POLITICAL CAMPAIGN-RELATED ACTIVITIES OF AND AT COLLEGES AND UNIVERSITIES

We summarize here "do's" and "don'ts" of potential entanglements of colleges and universities, and their personnel, in campaigns for public office. This summary, which updates a March 2016 ACE memorandum, is not exhaustive and omits legal citations. It is based on judicial and IRS rulings under Section 501(c)(3) of the Internal Revenue Code; IRS guidance; and the Federal Election Campaign Act of 1971, as amended, as well as Federal Election Commission regulations that apply to colleges and universities.

This Issue Brief is most directly relevant to private institutions, as it mainly draws on legal authorities and guidance that is applicable to them. Specific state laws that speak to political campaign activities at public institutions are not addressed here. However, public institutions would be prudent to consider this guidance as likely analogous in most respects to their applicable restrictions under relevant state laws.

Also not specified here are the potential penalties for improper political activity by and at a college or university. Generally speaking, they can include loss of the institution's tax-exempt status, imposition of taxes on the institution and its responsible managers, and other risks, including federal or state government lawsuits, audits, and investigations.

Of note, the IRS has not issued any additional precedential guidance on the political campaign activities of Section 501(c)(3) tax-exempt organizations since the publication of our March 2016 memorandum. Nevertheless, the political campaign activities of tax-exempt organizations continue to be a subject of considerable controversy and public debate. During the past year, the Trump Administration and certain Republican members of Congress have repeatedly sought to repeal or limit the Johnson Amendment, which refers to the portion of Section 501(c)(3) that prohibits 501(c)(3) non-profit organizations from participating or intervening in any political campaign. Although their efforts have so far been unsuccessful, repealing the Johnson Amendment remains on their agenda.

In this charged climate, political campaign-related activities that occur on college campuses or are perceived to be undertaken by a college or university are likely to continue to be scrutinized. In addition, colleges and universities continue to be criticized by free-speech groups over their policies and practices. Because of the complexities and challenges in this area, we recommend that each institution consult its counsel before taking proposed actions.

This memorandum was prepared by the Washington, DC law firm Hogan Lovells US LLP and edited by ACE Vice President and General Counsel Peter McDonough (September 2018).

I. ILLUSTRATIVE PERMITTED ACTIVITIES

A. Voter Education (including voter guides) and Voter Registration

Y1. **Conducting training programs** designed to increase public understanding of the electoral process or to encourage citizens, including students on campus, to become involved in the process, provided that such training is nonpartisan in the recruitment of instructors, the selection of students, and the curriculum. The program should be widely publicized, although groups underrepresented in the electoral process may be targeted.

Y2. **Participating in non-partisan voter registration or get-out-the-vote activities**. Such activities are considered nonpartisan even when aimed at groups (such as students, urban voters, young people or minorities) likely to favor a certain political candidate or party, provided that the activities are not intended to target voters of a particular party or to help particular candidates, and provided further that particular geographic areas are not selected to favor any party or candidates. Other factors that tend to show that voter registration or get-out-the-vote communications are nonpartisan include: (1) either no candidate is named or depicted or all candidates are named or depicted without favoring any candidate; (2) no political parties are named except that communications may identify the political parties of all candidates named or depicted; and (3) communications are limited to urging individuals to vote or register to vote and to describing the hours and places of registration or voting.

Y3. **Circulating unbiased questionnaires** to all candidates for an office, and tabulating and disseminating the results; provided that the questionnaires cover a broad range of subjects and neither reflect political skew nor contain editorial opinion. Candidates should be given a reasonable amount of time to respond to the questionnaires. To the extent the questionnaires include questions with "yes" or "no" answers, candidates should be given an opportunity to explain their answers.

Y4. **Conducting public opinion polls** with respect to issues (rather than candidates), provided that the questions are framed to be fair and neutral, accepted polling techniques are used, and the questions do not directly or indirectly concern records or positions of particular candidates or parties. With respect to such activities of faculty, the limitations should be addressed with due regard for academic freedom.

