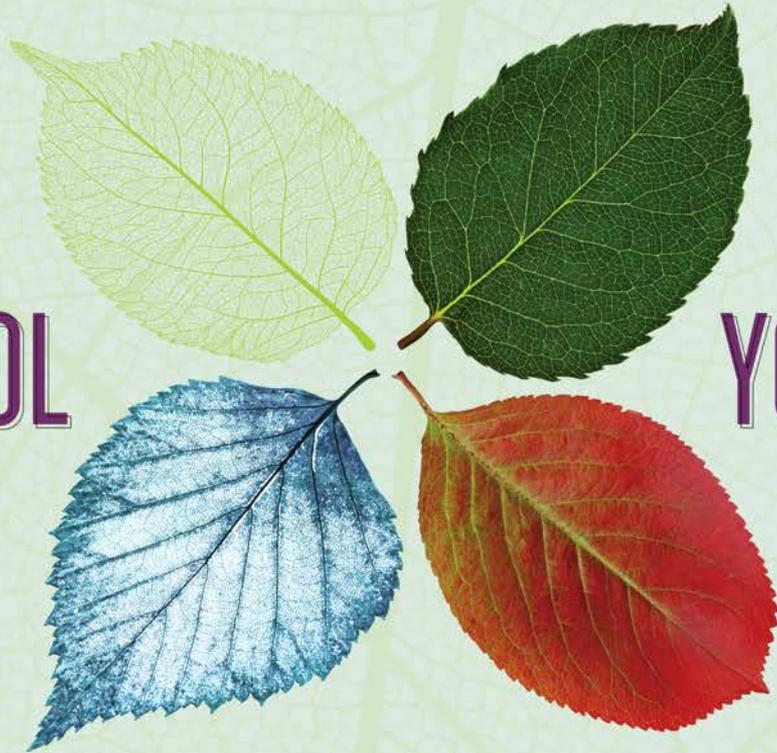


YOUR SCHOOL



YOUR LEGACY

National Association of Independent Schools

Independent Schools in the Times of Tax Reform, Activism, and Budget Cuts

Whitney Silverman
NAIS Staff Attorney
February 27, 2020

Introduction

- Whitney Silverman, Staff Attorney
- Contact Information for NAIS Legal and Government Relations Team
 - Silverman@nais.org, 202.973.9722, [conference call appointment link](#)
 - Mann@nais.org, 202.973.9716, [conference call appointment link](#)
 - Legal Team Email: legal@nais.org
 - A word on being an attorney...

NAIS Legal Education and Support Resources



The screenshot shows the NAIS website interface. At the top, there is a navigation bar with links for "NAIS CAREER CENTER", "DASL", "DIRECTORIES", "PARENTS' GUIDE", and "TRUSTEES' GUIDE". Below this is the NAIS logo and a search bar with a "LOGOUT" button. A secondary navigation bar includes "PARTICIPATE", "LEARN", "ANALYZE", "ABOUT", "MEMBERSHIP", "EVENTS", and "BOOKSTORE". The main content area features a breadcrumb trail "HOME > LEARN > NAIS LEGAL NEWS YOU CAN USE" and a section titled "NAIS Legal News You Can Use". This section includes a featured article "Legal Tips of the Week: Comply with TILA and Prepare for Coronavirus" with a sub-headline and a brief description. Below the article is a search filter for "Search Articles By:" with dropdowns for "Keyword", "Topic", and "Date", and a search icon. To the right, there is a dark blue box titled "About NAIS Legal News You Can Use" containing text about the Legal and Government Relations team. Below that is a section for "Independent School Magazine" with a "Winter 2020" issue highlighted, featuring a cover image and a description of its content.

NAIS CAREER CENTER | DASL | DIRECTORIES | PARENTS' GUIDE | TRUSTEES' GUIDE

NAIS National Association of Independent Schools

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PARTICIPATE | LEARN | ANALYZE

ABOUT | MEMBERSHIP | EVENTS | BOOKSTORE

HELP CENTER

HOME > LEARN > NAIS LEGAL NEWS YOU CAN USE

NAIS Legal News You Can Use



Legal Tips of the Week: Comply with TILA and Prepare for Coronavirus

If your school offers payment plans that allow families to defer payment of tuition, then you need to pay attention to the Truth in Lending Act (TILA). Find out how it may apply to your school. Plus, protect your school community by following the latest information on coronavirus.

