

Initiating Policy Change *Circulating Ballot Initiatives in California*

The ballot initiative process in California can be an effective tool for nonprofits, including 501(c)(3) public charities, to bring about change in public policy. Both California law and federal tax law permit 501(c)(3) public charities to participate in the ballot initiative process, including gathering the sufficient number of signatures (often referred to as circulating initiative and referendum petitions) to [qualify a measure for the ballot](#).

Under **California law**, ballot measure activity is treated as campaign activity; organizations that spend or receive a certain amount of money to qualify a measure for the ballot may be required to file reports with the secretary of state disclosing information about the organization's receipts and/or expenditures.¹ Not all organizations that support or oppose the qualification of ballot measures in California will trigger ballot measure disclosure reports. In fact, organizations interested in qualifying a measure for the ballot may engage in a variety of activities without triggering any disclosure reports.

Federal tax law treats activities related to drafting, qualifying, passing, or opposing a ballot measure as **direct lobbying**. The IRS does not consider activities around ballot measures to be campaign activity, even though measures may appear on the same ballot as candidates. For more information on lobbying limits on 501(c)(3) organizations under federal tax law, including the benefits of electing to use the 501(h) Expenditure Test to calculate your organization's annual lobbying limit, see the Alliance for Justice publication [Worry-Free Lobbying for Nonprofits](#) and other resources on [lobbying](#).

Nonprofit organizations working on state and local initiatives in California must comply with federal tax law, [California state law](#), as well as local laws. The California secretary of state's website provides information on the requirements to [prepare and qualify](#) a statewide measure or referendum. Organizations interested in qualifying local initiatives should check with the local county counsel or city attorney for information on qualifying a local measure. Because these federal and state laws have different purposes and definitions, it is important to remember that the amount of money spent on lobbying that may be reported by the 501(c)(3) on its annual Form 990 will likely be different from the amount reported spent on ballot measure activities under state disclosure laws.

Getting Your Measure on the Ballot through the Initiative Process

Drafting a Measure

Under California law, an initiative does not become subject to California's disclosure laws until an initiative starts circulating (i.e., once the first petition-circulator hits the streets). Activities that are limited to drafting an initiative will not need to be disclosed. As such, expenditures made to draft an initiative generally do not need to be reported pursuant to California's ballot measure disclosure laws either before the initiative starts circulation, or even after circulation begins. However, activities that may later be used in the qualification and passage of a measure will likely require part of their costs to be disclosed. Drafting expenses an organization will not need to disclose include:

¹ For additional information on California's ballot measure disclosure rules please visit AFJ's website at www.afj.org/stateresources.

- Attorneys' fees to draft an initiative
- Staff time spent researching or drafting an initiative
- Staff time spent working with coalition partners to prepare an initiative,
- Fees paid to political consultants or other technical experts to determine what voters would like to see in a potential measure. If the organization or its coalition partners later use these materials or analysis to qualify the measure, they may need to disclose a portion of the consulting fees pursuant to California's ballot measure disclosure rules.
- Polling used in the drafting of an initiative. Again, if the poll results are later used by the organization or its coalition partners to qualify the measure, part of those costs would likely need to be disclosed. (See additional information under "Polling" below.)

Under **federal tax law**, an organization may need to count more of its pre-circulation expenditures as "lobbying" against the organization's lobbying limit, since many of those activities will count as preparation for later lobbying. Although the IRS has not specifically advised on this issue, it is safest for the organization to count as lobbying most pre-circulation activity conducted to draft and prepare the initiative for circulation, if the primary purpose for that activity was to get the measure on the ballot. Examples of activities that will likely count as lobbying include:

- Attorneys' fees to draft an initiative
- Staff time spent researching or drafting an initiative
- Staff time spent working with coalition partners to prepare an initiative
- Fees paid to political consultants or other technical experts to determine what voters would like to see in a potential measure
- Polling used in the drafting of an initiative

However, organizations that have made the 501(h) election may not need to count all pre-circulation activities as lobbying if the organization had an additional non-lobbying purpose for pre-circulation activities such as polling or background research.

Qualifying the initiative

Under **California law**, once an initiative starts circulating, if an organization works to qualify the initiative for the ballot, it may need to disclose its expenditures to do so as well as the names of donors whose contributions were used to support the organization's work. For a variety of activities an organization can do without needing to file any disclosure reports, see the AFJ fact sheet "[Ballot Measures Activities Exempt from California Disclosure Laws.](#)"

The following are common activities associated with qualifying an initiative that may need to be disclosed under California's ballot measure disclosure laws:

- **Polling:** Under **California law**, if an organization conducts a poll on the subject of the initiative and uses or shares this polling data with another organization or a ballot measure campaign formed to help qualify a measure, the costs of the poll must be reported. The value of the poll will be based upon the poll's fair market value. California law recognizes that polling data loses value over time, and allows organizations to take this into account in establishing the fair market value. Organizations are permitted to follow federal election guidelines (or any other reasonable method) to establish the value of the polling data. Under federal election law, results shared with the campaign 16 – 60 days after receiving them are valued at 50% of the polling costs, results release 61 – 180 days after receiving them are valued at 5% of the polling costs, and results released any time after 180 days are considered to have no value.

