Public Health and Politics: Using the Tax Code to Expand Advocacy

Eric Gorovitz

Introduction
Protecting the public’s health has always been an inherently political endeavor. From its roots in preventing the spread of infectious disease to its modern, vastly expanded arena encompassing the promotion of nutrition and exercise, the health impact of paid sick leave, and preventing obesity, gun violence, and bioterrorism, public health has relied on the machinery of public policy to define and deploy effective interventions.

Public health today stands against not only natural phenomena that threaten our collective well-being, but also risks introduced and disseminated by private actors deeply invested in contesting and quashing prevention strategies that would protect the public’s health at the expense of corporate interests. Those interests (corn and tobacco farmers, soft drink manufacturers, prison contractors, minimum-wage employers, drug and medical device manufacturers, and many more) use all of the tools and assets at their disposal to fend off strategies that public health data demonstrates would be good for us, but, in theory, bad for their profits.

The field of public health, on the other hand, is conspicuously and persistently absent from sustained, sophisticated engagement in political processes, particularly elections, that determine policy outcomes, largely conceding the policy arena to corporate interests.

This imbalance results, at least in part, from a widespread lack of confidence among public health advocates working in nonprofit organizations, about how, and how much, they can participate in policy development, and from institutionalized reluctance — of advocates, academics, funders, and their organizational leadership — to commit available resources to achieving the degree of political influence required to overcome the clout of corporate producers of harm.

Much of this hesitation reflects the misperception that the provisions of the Internal Revenue Code (the “Code”) that grant tax-exempt status to many public health organizations are full of obstacles and landmines that make it difficult and dangerous to work on public policy.

In reality, the Code provides a roadmap of opportunities for advocacy. Advocates and funders who know how to read and use that map can engage aggressively in public policy advocacy without violating the Code.

This article highlights some of the most valuable opportunities provided by the Code, and how to use them.

Federal Tax Rules Governing Advocacy
The Code authorizes exemption from federal income tax for many different types of organizations, with varying rules governing qualification for and retention of exempt status. Because it is a form of government subsidy, exemption is accompanied by restrictions on certain activities, particularly with respect to advocacy.

The different exempt statuses can be divided into three categories, with different implications for policy advocacy. By combining structures and understanding the rules applicable to each, advocates can expand the advocacy tools at their disposal.

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1. Charities Exempt under Section 501(c)(3)²
Charities get the most favorable tax treatment but are also the most constrained.

TAX TREATMENT
The primary tax benefit available to charities is that in addition to the charity's income being exempt from tax, an individual donor to the charity can generally deduct the amount of her contribution from her own taxable income. This extra subsidy makes it easier to raise money.

In exchange for this significant benefit, however, a charity’s advocacy activities are constrained in two ways.

LIMITED LOBBYING
For federal tax purposes, the term “lobbying” refers specifically to advocacy that seeks to influence the outcome of legislation. Under Section 501(c)(3), “no substantial part” of an organization's overall activities may constitute lobbying.³ In other words, a charity can lobby; the only question is how much.

The best answer is provided in Section 501(h), which provides an optional and highly protective mechanism for measuring a charity’s lobbying. Section 501(h) sets forth specific, and surprisingly generous, rules for determining both the charity’s lobbying limit and exactly what activities count against that limit.⁴ Section 501(h) contemplates two types of lobbying: direct, which includes efforts to influence lawmakers, and grassroots, which includes efforts to enlist the public on influencing legislators. Grassroots lobbying is more stringent; thus, the IRS respects the corporate form of separate legal entities, so long as they operate as distinct entities.

NO CANDIDATE CAMPAIGN INTERVENTION
A charity cannot “intervene” in any candidate campaign for election to public office. This prohibition is absolute; unlike the rule on lobbying, there is no permissible amount of “intervention.”

Again, however, the provision creates opportunity. Charities can engage in policy- and election-related activities during elections, so long as those activities remain non-partisan. While not nearly as precisely drawn as the lobbying definition under Section 501(h) (the IRS applies a vague and complex “facts and circumstances” test), candidate campaign intervention encompasses only election-related activity that reflects a preference for one candidate or party over another.

