



MONITORING YOUR SECTION 501(C)(3) ORGANIZATION'S ACTIVITIES WITH RESPECT TO POLITICAL CAMPAIGNS

This year is another election year, and the IRS has stated that it will vigorously pursue any complaints made against nonprofits regarding improper political activity.

Part I of this legal alert discusses the rules describing the prohibition against political activities, and Part II applies these rules to particular fact patterns. A legal determination of what constitutes improper political activity is based on a facts and circumstances test and cannot be made without a thorough understanding of the specific facts relating to an activity. You should consult with your own legal counsel regarding the application of any of the provisions discussed below to your own particular circumstances.

I. Rules Prohibiting Political Activities

Nonprofit organizations that are exempt from tax under section 501(c)(3) of the Internal Revenue Code, including churches and other religious organizations, are prohibited from

intervening on behalf of, or in opposition to, candidates for local, state or national office. If a nonprofit organization violates this rule, it is subject to an excise tax on the amount expended on the campaign activity and the organization is at risk of losing its tax-exempt status. In 2004, the Internal Revenue Service (IRS) received a number of complaints that nonprofit organizations around the country were improperly intervening in political campaigns, and it launched a series of examinations of those organizations. In 2008, the IRS again reached out to nonprofits to ensure that they were aware of the rules regarding political activity.

In order to be classified as tax exempt, a nonprofit organization must not "participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office." The Internal Revenue Service has stated that "this is an absolute prohibition." Any

degree of political activity is enough to disqualify an organization. Further, the intervening political campaign activity does not need to form a substantial part of the organization's activities for it to lose its tax-exempt status.

Individuals, of course, still retain the right to participate in the political sphere. The law distinguishes between activities that individuals undertake in conjunction with their official responsibilities and personal activities. Only activities that are directly or indirectly authorized or ratified by the nonprofit organization, or that are reimbursed by the organization will be considered organizational activities.

A. Campaigns for Public Office

Three factors must be met for an organization to be participating in disqualifying political activity. First, the organization must participate or intervene in a campaign. Second, the campaign must be with respect to an individual who is a candidate, and finally, the election must be one for public office. These factors are discussed in this order below.

1. Participating or Intervening in a Campaign

There are many ways to participate or intervene in a political campaign. For this purpose, a campaign is considered the running for local, state or national office. The most obvious way for an organization to meet the first criteria is to make a contribution to a candidate

(including a loan, even an interest-bearing loan, where the funds are to be used for the campaign). Endorsing a candidate or providing a candidate with facilities or employees is also a clear way to violate this restriction. Evaluating the qualifications of candidates, even if done so in a nonpartisan manner, is another way to violate this standard. The IRS even views assembling panels of citizens to rate candidates as a prohibited political activity.

At times, nonprofit organizations want to engage in "voter education." If a nonprofit organization does so, it must ensure that it stays clear of "voter direction." Thus, it is acceptable for an organization to neutrally educate voters on various issues, but it is prohibited from presenting information about political issues and candidates in a biased way. For example, one organization lost its tax-exempt status when it attacked candidates and incumbents considered too liberal. Another organization was found to be in violation of the political activity prohibition by sending direct-mail fundraising letters during election periods that implied that the funds raised would be used in part to finance candidates who shared the organization's point of view. In another case, an organization whose fundraising letters were signed by a candidate for political office, and whose letters were very similar to the candidate's statements and positions, also lost its tax-exempt status.

As illustrated above, nonprofits may not express opinions on the candidates. Organizations risk losing their tax-exempt status if they publish answers to questions that indicate a bias on the issues, or publish a voter guide reflecting voting records on only select issues. However, an organization may publish the voting records of candidates on a “wide variety” of major issues, as long as there is no editorial comment or approval or disapproval of the voting records. An organization may also publish responses of all candidates for an office to a questionnaire on a “wide variety” of subjects as long as no preference for a candidate is expressed.

2. A Candidate

An individual is considered a candidate once he has declared himself a candidate for public office. The IRS regulations define a candidate to include “any individual who offers himself, or is proposed by others, as a contestant for elective public office.” Prominent political figures are not necessarily considered candidates, even if there is speculation regarding their election to specific offices, but organizations should exercise caution with respect to such individuals.

3. A Public Office

Public office can include local, state or national office. According to the IRS, public office is distinguished from public employment in that one must be elected to public office. For example, the IRS has stated that an organization

attempting to influence the confirmation of a judicial nominee by the U.S. Senate does not constitute participation or intervention in a campaign because the judicial nominee is not a candidate for elective public office. Most courts assume that if an individual’s name is listed on a ballot, he or she is a candidate for office.

