

Yes, most nonprofits *can* legally advocate for or against ballot questions!

Join Attorney Patrick Moore to learn how

Monday February 28, 2022 4:00 - 5:00pm

Attorney Patrick Moore will join us to help 501(c)(3) organizations learn about how they can advocate on ballot questions and stay within federal and state advocacy rules.

DELIVERING ON EQUITY IN MASSACHUSETTS



DELIVERING ON EQUITY SEED PARTNERS



- Voter Engagement Strategizing
- Digital Capacity Building



- Research/analysis
- Advocacy
- Transformative communications



- Deep, statewide, relational base building



- Donor engagement
- Capacity building
- Technical assistance



**Antiracist Policy
Research/Analysis**



**Deep Community
Organizing &
Engagement**

**Data-Driven
Advocacy & Voter
Engagement**

**Transforming
the narrative**

Nonprofit Participation in Massachusetts Ballot Initiatives



Image source:
Secretary of the Commonwealth's *Massachusetts Information for Voters 2020 Ballot Questions Guide*

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Overview

- Highlights
- Sources of Law
- Rules of Involvement

Our Focus

Organization type – 501(c)(3) public charities

- Will make comparisons to private foundations & 501(c)(4) entities

Highlights of what may/may not be done in 2022

- **Endorsement** – a (c)(3) may endorse yes/no on a ballot initiative
- **Use of (c)(3) resources** – yes, within limits addressed in this presentation, provided appropriate disclosures are made
- **Partnering with (c)(4)s** – yes, within limits addressed in this presentation



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- **Fundraising** – no, if your (c)(3) raises money to promote/oppose a ballot initiative, it becomes a political committee subject to state registration



Sources of Law

Federal Tax Law

- Draws lines between advocacy and support of/opposition to a ballot initiative

State Campaign Finance Law

- Governs fundraising and spending in support of/opposition to ballot initiative

State Lobbying Law

- Limited application in this context, because it imposes registration and disclosure requirements on organizations that contact the Legislature and the Executive Branch

Federal Tax Issues: Political Activity Candidates vs. Ballot Initiatives

Bright Line Rule

- For candidates: (c)(3)s **may not** endorse or spend any resources in support of or opposition to a candidate
- For ballot initiatives: public charities **may** endorse and spend resources (with certain limits) in support of or opposition to a ballot initiative or referendum (as it is an issue, not a candidate).

Federal Tax Law

Support of Ballot Initiatives = Lobbying

General Rule:

- Ballot initiative considered “legislation,” and most communications to the public supporting/opposing it is “lobbying,” except the audience is the general public rather than the legislature
- Some exceptions:
 - Drafting/polling of potential initiative may not be lobbying
 - Financing legal challenges to/legal support of an initiative is not lobbying
 - White papers/explainers with a “full and fair” exposition of the issues, even if they express a view.

(c)(3)s can lobby, subject to limitations:

- Key question: Does organization make a 501(h) election?
 - If so, about 15-20% of organizations expenditures can be made for lobbying (see next slide)
 - If not, only an “insubstantial part” (roughly, 5%) of the organization’s spending and activity – *including volunteer time* – may be for lobbying
- Communicating with public about a ballot initiative is “direct” rather than “grass roots” lobbying

Federal Tax Law 501(h) Thresholds

- Calculated as a portion of the organization's exempt purpose expenditures
 - 20% of first \$500,000, plus
 - 15% of next \$500,000, plus
 - 10% of next \$500,000, plus
 - 5% of remainder
- Total annual cap of \$1 million on all lobbying
- 25% maximum cap on grassroots lobbying
 - **BUT** publicizing communication about a ballot initiative ≠ grassroots lobbying.

Federal Tax Law

Complying with Lobbying Limits

Track your time and spending:

- Track all spending in support of/opposition to the initiative, including:
 - Share of employee time (pro rata, based on activities)

Key: distinguishing between advocacy and lobbying

- (c)(3) may engage in unlimited advocacy concerning an issue within its purpose (e.g., social spending on education and transportation)
- Spending in support of/opposition to a ballot initiative, by contrast, is subject to lobbying limits

Federal Tax Law Advocacy vs. Lobbying

- **Clearly Advocacy**
 - White papers/explainers with “full and fair exposition” of issues (w/o call to action), even if they express a view on ballot question
 - Analysis of effect of an initiative (as long as consistent with organization’s past practice)
- **Clearly Lobbying**
 - Canvassing & phone banking in support of initiative
 - Paid & organic communications in support of the initiative (e.g., Vote Yes!)
- **Depends on Circumstances**
 - Explainers & talking points about the initiative
 - Coordination with other organizations supporting/opposing the initiative
- **Special Case of Membership Organizations**
 - Communication only with members in support of/opposition to an initiative is not considered lobbying, *but* the communication must not encourage members to rally support for initiative
 - Members defined at 970 CMR s. 2.02.