Search Articles By: Keyword Topic Date



About NAIS Legal News You Can Use

Our Legal and Government Relations team brings you just-in-time legal education and support in the form of legal tips, questions from the field, and other independent school-related developments from Congress, federal agencies, and the courts.

Independent School Magazine

Winter 2020

Explore critical issues facing independent schools around tuition, financial aid, access and affordability, and more.

NAIS Legal Education and Support Resources

HOME > LEARN > KNOWLEDGE CENTER > LEGAL AND LEGISLATIVE RESOURCES

Legal and Legislative Resources

Browse Topics

This section of the Knowledge Center contains legal and legislative resources, information, and best practices from NAIS. Find what you're looking for by using the Search fields.

Search Articles By:

Keyword/s
Start Date
End Date
Topic ▼

SEARCH

Understanding Coronavirus: What Schools Need to Know

February 18, 2020

This page provides resources on Coronavirus for independent schools.

[READ MORE](#)

Public Health Emergency Preparedness: Considerations for Schools

January 28, 2020

Many schools are grappling with how to manage trips planned for countries where students and chaperones may be exposed to public health threats.

[READ MORE](#)

Auctions and Raffles: A Guide for Independent Schools

January 12, 2020

"Auctions and Raffles: Dos, Don'ts, Hows, and Whys" is a guide to federal rules and regulations regarding auctions and raffles.

[READ MORE](#)

Independent

Featured Products



New! The Trustee's Role in Fundraising
Make board training easy and effective with this practical booklet.

[ORDER NOW](#)



2019-2020 NAIS Trendbook

Help your school change and grow. Save when you buy in bulk for meetings of your board, faculty, and staff.

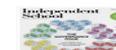
[ORDER NOW](#)



Trustee Handbook

Learn what you need to know to succeed as a school trustee, including both strategic context and practical advice.

[ORDER NOW](#)



Independent School Subscription

NAIS's award-winning magazine covers the issues that matter

Agenda

- Overview: Independent schools as nonprofits and 501(c)(3) tax-exempt organizations
- 2020 and beyond: Elections, politics, issues, and advocacy
- Tax Reform: The good (and bad news)
- State and Local Budget Environment: PILOTS and SILOTS

Terminology

- Nonprofit—Corporate status with state-level incorporation process
- Tax Exempt—Nonprofits are not automatically tax-exempt, to become exempt from federal income taxation, must file for tax exemption with IRS*
- There are 29 types of federal tax-exempt organizations under 501(c) of the tax code. Educational institutions fall under 501 (c)(3)

*state level tax exemptions as well

Limits on 501(c)(3)

- Must be organized and operated exclusively for its exempt purpose
- Prohibition on private benefit and inurement
 - Parameters on executive compensation (i.e. an excess benefit transaction)
- Limits on political activities
 - Loss of tax-exempt status and other penalties are a risk
- *Note: Focus in this presentation is on tax laws, but there may be other limitations from federal, state, and local lobbying and campaign finance law as well

Considerations for Schools

- The school as an entity
- Staff—Workplace restrictions vs. private conduct
- Students—More leeway, particularly around educational experiences. There is perceived value in learning about electoral, political and civic process
- Beyond the law: Mission, values, and culture are KEY

What are political activities?

- There is a difference between political activities (i.e. campaign intervention) and legislative activities (i.e. lobbying)

501(c)(3)s

Campaign Intervention Activity: Complete Prohibition
Legislative Lobbying: Limited
Issue Advocacy: Allowable

What is prohibited campaign intervention?

501(c)(3) organizations cannot directly or indirectly participate in or intervene in any political campaign on behalf (or opposition) of any candidate for elective public office (federal, state, or local).



Prohibited

- Endorsing or opposing a candidate
- Contributions (\$) and in kind)



Acceptable*

- Activities that are non-partisan and unbiased such as:
 - Voter registration activities
 - Get out the vote (GOTV)
 - Host a debate or forum (all candidates invited)
 - Voter education guides



Caution

- Evidence of bias in favor or opposition of a candidate
- Timing (proximity to the election)
- High ranking officials that can be seen as speaking for the school

Is There any Guidance on Prohibited Campaign Intervention?