B. The Internet

The rules for political activities conducted via the internet are the same as for political activities conducted elsewhere. Thus, an organization that posts material in favor of a candidate for elected office on its website can lose its tax-exempt status just as if it had published the material in a newspaper.

II. Application to Specific Activities

A. Educational Activities

A common question that arises when determining whether a section 501(c)(3) organization has violated the political campaign prohibition is whether the activity constitutes political intervention or whether it is educational. Educational activities serve a permissive purpose. Significantly, often an activity can be educational while simultaneously constituting intervention in a political campaign. The following section examines some of the circumstances that must be considered in relation to a specific educational activity.

1. Public Forums

A nonprofit organization can conduct public forums involving debates and lectures on social, international and political questions and retain their tax exempt status as long as they provide fair and impartial treatment of the candidates. All legally qualified candidates should be invited to the forum unless it is unreasonable or impractical. Further, such forums and debates should discuss a wide range of issues and the organization must present a sufficiently full and fair explanation of facts to allow the public to form its own opinion independent of the organization's. An organization cannot use disparaging terms, innuendoes, insinuations, or incomplete facts when educating the public. The organization must not publish a final report of the forum which rates the candidates. The following are some factors that would indicate that the organization is not trying to influence the public's vote:

- Questions for the candidate are prepared and presented by an independent nonpartisan panel,
- The topics discussed by the candidates cover a broad range of issues that the candidates would address if elected to the position sought, and
- Each candidate is given an equal opportunity to present his or her views on the issues discussed.

The following are some factors that would indicate that the organization is

improperly trying to influence the public's vote:

- The candidates are asked to agree or disagree with positions and platforms of the organization, and
- A moderator comments on the questions or otherwise implies approval or disapproval of the candidates.

2. Rating Candidates

It is not permissible for a 501(c)(3) organization to rate candidates, even on a non-partisan basis. This includes all candidate questionnaires, voting records, voting guides and any other materials in which one could compare candidates.

3. Voting Records and Guides

The IRS considers the publication of voting records and guides to be permissible educational activities of an organization as long as no editorial comment or opinion is implied. A nonprofit organization can prepare and pass out voting records for all members of Congress on a wide variety of subjects. A nonprofit organization may also publish all the candidates' responses to a questionnaire prepared by the organization. While conducting these activities, the nonprofit organization may not express a preference for a candidate or publish a candidate's answer to questions in a way which indicates bias, nor should it compare the candidate's position on issues with its own. Further, the organization cannot publish a voter guide with voting records

of Congressmen with only selected issues of special interest to the organization.

One organization lost its tax-exempt status when simultaneously educating voters and demonstrating the organization's preference for candidates by both distributing to its members information on how to register and be elected as precinct committeemen and a survey presenting the views of national political candidates on voluntary school prayer, abortion, the Equal Rights Amendment and homosexuality. The organization encouraged its members to "vote intelligently" for Christian candidates in elections. In its survey of candidates, the organization identified Christian candidates. The IRS ruled that the organization's action constituted participation or intervention in a political campaign on behalf of candidates for public office and revoked the organization's tax-exempt status.

4. Voter Registration and Get Out the Vote Drives

Organizations are permitted to assist with voter registration and to encourage people to participate in the electoral process if they do so in a non-partisan manner. For example, if an organization sets up a voter registration booth, decorating it with signs and banners that only state the organization's name, and the staff of the booth makes no reference to a specific candidate or political party, the organization is not engaged in a political campaign intervention. If the organization's representatives speak in

favor of one candidate or displays signs for a specific candidate, however, the organization is engaged in political campaign intervention.

B. Candidate Appearances

An organization may also invite political candidates to speak before their organization, in a non-candidate capacity. For example, an organization may invite a candidate to speak because the candidate currently holds or formerly held public office, is considered an expert in the field about which they are invited to speak, or is a celebrity or has a distinguished, military, legal or public service career. A candidate may choose to attend an event that is open to the public, such as a lecture, concert or religious service. When an organization invites a political candidate to speak, it is the organization's responsibility to ensure that there is no mention of the speaker's candidacy by the individual or any representative of the organization, no campaign activity occurs in connection with the speaker's attendance at the organization, the organization maintains a nonpartisan atmosphere at the event, and that the speaker does not talk in a candidate-capacity. The organization should make clear the capacity in which the candidate is appearing, and no mention of the speaker's candidacy or the upcoming election should be made. Unlike when an organization invites a candidate to speak in a capacity as a candidate, the organization does not have to provide equal access to all the political candidates for that election.