MA Campaign Finance Law

- Massachusetts campaigns are governed by G.L. c. 55 and regulations published by the Office of Campaign and Political Finance (OCPF)
 - Trigger for Campaign Finance Laws to Apply:
 - The RAISING or SPENDING of money “in support of or opposition to” candidates or ballot initiatives.

MA Campaign Finance Bright Line Rules

■ SPENDING

- Public charity *may* spend resources, including staff time, supporting/opposing a ballot initiative, but *must* track and disclose its spending to OCPF (as discussed in a few minutes)
 - **Special Rule for Organizations that Receive Public Grants:** public funds *may not* be used to support/oppose a ballot initiative, and must be segregated in a separate account.

■ FUNDRAISING

- Public charity *may not* solicit funds specifically to support/oppose a ballot initiative, unless it files with OCPF to create a ballot question committee

MA Campaign Finance Law

What is Spending in Support/Opposition?

- **Considered Campaign Spending:**
 - Signature collection & canvassing
 - Materials that advocate a vote for/against an initiative – organic or paid
 - NOTE: paid advertising requires a *disclaimer*, including of top 5 donors
- **NOT Campaign Spending:**
 - Membership communication for/against an initiative
 - Participation in legal proceedings concerning the initiative
- **Depends on particular facts/circumstances:**
 - Explainers on pro/cons of initiative that do not contain a call to action
 - OCPF is willing to review materials to help determine

MA Campaign Finance Law

Campaign Finance Disclosure of Spending

- State law requires disclosure of campaign spending to the Office of Campaign and Political Finance.
 - Resources (including staff time) used in support of/opposition to a ballot initiative must be tracked
- Disclosure depends on coordination with the ballot question committee
 - **If coordinated**: spending is considered an in-kind to the committee, and must be disclosed as a contribution to it
 - Work with committee to calculate the amount of the in-kind to make sure records are consistent
 - **If not coordinated**: spending must be disclosed on OCPF Form 22, first by September 3, 2022, and then at regular intervals thereafter (Sept. 20, Oct. 5, Oct. 20) before the election and after (Nov. 20)

MA Campaign Finance Law Fundraising

- **Overall Theme:** The core purpose of our state campaign finance system is disclosure. Generally, public charity contributions are not disclosed. So, raising money to support/oppose an initiative defeats that core purpose and will not be allowed. OCPF prominently enforced this prohibition in connection with the charter school ballot question in 2016.
- **Rule:** Consequently, a public charity should not engage in fundraising to support/oppose a ballot initiative
- **Permissible Approaches:**
 - Can encourage prospective contributors to give directly to an existing ballot question committee
 - May seek **general support** for organization
 - If organization would not have been able to fund ballot initiative activities without general support contribution received within 30 days those activities are undertaken, contribution assumed to be for initiative activities

Other Considerations

- **GRANT SOURCES**

- **Foundations:** may give general support grants, but may not earmark grants to finance work supporting/opposing ballot initiatives. Resources predating a foundation's grant must be sufficient to support any initiative work.
- **Public Grants:** no public grants may be used to support/oppose a ballot initiative.
 - NOTE: if your organization receives public funds, they must be held in a separate account from where ballot question spending occurs

- **STATE LOBBYING DISCLOSURE**

- Though it is considered "lobbying" for federal tax purposes, spending in support of/opposition to ballot initiatives is not "lobbying" under state lobbying disclosure law
 - Filing/disclosures not triggered unless advocacy is to Legislature/Executive Branch

Examples

- **#1:** Your organization prepares materials that explain the impact of ballot initiative and take a position on its wisdom. Other parts of your organization are spending in favor of that very same initiative.
 - How should spending on the explainers be allocated:
 - As a matter of federal tax law
 - As a matter of state campaign finance law
- **#2:** My organization does not make a 501(h) election. What considerations are involved in making such an election?
 - May be made at any time during your current fiscal year, but
 - Gives rise to tracking and disclosure requirements on the extent of your lobbying activities

Resources

- Alliance for Justice Explainer (available [here](#))
- OCPF Materials:
 - Memorandum re: Organizations Making Expenditures to Influence Ballot Questions, [M-98-04](#) (Rev. Jul. 24, 2020)
 - OCPF Ballot Question Committee [Guide](#)

Contact Information



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THANK YOU!

**IF YOU HAVE ANY QUESTIONS ON FAIR SHARE AND UBER/LYFT BALLOT QUESTIONS
PLEASE REACH OUT TO:**

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