IRS Facts and
Circumstances
Test

[Revenue Ruling 2007-41](#)

21 examples of different activities that 501 (C)(3) organizations may consider undertaking and whether they violate the prohibition on campaign intervention

General Questions to Ask To Determine if Activity is Prohibited Campaign Intervention

Do you mention candidates, an election, or voting?

How close is the election?

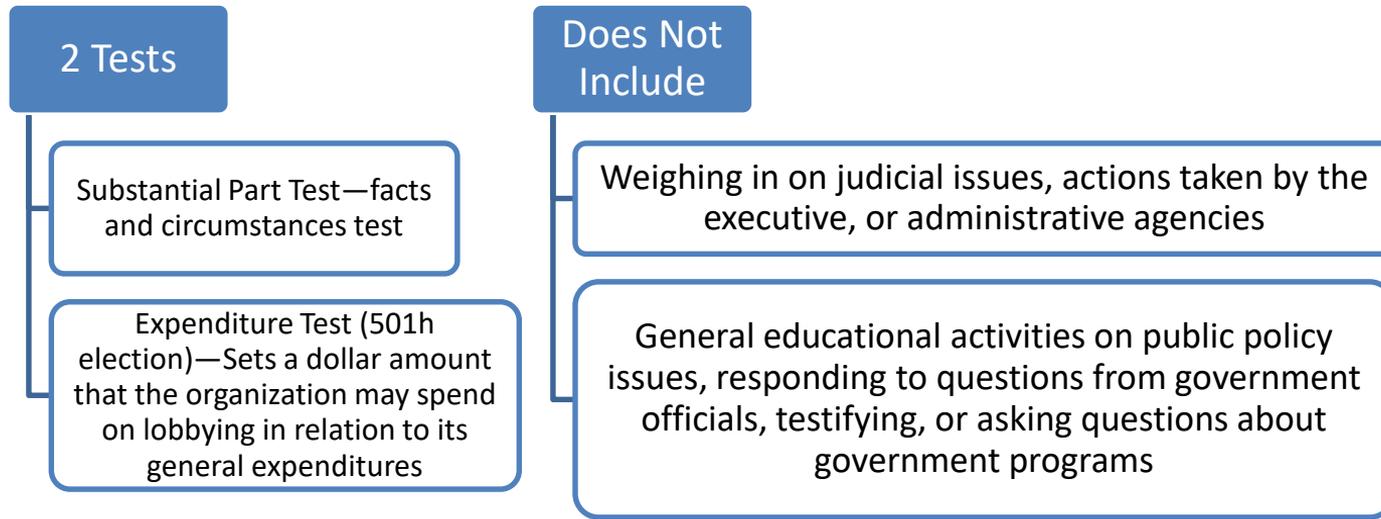
Is this a new type of activity or communication for the organization, or something that is done outside of election season as well? Is it connected to other events such as an upcoming hearing or vote?

Does the activity or communication mention one candidate or party over another?

Does the activity or communication involve an issue(s) that has divided candidates or parties during the campaign?

What are Legislative Activities (lobbying)?

Trying to influence legislation (at any level) by contacting (or urging others in the public) to contact elected officials or their staff to propose, support, or oppose legislation on the federal, state, and local level. There are 2 tests to determine whether a 501(c)(3)'s lobbying activities fall within appropriate bounds*



*Federal LDA and state/local lobbying laws have different definitions and may apply depending on the circumstances

Voter Registration and GOTV

Engaged Citizen School organizes and promotes a school wide effort to register eligible students and community members to vote in advance of the primary and general election. The school provides resources such as tables, information on how to register and vote (dates, times, needed identification), and organizes rides to the polls on election day.

Is this allowable under IRS rules?

What information can the school provide?

Voter Registration and GOTV

Is this allowable under IRS Rules? **Yes, as long as:**

Activities and communications are non-partisan

- Do not mention, favor, or disfavor particular candidates or parties
- This includes promotional communications, signage, handouts

IRS examples on point in Rev. Rul. 2007-41 Situation #1, #2

- Signage only listed name of organization, the date of the election, and providing the opportunity to register to vote. Materials provide general information only. (OK)
- Mentioning certain issues, particularly if they divide the candidates/parties and are at issue in the election (Caution)
- Treating potential voters differently by referencing importance of issues, voting, offering transportation, only to those that agree with certain viewpoints/candidates (NOT OK)

Important to train volunteers on the rules

Debates/Forums

Engaged Citizen School wants to host a debate for candidates running for Congress in the district which the school is located. Is this allowable and what does the school need to consider?