If an organization does invite candidates to speak in their capacity as candidates, it must invite all candidates to speak, unless it is unreasonable or impractical. The topics discussed by the candidates should cover a broad range of issues that the candidates would address if elected to the position sought. Each candidate should be given an equal opportunity to present his or her views on the issues discussed, and the organization must conduct the appearance in a neutral, non-partisan manner. Finally, no political fundraising may occur at the event.

C. Speaking as an Individual

The IRS distinguishes between activities people do in their “official” capacity and those that are “personal” only. Only activities people perform in their “official” capacity as employees of the 501(c)(3) organization are taken into account when assessing an organization’s qualifications for tax-exempt status with regards to political campaign efforts. If an organization has, directly or indirectly, authorized or ratified an individual’s political acts or reimbursed an individual for contributions or other similar expenditures, the political campaign activities of an individual will be attributed to the organization.

Employees and board members of a nonprofit organization may make comments regarding political candidates provided they are speaking as individuals. Such statements should not be made in any of the organization’s

publications or at any of its functions. The IRS advises that “ministers and others who commonly speak or write on behalf of religious organizations should clearly indicate, at the time they do so, that public comments made by them in connection with a political campaign are strictly personal and are not intended to represent their organization.” Religious leaders cannot use the pulpit to advocate a certain message on behalf of a political candidate during an official religious event.

For example, the IRS held that one church intervened in a political campaign when a reverend delivered a guest sermon two days before the 2004 presidential election in which he discussed the candidates having a debate with Jesus. The reverend said that Jesus would have told President Bush that his pre-emptive war policy “has led to disaster.” Although the reverend did not directly endorse a candidate, the IRS held that his comment constituted an intervention in a political campaign by the church in which the reverend delivered his guest sermon.

D. Issue Advocacy versus Political Intervention

A nonprofit organization is entitled to take positions on important public policy issues, including issues that divide candidates for office. However, the organization must be careful that its advocacy does not cross the line into political intervention.

Depending on the facts and circumstances, even if a statement does not say to vote for a specific candidate, the organization's activity may still be considered campaign intervention if there is any message favoring or opposing a candidate. A statement can identify a candidate not only by name, but by showing a picture of the candidate or by referring to political affiliations or other distinctive features of a candidate's platform or biography.

Some factors used in determining whether a communication is a political campaign intervention are whether the statement:

- identifies one or more candidates for office;
- approves or disapproves of a candidate's position;
- is delivered close to an election;
- makes reference to the election;
- refers to an issue raised in the campaign; and
- is related to a non-election event, such as a vote by the legislature, or an on-going series of advocacy communications by the organization.

For example, a college issued a statement encouraging people to contact Senator X, a candidate for re-election, and ask him to vote for legislation pending before the Senate that would increase funding for college scholarships. The IRS has stated that the college did not intervene in a political campaign because the issue was not one

that was being debated in the campaign; the timing of the statement was determined by the timing of the Senate vote, and not the election; Senator X was in a position to vote on the pending legislation; and the statement did not mention the election.

In contrast, the IRS said that another organization violated the political campaign rules when it aired a radio spot encouraging voters to contact Governor X and ask him to end the under-funding of public schools. The IRS noted that the statement was not part of an ongoing series of advocacy messages the organization was making to the public; was made a few days before an election in which the Governor was a candidate for office; the issue of public school funding had sharply divided the Governor and the other candidates for office; and there was no external event, such as a pending legislative vote, that dictated the timing of the statement.

E. Business Activity

Often times the question arises whether business activities, such as selling mailing lists or leasing office space, with a candidate constitute participation in a political campaign. Generally, it will not constitute participation in a campaign if business is conducted with a candidate on the same terms as any other person. For example, if an organization rents out space for receptions and dinners to the general public for a standard fee, the organization does not intervene in a political campaign if a candidate rents

out that space for a fundraising dinner at its standard rates. If the organization gave the candidate a lower rate or would only rent the space to certain candidates, however, this would not be an acceptable activity.

III. Additional Resources

You may find the following information helpful in addressing concerns you might have:

- IRS Fact Sheet 2006-17, Election Year Activities and the Prohibition on Political Campaign Intervention for Section 501(c)(3) Organizations
<http://www.irs.gov/newsroom/article/0,,id=154712,00.html>
- Charities, Churches and Politics
<http://www.irs.gov/newsroom/article/0,,id=161131,00.html>
- IRS Revenue Ruling 2007-41
<http://www.irs.gov/charities/article/0,,id=170893,00.html>
- IRS Publication 1828, Tax Guide for Churches and Religious Organizations
<http://www.irs.gov/pub/irs-pdf/p1828.pdf>
- IRS Publication 1828 Spanish, Guia Tributaria Para Iglesias y Organizaciones Religiosas
<http://www.irs.gov/pub/irs-pdf/p1828sp.pdf>

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