Initiating Policy Change

Circulating Ballot Initiatives in California

The ballot initiative process in California can be an effective tool for nonprofits, including 501(c)(3) public charities, to bring about change in public policy. Both California law and federal tax law permit 501(c)(3) public charities to participate in the ballot initiative process, including gathering the sufficient number of signatures (often referred to as circulating initiative and referendum petitions) to qualify a measure for the ballot.

Under **California law**, ballot measure activity is treated as campaign activity; organizations that spend or receive a certain amount of money to qualify a measure for the ballot (and to later support passage of that measure) may be required to file reports with the Secretary of State disclosing information about the organization's receipts and/or expenditures. Not all organizations that support or oppose the qualification or passage of ballot measures in California will trigger ballot measure disclosure reports. In fact, organizations interested in qualifying, passing, or opposing a measure may engage in a variety of activities without triggering any disclosure reports.

Federal tax law treats activities related to drafting, qualifying, passing, or opposing a ballot measure as **direct lobbying**. The IRS does not consider activities around ballot measures to be political campaign activity, even though measures may appear on the same ballot as candidates. Click here for more information on lobbying limits on 501(c)(3) organizations under federal tax law, including the benefits of electing to use the 501(h) Expenditure Test to calculate your organization's annual lobbying limit.

Nonprofit organizations working on state and local initiatives in California must comply with state and local laws in addition to federal tax law. The California Secretary of State's website provides information on the requirements to prepare and qualify a statewide measure or referendum. Organizations interested in qualifying local initiatives should check with the local county counsel or city attorney for information on how to do so. Because these federal and state laws have different purposes and definitions, it is important to remember that the amount of money spent on lobbying that may be reported by a 501(c)(3) on its annual Form 990 will likely be different from the amount reported spent on ballot measure activities under state disclosure laws.

Getting Your Measure on the Ballot through the Initiative Process

Drafting a Measure

Under California law, an initiative does not become subject to California's disclosure laws until an initiative starts circulating (i.e., once the first petition-circulator hits the streets.) Expenditures made to *draft* an initiative generally do not need to be reported pursuant to California's ballot measure disclosure laws, regardless of whether the expenditure is made before the initiative starts circulating or after circulation begins. However, activities that may later be used in the qualification or passage of a measure will likely require part of their costs to be disclosed. Common drafting expenses an organization may need to disclose include:

- Attorneys' fees to draft an initiative.
- Staff time spent researching or drafting an initiative.
- Staff time spent working with coalition partners to prepare an initiative.
- Fees paid to political consultants or other technical experts to determine what voters would like to see in a potential measure. If the organization or its coalition partners later use these materials or analysis to qualify the measure, they may need to disclose a portion of the consulting fees pursuant to California's ballot measure disclosure rules.
- Polling used in the drafting of an initiative. Again, if the poll results are later used by the organization or its coalition partners to qualify the measure, part of those costs would likely need to be disclosed. (See additional information under "Polling" below.)

Under **federal tax law**, an organization may need to count more of its pre-circulation expenditures as "lobbying" against the organization's lobbying limit, since many of those activities will count as preparation for later lobbying. Although the IRS has not specifically advised on this issue, it is safest for the organization to count as lobbying most pre-circulation activity conducted to draft and prepare an initiative for circulation, if the primary purpose for that activity is to get the measure on the ballot. Examples of activities that will likely count as lobbying for federal tax purposes include:

- Attorneys' fees to draft an initiative.
- Staff time spent researching or drafting an initiative.
- Staff time spent working with coalition partners to prepare an initiative.
- Fees paid to political consultants or other technical experts to determine what voters would like to see in a potential measure.
- Polling used in the drafting of an initiative.

However, organizations that have made the 501(h) election may not need to count all pre-circulation activities as lobbying under federal tax law if the organization had an additional non-lobbying purpose for pre-circulation activities, such as polling or background research.

Qualifying the Initiative

Under **California law**, once an initiative starts circulating, if an organization works to qualify the initiative for the ballot, it may need to disclose the expenditures spent to do so as well as the names of donors whose contributions were used to support the organization's work. For a variety of activities an organization can do without needing to file any disclosure reports, see the AFJ fact sheet "Ballot Measures Activities Exempt from California Disclosure Laws."

The following are common activities associated with qualifying an initiative that may need to be disclosed under California's ballot measure disclosure laws:

- **Polling:** Under **California law**, if an organization conducts a poll on the subject of the initiative and uses or shares this polling data with another organization or a ballot measure campaign, the costs of the poll must be reported. The value of the poll will be based upon the poll's fair market value. California law recognizes that polling data loses value over time, and allows organizations to take this into account in establishing the fair market value. Organizations are permitted to follow federal election guidelines (or any other reasonable method) to establish the value of the polling data. Under federal election law, results shared with the campaign

16 – 60 days after receiving them are valued at 50% of the polling costs, results released 61 – 180 days after receiving them are valued at 5% of the polling costs, and results released any time after 180 days are considered to have no value.

Under **federal tax law**, polling would count as lobbying if there is no other real purpose for the poll but to develop support for or opposition to the ballot measure. If there are several purposes for the poll, one of which is preparing to qualify a measure for the ballot, an organization may allocate a reasonable portion of the costs of the poll as a lobbying expenditure.

