VOTER REGISTRATION, EDUCATION & BALLOT CAMPAIGNS

A Funders' Guide to Legal Issues

Douglas N. Varley and Elizabeth A. Grossman
Caplan & Drysdale, Chartered October 2011

FUNDERS' COMMITTEE FOR CIVIC PARTICIPATION

Established in 1983, the Funders' Committee for Civic Participation (FCCP) is a Council on Foundations recognized affinity group that provides grantmakers who are active in the field of civic engagement with a stage for showcasing innovative ideas, a forum for strategic dialogue, and a resource for civic participation research, tools, and news. Believing that a vibrant and inclusive democracy is critical to the health of our nation, FCCP works to further this vision with heightened attention to historically disenfranchised and underrepresented communities. Its members support efforts to engage voters, eliminate structural barriers to voting, advance reforms to improve government and electoral systems, and inspire public involvement in our democracy. Through ongoing member-directed programming that includes two annual convenings, monthly funder briefings and various member-led working groups, FCCP creates a learning community that strengthens grantmakers' efforts to enhance democratic participation in all aspects of civic life.

FCCP is grateful to the Ford Foundation for supporting the original version of this legal guide, and to the Carnegie Corporation of New York, Gill Foundation and HKH Foundation for their support in making the subsequent legal review and reprint possible.

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FCCP

FUNDERS' COMMITTEE FOR CIVIC PARTICIPATION

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INTRODUCTION

Civic participation – the active engagement of people in the decision-making processes that shape their communities, their government, and their lives – is critical to a healthy society. In fact, we only realize the full promise of democracy when people participate; when all segments of a community have fair and equal access to institutions of government and meaningful opportunities to voice their opinions about important issues that shape public policies. Our democracy demands the attention and engagement of all people, and nonprofits are particularly critical to educating and mobilizing the public as well as reducing the barriers that would keep them from participating. Activities such as nonpartisan voter registration and mobilization, election protection, and leadership development are among the varied approaches to civic engagement that organizations can – *and should* – be adding to their toolbox. When combined with organizing, communications, research, advocacy, and coalition building, year-round civic engagement can help any organization build a more effective base to advance their mission. By investing in organizations that inform and engage the public on the issues they care about, grantmakers can help to build a more vibrant and inclusive democracy for all.

While many philanthropists are deeply concerned about low levels of voter participation and the impact on overall civic engagement, the Internal Revenue Code' regulations that guide grantmaking may be confusing. What is the impact on the tax status of foundations? What types of groups are eligible to conduct nonpartisan electoral activities? What activities might foundation resources support? Where can these activities take place and toward whom might they be targeted?

The short answer is that foundations can (and should) support nonpartisan civic engagement activities, and nonprofits can (and should) integrate nonpartisan civic engagement activities into their ongoing work. In addition, private foundations, community foundations, public charities, individual donors, and corporations have a long history of supporting nonpartisan voter registration, education, and get-out-the-vote work. Restrictions that apply to particular types of voter engagement work are described in detail in this booklet. Given the growing importance of ballot measures for making public policy, we also include a section clarifying how private foundations and other funders can support ballot measure campaigns.

The authors of this report, Douglas N. Varley and Elizabeth A. Grossman of Caplin & Drysdale, are among the nation's foremost legal experts in the field of foundation funding and electoral participation work. However, this publication is not intended as legal advice, and funders are encouraged to consult their own legal counsel about specific questions. In addition, a wide range of legal resources are available for funders and nonprofits from the Alliance for Justice (allianceforjustice.org) and the Center for Lobbying in the Public Interest (clipi.org).

As co-chairs of the Funders Committee for Civic Participation, we welcome your interest in supporting voter registration, education and other nonpartisan efforts aimed at increasing public engagement in our democracy. If you have any questions or want additional information, we invite you to contact us at FCCP.

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October 2011

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The 20 Most Frequently Asked Questions

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Absolutely yes. As long as the programs are nonpartisan, the tax laws provide substantial opportunity for public charities and private foundations, corporations, and individuals to support voter registration activities.

Q#2: Under what circumstances can my private foundation support voter registration activities?

There are some specific limitations on *private foundation* support of voter registration imposed by section 4945(f) of the Internal Revenue Code (see Q#3), but nothing in the tax laws prohibits such support. Moreover, section 4945(f) does NOT apply to community foundations, public charities, individual donors, or corporations making direct contributions (as distinguished from corporate foundations that are classified as private foundations for tax purposes). (See Q#5-8 for further information and Q#13 for an additional issue involving grants by community foundations.)

If you want your grant to be earmarked for voter registration, then you and the grantee organization must both satisfy the following requirements of section 4945(f):

The grantee organization must be a charitable or educational organization with section 501(c)(3) tax-exempt status and must spend substantially all (generally 85 percent) of its income on a direct educational or charitable program of its own—although it can pay local groups to serve as its agents in conducting voter registration if it exercises control over those groups. To exercise the necessary degree of control, your grantee must monitor and guide the activities of the local groups sufficiently to ensure that they are really acting as agents of the organization you have funded. A grant by your grantee does not count as a direct expenditure.

The voter registration organization you fund must mount a nonpartisan program (see Q#4-6) that is conducted in five or more states (see Q#7 and 8) and is not limited to a single election period (see Q#9).

Such an organization must receive substantially all (again 85 percent) of its support, other than investment income, from exempt organizations, the general public, and governmental units. No more than 25 percent of this support may come from any one foundation or other exempt organization, no more than 50 percent of its support may come from investments, and none of the contributions it receives may be directed to specific geographic areas or election periods (see Q#7-9).

Q#3: How can my private foundation ensure that the group it is funding for voter registration meets the requirements of section 4945(f)?

A foundation may rely on a ruling obtained from the IRS by the

grantee organization that it meets the section 4945(f) requirements. All you will need is a copy of that ruling and a statement signed by someone authorized to act for the group that it still meets those requirements. Of course, it is not necessary to have a ruling, and many private foundations do not require it. If there is no ruling, you will need to get a detailed statement from the organization outlining the facts showing that it meets the requirements and evaluate for yourself whether the group will qualify under section 4945(f).

Q#4: What does it mean for a program to be nonpartisan under section 4945(f)?

The IRS takes the position that a program is nonpartisan if it is designed solely to educate the public about the importance of voting and requirements for voter registration and does not show a preference for or against any candidate or political party.

