LOEB & LOEB LLP

Charitable Giving and Tax-Exempt Organizations

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

The vacancy on the U.S. Supreme Court created by Justice Antonin Scalia's recent passing has prompted a national discussion regarding appointment of the next justice. Headlines in the press and social media reflect the debate on Capitol Hill regarding the constitutional issues around presidential and congressional powers in the context of the federal judicial nomination and confirmation processes.

Not surprisingly, tax-exempt charitable organizations that engage in (or fund) mission-driven issue advocacy across the ideological spectrum are among the many concerned stakeholders that wish to express their views about the next Supreme Court appointment. The good news for these organizations is that the law certainly permits them to share their expertise and opinions with legislators and the public.

However, charities and their representatives must be careful to conduct and report their activities and communications regarding the forthcoming nominee and the Senate confirmation process in accordance with the applicable federal tax law limits on charities' lobbying activity. Moreover, because this discussion is taking place against the backdrop of the 2016 presidential election, charities must be especially vigilant to avoid engaging in prohibited campaign intervention.

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

Legal Framework

For organizations described in Section 501(c) 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 will become more difficult to meet the requirements for these exceptions once a particular nominee is identified. Therefore, as explained below, Section 501(c)(3) organizations have more flexibility to comment on potential nominees and on the nomination and confirmation processes before the president selects a nominee.

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 public office. This prohibition is absolute, and we advise caution throughout the 2016 election season, regardless of when the president puts forth a Supreme Court nominee. 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 equally 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.

Pre-nomination

During the pre-nomination period, charities have maximum flexibility because much of the discourse will relate to (1) the issues that may be debated before the Supreme Court, (2) speculation regarding the "short list" and (3) interpretation of the Constitution's provisions governing the nomination and confirmation processes.

Some examples of communications that should not constitute lobbying include:

- Commenting about the specific records of persons who are considered to be on the president's short list of candidates, so long as the communications are directed to the general public and not to the White House.
- Publishing broad statements regarding the necessary qualifications for the next Supreme Court justice.
- Publishing broad statements regarding the importance of certain legal issues that the Supreme Court will consider in the near term.
- Publishing constitutional analyses and opinions regarding the judicial nomination and confirmation procedures.
- Drafting amicus briefs should any litigation arise with regard to the judicial nomination process.

Even if these statements do not constitute lobbying, however, charities should carefully review any statements that could be construed as criticizing or comparing the positions espoused by specific political parties or by any current presidential candidates who may be involved in this nomination process or who may be simultaneously commenting on these same issues.

Post-nomination

Once the president presents a nominee to the Senate for consideration, for tax purposes we recommend treating the very name of a 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, 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

Once a nominee is identified, any communications with senators or their staff that express the charity's view in support of or against the nomination will 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") will 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).

Even after a nominee is identified, certain communications will 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 testimony would qualify as providing "technical advice or assistance" to a governmental committee, it would be 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 after the president announces his nominee. Some activities in which a private foundation may engage — whether directly or by funding grantees' activities — include:

- Conducting any of the nonlobbying 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 nonlobbying 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 should consult their tax advisers before devoting substantial resources or making public statements regarding any judicial nominees.

Loeb & Loeb LLP's Nonprofits and Exempt Organizations Practice

Loeb & Loeb's leading national Nonprofits and Tax-Exempt Organizations Practice offers the full spectrum of services to help nonprofit organizations grow, innovate and succeed in the face of increasing regulatory and marketplace challenges. Our distinguished practice team includes some of the nation's leading nonprofit legal authorities, including former top regulators at the federal and state levels, offering unique insight and regulatory perspective that do not exist elsewhere.

The nonprofit legal landscape is challenging for even the most sophisticated organizations. Our experienced lawyers offer skilled guidance on what tax-exempt entities need to know to stay compliant with both federal and state legal requirements. Our core nonprofit practitioners work closely with the firm's other leading practices — corporate, trusts and estates, litigation, intellectual property, advertising and promotions, real estate, digital media and technology, executive compensation, and employment law — to provide our clients with a truly integrated platform at an exceptional value.

Loeb & Loeb's Nonprofits and Exempt Organizations Practice

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