- **Grants to other organizations:** A nonprofit organization can make a grant to another organization, including a 501(c)(4) or a labor union, to help qualify a measure for the ballot or support/oppose it once it's on the ballot. Under California law, if the nonprofit makes a grant to another organization to help qualify an initiative for the ballot or to support/oppose a measure, the contributing organization may need to file a California ballot measure disclosure report disclosing the grant. To learn more about the reporting that may be required as a result of a contribution, see our fact sheet "Supporting or Opposing Ballot Measures in California: What You Need to Disclose." Most organizations will be able to easily comply with California's disclosure requirements and should not let these disclosure reports deter it from granting money to help support or oppose a measure on the ballot. AFJ's California offices offer free technical assistance on California ballot measure disclosure laws.

  Under **federal tax law**, a grant that is earmarked to qualify and otherwise support/oppose a measure would count as direct lobbying against the contributing 501(c)(3) organization's annual lobbying limits. Additionally, if the organization makes the grant to a 501(c)(4) or a labor union, this grant must include certain restrictions. For more information, please review the AFJ publication *The Connection: Strategies for Creating and Operating 501(c)(3)s, 501(c)(4)s, and Political Organizations*.

- **Donating staff time for a measure:** If any employee of an organization spends 10% or more of her compensated time in a calendar month working on a ballot measure campaign, the organization will have to count that portion of salary as a contribution, and if the organization's cumulative contributions reach certain thresholds, the organization will have to register and report under California ballot measure disclosure law. However, if none of an organization's employees spend 10% or more of their time working on a ballot measure campaign, that staff time does not count as a contribution to the campaign and does not need to be disclosed.

  Under **federal tax law**, all of an organization's compensated staff time spent to qualify a measure counts towards the organization's annual lobbying limits, regardless of whether this activity must be reported under California disclosure laws. An organization that dedicates staff time to ballot measure activity, pre and post-circulation, should track the amount of staff time to calculate a pro-rata share of each employee's compensation to count against the organization's lobbying limit.

Reacting to Measures Proposed by Others

Instead of proactively proposing an initiative, an organization might want to respond to an initiative or

referendum that is being drafted or circulated by someone else. For example, some organizations participate in "decline to sign" efforts that encourage voters not to sign initiative petitions being circulated by other organizations, or may attempt to influence the title and summary given to a ballot initiative by the Attorney General's office. Such efforts will be treated the same as efforts to qualify, pass, or oppose a measure under both California law and federal tax law.

Funding Ballot Initiative Campaigns

Organizations that raise money to support their efforts to draft, qualify, support, or oppose a measure should be aware of possible consequences for potential funders. For more information about the potential impact of raising money to qualify a ballot measure in California, please see our fact sheet on supporting or opposing ballot measures in California and contact AFJ for technical assistance.[1]

Who Can Contribute?

Individuals, unions, trade associations, corporations and other businesses may contribute to nonprofits that engage in ballot measure advocacy, including drafting and qualifying measures. As discussed below, private foundations may not make earmarked grants to draft or qualify a measure for the ballot, or otherwise support/oppose a measure.

Under **California law**, some donors contributing to qualify, support, or oppose a measure for the ballot may have to be disclosed on public campaign reports. Donors contributing to draft a measure *may not* need to be disclosed. If the donor is a nonprofit, public foundation, trade association, or union and the entity contributes $50,000 or more or raises its own funds to support ballot measures, the donor organization may have its own registration and reporting requirements. Additionally, some donors may be disclosed on campaign advertisements if they are one of the top donors to the campaign. We discuss these rules more in "Supporting or Opposing Ballot Measures in California: What You Need to Disclose."

Under **federal tax law**, 501(c)(3) organizations raising funds earmarked for drafting, qualifying, supporting, or opposing a measure for the ballot should be clear with donors that the donation is not tax-deductible for the donor.

Public Foundations May Make Earmarked Grants

Public foundations that are grantmaking entities and are legally considered to be 501(c)(3) public charities, may make earmarked grants to help grantees draft, qualify, or support/oppose a measure.

Under **California law**, if the public foundation makes a grant of $10,000 or more[2] to another organization to help qualify an initiative for the ballot or to support/oppose passage of the measure, the contributing organization may need to file a California ballot measure disclosure report disclosing the grant, and the receiving organization may also have to file disclosure reports.

[1] See also our online resources on California campaign finance law.
[2] If the foundation has sufficient interest income (e.g., interest on stocks, bank interest, CDs, etc.) with which to make this grant, the foundation may be subject to slightly different registration and reporting rules.

Under **federal tax law**, these earmarked grants will count against the giving public foundation's own annual lobbying limits, which are calculated the same way as for any other 501(c)(3) public charity.[3]

Private Foundations May Not Make Earmarked Grants

Private foundations, such as The California Endowment, may not make earmarked grants to support or oppose drafting, qualifying, supporting, or opposing a measure for the ballot under **federal tax law**. However, grantee organizations should be able to use unrestricted general support funds from private foundations to engage in support or opposition to proposed ballot measures. For more information on how foundations can fund grantees that engage in lobbying, see the AFJ fact sheet Private and Public Foundations May Fund Charities that Lobby.

Timing Your Efforts

All state-wide ballot measures that qualify for the ballot through the initiative process after July 2011 will only appear on the ballot in November of an even-numbered year – so the measure can appear on the ballot when there is a larger voter turnout typical of general elections. If your organization wants a measure to appear on a primary election ballot (typically held in June), the organization must petition the legislature to place the measure on the ballot rather than using the initiative process.

[3] Donor Advised Funds must adhere to different rules in regard to making lobbying grants.