Which candidates need to be invited?

What if only one candidate (or candidate from one party is available) ?

Do both (or all candidates) need to be there at the same time?

What types of questions can/cannot be asked?

Who can ask the questions/moderate?

Debates/Forums: Is this allowable under IRS rules? **Yes, as long as:**

Yes (IRS examples on point in Rev. Rul. 2007-41 Situation #7 and #8, Rev. Rul 86-95)

- All candidates are invited and have equal opportunity to present views; they do not all have to be available, but move cautiously if only candidate from 1 party will be there
- Questions are prepared and presented by an independent, nonpartisan panel on a wide range of issues

Watch Out For

- Marketing and comms, introductions, and moderator commentary that indicates a preference
- Candidates appearing at different times—make sure opportunities are equal (i.e. one event cannot be in a large auditorium and the other a small lunch)*

No: Fundraising

*FEC considerations regarding forums, educational exceptions

Other Appearances by Elected Officials/Candidates

Engaged Citizen School often fields requests from elected officials to visit campus. Additionally, the school occasionally invites elected officials or individuals who happen to be candidates to annual events like the gala or to speak at community forums. Is this allowable and what do schools need to consider?

What hat
in the
individual
wearing?

What is the context of the invitation to campus?

What is the communications plan?

What is the timing? Is there an election approaching and how close is it?

Other Appearances by Elected Officials/Candidates

Yes, as long as:

That is clear, IRS Examples on Point in Rev. Rul. 2007-41 Situations #10, 11, 12

- Individual is speaking for a reason other than the fact they are running for office (they are current office holder, public figure, artist, celebrity, or otherwise known)
- Individual is speaking only in the non-candidate capacity
- Non partisan atmosphere, including communications around event
- If current elected official, arrange visit with office not campaign staff and make sure ground rules are clear

NO:

- No mentions of candidacy or election
- No campaign activity

Watch Out for: introductions, mentions of issues important to the organization and linking it to voting in an upcoming election

Active Head of School/Board Chair

The Head of Engaged Citizen School is politically active and engaged. She wants to publish an op-ed endorsing a presidential candidate in the 2020 election. Can she do so, and can the school place any limitations or restrictions on this activity?

Who is the Head speaking for?

How does the Head identify herself in the op-ed?

Where is the op-ed published?

Does the forum matter? What if instead of an op-ed, the Head is speaking at an event?

Active Head of School/Board Chair

Yes, as long as:

There is awareness of the location of speech and there is inclusion of a disclaimer (IRS Examples on Point in Rev. Rul. 2007-41 Situations #3,4)

- Third party publication or event, indicate that name and title are for identification purposes only and do not reflect the views of the school

No:

- School newsletter or event
- School space or resources

Lobbying and Other Activity

Engaged Citizen School is very active on the issue of climate change. The board has passed a climate resolution, the head of school has submitted letters to elected officials urging the passage of legislation to curb climate change, and students have organized forums, attended rallies, and visited Washington, D.C. to meet with their representatives.

Issue advocacy	What if an issue or piece of legislation is more associated with one party or candidate?
vs. lobbying vs.	What is the difference between school (institutional activity) and student activity?
campaign intervention	What is the role of school mission and ethos?

Lobbying and Other Activity

Issue
advocacy
vs. lobbying
vs.
campaign
intervention

Board Activity: Depending on the content of the resolution, it could be issue advocacy or lobbying (if advocating for a particular bill, which would be okay subject to IRS limits). The closer it is to the election, be aware of whether the issue is one that divides the candidates and whether there are any mentions of voting or implications that favor one candidate over the other. [Prudential question: Is speaking on this issue in line with school mission and values]

Head Activity: Submitting letters to Congress urging passage of legislation is lobbying activity, which is okay subject to IRS limits. [Prudential question: Is speaking on this issue in line with school mission and values?]

Student Activity: Students have more leeway when it comes to political activity, particularly if it has an educational element, and attending a rally or visiting their elected officials can both qualify. Students are also less likely to be seen as speaking for the school. [Prudential question: Is speaking on this issue in line with school mission and values?]