The nonpartisanship requirement does not mean that a voter registration program cannot register specific groups of people. For example, the IRS has approved voter registration programs aimed specifically at African Americans and other minorities, even though, as groups, they traditionally favor one party over another. However, in registering voters, the program cannot ask registrants their preferences or political parties.

Q#5: Can a voter registration program be nonpartisan and address important issues?

Certainly. A program can provide information about important issues, and the organization can take a definite position on the

issues. However, in addressing issues, it is best that a program focus on a broad array of issues rather than on just one issue, and that the issues addressed do not separate the candidates in a pending election. The IRS has indicated that it may consider a program that focuses heavy attention on a specific issue that is clearly identified with one candidate to be supporting that candidate by inference and may, as a result, find the program to be partisan.

Q#6: What if the organization we're funding to do voter registration also lobbies on some issues?

That's ok. The IRS does not interpret the nonpartisan requirement as barring public education or lobbying activities, as long as there is a clear separation between these activities and the organization's voter registration activities. Of course, private foundations cannot target funds specifically for lobbying. However, the IRS regulations specifically provide that a private foundation can make a grant to a public charity to support a specific project that includes lobbying, provided the foundation obtains a signed project budget showing expenses for nonlobbying activities that are equal to or greater than the amount of the foundation's grant. To obtain the benefit of this rule the foundation must (a) obtain assigned project budget allocating costs between lobbying and nonlobbying work (b) have no reason to doubt the accuracy of the grantee's budget projection and (c) must not have earmarked its grant for the lobbying component of the project.

Q#7: Can funds for voter registration activities be restricted to use in a specific geographic area?

A *private foundation* may not restrict its voter registration support geographically. Section 4945(f) also prohibits grantee organizations from accepting funds subject to restriction to a specific geographic area or election. On the other hand, *with no prior agreement, a grantee organization* may decide to concentrate its efforts in a specific geographic area if it does so on the basis of nonpartisan criteria so long as the five-state requirement is met. For example, the grantee may not target an area in the hope that it will favor a particular candidate or party, but it may choose to focus its resources in an area that has a history of low turnout or low registration, the best media resources, the greatest access to volunteers, etc.

Q#8: Does the five-state rule require equal distribution of program activities in all five states?

No. Nothing in the law requires that program activities be even roughly of the same scope, but programs should have more than nominal efforts in at least five states.

Q#9: Must a foundation support a grantee for more than one election period?

No. While a foundation cannot restrict use of its grant funds to a specific election period, the grantee may, at its own discretion and with no prior agreement with the foundation, use all of a grant during one election period, and the foundation is free *but not required* to support the grantee in a subsequent election period. The voter registration program needs to have operated during an election period prior to the one in which it is working *OR* be planning to operate in the next election period. (Election

period could apply to municipal, state, congressional, or presidential elections, among others.)

Q#10: Are the requirements the same if my private foundation wants to provide general support to an organization that does some voter registration?

No. The restrictions imposed by section 4945(f) do not apply if you are making general support grants to a public charity doing voter registration as part of a broader program. However, there must be no written or oral agreement that the funds will be used for voter registration.

Q#11: Can a private foundation support "get-out-the-vote" drives?

Yes, so long as the drives are carried on in a nonpartisan manner (see Q#4-6). The special tax requirements for private foundation support of voter registration do *not* apply to "get-out-the-vote" drives. For example, a foundation can support efforts providing transportation to the polls or simply reminding voters of their rights and duties as citizens on Election Day. Again, these efforts may be focused on historically disenfranchised groups or minorities that are selected on a nonpartisan basis (see Q#4). Complete nonpartisanship is the only rule that must be observed.

Q#12: What other kinds of efforts to encourage and protect the right to vote can a private foundation support?

Private foundations can support research identifying specific demographic groups that are underrepresented on voter rolls and

proposing general strategies for reaching members of those groups. Foundations can also support the development of best practice standards and training materials explaining how to register voters or conduct GOTV drives, without triggering the five-state rule, provided the foundation is clear that its funds are not to be used to register voters. Similarly, a foundation can make grants to support "voter protection" activities helping ensure the integrity of registration lists and fair access to the polls. As for GOTV activities generally, the touchstone defining permissible activities is that the organization's work be strictly nonpartisan and not calculated to benefit or harm any candidate or party.

Q#13: How do the technical voter registration rules in the tax law apply to community foundations, public charities, individual donors, and corporations (other than corporate foundations)?

As noted above, they don't. Community foundations, public charities, individual donors and corporations can make grants to fund voter registration activities without regard to the special restrictions imposed by section 4945(f) as long as those activities are nonpartisan (see Q#4-6). In fact, educating people about voter registration and encouraging them to register has been a long-established and proper charitable activity. As a general rule, community foundations and other public charities can support a nonpartisan voter registration program even though it is not conducted by a tax-exempt organization and does not have activities in five states, provided that the funder complies with the general legal requirements applicable to all grants by section 501(c)(3) organizations. Section 4945(f) will, however, affect community foundation grants if the community foundation is required by its charter to restrict use of its grant funds to its local

community, since a grantee that has received section 4945(f) grants from private foundations will be barred from accepting such a restricted community foundation grant for voter registration and vice versa.

Q#14: Is there a penalty if a foundation is deemed to have broken the tax rules for conduct in this area?

A private foundation that makes a grant in good faith to an organization that has received a section 4945(f) ruling will have a large measure of practical protection from legal liability. If a foundation makes a grant for voter registration activities to an organization that does not satisfy the requirements of section 4945(f) or itself violates the requirements of section 4945(f) (for example, targets the funds for use in a specific election or geographic area), it can incur a first-level penalty tax equal to 20 percent of the grant amount. Unless the foundation recovers the grant amount or otherwise "corrects" the improper expenditure within a specified period, it can also incur a second-level penalty equal to 100 percent of the grant amount. Generally, correction is deemed to have been accomplished by recovering the grant funds "to the extent possible." If trustees and/or foundation managers knowingly and without reasonable cause approve a grant to an organization outside the private foundation guidelines described here, they too may be subject to a penalty tax. However, the IRS may abate all such taxes where "correction" has occurred and, in the case of the first-level taxes, the expenditure was due to reasonable cause, not willful neglect.

Q#15: Do the campaign finance laws restrict funders' ability to support nonpartisan voter registration and voter education

activities?

