials. Elected officials vote on bills, make public statements and executive decisions, or take other actions as part of their official duties. These actions may be consistent with or conflict with a nonprofit's position on an issue. As part of an advocacy campaign, a nonprofit may want to publicize its views by criticizing or praising an elected public official for her actions in paid advertising in newspapers, on the radio, or online, as well as billboards, mailers and other materials that praise or criticize the policy positions or votes of elected officials.

## Criticizing official actions or votes of incumbents

501(c)(3) public charities can criticize or praise the votes or official actions of incumbent legislators or executive branch officials. However, in the months preceding an election, the IRS may view positive or negative comments about an incumbent who is also a candidate as "intervention" in the campaign. The IRS will apply a "facts and circumstances" analysis to determine whether a nonprofit's public communication regarding an issue of concern to the organization is conducted in a nonpartisan manner or is instead an impermissible attempt for the 501(c)(3) organization to support or oppose a candidate. To avoid campaign intervention, a 501(c)(3) conducting public communications in an election year should:

### *Focus on official actions only.*

Comment on official actions; do not mention an incumbent's candidacy or re-election.

### *Time communications to coincide with policy actions.*

A communication that is timed to coincide with, and discusses a specific upcoming legislative vote or administrative hearing, is less likely to be viewed as partisan political activity. Similarly, if the communication occurs directly after or in close proximity to a vote or other official decision, with a view toward influencing future actions, it is more likely to be viewed as nonpartisan advocacy. For example, it would likely be viewed as non-electoral for a group that has a history of working on immigration reform to urge the public to contact the President, who is also running for reelection, and ask him to show leadership on passing the DREAM Act in the weeks before a possible vote on the DREAM Act.

### *Have a track-record of working on the issue.*

Include the communication as part of an ongoing series of communications by the organization on the same issue. The public charity should be able to demonstrate to the IRS a history of engagement on the issue during nonelection times of the year. For example, if an organization sponsors a blog that comments on the actions and votes of elected officials on a regular basis, it is less likely to raise

concern when the organization continues similar comments on legislators in an election year. Or, if a public charity has been pressuring legislators to adopt its views on certain legislation, and a legislator votes against those recommendations, the group is permitted to continue calling public attention to how the incumbent voted, even during the election campaign.

### *Use nonpartisan criteria only.*

Ensure the criteria used to choose the legislator featured in the communication are nonpartisan and is not related to his or her candidacy. For example, the advertisement or mailer might focus on the positions of legislators who are on a key committee and therefore in important decision-making roles related to the issue at hand, or represent a part of the state or country where the nonprofit has a lot of members or has historically been active. Focusing communications on legislators who are in marginal districts or in districts where the issue featured in the communication is a divisive campaign issue would not likely be viewed by the IRS as appropriate nonpartisan criteria.

### *Include legislators not up for re-election.*

If ads are being run or communications distributed in multiple places, it is safer for a public charity to focus the communications on a mix of legislators running for re-election as well as legislators not up for election to demonstrate the organization's nonpartisan targeting.

### *Pay attention to timing.*

Ensure communications are not appearing in print, on the radio or TV, too close to an election. The closer to an election, primary or general election, the more likely the communication will be treated by the IRS as campaign activity.

Although 501(c)(3)s are prohibited from supporting and opposing candidate for office, federal and state campaign finance laws often regulate advertisements that mention candidates, if the advertisement is run within a certain number of days before an election. For example, broadcast ads thanking a sitting Congresswoman for action taken, when that Congresswoman is also a candidate for federal office,

which are run within 60 days of a general election and 30 days of a primary, is classified as an “electioneering communication.” Donors contributing to the organization for the specific purpose of funding these electioneering communications must be disclosed.

***Use caution when the issue distinguishes candidates.***

Do not raise the issue in your communication in order to distinguish candidates for a given office.

***Avoid overlap with affiliated 501(c)(4).***

A public charity should not sponsor communications about an elected official running for re-election when it also has an affiliated organization, such as a 501(c)(4), that is conducting partisan political activity regarding the same candidate.

In no circumstance should an organization consult with a candidate before ads are run or communications are distributed. A nonprofit is permitted to deliver copies of an ad to an incumbent once it has been shown to the public.

## **Praising incumbents**

At times, organizations may also want to praise the activities of an elected official, including giving the official an award or recognizing the official’s leadership on a particular issue. Praising the acts of incumbents is treated the same as efforts to criticize incumbents for their actions. For example, an organization would want to be cautious about giving an award to an incumbent official too close to an election.

## **Activities to avoid**

The following activities are more likely to be viewed by the IRS as campaign intervention and could put the 501(c)(3) organization’s tax status at risk:

- » ***Increasing*** the organization’s level of criticism or praise of an official or devoting a special issue of its publications to an incumbent’s favorable or unfavorable record.
- » ***Distributing*** more copies than usual of the publication during the campaign year.
- » ***Focusing*** on the personal character or qualifications of an incumbent or campaign contributions of the incumbent.
- » ***Connecting*** the organization’s criticism to voting in an election. For example, publicly remarking that an official is anti-\_\_\_\_\_ and mentioning that people should register to vote.
- » ***Pointing out*** that a particular candidate’s actions (as opposed to official actions) or views are incorrect. For example, a 501(c)(3) should not urge the public to withhold campaign contributions for a Senator’s re-election if she votes for the repeal of the Affordable Care Act or remark that one candidate would be more trans-friendly if elected than another candidate.