

Confirmation of Federal Judges and Executive Branch Nominees

What Your Nonprofit Needs To Know

501(c)(3) public charities are legally allowed to influence the Senate confirmation of federal judicial and executive branch nominees.

The Internal Revenue Service (“IRS”) has recognized that influencing the confirmation of federal judges is exactly like influencing any other legislative vote through lobbying. “Because the Senate’s action of advice and consent on a judicial nomination is an action with respect to a resolution or similar item, the Senate’s confirmation vote constitutes a vote on legislation.” (Notice 88-76, 1988-2 C.B. 392.)

Likewise, Senate actions to confirm cabinet level and other executive branch nominations are also considered legislative actions. Attempts by a 501(c)(3) public charity to influence the confirmation of executive branch nominees would similarly fall under the IRS definition of lobbying.

It is important to remember that 501(c)(3) public charities can lobby within the generous limits allowed by law. Because influencing judicial and cabinet level confirmations are clearly lobbying activities, efforts to influence these nominations should be counted against a public charities lobbying limit.

Possible Tax Consequences

In 1988, the IRS General Counsel issued a General Counsel Memo (GCM 39694) suggesting that while permissible as lobbying, expenditures to lobby on judicial nominations might also be subject to tax as “political” expenditures. The tax is on the lesser amount of the organization’s investment income or expenditures for activities. Thus, the tax does not apply to organizations with NO investment income. Alternatively, a non-501(c)(3) organization could create a separate segregated fund and avoid any tax consequence.

The GCM suggested that enforcement of this reading of the law should not be retroactive and should await more clarification from the IRS. Subsequently the IRS requested comments from the public to clarify this point and then has never acted to affirmatively indicate whether 527(f) applied to nominations. In the years since 1988 AFJ is not aware of any actions taken by the IRS under the GCM.

Alliance for Justice believes that 501(c)(3)s engaged in lobbying on judicial nominations should NOT be subject to this “political” expenditure tax, in the absence of explicit guidance from the IRS. Organizations should consult with their legal counsel to decide how best to proceed.

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