Not significantly. Funders need to be aware that federal campaign finance law restricts coordination between candidates or political parties and organizations that conduct voter registration or GOTV drives. A group that runs a radio or television communication may also be required to publicly disclose its donors' names. These provisions were intended to make it harder for corporations (including nonprofit corporations) and individuals to circumvent the federal campaign contribution limits and disclosure rules. Funders need to be sure that any voter registration or GOTV drives they support comply with these rules. However, since the federal election law regime targets activities conducted in coordination with candidates or parties and radio or television communications that identify candidates, it should not impede nonpartisan voter participation drives that avoid these trip wires.

Q#16: Did the Supreme Court's decision in the *Citizens United* case affect the ability of charities to engage in voter registration and get-out-the-vote efforts?

No, the tax rules that apply to electoral activities conducted by section 501(c)(3) organizations remain the same following the case.

The Supreme Court's 2010 decision in *Citizens United v. Federal Election Commission* struck down election law restrictions on independent political campaign spending by corporations and unions. Following the Court's decision, for-profit corporations, unions, and most types of nonprofits (including section 501(c)(4) and 527 organizations) can use corporate treasury funds and raise

unlimited donations to engage in partisan campaign activities undertaken independently of candidates and parties, although they may still be required to disclose this spending. For example, these organizations can make "independent expenditures" to run ads that expressly advocate the election or defeat of a particular candidate without following the restrictions on sources and amounts of funding formerly imposed on these independent efforts by campaign finance laws.

However, the *Citizens United* case did not alter the tax code's prohibition on participation in partisan political campaign activity by section 501(c)(3) organizations. As a result, foundations and other charities engaged in voter engagement activities must continue to follow the rules set out in this guide.

Q#17: What about *Citizens United* and section 501(c)(4), 501(c)(5), and 501(c)(6) organizations?

The *Citizens United* decision has dramatically increased the role that section 501(c)(4), 501(c)(5), and 501(c)(6) organizations may play in federal political campaigns. After the Court's decision in that case, such "section 501(c)" organizations may, without violating federal election laws, receive unlimited and undisclosed donations to use on partisan campaign activities undertaken independently of candidates and parties. (Notwithstanding the large amounts of money now flowing through section 501(c) organizations, however, section 501(c) organizations are still required by the tax law to limit their political campaign work so that partisan electoral activities do not become their "primary" purpose.)

Q#18: What about section 527 organizations, PACs, and Super PACs?

During past election cycles, section 527 organizations, including Political Action Committees (or "PACs"), have been significant players in electoral politics. "Super PACs" have only just recently emerged as another set of major players as a consequence of the *Citizens United* decision. Section 527 organizations are required by tax law to have as their primary purpose influencing elections. PACs are a type of section 527 organization that raise enough campaign "contributions" or make sufficient campaign "expenditures," under federal election law definitions, to meet the threshold required for registration with the Federal Election Commission. Super PACs must also register and report with the FEC, but they differ from standard PACs in that Super PACs do not make campaign contributions to or coordinate activities with federal candidates or political parties.

Because section 527 organizations, including PACs and Super PACs, primarily operate to influence political campaigns, federal tax law prevents private foundations, community foundations, and public charities from making grants to these organizations. However, individual donors, for-profit corporations, and non-501(c)(3) nonprofit organizations may find a section 527 organization, PAC, or Super PAC useful as a vehicle through which they can pool their resources to fund electoral activities that are prohibited for section 501(c)(3) organizations.

Q#19: Can a private foundation fund work on a ballot campaign?

Yes. The federal tax law treats ballot measures as legislation.

Hence foundation-funded work in this area is governed by the rules applicable to lobbying, not the prohibition against intervention in election campaigns for or against candidates. As described above, the foundation lobbying rules allow grants to public charities for specific projects that include some lobbying activity (Q#6). Moreover, the regulations further provide that in the case of measures that qualify for the ballot through a signature process, the measure is not "specific legislation" subject to the lobbying rules until a petition is circulated to collect signatures. This rule frequently allows foundations to fund a wide range of advocacy activities related to a ballot measure during the early stages of the process. In addition, even after a ballot measure becomes specific legislation, the tax rules exclude many public statements about the measure from the definition of lobbying that applies to foundation grants.

Q#20: What is the "501(h) election" and how does it affect grantees working on ballot campaigns?

Section 501(h) is an election that public charities, other than churches, can make to report their lobbying expenditures to the IRS. Charities that make this election can rely on safe harbors setting the amount they can spend on lobbying each year and clear rules defining what advocacy activities count as lobbying. Making the 501(h) election allows organizations to rely on the same favorable rule stating when a ballot measure becomes "specific legislation" that applies to foundation grants (Q#19).

VOTER REGISTRATION, EDUCATION AND BALLOT CAMPAIGNS

A Funders' Guide to Legal Issues

I. AN OVERVIEW OF THE TAX RULES FOR VOTER REGISTRATION, EDUCATION, AND BALLOT CAMPAIGNS

The tax laws do not prohibit charitable and educational organizations from conducting and financing voter registration drives. Nor do they prevent such organizations from carrying on voter education or working to influence the result of ballot measures. Charities' work on registration drives, voter education and ballot campaigns—like everything else they do—has to be nonpartisan. It cannot be aimed at helping or hurting particular candidates or parties. And, for private foundations, there are modest extra requirements and restrictions. But the basic point is that charities can work on voter registration, education, and ballot campaigns, and the rules for doing so are quite simple.

The principle of nonpartisanship. The main rule, which applies to all charities, is that their voter registration and education work (whether they conduct it directly or provide money for other charities that do) cannot be directed at helping one side or another in an election. That means, for example, that a voter registration drive must give its registration guidance without inquiring how the recipients plan to vote. It also means that the places in which the drive will operate cannot be chosen for reasons that relate to the outcome of the election (for example,

states in which contests are thought to be close). So long as they adhere to this fundamental principle of nonpartisanship, charities—including private foundations—can also carry on or support "get-out-the-vote" drives.

Similarly, charitable groups may engage in nonpartisan voter education activity, such as conducting candidate forums or debates, circulating unbiased and reasonably broad-ranging questionnaires to candidates, and similar activities. In all this work, the key limitation is that the organization not reflect a preference among candidates.

That said, it is equally important to understand that a nonpartisan voter registration drive is perfectly entitled to concentrate on a particular group in a community—minorities, students, women, homeless, low-income groups—even if it is statistically likely that getting more of that group registered will help a particular party.

