

## **Praising and Criticizing Incumbents**

### **How 501(c)(3)s Can Hold the Senate Accountable for Confirming a Supreme Court Justice**

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, confirm nominations from the executive branch (including Supreme Court justices), 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, billboards, online, mailers and through 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.<sup>1</sup> 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 non-partisan manner or is instead an impermissible attempt of the 501(c)(3) organization to support or oppose a candidate. To avoid such campaign intervention, a 501(c)(3) conducting public communications in an election year should:

- **Focus on official actions only** – Comment on official actions related to the confirmation; do not mention an incumbent's candidacy or re-election. Click [here](#) for information on commenting on a candidate and judicial nominations in the context of an 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 judicial nominations to urge the public to contact their senators, even if they are running for re-election, and ask them to show leadership on confirming a Supreme Court nominee.
- **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 non-election 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 confirming judges, and a

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<sup>1</sup> For more information on the risks of a 501(c)(3) intervening in a candidate campaign, please see our publication [The Rules of the Game](#): a Guide to Election-Related Activities for 501(c)(3) Organizations.

legislator votes against those recommendations, the group is permitted to continue calling public attention to how the incumbent voted, even during the incumbent's 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 or 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 candidates 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](#).<sup>2</sup>

- **Use caution when the issue distinguishes candidates** – Do not raise the Supreme Court vacancy 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.

Generally, efforts to praise or criticize elected officials for official actions or votes taken will not count as lobbying against the organization's lobbying limit. For more information on these rules, check our fact sheet on using accountability efforts to [advocate for policy change](#).

## **Praising Incumbents Also Allowed**

At times, organizations may also want praise the activities of an elected official, including giving the official an award or recognizing the official's leadership on filling the vacant Supreme Court seat. Praising the acts of incumbents is treated the same as efforts to criticize incumbents for their actions.

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<sup>2</sup> *Van Hollen v. Federal Elections Committee*, No. 15-5016 (D.C. Cir. January 21, 2016).

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 blocking the confirmation of a Supreme Court justice 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 delays the confirmation of a Supreme Court justice or remarks that one candidate would be better at creating green jobs if elected than another candidate.

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