2. Other Section 501(c) Organizations
Non-charitable organizations that qualify for exemption under other subparagraphs of Section 501(c) (e.g., Section 501(c)(4) social welfare organizations; Section 501(c)(5) labor unions; and Section 501(c)(6) trade associations and business leagues) cannot offer donors a charitable deduction for their contributions. However, because they receive a smaller government subsidy, their participation in advocacy is less restricted.

These non-charities can conduct unlimited lobbying, and they can engage to a limited degree in candidate campaign intervention.⁵

3. Political Organizations Exempt under Section 527
Section 527 exempts organizations, including political parties and candidate campaign committees, whose primary purpose is to influence candidate elections.

A Section 527 organization can be independent, or it can be a bank account, called a “separate segregated fund” (“SSF”), belonging to Section 501(c) organization.⁶ The IRS treats such an account as a separate entity for federal tax purposes (though it is part of its parent Section 501(c) organization for other purposes). Thus, if a Section 501(c) organization has an SSF, and uses the SSF solely to raise and spend money to influence candidate elections, then, for tax purposes, those expenditures will be attributed to the SSF, not the 501(c).

4. Tandem Structures
The IRS respects the corporate form of separate legal entities, so long as they operate as distinct entities. This principle allows the creation of hybrid structures that maximize both tax advantages and advocacy capabilities.

For example, a Section 501(c)(3) charity could form and control a Section 501(c)(4) affiliate. The affiliate, in turn, could establish a Section 527 SSF. This structure would allow the affiliated enterprise to raise deductible contributions into the charity while retaining the ability to engage (with separate funds) in more lobbying than the charity could do on its own, and to influence candidate elections directly through contributions or independent expenditures.

There are many variations of affiliated structures, depending on which entity is dominant, available funding sources, and the desired mix of activities.
The Tools of Public Policy

Every public policy outcome reflects the extent and effectiveness of participation in the policy development process by individuals and institutions interested in that policy. When a proposed policy faces opposition, the outcome often depends largely on the balance of power among competing interests. The side that exerts, at the right time, the most influence on the relevant decision-makers, whether through persuasion, coercion, or favor, has the best chance of getting the outcome it seeks.

Exerting the necessary influence requires persistent and knowledgeable engagement with the varied machinery of public policy — specifically, legislation, regulation, and the selection of decision-makers through appointment (which sometimes requires legislative confirmation) or election.

a. Legislation

Legislative policy change may be the strategy most familiar, at least superficially, to public health advocates. Federal, state, and local legislation, including government budgets, directly affects the substance and availability of public health interventions and can have lasting impact on the public’s awareness of and response to risk.

The key to legislative victory lies in persistent communication with legislators and staff when the details of a proposal, and the alignment of votes, are beginning to take shape. Those visible moments, though easy to explain and organize around, are not without their own world views, experiences, or personal commitment to causes and ideas. They may also respond on principle, based on the election or appointment, can dramatically change the policy landscape.

Ballot measures are a special case of legislative policy-making. When a measure is on the ballot, the public stands in the shoes of a legislature, and the rules for direct lobbying apply. While ballot measures can be clumsy and expensive, they may also be the best opportunity for accomplishing elusive policy change.

b. Regulation

Regulation is an advocacy freebie that encompasses activities of the Executive Branch implementing and enforcing legislative enactments. Federal tax law imposes no limitations on a charity’s ability to influence regulation (although the agreements accompanying government grants may restrict the use of public funds for such purposes).

In a contentious policy debate, a legislative victory can quickly become Pyrrhic if one side is absent from the regulatory process that follows. Companies engage as fully with regulatory agencies as they do with legislatures, and will look for every opportunity to weaken legislation that they believe harms their interests by influencing the details that legislatures often leave to regulators to work out.

c. Selection of Decision-Makers

Sometimes, the biggest obstacle to accomplishing policy change is the decision-maker. Influencing the selection process, whether election or appointment, can dramatically change the policy landscape.

Elections

Candidates and elected officials respond to influence from people they think can affect the outcome of elections. They may also respond on principle, based on their own world views, experiences, or personal commitment to causes and ideas. While charities cannot take sides in candidate elections, they can conduct nonpartisan activities (including candidate forums or questionnaires, voter registration, educating candidates about issues, etc.) that inform and engage the public in the context of an election.

Non-charity exempt organizations may, within limits, influence candidate elections directly, through contributions of money or services directly to candidate campaigns, or by conducting independent activities that support or oppose candidates.