Beyond the tax laws, federal campaign finance laws also permit nonpartisan voter registration drives and voter education. Nonpartisan voter registration and GOTV drives that do not publish partisan communications or coordinate their activities with political candidates or parties will not be restricted by these laws.

Private foundations' voter registration. There are additional requirements (enforced by penalty taxes for violations) for voter registration supported by private foundations. Broadly, they are designed to assure that the foundation cannot "target" its support even for nonpartisan voter registration in a way designed to affect particular elections. Private foundations can fund voter

registration drives if both the drive itself and the grantee that will conduct it meet prescribed tests.

The grantee must:

- be tax exempt under section 501(c)(3)[1];
- spend at least 85 percent of its income in direct charitable activity (rather than making grants to other organizations; hiring other groups as its agents to work in the registration drive is permissible so long as the grantee retains control over their work); and
- meet certain standards of breadth of public support that ensure, for example, that it draws contributions from a range of sources and is not freed from the need for public accountability by excessive reliance on any single donor or on investment income.

The drive itself must:

- be nonpartisan;
- be conducted in five or more states (not requiring equal efforts in all states, but more than token efforts in at least five);
- not be limited to one election period; and
- not accept contributions (from anyone, not only private foundations) limited to use in specified states or election periods.

[1] Except as otherwise stated, all section references are to the Internal Revenue Code of 1986, as amended (the "Code" or "I.R.C.") and all regulatory references are to the Treasury Regulations currently in effect under the Code ("Treas. Reg.").

If these tests are met, private foundations are entirely free to fund voter registration drives, and payments for doing so count toward meeting the foundation's five percent payout requirement. The tests are straightforward. A number of voter registration charities have secured rulings from the Internal Revenue Service ("IRS") that they meet these tests and, within the usual limits of IRS ruling protection, private foundations may rely on those rulings in making voter registration grants to charities that have them.

Voter registration supported by community foundations and other public charities. These special rules apply only to private foundations, including operating foundations and company foundations; they do not apply to community foundations or any other type of public charity. Moreover, they do not apply even to a private foundation's grant to an organization that does voter registration unless the grant is earmarked for that work. For all voter registration activities beyond those governed by the special private foundation rules, the charity supporting or conducting them need only adhere to the fundamental principle of nonpartisanship.

Ballot measure campaigns. Although the success or failure of ballot measures is determined by voters, the tax laws treat efforts to pass or defeat such measures as legislation, rather than as political campaign activity. Consequently, while private foundations may not earmark grant funds for lobbying on ballot campaigns, foundations may support public charities that engage in ballot campaign work provided that they follow the safe harbor rules applicable to grants made to charities that lobby. In addition, public charities and community foundations can lobby for or against passage of ballot measures so long as such work, in

conjunction with other lobbying activities, does not become a substantial part of their overall activities.

II. FOUNDATIONS AND VOTER REGISTRATION

It is important for funders to understand that the Internal Revenue Code does *not* bar foundations from supporting voter registration programs. The tax law explicitly permits private foundations to support voter registration efforts provided certain straightforward standards are met. For community foundations and other public charities, the standard is even more liberal. Generally, so long as public charities observe the fundamental rule of nonpartisanship, they are as free to fund voter registration activities as they are to support any other permissible educational and charitable function.

Three points are worth examining separately: A) grants by private foundations required by the grantor to be used for voter registration work; B) general purpose grants by private foundations to public charities engaged in voter registration work; and C) support of nonpartisan voter registration by charities that are not private foundations, such as community foundations.

A. Private Foundation Support for Voter Registration

A grant or other payment by a private foundation earmarked to support a voter registration program is permitted if the program complies with the statutory requirements established by section

4945(f) of the Internal Revenue Code.[2] These requirements fall into two general categories: first, those pertaining to the type of permitted grantee, and second, those pertaining to the nature of the voter registration programs that private foundations can support.

The IRS issues rulings of qualification under these standards to charities that wish to support their voter registration activities, partly or entirely, with private foundation grants.[3] Where a private foundation intends to make a voter registration grant to a charity with such a ruling, it should obtain a written statement from an authorized official of the grantee that the relevant facts continue to comport with those upon which the IRS ruled favorably. With a copy of the IRS ruling and such a statement by the prospective grantee, the grantmaking private foundation may proceed with its grant under the usual IRS ruling protection.[4] In cases in which the prospective voter registration grantee does not have an IRS ruling on its qualification, the grantmaking private foundation will commonly be able to satisfy itself that the

[2] A private foundation making a grant that does not satisfy these requirements incurs a first-level penalty tax equal to 20 percent of the grant amount. Unless the foundation recovers the grant funds or otherwise "corrects" the taxable expenditure within a specified period, it will also incur a second-level penalty tax equal to 100 percent of the grant amount. First and second-level penalty taxes may also be imposed on individual trustees and other foundation managers who approve a taxable expenditure, but only if the IRS sustains the burden of proving that the manager approved the violating grant knowing it to be a violation, and acted willfully and without reasonable cause. I.R.C. § 4945(a), (b).

[3] *See, e.g.*, IRS Private Letter Ruling 201137012 (June 21, 2011); IRS Private Letter Ruling 9751029 (Sept. 19, 1997); IRS Private Letter Ruling 9640021 (July 8, 1996); IRS Private Letter Ruling 962905 (Apr. 23, 1996); IRS Private Letter Ruling 9540044 (July 6, 1995).

[4] Treas. Reg. § 53.4945-3(b)(4). Under the general IRS standards, of course, grantors and contributors may not rely on a ruling if they are responsible for, or aware of, the fact that the grantee organization no longer qualifies under section 4945(f), or if they acquire knowledge that the IRS has notified the grantee that it no longer has that qualification. *Id.*

grantee's proposed voter registration activities satisfy the section 4945(f) requirements by review of the necessary information furnished it by the grantee.

The section 4945(f) requirements for foundation support of voter registration activities are detailed in the following paragraphs.

