

Nonprofits & Tax-Exempt Organizations Alert

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Cautionary Guidance for Tax-Exempt Organizations Wanting to Influence the Supreme Court Nomination Process

For the second time in just over four years, a vacancy on the U.S. Supreme Court—this one resulting from the recent passing of Justice Ruth Bader Ginsburg—is prompting a national discussion on the nomination of Seventh Circuit Judge Amy Coney Barrett and the general process for appointing the next justice. Much like when Justice Antonin Scalia passed away in 2016, today's press and social media reflect the debate on Capitol Hill over constitutional issues and the power of the president and Congress in the context of the nomination and confirmation processes.

The appointment of a Supreme Court justice will have a profound impact on the United States. Tax-exempt organizations offer substantive expertise on legal issues and represent important perspectives, and therefore may wish to influence the confirmation process for the next Supreme Court justice. The good news for these organizations is that the law certainly permits them to share their expertise and opinions with legislators and the public.

Charities and their representatives must be careful, however, to conduct and report their activities and communications regarding Judge Barrett's nomination and record, and the Senate confirmation process, in accordance with the applicable federal tax law limits on charities' lobbying activity, which have not changed in the past four years. Moreover, because this discussion is once again taking place against the backdrop of a presidential election, charities must be especially vigilant to avoid engaging in prohibited campaign intervention.



We hope our summary of the relevant federal tax law guidance will aid private foundations and public charities that may wish to influence this national discussion while safeguarding their organizations' tax-exempt status.

Legal Framework

For organizations described in Section 501(c)(3) of the Internal Revenue Code, attempting to influence a senator's vote regarding the confirmation of a federal judicial nominee constitutes lobbying activity, because it is akin to influencing proposed legislation.

Certain exceptions to the tax law definition of "lobbying" enable charities to comment on current events and matters of broad social concern—and even to express positions on legislation when their communications are framed as "nonpartisan research and analysis"—without this commentary constituting lobbying activity. However, it becomes more difficult to meet the requirements for these exceptions once a particular nominee is identified.

Charities should also keep in mind that they are prohibited from participating or intervening in any political campaign in support of or opposition to a candidate for

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public office. This prohibition is absolute, and we advise caution throughout the remainder of the 2020 election season. Section 501(c)(3) organizations are permitted to state positions on public policy issues, including issues that distinguish candidates in an election, as long as their statements do not convey a message of favoring or opposing a particular candidate or party. Therefore, when participating in judicial nomination discussions, charities should be careful about criticizing and comparing any senators who are involved in the confirmation, because those statements could be construed as electioneering when those legislators are also candidates for public office.

It is important to remember that these restrictions on a charity's lobbying and electioneering communications apply just as much to tweets, Facebook posts, blogs and other messages conveyed via social media as they do to print publications, public speeches and events, the charity's website, and other traditional media channels.

Rules of Engagement

Now that President Trump has nominated Judge Coney Barrett, for tax law purposes we recommend treating the very name of the nominee as if it were the name of a proposed or pending Senate bill. At this point, the rules of engagement will depend on the charitable organization's classification under Section 509(a) as either a private foundation (lobbying prohibited) or a public charity—and in the case of a public charity, on whether the charity has made an election under Section 501(h) to be covered by an expenditure-based standard instead of the default "no substantial part" test in Section 501(c)(3).

Rules for Public Charities

Any communications with senators or their staff that express the charity's view in support of or against the nomination count as direct lobbying. Similarly, any communications with the public that include a "call to action" (e.g., "Call Senator X and tell her to vote for/against this nominee") count as grassroots lobbying. All expenses associated with preparing and delivering lobbying communications must be tracked and reported on the charity's Form 990 (Schedule C).

Certain communications do not count against a Section 501(h)-electing charity's direct or grassroots lobbying limits. For example:

- Commenting on the nominee's credentials, experience and record, or any other issues, upon the written request of the leadership of the Senate Judiciary Committee. Because this sort of testimony qualifies as providing "technical advice or assistance" to a governmental committee, it is excluded from the tax law definition of lobbying.
- Publishing statements intended to educate the public regarding the nominee's judicial record on issues of importance to the charity (e.g., gun control, education, environmental stewardship, civil rights, immigration, abortion), as long as those statements (1) are not directed to specific legislators or staffers and (2) do not include calls to action.

Rules for Private Foundations

Because lobbying is prohibited for private foundations, these organizations must be particularly cautious about how they contribute to the discourse regarding a judicial nominee. Some activities in which a private foundation may engage—whether directly or by funding grantees' activities—are:

- Conducting any of the non-lobbying activities discussed under Rules for Public Charities, above.
- Making general support grants (i.e., not earmarked for a particular project) to public charities that may themselves engage in lobbying on the nomination.
- Making project grants (supported by an allocated budget) to support a public charity or a coalition of charities that have defined a project involving some lobbying and some non-lobbying activity on the subject of the confirmation process.

The stakes are high in more than one sense. Issue advocacy organizations can, and certainly will, contribute to the important discussion around the nomination and confirmation of the next Supreme Court justice. Because of the potential adverse impact on tax-exempt status and the potential imposition of excise taxes, however, Section 501(c)(3) organizations would be wise to consult their tax advisers before devoting substantial resources or making public statements regarding Judge Coney Barrett or any other judicial nominees.

Related Professionals

Diara M. Holmes dholmes@loeb.com
Kensington A. Wolgamott kwolgamott@loeb.com

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