Y5. **Annually preparing and distributing a compilation of voting records of all members of Congress on major legislative issues** that involve a wide range of topics, without political skew and without editorial opinion, provided that the information is not geared to coincide with the election period. Guides such as these should avoid rating candidates, even if the rating criteria are nonpartisan (e.g., based on professional qualifications) and should not be accompanied by a statement or actions that tie a position articulated in the guide to a particular candidate or election. (See N2 below.)

B. Candidate appearances

Y6. **Providing access to air time** on a university-owned radio station on an equal basis to all legally qualified candidates for a public office, in a manner consistent with the limits imposed by Federal Communications Commission standards.

Y7. **Providing opportunities to speak** at college or university events on an equal basis to all legally-qualified candidates for a public office. If the institution chooses to invite candidates to speak individually in their capacity as a candidate, it must take steps to ensure that all such legally qualified candidates are invited and that none are favored in relation to the activity. For example, if a university invites one candidate to speak at a well-attended annual banquet, but invites another candidate to speak at a sparsely attended general meeting, the university will not have provided equal opportunity to participate. An explicit statement should be made as part of the introduction of the speaker and in communications concerning the speaker's attendance that the institution does not support or oppose the candidate. Campaign fundraising at the event should be prohibited. The institution must make reasonable efforts to ensure that the appearances constitute speeches, question-and-answer sessions or similar communications in an academic setting and are not conducted as campaign rallies or events.

Please note that Y7 addresses situations in which the institution itself (acting through its officials/ authorized persons) invites one or more candidates to speak. For situations involving student groups inviting a candidate to speak, please see Y14 below. For situations involving faculty or other staff inviting candidates to speak, the university should consider whether the actions of the faculty member or staff could be attributed to the university and whether university resources will be used to support a political candidate. See Y17-Y19 and N16-N17 for discussions of whether an individual's actions or statements would likely be attributed to the university. See N14 (prohibiting providing a forum to a candidate to promote his or her campaign if other candidates are not treated equally) and N9 (prohibiting providing university facilities to a candidate in a way that favors that candidate) for a discussion of the use of institutional resources.

Y8. **Conducting institution-sponsored public forums** to which all legally qualified candidates for a public office (or for the nomination of a particular party) are invited and given equal access and opportunity to speak, if the format and content of the forum are presented in a neutral manner.

Y9. **Inviting candidates to appear in a non-candidate capacity,** provided that the individual is chosen to speak solely for reasons other than his or her candidacy, the individual speaks only in his or her non-candidate capacity, no reference to the election is made, and the organization maintains a nonpartisan atmosphere on the premises or at the event. Campaigning at the event should be prohibited. The institution should clearly indicate the capacity in which the candidate is appearing and should not mention the candidacy or the upcoming election in any communications announcing the candidate's attendance.

C. Issue advocacy

Y10. **Engaging in usual and permissible lobbying and public policy education activities**, within the constraints ordinarily applicable to such activities conducted by a college or university. This is a complex topic that warrants fuller analysis and advice. Special caution is indicated with respect to heightened, different or targeted lobbying and public policy education activities conducted during a campaign season.

D. Use of institutional resources

Y11. **Establishing genuine curricular activities aimed at educating students** with respect to the political process. For example, the IRS approved a political science program in which, as part of a for-credit course, university students participated in several weeks of classroom work to learn about political campaign methods, and then were excused from classes for two weeks to participate in campaigns of their choice, without the university influencing which campaigns were chosen.

Y12. **Rearranging the academic calendar** to permit students, faculty, and administrators to participate in the election process, if the rearrangement is made without reference to particular campaigns or political issues; provided that the recess is in substitution for another period that would have been free of curricular activity.

Y13. **Providing financial and administrative support to a student newspaper** even though the newspaper publishes editorial opinions on political and legislative matters.

Y14. **Allowing established student groups to use institutional facilities** for partisan political purposes, including candidate appearances on campus, provided that such groups pay the usual and normal charge, if any, for use of institutional facilities by student groups. Fees usually are not required for traditional, on-campus student political clubs. Generally, groups other than student groups should be charged. Administrators and faculty should take special care in relation to any such proposed student activities, to avoid the appearance of institutional endorsement and to observe the other principles this memorandum identifies. Subject to applicable law, institutions may as a matter of their own general policy decline to permit their facilities to be used for such purposes. Student groups should not be permitted to use institutional resources to conduct fundraising activities on behalf of candidates. (See N15 below.)