1. Permitted Grantees

Section 4945(f) imposes three specific requirements on the type of organization that may receive foundation grants for voter registration projects.

a. *Section 501(c)(3) status*. The grantee must be tax-exempt under section 501(c)(3).[5] A foundation cannot, therefore, make a grant to a labor union, trade association, or other noncharitable organization, including section 501(c)(4) or 527 organizations, for a voter registration program.[6]

b. *The direct expenditure requirement*. The grantee must spend "substantially all of [its] income ... directly for the active conduct of activities constituting the purpose or function for which it is organized and operated."[7] The regulations define "substantially all" to mean 85 percent of the grantee's

[5] I.R.C. § 4945(f)(1); Treas. Reg. § 53.4945-(b)(1)(i).

[6] One private foundation can, in theory, make a grant for qualified voter registration activities conducted by another private foundation, and such a grant would not be subject to the expenditure responsibility requirements of section 4945(g). *See* Treas. Reg. §53.4945-5(a)(1). As a practical matter, however, it would be rare for the grantee private foundation to be able to satisfy the "breadth-of-support" test outlined below.

[7] I.R.C. § 4945(f)(3).

income.[8]

To qualify as a "direct" expenditure for this purpose, a payment must be used by the grantee itself, rather than being passed on to one or more further grantees.[9] "Grants" in the normal sense of payments to other organizations "to assist them in conducting activities which help to accomplish ... their exempt purpose" are explicitly excluded from the definition of direct expenditures.

While grants thus do not qualify as direct expenditures, a payment by the recipient of a foundation grant to another organization that acts as its agent in carrying out the payer's voter registration activities (or other charitable efforts) qualifies as a direct expenditure. Like other corporate entities, charitable organizations receiving foundation grants for voter registration activities necessarily act through agents. While typically these agents are individual employees, they may also be other organizations. Thus, if a grantee exercises sufficiently close, continuing, and direct control over the activities of another organization to establish an agency relationship, payments to the organization qualify as direct expenditures. To avoid confusion by the IRS and others, grantees using other organizations as agents in the conduct of voter registration activities should not refer to payments to these organizations as "grants."

c. *The breadth-of-support test*. Section 4945(f)(4) establishes

[8] Treas. Reg. § 53.4945-3(b)(1)(iii).

[9] Treas. Reg. § 53.4942(b)-1(b)(1). The voter registration regulations, Treas. Reg. § 53.4945-(b)(1)(iii), define direct expenditures by cross-reference to section 4942(j)(3) and the accompanying regulations, where the same concept is central to the definition of an operating foundation.

a three-part breadth-of-support test for grantees.

First, "substantially all" of the grantee's support, other than gross investment income,[10] must be received from exempt organizations, the general public, or governmental units. For this purpose, the term "support" includes gifts, grants, contributions, membership fees, gross receipts from business activities related to the grantee's exempt purposes, and net income from any unrelated trade or business conducted by the grantee, but *not* investment income.[11] "Substantially all" for these purposes is again defined by the regulations to mean 85 percent.[12] Thus, the grantee must receive at least 85 percent of its total support—excluding investment income—from other exempt organizations, the public, or governmental units.[13]

Second, not more than 25 percent of the grantee's support, again excluding investment income, can be received from any one exempt organization. For this purpose, private foundations that are effectively controlled by, or were funded by, the same persons are treated as a single exempt organization.[14]

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[10] This provision incorporates the definition of "gross investment income" in section 509(e), i.e., interest, dividends, rents, royalties, payments with respect to securities loans, and similar sources, except to the extent that such income is subject to unrelated business income tax under section 511.

[11] *See* I.R.C. § 509(d); Treas. Reg. § 53.4945-3(b)(1)

[12] Treas. Reg. § 53.4945-3(b)(1)(iv).

[13] The test described here is different from the variations on the public support test that section 501(c)(3) organizations must satisfy in order to qualify as public charities rather than private foundations.

[14] *See* Treas. Reg. §§ 53.4945-3(b)(1)(iv), 53.4946-1(b).

Third, the grantee must not receive more than 50 percent of its total support in the form of interest, dividends, or other investment income.[15]

In the case of a grantee that has been in existence for at least four taxable years, compliance with these breadth-of-support requirements for a particular taxable year is based on the aggregate support received by the organization during the year in question and the four immediately preceding taxable years. For organizations in existence less than four years, the requirements are applied to the aggregate support received by the organization from the date of its creation through the end of the tax year in question.[16]

2. Qualified Voter Registration Programs

Qualified grantees' voter registration programs must themselves satisfy four requirements to be eligible for foundation funding: they must be nonpartisan, they must be conducted in five or more states, they must not be limited to one election period, and the grantee must not accept contributions restricted to use in specified states or in a specified election period.[17]

a. *Nonpartisan voter registration program*. Qualification of an activity as nonpartisan depends on all of the facts and circumstances involved.[18] IRS rulings suggest that three

[15] I.R.C. § 4945(f)(4).

[16] Treas. Reg. § 53.4945-3(b)(3).

[17] I.R.C. § 4945(f)(2), (5); Treas. Reg. § 53.4945-3(b)(1)(ii), (v).

[18] *See, e.g.*, Rev. Rul. 2007-41, 2007-25 I.R.B. 1421; Rev. Rul. 78-248, 1978-1 C.B. 154, *amplified by* Rev. Rul. 80-282, 1980-2 C.B. 178, which interpreted the analogous prohibition on partisan election-related activities under section 501(c)(3)).

aspects of a voter registration program are particularly important in ensuring that it satisfies the nonpartisan requirement.

First, it must be strictly neutral about the party and candidate preferences of the people it registers. Thus, an organization conducting a voter registration program must make its educational materials and services available without regard to recipients' views as to any political candidate or party. Any effort to ascertain recipients' party or candidate preferences before they register—directly or indirectly—is strictly prohibited. Cooperation in running the drive with party or candidate organizations—or with organizations that endorse candidates—should also be avoided.

Significantly, however, the IRS does not interpret this nonpartisan requirement as precluding private foundation support for voter registration programs focused on particular groups, even groups whose past voting behavior indicates that members of the group are statistically more likely to favor candidates of one party. The rules were explicitly intended by Congress to permit continued private foundation funding of efforts to register African Americans, and the IRS has repeatedly approved voter registration programs aimed primarily at minority groups, notwithstanding the fact that African American and some other minority voters traditionally favor Democratic candidates by a substantial margin.[19] Voter

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[19] *See e.g.*, IRS Private Letter Ruling 9751029 (Sept. 19, 1996), ruling that grants made to a charitable organization to conduct a voter registration program for low-income, young, and minority women would not be taxable expenditures; IRS Private Letter Ruling 9540044 (July 6, 1995), ruling that grants to fund voter registration and education targeted at female voters,

registration drives geared to other groups with strong party preferences have also been approved, so long as individuals in the groups are registered without considering their personal political orientation.

