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Nonprofits and ICE: Illegality, Compliance, and Exemption

Recent public protests in Los Angeles and across the nation against the anti-immigrant policies and actions of the Trump administration highlight that Americans (including immigrants) enjoy a broad right under the First Amendment to the United States Constitution, to peaceably assemble and express grievances with the government and its policies.

Charities can organize, promote, and engage in these legal activities, and their supporters, including private foundations, can fund and publicly embrace that work. However, the line is drawn at supporting and participating in **illegal** activities that are not consistent with, and can endanger, a charity's 501(c)(3) tax exemption. This overview presents basic information on the implications of illegal activities for exempt status.

What constitutes illegal activity? Illegal activity includes any activity that itself violates the law, or that urges, promotes, or facilitates violation of the law. Conducting or encouraging legal forms of protest or other resistance to laws is not illegal.

Illegality and 501(c)(3) status. A charity cannot be organized or operated for an illegal purpose, or for the purpose of conducting illegal activity in furtherance of a lawful goal. But a charity that has a lawful purpose and conducts lawful activities may retain its tax-exempt status even if some actions it takes in furtherance of charitable ends result in *some* illegal activity, so long as the illegal activity is not "substantial." Substantiality in this context is determined by both the *quality* and the *quantity* of illegal activity.

Qualitative considerations. In evaluating qualitative substantiality, some illegal activities are more substantial than others and carry correspondingly more severe potential tax consequences for a charity that is associated with the activity, whether by having funded, promoted, or conducted it. For example, organizing a permitted, peaceful protest outside a detention facility during which some individual participants trespass and get arrested would not likely, by itself, be considered qualitatively "substantial" illegal activity sufficient to cost the charity its exemption. Organizing an occupation of the same facility, or promoting violence against law enforcement personnel protecting it, could result in revocation. As the IRS put it in GCM 34631, "[a] very little planned violence or terrorism would constitute 'substantial' activities not in furtherance of exempt purposes."

Also, the more directly a charity's leadership exercises control or authority over, or claims ownership of, the illegal activity, the greater the likelihood that the IRS

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Nonprofit Law Matters looks at legal issues in the nonprofit and tax-exempt organizations world. Written by the attorneys and paralegals of Adler & Colvin, it provides updates and analysis regarding philanthropy, charity, and other exempt organization issues.

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will consider the organization's illegal activity to be "substantial."

Quantitative considerations. The amount of illegal activity that a charity is associated with is also relevant to retaining its tax exemption. The IRS denied exemption under Section 501(c)(3) for an organization whose primary activity was to sponsor demonstrations against the Vietnam War, at which the organization knowingly and intentionally urged participants to commit illegal acts of civil disobedience. On the other hand, when the facts have demonstrated that illegal activity attributed to a charity is *not* its primary activity or was an unintended consequence of its legal activities, the IRS has allowed the organization to retain its exempt status under Section 501(c)(3) despite having engaged in *some* illegal activity.

When will illegal acts of individuals be attributed to an organization? Not every illegal act that occurs during or in connection with an organization's activities will be attributed to the organization. Attribution depends on the extent to which the organization's actions demonstrate its control over or responsibility for the illegal activities.

The IRS will attribute to an organization the illegal activities of its directors, officers, employees, or agents, under three circumstances:

1. Directors or officers engage in illegal activity under actual or purported authority to act on behalf of the organization.
2. An employee, independent contractor, volunteer, or other agent conducts illegal activity within the boundaries of their authority to act on behalf of the organization.
3. The organization expressly or implicitly ratifies or condones illegal acts committed by its directors, officers, employees, members, or agents.

Determining whether these circumstances exist in a given instance depends on the specific facts, so charities should make certain that they can credibly document steps they have taken to ensure that activities conducted on their behalf, or in their name, remain legal.

When laws conflict, which law determines illegality? In some cases state (or local) law may conflict, or appear to conflict, with federal law, which raises questions about how to assess illegality for purposes of exemption. The IRS has denied exemption to organizations distributing medical marijuana in states where that activity is legal, because marijuana distribution remains illegal under federal law. The IRS could apply similar logic to support revocation of exemption of a charity that supports or conducts activities complying with local "sanctuary policies" that serve immigrants without regard to immigration status, if the activity violates federal law.

Illegal activities and charitable trust laws. Charities also have to comply with state laws governing the use and stewardship of assets held in charitable trust. In California and many other jurisdictions, all of the assets donated to or held by a charity (or a non-charity if restricted by the donor to charitable purposes) are subject to these rules. State charitable trust laws are usually enforceable by that state's Attorney General or, in some states, by donors.

Charitable trust laws could prevent a charity from using its assets to pay costs associated with illegal activities, such as paying bail for, or fines or penalties incurred by, charity personnel, including directors, staff, and volunteers, even if those activities would not threaten the charity's federal tax exemption.

When might funders be responsible for illegal activities of their grantees? In most cases, the IRS will not hold a funder accountable for illegal activities conducted by a grantee, so long as the funder did not earmark funds for the activities or control, direct, or participate in the grantee's decisions about how to use grant funds.

Managing the risk of illegality. Charities funding or conducting activities that further their charitable purposes but that may be hard to control or controversial in terms of legality should consider how to manage the potential for actual or alleged illegality to

occur as a result of those activities.

- › Crisis planning: Organizations should develop, in advance and in consultation with knowledgeable counsel, a crisis response plan to deal with potential consequences of illegal activity that may occur in connection with a planned, legal activity. For example, if an organization publicizes an upcoming protest to its members, it should consider exposure of its staff or volunteers to arrest, and plan accordingly.
- › Training: Organizations can reduce their risk by training participants (including directors, officers, staff, volunteers, and independent contractors) about how to conduct the activity safely and legally. Training could include an explanation of applicable local law; education about legal, but effective, protest and advocacy strategies; and techniques for recognizing and mitigating potential risks that may arise during the activity. Documentation that proves the charity's provision of such training may help avoid attribution to the charity of illegal activity conducted by individuals at an otherwise-legal event.
- › Messaging: Organizations should consider how to protect against reputational damage among members, donors, and the general public, by developing and disseminating messages that emphasize and promote the charitable purposes of the activity, and resisting efforts to distract them from their mission.
- › Hardening the target: Before engaging in potentially controversial activities that might draw attention from opponents, organizations should ensure that their regulatory compliance is current, that they have current, appropriate insurance coverage, and that they have complied with all of their legal obligations.

Conclusion. Conducting or encouraging legal forms of civil protest and resistance is lawful for charities. Charities are often the voice for their constituencies, especially constituencies who may fear to speak for themselves. Charities can, and should not hesitate to, exercise their First Amendment rights under the U.S. Constitution when it furthers their charitable purposes.

Although an illegal purpose will preclude 501(c)(3) tax exempt status entirely, an charity with a valid 501(c)(3) purpose might not lose its exemption despite having engaged in some illegal activity, but such activity is never without risk. Various factors affect the level of risk to which an organization is exposed as a result of illegal activity by its directors, officers, employees, agents, volunteers, or members. The most significant are the nature and amount of illegal activity and the extent to which the organization's leadership ratifies, condones, or encourages it. Risks include reputational damage, revocation of tax-exempt status, and criminal and/or civil liability under applicable laws. If an organization intends to exercise its First Amendment rights in an activity that risks illegality, or an activity that could be associated with illegal activities of others, it should first understand the specific risks posed by the proposed activity and take mitigating steps before proceeding, including prior consultation with appropriate knowledgeable counsel, to minimize and manage those risks.