Political Expression on Campus

At Engaged Citizen School, the community is indeed engaged in the issues of the day. Students have participated in gun control walk outs, volunteered with campaigns as part of their government class, operated an active student newspaper, engaged in climate protests, and attended other rallies on issues ranging from immigration to abortion. It is common for students and teachers to wear clothing or affix buttons/stickers to their bags or laptops indicating their support for candidates and causes.



Student Engagement and Advocacy

- What is the culture and mission of your community?

Would your answer to greenlighting a student activity be different if the advocacy was on the other side of the issue?

What about the First Amendment?

-What are your policies around dress code? Campaign clothing? Slogans?

-Do you have a policy or program around promoting and facilitating civil discourse? What could that look like?

BE CONSISTENT!!!

Student Engagement and Advocacy

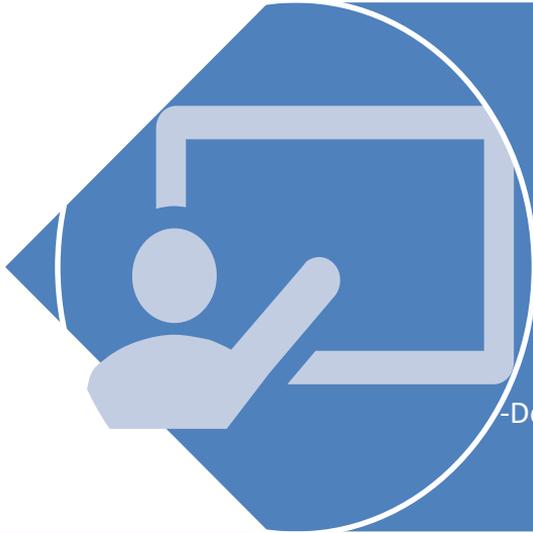


Student Engagement and Advocacy

- Students can volunteer/work on political campaigns (IRS guidance in Rev. Rul. 72-513). Provide equal opportunity for student to be involved with campaign of their choice
- Students can express political/electoral opinions in a student newspaper (IRS guidance in Rev. Rul. 72-512). Opinions are not imputed to school, though you may want to consider disclaimers
- Student political groups can use school space like other groups (if you charge for outside groups to use space, charge that market rate for political groups)
 - Dress code and conduct codes still apply, make sure you apply evenly
 - Train faculty advisors on school policies

Political Expression on Campus

At Engaged Citizen School, the community is indeed engaged in the issues of the day. Students have participated in gun control walk outs, volunteered with campaigns as part of their government class, operated an active student newspaper, engaged in climate protests, and attended other rallies on issues ranging from immigration to abortion. It is common for students and teachers to wear clothing or affix buttons/stickers to their bags or laptops indicating their support for candidates and causes.



Teachers or Other Staff

- What is the culture and mission of your community?
- Are there other considerations at play, including power dynamics of the student-teacher relationship?
- What are your policies around dress? Campaign clothing? Slogans? Use of school resources? Social media? Speaking on behalf of the school?
What about the first amendment? The NLRA?
- On campus vs. off duty: may be state protections re: personal lawful activity
- Do you have a policy or program around promoting and facilitating civil discourse? What could that look like? Is there teacher training?

BE CONSISTENT!!!

Political Expression on Campus



Teachers or Other Staff

- As a private employer, schools can set policies around issues such as dress, social media, media engagement, and political engagement (on school time)
- It is critical to be clear that school resources and time cannot be used for personal election/campaign activity/endorsements (per IRS rules)
- Be aware when creating policies that may limit employee's ability to engage with one another on conditions of employment per the NLRA
 - Be cautious when considering limitations on employees off-campus political or campaign activity: several states have varying levels of protection against employer interference re: personal lawful activity
 - Consider how current events, social issues, and conversations around diversity/equity/inclusion can and should be discussed in classrooms and via extra-curricular activities. Some schools have developed (with community input) guidelines around civil discourse with reminders of the school's general policies around bullying and harassment

Tax Cuts and Jobs Act 2017 (High Level Changes)

Doubled Estate Tax Threshold

Increased standardized deduction (now approximately \$12,000/individuals and \$24,000 for couples)