- Under **federal tax law**, polling would count as lobbying if there is no other real purpose for the poll but to develop support for or opposition to the ballot measure. If there are several purposes for the poll, one of which is preparing to qualify a measure for the ballot, an organization may allocate a reasonable portion of the costs of the poll as a lobbying expenditure.
- **Grants to other organizations:** A nonprofit organization can make a grant to another organization, including a 501(c)(4) organization or a labor union, to help qualify a measure for the ballot. Under **California law**, if the nonprofit makes a grant of \$1,000 or more to another organization to help qualify an initiative for the ballot, the contributing organization may need to file a California ballot measure disclosure report disclosing the grant. Most organizations will be able to easily comply with California's disclosure requirements and should not let these disclosure reports deter it from granting money to help qualify a measure for the ballot. AFJ's West Coast Office offers free technical assistance on California ballot measure disclosure laws.

Under **federal tax law**, a grant that is earmarked to qualify a measure would count as direct lobbying against the contributing 501(c)(3) organization's annual lobbying limits. Additionally, if the organization makes the grant to a 501(c)(4) organization or a labor union, this grant must include certain [restrictions](#). For more information, please review the AFJ publication *The Connection: Strategies for Creating and Operating 501(c)(3)s, 501(c)(4)s, and Political Organizations*.

- **Donating staff time to qualify a measure:** Donating the organization's compensated staff time to qualify a measure may be subject to disclosure under **California law** if any employee of the organization spends 10% or more of her compensated time in a calendar month working on the campaign. However, if an organization's employee spends less than 10% of her time working on the campaign, that staff time does not count as a contribution to the campaign and does not need to be disclosed.

Under **federal tax law**, all of an organization's compensated staff time spent to qualify a measure counts towards the organization's annual lobbying limits, regardless of whether this activity must be reported under California disclosure laws. An organization that dedicates staff time to ballot measure activity, pre and post-circulation, should track the amount of staff time to calculate a pro-rata share of each employee's compensation to count against the organization's lobbying limit.

Reacting to measures proposed by others

Instead of proactively proposing an initiative, an organization might want to respond to an initiative or referendum drafted by someone else – for example, by participating in a “decline to sign effort.” Such efforts will be treated the same as efforts to qualify a measure.

Funding Ballot Initiative Campaigns

Raising money for drafting and qualifying a measure

Organizations that raise money to support their efforts to draft or qualify a measure should be aware of different restrictions that apply to potential funders. For more information about the potential impact of raising money to qualify a ballot measure in California, please contact AFJ for technical assistance.²

² See also our online resources on California campaign finance law at http://www.afj.org/for-nonprofits-foundations/state-law-resources-2010/california_campaign_finance.pdf

- Individual donors and businesses may contribute to nonprofits that are engaging in ballot measure advocacy, including drafting and qualifying measures. Under **California law**, if an organization raises money from individuals, the organization may have to list information about any donor who contributes \$100 or more. Similar rules apply to donations from corporations, trade associations, unions, and other entities. Additionally, 501(c)(3) organizations seeking funding from individuals should be clear that when they are seeking funding specifically for their ballot measure work, that donation is not tax-deductible for the donor, under **federal tax law**.
- Public foundations, such as the San Francisco Foundation, that are grantmaking entities and are legally considered to be public charities, may make earmarked grants to help grantees draft or qualify a measure. Under **California law**, if the public foundation makes a grant of \$10,000 or more³ to another organization to help qualify an initiative for the ballot, the contributing organization may need to file a California ballot measure disclosure report disclosing the grant, and the receiving organization may also have to file disclosure reports.

Under **federal tax law**, these earmarked grants will count against the giving public foundation's own [annual lobbying limits](#), which are calculated the same as for any other 501(c)(3) public charity.⁴

- Private foundations, such as The California Endowment, may not make earmarked grants to support ballot measure advocacy, including drafting and qualifying, under **federal tax law**. However, grantee organizations should be able to use unrestricted general support funds from private foundations to engage in support or opposition to proposed ballot measures. For more information on how foundations can fund grantees that engage in lobbying, see the AFJ fact sheet "[Private and Public Foundations May Fund Charities that Lobby](#)."

Timing Your Efforts

As a result of Senate Bill 202, all state-wide ballot measures that qualify for the ballot through the initiative process after July 2011 will only appear on the ballot in November of an even-numbered year – so the measure can appear on the ballot when there is a larger voter turnout typical of general elections. If your organization wants your measure to appear on a primary election ballot (typically held in June), the organization must petition the legislature to place the measure on the ballot rather than using the initiative process.

The information contained in this fact sheet and any attachments is being provided for informational purposes only and not as part of an attorney-client relationship. The information is not a substitute for expert legal, tax, or other professional advice tailored to your specific circumstances, and may not be relied upon for the purposes of avoiding any penalties that may be imposed under the Internal Revenue Code. Alliance for Justice publishes plain-language guides on nonprofit advocacy topics, offers educational workshops on the laws governing the advocacy of nonprofits, and provides technical assistance for nonprofits engaging in advocacy. For additional information, please feel free to contact Alliance for Justice.

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³ If the Foundation does not have sufficient interest income (e.g., interest on stocks, bank interest, CDs, etc.), the foundation may need to file reports sooner.

⁴ Donor Advised Funds must adhere to different rules in regard to making lobbying grants.