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Influencing Governor's Appointment to Fill Vacant Senate or House Seat

Vice-President Elect Kamala Harris is half-way through her current term representing California in the United States Senate. As a result of her election as Vice-President, her Senate seat will become vacant by January 20, 2021, and it will fall to California Governor Gavin Newsom to appoint the person to serve out the remainder of her term (or until the next general election in California). Similar issues may come up in other states, as President-Elect Biden begins building his cabinet and staff, possibly by drawing from current Senators and Representatives, and creating vacancies in those seats.

Charities may have views about how these vacancies should be filled, and can share those views without violating federal tax law, if they do so carefully.

Charities can conduct a significant but limited amount of legislative lobbying and are absolutely prohibited from directly or indirectly participating in, or intervening in, any campaign (whether for or against) any candidate for elective public office. The question for a charity is whether making its views known about a potential appointee to a vacant Senate seat is subject to either of these restrictions.

As we've discussed before, a Senate vote to confirm a President's judicial or executive branch nominee constitutes "specific legislation" for purposes of federal tax rules governing lobbying by charities. As a result, a charity's communications that express support for or opposition to the confirmation may count as lobbying for tax purposes, either as direct lobbying (e.g., communications directly with Senators) or as grass roots lobbying (e.g., communications with the public that include a "call to action" to contact their Senators).

However, because a governor's appointment to fill a vacant Senate seat generally *does not require confirmation* by any legislative body, it does not involve legislative action. As a result, communications with Governor Newsom or the public about the appointment to fill Harris' Senate seat will not constitute lobbying for tax purposes. (State lobbying disclosure rules still may apply, however, which the charity also should consider.)

In addition, because Harris' vacant seat will be filled by appointment and not by an election, influencing the Governor's appointment should not constitute prohibited intervention in a candidate campaign under Section 501(c)(3). (Judicial appointments are a little different from Senatorial appointments because federal judges are not

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normally elected, while Senators are. In theory, the IRS could draw a clear distinction between the two types of appointment, but to date, it has not done so.)

There is another tax issue to consider, about which the IRS has not provided definitive guidance. Section 527(f) of the Internal Revenue Code imposes a tax on certain political expenditures made by a 501(c) organization (including but not limited to charities), up to the amount of that organization's investment income in that same tax year. (If the organization has no net investment income, it will have no tax liability under Section 527(f).) Unlike the prohibition under Section 501(c)(3), however, Section 527(f) encompasses not just elections, but also non-election-related activities, including any attempt to influence the "selection, nomination, . . . or appointment" of an individual to public office.

More than thirty years ago, the IRS considered whether a Section 501(c)(3) organization attempting to influence the Senate confirmation of a federal judicial nominee should be subject to tax under Section 527, but ultimately did not make a final determination on that issue. As a result, practitioners generally believe that if the IRS were to decide to impose tax under Section 527(f) on charity attempts to influence judicial appointments, it would do so only after publicly announcing that position, and only with respect to activities conducted after that announcement. The same may be true for Senate appointments, although the IRS has not expressly said as much.

Charities can influence a Governor's appointment to fill a vacant seat in the US Senate or House of Representatives. However, because of the complexity and uncertainty inherent in the applicable rules, a charity that decides to engage in this work should first get legal advice about how to do it safely.