Second, the voter registration program must not explicitly or implicitly endorse or oppose any candidate or party. In the IRS's view, an implicit indication of bias or preference concerning candidates or parties is as much a badge of partisanship as a direct endorsement. For example, the IRS has held that an organization had violated the section 501(c)(3) prohibition on participation in an election campaign even though its activities stopped well short of a direct endorsement of any candidate.[20] The organization posed questions to candidates for major public offices on issues of general importance to the electorate and published the responses in a voter's guide for distribution to the public. Because some of the questions evidenced "a bias" on the issues, the organization's activity was treated as partisan. For these reasons, voter registration programs should be reviewed carefully to ensure that there is no fair basis to infer a candidate or party preference from the way the program is conducted.

This caution about bias for or against candidates notwithstanding, a voter registration program need not refrain from discussion of controversial public issues in order

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particularly in minority communities, would not be taxable expenditures; IRS Determination Letter for National Coalition for Black Voter Participation (May 24, 1982).

[20] Rev. Rul. 78-248, 1978-1 C.B. 154, *amplified by* Rev. Rul. 80-282, 1980-2 C.B. 178; *see also* Rev. Rul. 2007-41, 2007-25 I.R.B. 1421; Rev. Rul. 2004-6, 2004-4 I.R.B. 328.

to qualify as nonpartisan. It would clearly be permissible for an organization to try to persuade individuals to register and vote in an election by emphasizing that the election results will influence government policy on particular issues of importance to them, so long as the organization does not screen voters based on their views on any issue. On the other hand, if a particular issue becomes of central importance in a campaign and the candidates have clearly stated opposing positions, urging individuals to vote by stressing their interest in a particular resolution of that issue would risk being treated by the IRS as partisan activity. Whether a court would agree with such an IRS stance is another matter, but since it is impossible to state precisely where between these two examples an organization crosses the line between nonpartisan and partisan activities, caution in this aspect of voter registration programs is appropriate.

Finally, an organization must not select the geographic areas for the conduct of voter registration activities on the grounds that increased registration in the selected areas is likely to favor one candidate or party or that the elections in the selected areas involve certain types of candidates (e.g., an African American running against a white, or a liberal running against a conservative).[21]

Instead, an organization must use nonpartisan selection criteria. Historically low voter registration and participation in

[21] For this reason—and because parties, candidates, and groups that endorse them conduct increasingly sophisticated and carefully targeted partisan registration and get-out-the-vote campaigns—a nonpartisan effort should avoid direct or indirect cooperation or coordination with such groups.

an area, either among the electorate as a whole or an appropriate subgroup, clearly constitutes one such permissible criterion.[22] Several IRS private rulings suggest that appropriate nonpartisan selection criteria also include an organization's desire "to increase its exposure in a particular area," and the organization's access to financial, staff, and other logistical support.[23]

b. *The five-state rule*. To qualify for foundation support, a voter registration program must also be conducted in at least five states.[24] Neither the statute nor regulations require that the registration programs in each state be of equal scope or intensity. On the other hand, merely token efforts in one or more states clearly would not satisfy the five-state rule.

c. *The single election rule*. A further requirement for foundation support is that the grantee's voter registration program not be confined to one specific election period.[25] While the regulations do not define the term "election

[22] For example, in response to an explicit inquiry from the IRS National Office in connection with a request for an IRS determination under section 4945(f), Americans for Civic Participation stated that the level of voter participation would be one factor considered in selecting areas for the conduct of voter registration activities. The IRS subsequently determined that the organization's proposed voter registration activities qualified under section 4945(f). IRS Exemption Determination Letter (June 15, 1982). *See also* IRS Private Letter Ruling 9540044 (Oct. 6, 1995), in which the IRS approved a voter registration project that selected areas of activity on the basis of factors such as the number of unregistered voters and minority population.

[23] The program approved in IRS Private Letter Ruling 9540044 (Oct. 6, 1995) considered the "availability of local resources to assist in the project" in selecting its sites for voter registration activity. The IRS ruling quoted in the text above, issued to Independent Sector (Oct. 8, 1980), involved the selection of locales for nonpartisan candidates' forums rather than voter registration activities, but the rationale is equally applicable to voter registration programs.

[24] I.R.C. § 4945(f)(2).

[25] *Id.*

period," the most reasonable construction of the statute would seem to be that each general election held within a jurisdiction constitutes a separate election period. Thus, for example, if an organization's registration activities span both a Congressional election and a municipal election held the following year, the organization will have complied with the requirement that its activities not be restricted to a single election period.

It is also important to point out that the single election rule applies to the duration of the grantee's voter registration program, not the duration of a foundation's support. While, as explained below, a foundation may not restrict the use of its grant funds to a single election period, it need not make separate grants during successive election periods nor need it insist that some of its grant be reserved for a later period.

d. *The bar on restricted contributions*. The final requirement for qualification under section 4945(f) is that a grantee organization must not accept any contributions that are subject to conditions that the funds be used in specific states or political subdivisions or that they be used in only one specific election period.[26] A contribution will not be treated as restricted to use in a particular state or election period provided that it is not received subject to an oral or written agreement that it will be used for that purpose or an agreement enabling the grantmaker "to cause" the grantee to make such use of the grant.[27]

[26] I.R.C. § 4945(f)(5).

[27] Treas. Reg. § 53.4945-2(a)(5)(i).

> This bar on restricted gifts applies to all contributions received by the organization—not only to foundation-granted funds. Thus, a grantee qualifying to receive foundation funds under section 4945(f) must not accept contributions from anyone earmarked for use in particular jurisdictions or for use during a particular election period.

B. General Support Grants

The section 4945(f) restrictions on support of voter registration activities apply only to foundation grants specifically "earmarked" for such programs or grants that exceed the total cost of the grantee's non-voter registration activities in the grant period. The regulations make clear that an otherwise proper non-earmarked grant to a public charity will not be treated as a taxable expenditure even though the grantee actually uses the grant funds for voter registration activities that do not comply with the requirements of section 4945(f).[28] Thus, the section 4945(f) restrictions will not apply to an unrestricted general support grant to a public charity that conducts voter registration and other programs.[29] Likewise, the restrictions do not apply to grants earmarked for other projects of the grantee, notwithstanding that such grants will free up other funds for the grantee's voter registration program.

