

**PRESENTED AT**

**37th Annual Nonprofit Organizations Institute**

**January 23-24, 2020**

**Austin, TX**

## **What You Need to Know to Get Through the 2020 Election**

**Irina Petrova, Natural Resources Defense Council, New York, NY**  
**John Pomeranz, Harmon, Curran, Spielberg + Eisenberg, LLP, Wash., DC**  
**Douglas N. Varley, Caplin & Drysdale, Chartered, Washington, DC**

## Prohibition on Political Campaign Intervention

Doug Varley  
Caplin & Drysdale  
Washington, DC

One of the most vexing areas of the law governing tax-exempt organizations is the rules governing what section 501(c)(3) organization can and cannot do around elections. The questions are difficult because the opportunities to advance an organization's mission are potentially significant while the difference between what's allowed and what's prohibited is often difficult to discern. Unfortunately, the uncertainty inherent in this approach coupled with the potentially draconian sanction of revocation of an organization's tax-exempt status has likely "chilled" speech by these organizations around elections.

Section 501(c)(3) states that qualifying organizations must not "participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office."<sup>1</sup> This provision was added as a floor amendment in 1954 by Lyndon Johnson to supplement the existing prohibition against substantial lobbying. In 1987 Congress clarified that the prohibition applies equally to support and opposition of candidates; the House Report stated that the restriction "reflect[s] Congressional policies that the U.S. Treasury should be neutral in political affairs."<sup>2</sup>

The law of political campaign intervention has been worked out by the IRS in a series of published revenue rulings, with relatively little guidance from either Treasury or the courts. Generally, the IRS has eschewed broad pronouncements of bright-line rules, confining itself to issuing guidance on what will and will not be considered political campaign intervention in discrete areas of conduct such as public debates and other candidate appearances, voter guides, voter registration efforts, etc. The IRS's longstanding position in this area has been that whether an activity constitutes political campaign intervention must be determined based on "all the facts and circumstances." The result is a number of multi-factor tests geared to specific applications and some uncertainty on the part of charities that must comply with this prohibition.

### A. Definition of "Candidate for Public Office"

The campaign prohibition reaches only political activities for or against a "candidate for public office." The regulations construe this to mean *elective* public office, with the result that a 501(c)(3) organization can campaign for or against the appointment of Supreme Court justices or any other appointed officials, no matter how high their rank.<sup>3</sup> In other ways, however, the prohibition is quite broad. The federal tax rules reaches campaigns at every level of government,

---

<sup>1</sup> I.R.C. 501(c)(3).

<sup>2</sup> H. R. Rep. No. 391, 100th Cong., 1st Sess. 1621, 1625 (1987).

<sup>3</sup> Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii). Note, however, that if an appointment requires legislative ratification, such campaigning may run afoul of the limits on influencing legislation that apply to 501(c)(3) charities. See Gen. Couns. Mem. 39694 (Feb. 1, 1988).

be they national, state, or local<sup>4</sup>; even relatively minor elections like school board elections are covered.<sup>5</sup>

There is little authoritative guidance on what qualifies a particular position as a “public office.” Cases construing that term have been content to rely on its common understanding,<sup>6</sup> which is admittedly clear enough in most cases. However, hard cases can arise as to whether positions in political parties or other quasi-governmental bodies are “public offices.”<sup>7</sup>

The IRS has not identified any bright-line threshold a person must cross to become a “candidate.” The term “candidate” is defined to include anyone who “offers himself, or is proposed by others, as a contestant for an elective public office.”<sup>8</sup> This broad standard does not depend on whether an individual has formally declared his or her candidacy. Indeed, one IRS article summarizing the law in this area for IRS internal training purposes (the “2002 CPE Text”) has suggested that, anyone that a charity recommends for an office is *ipso facto* a candidate.<sup>9</sup> However, the Joint Committee on Taxation has noted that “the fact that an individual is a prominent political figure does not make him a candidate, even if there is speculation regarding his possible future candidacy.”<sup>10</sup>

While the IRS has not established any fixed date before which a person will not be considered a candidate, it has recognized that there are temporal limits on the term. For instance, in one case it condoned materials, distributed in June of a non-election year, urging the public to vote against particular named Members of Congress in future elections, on the ground that there was no evidence any of the attacked officials’ Congressional races had begun.<sup>11</sup> On the other hand, the same ruling held that a criticism of a presidential candidate distributed in the fall of the year previous to the presidential election was considered to be political campaign intervention.<sup>12</sup>

## B. Candidate Ratings and Endorsements

501(c)(3) organizations are not allowed to endorse or evaluate candidates, regardless of whether they do so in a nonpartisan or objective manner. For instance, the Second Circuit held that the American Bar Association’s practice of rating the qualifications of candidates for elected judicial offices violated the prohibition -- even though the court assumed that the ratings were non-partisan in nature.<sup>13</sup> As the court noted, “[a] candidate who receives a ‘not qualified’ rating

---

<sup>4</sup> Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii).

<sup>5</sup> Rev. Rul. 67-71, 1967-1 C.B. 125.

<sup>6</sup> See *Ass’n of the Bar of City of New York v. Comm’r*, 858 F.2d 876, 880 (2d Cir. 1988) (“A campaign for public office in a public election merely and simply means running for office, or candidacy for office, as the word is used in common parlance and as it is understood by the man in the street.”) (internal brackets and quotation marks omitted).

<sup>7</sup> GCM 39811 (Feb. 9, 1990).

<sup>8</sup> Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii).

<sup>9</sup> Judith E. Kindell & John Francis Relly, *Election Year Issues*, in EXEMPT ORGANIZATIONS TECHNICAL INSTRUCTION PROGRAM FOR FY2002, at 335, 342.

<sup>10</sup> Staff of the Joint Committee on Taxation, 100th Cong., 1st Sess., *Lobbying and Political Activities of Tax-Exempt Organizations* 14 (1987), *quoted in* Kindell & Reilly at 342.

<sup>11</sup> Tech. Adv. Mem. 199907021 (May 20, 1998).

<sup>12</sup> *Id.*

<sup>13</sup> See *Ass’n of the Bar of City of New York v. Comm’r*, 858 F.2d 876, 880 (2d Cir. 1988).

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

## Title search: What You Need to Know to Get Through the 2020 Election

Also available as part of the eCourse  
[2020 Nonprofit Organizations eConference](#)

First appeared as part of the conference materials for the  
37<sup>th</sup> Annual Nonprofit Organizations Institute session  
"What You Need to Know to Get Through the 2020 Election"