Y15. **Adopting a voluntary payroll deduction plan** that would allow individual employees to direct a portion of their wages to the political action committees ("PACs") for their respective unions, provided that the institution's activities with respect to the PAC are ministerial and simply involve transferring the funds earmarked by the employees to the PAC chosen by the employee, the institution has absolutely no role in the management or governance of the PAC or any influence over the selection of candidates or political parties to be supported by the PAC, the institution's name is not used or otherwise acknowledged in connection with any contributions made by the PAC to any candidates for public office, the institution is reimbursed for costs associated with the plan, the institution takes steps to ensure that no employee associates the PAC with the institution, and the institution does not allow employees to participate in PAC activities during work hours other than in the performance of the ministerial activities described above.

Y16. **Providing hyperlinks to the webpages**, or other space on the institution's website, of all legally qualified candidates for a public office, if a tax-exempt purpose (e.g., "voter education") is served by offering the link and the link is made in a manner that, after taking into account the format and other content on the institution's website, does not favor one candidate over another. (See N13 below.)

E. Participation in the election process by faculty, administrators, and other employees of the institution

Y17. **Members of the college or university community are entitled to participate or not, off-hours, as they see fit, in the election process**; provided that speaking or acting in the name of the institution is prohibited except as described in this Issue Brief; provided further that they are not acting at the direction of an institutional official; and provided further that if the institution is identified, that the opinions that are expressed are not the opinions of the college or university should be communicated.

Y18. **A faculty member, administrator or other employee may, if permitted by institutional policies and procedures, engage in federal campaign-related activity** that is (a) outside normal work hours; (b) within ordinary work hours, if the time is made up within a reasonable period by devoting a comparable number of extra hours to work for the institution; (c) charged to vacation time to which the person is then entitled or occurs during a regular sabbatical leave; or (d) during a leave of absence without pay taken with the institution's approval. The institution should consult applicable state law concerning permitted volunteer activities by employees in connection with campaigns for state or local office. Senior institutional officials, such as the president and the vice-president for governmental affairs, should be extremely cautious about personal engagement in campaign activity, and ordinarily refrain from it, as there is risk that such activity would be perceived as support or endorsement by the institution. (See N16 below.)

Y19. **Public statements, oral or written, by institutional officials** (such as the president and deans) are permitted in support of a candidate, political party, PAC or the like, where the institutional official clearly indicates that his or her comments are entirely personal and do not, and are not intended to, reflect or represent the views of the institution. For example, the IRS condoned a full-page advertisement in a local newspaper, paid for by a candidate, where the advertisement referred by name and title to the president of a 501(c)(3) non-profit organization as a campaign supporter, when the ad expressly stated that the "titles and affiliations of each individual are provided for identification purposes only." (See N15 below.)

II. ILLUSTRATIVE PROHIBITED (OR, IN SOME INSTANCES, QUESTIONABLE) ACTIVITIES IF UNDERTAKEN BY THE INSTITUTION OR BY AN INDIVIDUAL WHOSE ACTIONS ARE ATTRIBUTABLE TO THE INSTITUTION

A. Voter education (including voter guides) and voter registration

N1. **Conducting "voter education" activities,** such as those involving questionnaires, if confined to a narrow range of issues or skewed in favor of certain candidates or a political party. For example, the IRS has disapproved such activities that involved selected voting records of certain incumbents on a narrow range of issues, such as "land conservation."

N2. **Publishing ratings of the candidates**, particularly in situations where the ratings could be viewed as reflecting the views of the institution, or institutional resources are used in connection with the preparation or publication of such ratings without reimbursement at the usual and normal charge. (See Y2 above.)

N3. **Endorsing, expressly or impliedly, a candidate for public office**. Examples of express endorsement include the placement of signs on university property that show support for a particular candidate, and contributing to political campaign funds. Examples of implied endorsement are public statements at a college or university event by an official of the institution, praising a particular candidate in relation to the holding of public office, and a pattern of institutional activities in relation to or support of a particular candidate. As with all of the prohibitions discussed in this Issue Brief, such a prohibition applies even if the candidate is an administrator or faculty member of the institution.