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[28] Section 53.4945-2(a)(5)(i) of the regulations provides that

> a grant by a private foundation to an organization described in section 509(a)(1),(2), or (3) does not constitute a taxable expenditure by such foundation under section 4945(d) if the grant by the private foundation is not earmarked to be used in a manner which would violate [section 4945(d)(2)], and there does not exist an agreement, oral or written, whereby such grantor foundation may cause the grantee to engage in any such prohibited activity....

[29] *See* Treas. Reg. § 53.4945-2(a)(6).

C. Voter Registration Grants by Community Foundations and Other Public Charities

The section 4945(f) restrictions on support of voter registration activities apply only to grants by organizations classified as private foundations under section 509(a).[30] Accordingly, community foundations and other public charities that provide financial support for, or engage directly in, voter registration activities need not comply with section 4945(f).

Therefore, community foundations and other public charities can make grants in support of voter registration activities without regard to whether the grantee is a section 501(c)(3) organization,[31] meets the breadth-of-support standards required for section 4945(f) grantees, conducts its voter registration activities in five or more states, or meets the other detailed

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[30] In 1969, the Department of the Treasury made clear both that public charities were permitted under then current law to engage in voter registration activities and that the proposals ultimately enacted as section 4945(f) would not impose any restrictions on such activities of public charities. Specifically, the Treasury stated that

> [T]he Treasury Department has recommended to Congress that with respect to private foundations, the ... prohibition [on a section 501(c)(3) organization intervening in a political campaign] be broadened.... The Treasury Department recommendation would not prohibit or affect voter registration drives or other such political activities by charitable or educational organizations other than private foundations.

Treas. Dept. Release K-87 (May 11, 1969). *See also* Rev. Rul. 2007-41, 2007-25 I.R.B. 1421; Judith E. Kindell & John Francis Reilly, *Election Year Issues*, *in* INTERNAL REVENUE SERVICE, EXEMPT ORGANIZATIONS TECHNICAL INSTRUCTION PROGRAM FOR FY2002 at 378 (2001).

[31] If a public charity makes a grant to an organization not exempt under section 501(c)(3), the grantor must maintain control over the grantee's use of the grant funds to ensure that they are used for charitable purposes. *See* Rev. Rul. 68-489, 1968-2 C.B. 210. In the voter registration context, this would include ensuring that the drive met nonpartisan standards.

requirements for private foundation support.

However, a practical consideration that will often be relevant is that if a grantee accepts contributions for work in a single state for a voter registration project that otherwise would qualify under section 4945(f), section 4945(f)(5) will disqualify the grantee from receiving any private foundation funds for the project. Accordingly, a grantee that also seeks private foundation support could not accept grants from a community foundation that was required to limit use of its funds to particular states.

Public charities are subject to the general section 501(c)(3) prohibition on partisan election campaign activities. Further, expenditures for partisan voter registration programs would constitute taxable "political expenditures" under section 4955[32] and may constitute reportable campaign expenditures under federal election laws.[33] Accordingly, any voter registration activity conducted or supported by a public charity must qualify as nonpartisan under the rules outlined above.

[32] If it makes a political expenditure, the public charity incurs a first-level penalty tax equal to 10 percent of the expenditure. Unless the charity recovers the amount expected or otherwise "corrects" the political expenditure within a specified period and establishes safeguards to prevent future political expenditures, it will also incur a second-level penalty equal to 100 percent of the expenditure. If trustees and/or managers knowingly and without reasonable cause approve a political expenditure, they too may be subject to a penalty tax. The IRS can abate these taxes, though, where correction occurs within a specified period and, in addition in the case of the first-level tax, the political expenditure was not "willful and flagrant." I.R.C. §§ 4955, 4961, 4962.

[33] Genuinely nonpartisan voter registration and get-out-the-vote efforts are not subject to the Federal Election Campaign Act limitations. 2 U.S.C. § 431(9)(B)(ii); 11 C.F.R. § 114.4(c).

III. PRIVATE FOUNDATION SUPPORT FOR BALLOT CAMPAIGNS

Ballot measures—variously styled as "initiatives," "referenda," or "propositions"—can be an important means of making public policy. However, there is occasionally confusion in the field as to the legal status of ballot measures under the federal tax law. Some mistakenly assume that, since ballot measures are decided by voters on Election Day, advocacy in this area is governed by the broad and absolute prohibition against intervening in an election campaign. In fact, the federal tax law treats ballot measures as legislation on the view that the voters are acting as the legislature.[34] Consequently, public charities—including community foundations—are free to lobby for or against passage of ballot measures so long as this is not a substantial part of their overall activities, and private foundations can rely on robust safe harbor rules to make grants to public charities engaged in this work without violating the tax law prohibitions against foundation lobbying.

A. Tax Definition of Lobbying

Private foundations are prohibited from funding or engaging in any "attempt to influence legislation."[35] While this prohibition is absolute, it is also narrow and very clearly defined. Although there

[34] Treas. Reg. § 56.4911-2(b)(1)(iii).

[35] Section 4945(d)(1) imposes a 20 percent penalty tax on any expenditure for an "attempt to influence legislation." Making a lobbying expenditure also triggers an obligation to "correct" the violation. Failure to meet this correction obligation results in a second level penalty tax equal to 100 percent of the lobbying expenditure. Similar rules for manager's penalties and abatement apply to lobbying expenditures as apply to expenditures for partisan campaign activity. In addition, like any section 501(c)(3) organization, a private foundation may lose its tax-exempt status if attempting to influence legislation constitutes a "substantial part" of its activities during any tax year.

are certain kinds of policy-related work that foundations are strictly forbidden from supporting, there are many highly effective activities that are perfectly permissible. In general, a communication with the public that refers to or reflects a view on a ballot measure is a lobbying activity that is ineligible for private foundation support. A "call to action" is not needed for a communication about a ballot measure to be lobbying. However, a number of important principles limit the effects of that rule and open up significant opportunities for foundations to fund ballot campaigns.