Limits State and Local Tax Deduction to \$10,000

Limits Mortgage Interest Deduction to \$750,000 (down from \$1 million)

Increases deduction threshold to 60% (up from 50%) of AGI for cash gifts

Repeals the overall limitation on itemized deductions (for those still itemizing)

Impacts on Giving

Fewer Itemizers

- Not worth itemizing because itemizations will not outweigh the increased standard deduction
- Charitable deduction is only available to itemizers

General Giving Data from 2018 is Mixed

- Total charitable giving increased by 1.6% in 2018, but the total number of donors declined by 4.5% as compared to 2017*
- Giving from gifts of \$1,000+ increased by 2.6%; giving from gifts between \$250-\$999 declined by 4.0%, gifts under \$250 declined by 4.4%*
- Giving by individuals declined 1.1% in 2018 (3.4% adjusted for inflation).**
- Giving to education declined by 1.3% (3.7% adjusted for inflation)**

* Fundraising Effectiveness Project; ** Giving USA 2019: The Annual Report on Philanthropy for the Year 2018

Impacts on Giving—NAIS DASL Data

Total amount given by (2014-15 forward): TOTAL (2014-15 forward) [View Chart](#)

(Advancement - Annual Giving (Previous Year))

All Schools View Chart	2017-2018	2018-2019	2019-2020
Mean	\$1,045,275	\$1,033,881	\$976,010
50th Percentile (Median)	\$505,126	\$547,437	\$545,752
Number of Schools with Data Entered	1378	1385	1369
Number of Schools Reporting N/A Values	49	61	62
Total Number of Schools	3081	3081	3081

Average Gift (2014-15 forward): TOTAL (2014-15 forward) [View Chart](#)

(Advancement - Capital Giving (Previous Year))

All Schools View Chart	2017-2018	2018-2019	2019-2020
Mean	\$76,972	\$119,043	\$79,399
50th Percentile (Median)	\$21,414	\$24,160	\$27,260
Number of Schools with Data Entered	458	500	372
Number of Schools Reporting N/A Values	925	899	914
Total Number of Schools	3081	3081	3081

Impacts on Giving—NAIS DASL Data

Total amount given by (2014-15 forward): TOTAL (2014-15 forward) View Chart

(Advancement - Capital Giving (Previous Year))

All Schools <input checked="" type="checkbox"/> View Chart	2017-2018	2018-2019	2019-2020
Mean	\$3,043,864	\$3,223,667	\$2,952,893
50th Percentile (Median)	\$1,238,618	\$1,333,581	\$1,391,925
Number of Schools with Data Entered	517	574	566
Number of Schools Reporting N/A Values	927	899	914
Total Number of Schools	3081	3081	3081

Average Gift (2014-15 forward): TOTAL (2014-15 forward) View Chart

(Advancement - Capital Giving (Previous Year))

All Schools <input checked="" type="checkbox"/> View Chart	2017-2018	2018-2019	2019-2020
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TCJA Tax-Exempt Org Provisions

Unrelated Business Income Tax for Fringe Benefits

“Silos” for Separate Unrelate Business Income Tax Activities

Excise Tax on Nonprofit Compensation Over \$1 million

Unrelated Business Income Tax for Fringe Benefits

Created new tax code section—512(a)(7)—which required tax-exempt orgs to recognize the cost of qualified transportation fringe benefits as unrelated business income

- “Popularly” referred to as the parking lot tax
- Included parking provided to employees, costs re: parking facilities, and transit passes (including allowing employees to put aside their own \$ pre-tax for transit related costs)

Repealed by Congress in December 2019

- Repeal is retroactive
- IRS has issued instructions on how to claim a refund or credit by filing an amended 990-T

“Silos” for Separate Unrelate Business Income Tax Activities

Created new tax code section—512(a)(6)—which requires tax-exempt orgs to calculate gains and losses from each money-making activity separately

- To generate UBIT, an activity must be 1) from a trade or business; 2) regularly carried on; and 3) not substantially related to the organization’s exempt purpose
- 512(a)(6) eliminates an organization’s ability to offset gains from one activity against losses from another.