N4. **Commenting on specific actions, statements or positions taken by candidates**, including incumbents, in the course of their campaigns. The institution is not forbidden to comment on specific issues pertinent to its tax-exempt purposes, particularly if it has a track record of commenting on such issues in non-election years. Whether a statement is delivered close in time to an election, whether the communication identifies specific candidates or approves or disapproves of a candidate's positions or actions, whether the communication is part of an ongoing series of communications on the issue by the institution that are not related to the timing of any election, and whether the timing of the communication and identification of the candidate are related to a non-electoral event are all relevant factors in determining whether an institution's statement on a particular issue could result in political campaign intervention.

N5. **Promoting action (voting) with respect to issues that have become highly identified as dividing lines between the candidates**. This principle does not bar the institution from commenting on issues critical to its tax-exempt purposes, if it has a track record of commenting on such issues in non-election years with respect to such issues.

N6. **Coordinating voter education activities with campaign events.**

B. Use of institutional resources

N7. **Coordinating institutional fund-raising with fund-raising** of a candidate for public office, political party, PAC or the like.

N8. **Reimbursing college or university officials** for campaign contributions.

N9. **Providing mailing lists, use of office space, telephones, photocopying or other institutional facilities or support** to a candidate, campaign, political party, political action committee (PAC) or the like free of charge. If mailing lists or facilities are sold or rented to a candidate or campaign, the items must be made available to all other candidates on the same terms and at fair market prices. Additionally, the institution should be prepared to show that it did not take the initiative in making the items available and that the sales or rentals are part of an ongoing pattern in which similar items are provided to unrelated, nonpolitical entities. Counsel should be consulted on the potential for taxation of revenues generated by such sales or rentals.

N10. **Using institutional letterhead** in support of a candidate, political party, PAC or the like.

N11. **Sponsoring events** to advance the candidacy of particular candidates.

N12. **Using message boards and forums** affiliated with the institution's website to support particular candidates, if the statements of the provider of the information can be reasonably attributed to the institution. A disclaimer that states that the opinions are neither those of the institution nor sanctioned by the institution is recommended in those public discussion areas where the information could reasonably be attributed to the institution.

N13. **Providing hyperlinks to the webpages,** or other space on a university's website, of one or more candidates for public office in a manner that favors one candidate over another. Generally, information posted on an institution's website that favors or opposes a candidate for public office is treated the same as distributed printed material, oral statements or broadcasts that favor or oppose a candidate. Institutions should diligently monitor the content of the linked website for any changes.

N14. **Providing a candidate a forum** to promote his or her campaign if other candidates are not treated equally, even if the forum is not intended to assist the candidate. For example, the IRS concluded that a charitable organization violated the prohibition on campaign intervention when the candidate solicited funds on the organization's behalf, because the content of the solicitation included campaign rhetoric.

N15. **Using institutional resources to conduct political campaign fundraising activities**. Funds or contributions for political candidates or campaigns may not be solicited in the name of the university, on the university's campus or through the use of campus resources, including by student groups.

C. Participation in the election process by faculty, administrators, and other employees of the institution

N16. **Public statements, oral or written, by institutional officials** (such as the president and deans) in support of a candidate, political party, PAC or the like, where there is risk that the statements would be perceived as support or endorsement by the institution. For example, the IRS has indicated that it would be inappropriate for a column titled "My Views" to appear in a university's monthly newsletter in which the university president stated, "it is my personal opinion that Candidate U should be reelected," even though the president paid part of the cost of the newsletter.

N17. **Remarks at an institutional meeting by an institutional official in support of a candidate, political party, PAC or the like**. For example, institutional officials should not make statements that could be perceived as support for a particular candidate at a meeting of the board of trustees.

The foregoing is not exhaustive. Considerable judgment in the application of these principles is likely to be required. When activities that are separately identified in this Issue Brief are combined, an institution should analyze the interaction between the activities, as the interaction may affect whether the institution is engaged in political campaign intervention.