Many states have a process through which the proponents of a measure can qualify their proposal for inclusion on the ballot by obtaining a prescribed number of signatures. Under the tax rules, a proposed ballot measure subject to this process does not become "specific legislation" subject to the lobbying rules until a petition is first circulated among voters to collect signatures.[36] Accordingly, efforts to promote the proposed referenda are not "attempts to influence legislation" subject to the foundation lobbying prohibition until signature gathering begins. This rule frequently allows private foundations to fund a wide range of advocacy activities related to a ballot measure during the early stages of the process.

Even after a ballot measure becomes specific legislation, the tax rules exclude many public statements about the measure or the subject it addresses from the definition of lobbying. For example, under the general definition of lobbying, public communications about the same general topic as the ballot measure will not be

[36] Treas. Reg. § 56.4911-2(d)(1)(ii).

lobbying if they do not refer to the measure itself, even if they appear after the measure is on the ballot.[37] Similarly, the tax law allows foundations to support the distribution of objective information about a ballot measure—such as the measure's content and sponsors so long as the communications do not reflect a view on the merits of the measure.[38]

In addition to these general rules, the tax definition of lobbying includes a number of specific exceptions that further expand the range of communications about ballot measures private foundations can support. The most important exception permits foundations to fund the preparation and distribution of "nonpartisan analysis or research" discussing ballot measures or other legislation. In order to qualify for this exception the communication must provide an independent and objective exposition of the issues addressed by the ballot measure and its distribution may not be restricted only to people supporting one side of the issue.[39] A report or similar communication may advocate a particular position or point of view on the ballot measure and still qualify for this exception, provided it offers a sufficiently full and fair exposition of the facts to enable the recipient to form their own independent views on the matter.[40]

B. Grantmaking Safe Harbors

Although private foundation rules prohibit private foundations

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[37] Treas. Reg. §§ 53.4945-2(a), 56.4911-2(b)(1).

[38] Treas. Reg. §§ 53.4945-2(a), 56.4911-2(b)(1).

[39] Treas. Reg. § 53.4945-2(d)(1).

[40] *Id.*

from engaging in or supporting lobbying under the narrow definition just described, the Treasury regulations provide two highly favorable safe harbors permitting grants to public charities that lobby.[41] These safe harbor rules do not apply to grants to organizations that are not public charities—for example, grants to other private foundations or social welfare organizations described in section 501(c)(4).

1. General Purpose Grants

A private foundation may make a general purpose grant to a public charity engaged in lobbying on a ballot measure provided that the grant is not "earmarked" to be used in an attempt to influence legislation.[42] A private foundation grant is "earmarked" if the grant is given pursuant to an agreement, oral or written, that the grant will be used for specific purposes.

2. Specific Project Grants

A private foundation may also make a grant to a public charity to support a specific project that will include lobbying on a ballot measure if three conditions are satisfied:[43]

a. The grant must not be earmarked to be used in an attempt to influence legislation.

b. The amount of the specific project grant, together with other grants made by the same private foundation for the

[41] *See* IRS Information Letter to Charity Lobbying in the Public Interest (Dec. 9, 2004).

[42] Treas. Reg. § 53.4945-2(a)(6)(i).

[43] Treas. Reg. § 53.4945-2(a)(6)(ii).

same project for the same year, must be less than or equal to the amount budgeted by the grantee organization for nonlobbying expenditures within the project budget.

c. The private foundation must not have any reason to doubt the accuracy of the budgetary information provided by the prospective grantee. Absent such reason to doubt the grantee, the foundation may rely on budget documents or other sufficient evidence supplied by the grantee organization (including a signed statement by an authorized officer, director, or trustee of the grantee organization) showing the proposed budget of the specific project.

IV. PUBLIC CHARITY AND COMMUNITY FOUNDATION SUPPORT FOR BALLOT CAMPAIGNS

The absolute prohibition against lobbying applies only to organizations classified as private foundations under section 509(a). Hence, public charities, including community foundations, may support a limited amount of lobbying on ballot measures and other legislation. The exact limit depends on whether the public charity has elected to report its lobbying activity under section 501(h), also known as the “expenditure test.”

Absent the section 501(h) election, public charities are subject to a default rule under which they may only engage in lobbying as an insubstantial part of their activities. Whether lobbying is insubstantial under the default rule depends on all of the facts and circumstances. The resulting uncertainty about the amount of lobbying that is permissible under the default rule and also about just what activities constitute lobbying has been a significant

disincentive for many charities to engage in any lobbying at all.

In contrast to the default rule, section 501(h) establishes specific limits on an organization's lobbying expenditures. Specifically, the overall lobbying expenditure ceiling equals 20 percent of the first $500,000 of the organization's charitable budget and declines as exempt expenditures rise, reaching a maximum allowance of $1 million per year. Further, only 25 percent of this amount may be devoted to so-called "grassroots" lobbying. Generally, grassroots lobbying is the attempt to influence legislation by influencing the general public, as distinguished from "direct lobbying," which is the attempt to influence legislation by communicating directly with legislators and certain other government officials. Because the voters act as the legislature on ballot measures, lobbying on these measures counts against the organization's higher direct lobbying limit.[44]

In addition to fixing precise expenditure limits, the section 501(h) election also allows public charities to rely on the generous bright-line definitions of lobbying described above in section III.A. These definitions can be particularly beneficial for public charities conducting ballot campaigns. In particular, it is not clear under the default rule that a ballot measure is not legislation until a petition is circulated to collect signatures. Nor is it clear that simply avoiding a reference to a ballot measure is sufficient to prevent a communication on the same subject as the measure from being a lobbying activity. Accordingly, public charities contemplating a ballot campaign should seriously consider making the section 501(h) election.

[44] Treas. Reg. § 56.4911-2(b)(1)(iii).

CONCLUSION

Public charities that conduct substantial voter registration programs, GOTV drives or ballot campaigns will generally be mindful of the requirements for foundation support, and make sure that their programs qualify. In the case of voter registration drives, many charities will have specific IRS rulings that their programs meet the requirements of section 4945(f), and where the programs continue to be conducted as they were represented to the IRS, private foundations may rely on the favorable IRS rulings in making voter registration grants to these organizations. Even when a nonpartisan voter registration program does not qualify for support by private foundations, it can be funded by community foundations. Similarly, the grantmaking safe harbors that allow private foundations to support organizations conducting ballot campaigns are straightforward. Thus, while it is important that foundations interested in supporting voter registration or other election-related work make themselves thoroughly familiar with the tax law restrictions, they will rarely find these restrictions a bar to support for nonpartisan voter registration or ballot campaigns.

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