IRS issued a notice in August 2018 ([Notice 2018-67](#))

- Creates a reasonable, good-faith standard looking at all the facts and circumstances
- One reasonable, good-faith interpretation is the use of the North American Industry Classification System 6-digit codes
- Regulations are on the Treasury IRS Priority Guidance Plan for 2019-2020 but have not yet been released

Excise Tax on Nonprofit Compensation Over \$1 million

Establishes a 21% excise tax [on the employer] on compensation to “covered employees” over \$1 million

- Covered employees are employees who are among the top five highest-paid employees in the organization in that year or persons who were among the top five highest-paid persons in any previous year beginning after December 31, 2016
- Watch out for retiring heads and deferred compensation
- Interim guidance was issued in December 2018 ([2019-09](#)). Regulations are on the Treasury IRS Priority Guidance Plan for 2019-2020 but have not yet been released

Interaction with intermediate sanctions

- IRS prohibits tax-exempt orgs from providing excessive compensation to certain employees by imposing a penalty called intermediate sanctions
- It is important to go through a documented process when setting compensation for the Head to show it is presumptively reasonable
- Note: A salary can be reasonable under intermediate sanctions **and** incur the new excise tax.

Cutting Room Floor—A Warning

There were several proposed provisions that did not make it into the final Tax reform bill, plus some warning shots focused at the higher-ed community including:

- Not included: Repeal of Tuition Remission benefits (117(d))
- Not included: Repeal of Employer Provided Tuition Assistance (127)
- Not included: Limitation on Employer Provided Housing Benefits
- Not Included: Repeal of tax-exempt private activity bonds
- Not included: Repeal of the Johnson Amendment (prohibition on 501(c)(3) campaign activity)
- Included for Higher Ed: Endowment Tax

Tax-Exempt Orgs on the Local Level

- States and cities offer an array of tax exemptions for nonprofits, including but not limited to, property tax exemptions
- As budgets tighten, localities across the country continue to challenge those exemptions or establish PILOT (Payments in Lieu of Taxation) or SILOT (Services in Lieu of Taxation) programs to fill the gaps

PILOT/SILOT Examples

City-Wide Example: Boston

- 'Voluntary' payments are due from tax-exempt orgs (educational, medical, and cultural) who own property valued over \$15 million
- Organizations may receive a 'community benefits' deduction worth 50% of estimated contribution
- In January 2020, city council president announced intention to revisit guidelines indicating that there is a lot of \$ being left on the table

Others

- Most common: hospitals and higher ed in the Northeast
- In some cases, agreements between individual institutions and city (Yale and New Haven)
- Others are sector specific with a list of institutions (Hospitals and Higher ed specific 10-year agreement 2016-2026 (Baltimore))
- Vigilance: legislative proposal in CT in 2019 that would have placed a 25% fee (of property tax that would have been owed) on higher ed & hospitals & any nonprofit with an endowment

Community Relations and Responses

Get to Know Your Neighbors

Develop a Community Relations Plan

Be Attentive to Local Needs and Look For Ways to Meet Them

Evaluate Options if Approached for PILOT/SILOT: Agree, Compromise, No

Resources

NAIS

- [NAIS Legal Advisory Politically Active and Legally Compliant: An Election Year Primer for Independent Schools](#)
- [Election Year Dos and Don'ts for Nonprofits](#)
- [Webinar: Politics on Campus: A Discussion of the Law and Practical Approaches this Election Season](#)
- [Webinar: Midterms, Full Tensions: What You Need to Know About Political Engagement and Civil Discourse](#)
- [Independent Ideas Blog: Election Season: How to Find the Teachable Moments](#)
- [NAIS Legal Advisory: Comprehensive Analysis of Tax Reform Legislation](#)
- [Compensation Issues for School Heads](#)
- [PILOTs and SILOTs Redux: When Tax-Exempt Status and Municipal Finances Collide](#)

Outside Resources

Exemption Requirements—501(c)(3) Organizations

IRS Rev. Rul. 2007-41

- [IRS Rev. Rul. 72-512](#)
- [IRS Rev. Rul. 72-513](#)
- [IRS Rev. Rul. 86-95](#)

IRS Lobbying Definition

IRS Online Course: Political Campaigns and Charities: The Ban on Political Campaign Intervention

Learn Foundation Law's Electioneering Rules for Private Foundations and Public Charities Online Training

Bolder Advocacy

Association of Fundraising Professionals

Giving USA

Questions?