Appointments

Some decision-makers with influence over public health policy serve by appointment, usually by the chief executive.

Confirmable appointments. Certain appointments, particularly to high-level positions, require confirmation by a legislative body. For example, the President’s nominations for Cabinet secretaries must be confirmed by the United States Senate.

Nomination is an administrative act by the Executive Branch, but the confirmation vote by a legislature constitutes legislation. Accordingly, efforts to influence a legislatively confirmable nomination constitute lobbying for federal tax purposes.

Appointments not requiring confirmation. An appointment that does not require confirmation is purely administrative, and efforts to influence it are not lobbying. Such appointments include many positions in agencies relevant to public health, such as key offices in state or local health agencies, insurance regulatory bodies, etc.

Charities can influence such appointments without limit.
Roadmap of Opportunity: Applying the Tax Code to Expand Public Health Engagement in Policy

The federal tax rules governing public policy advocacy by tax-exempt organizations are full of opportunities for those who can see and use them. To encourage more aggressive engagement in public health policy, I offer the following recommendations:

The Code provides a roadmap of opportunities for advocacy. Advocates and funders who know how to read and use that map can engage aggressively in public policy advocacy without violating the Code.

a. Use the Section 501(h) Lobbying Limit
Public health charities should consider the available amount of lobbying under Section 501(h) not as a limit, but as a target. They should embrace their power to lobby, and seek to use as much of their lobbying limit as they can fund, every year. If unrestricted funds are scarce, then finding more should become a development priority.

b. Private Foundations Devoted to Public Health Should Free Up Grant Funds for Lobbying Whenever Possible
Private foundations can use two safe harbors, one for general support grants and one for certain, carefully-constructed grants supporting specific projects, to make grants that support a charity that lobbies, without restricting the use of grant funds for lobbying. The more educated foundations are about these opportunities and how to use them, the more funds public health advocates will have available to influence public policy. Charities can educate their funders about these tools and encourage foundations to use them more frequently.

c. Invest Proactively in Advocacy Relationships
Public health organizations that want or intend to influence public policy should not wait for hearings or votes, but should proactively engage with the decision-makers, staff, allies, and other influencers, building strong relationships that can be drawn upon when a policy opportunity arises. Relationships with local officials can be particularly fruitful, especially as they advance to higher levels of government.

d. Build the Infrastructure to Influence Elections
The final weapon missing unnecessarily from public health’s arsenal is the ability to hold elected officials accountable when they fail to address the public health needs of their constituents. Ultimately, this is the single most effective tool, because demonstrating the ability to influence how those constituents will vote in the next election is the most persuasive argument one can make to any elected official.

Public health organizations and advocates should build the infrastructure that will allow active engagement in elections. Public charities should establish social welfare affiliates (exempt under Section 501(c)(4)) that have broader public policy capabilities under the tax code, including the ability to take sides in candidate elections. Where appropriate, these affiliates should create Section 527 political organizations specifically to raise and spend money on candidate elections, to impose accountability on candidates who prioritize corporate interests over public health.

Conclusion
Public health advocates should embrace (with help from knowledgeable counsel when appropriate) the full array of tools available to them under the Code to influence public policy. Doing so will vastly increase their ability to engage in all of the advocacy mechanisms that harm-causing corporations use to defeat sound public health policy.

References
1. The Code does not define “advocacy”. As a general principle, subject to the limitations discussed in the text, every charity can express, promote, and educate the public about the charity’s perspective on the policies, practices, and behaviors of governments, public officials, private institutions, or individuals.
2. All statutory references are to the Code.
3. This limit applies to activity at any level of government, foreign or domestic.
4. Small organizations (with expenditure budgets of $500,000 or less) can spend up to 20% on lobbying. As the organization grows, the percentage limit shrinks.
5. Currently, for example, Section 501(c)(4) organizations must ensure that their candidate campaign intervention activities constitute less than half of their overall activities. The IRS is considering whether to modify this limit.
6. A charity cannot have a separate segregated fund, because such a fund can only conduct activities that a charity is prohibited from conducting.
7. Ballot measure advocacy, including fundraising, may trigger disclosure obligations under state or local campaign finance rules.
8. Candidate campaign activity may be subject to disclosure obligations under federal, state, or local campaign finance rules.