

## LEGAL ANGELIA DICKENS AND CATHERINE OETGEN

### How Much Is Too Much?

#### *Participation in political activities by nonprofits*

**W**ith the presidential campaigns under way and another election year quickly coming upon us, many exempt organizations are questioning whether certain contemplated activities violate the prohibition against “electioneering” activities by organizations exempt from taxation under Section 501(c)(3) of the Internal Revenue Code (IRC).

Federal tax law strictly limits the extent to which 501(c)(3) organizations can participate in political campaign election activities on the state, local and federal levels. So-called “electioneering” activities (e.g., organizing get-out-the-vote drives, inviting political candidates to speak at events, and opining on campaign issues) by 501(c)(3) organizations raise important federal tax law questions. What types of activities are 501(c)(3) organizations permitted to engage in before an organization’s tax exemption is at risk? Unfortunately, there is no bright-line answer and the dos and don’ts of this type of behavior are murky at best.

The prohibition against political activity and electioneering derives from the definition of a 501(c)(3) exempt organization. The Internal Revenue Service (IRS) defines it as an organization “organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, which does 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.”

Certain activities are strictly forbidden:

- Financial or other contributions to or solicitations for candidates or political organizations;
- Oral or written public statements in favor of or in opposition to any candidate;
- The distribution of partisan campaign literature;
- The rating of candidates (even on a nonpartisan basis); and,
- The establishment of political action committees.

Violating this prohibition can result in the denial or revocation of tax-exempt status of the organization and the imposition of an excise tax on the organization and/or its managers. With these harsh consequences in mind, a 501(c)(3) organization should be familiar with IRS electioneering rules prior to engaging in any activity relating to a political candidate or election.

A determination of whether an organization has participated or intervened in a political campaign is fact-specific. Over the years, the IRS has released several rulings and publications to deal with specific instances of political activity. This past June, the IRS issued Revenue Ruling 2007-41, which illustrates 21 separate, fact-based hypotheticals analyzing whether each scenario violates the prohibition against electioneering.

Also in June, the United States Supreme Court reviewed the constitutionality of the ban on election-

eer communications by corporations (including nonprofit organizations) under the Bipartisan Campaign Reform Act (BRCA). In light of this recent guidance, here are potential pitfalls of which you should be aware as election season approaches.

#### ENDORSEMENTS

The IRS has stated that the electioneering prohibition imposed on 501(c)(3) organizations is not intended to restrict the free expression on political matters by individuals employed or associated with organizations who are speaking in a personal capacity and not as a representative of the tax-exempt organization. Individuals are free to endorse, support or oppose candidates for election, but such endorsements should not be attributed to the organization.

***When a person is invited to speak in the capacity as a political candidate, the organization should state explicitly that it does not support or oppose the candidate.***

As a rule of thumb, individuals speaking or acting in a private capacity will not jeopardize their organization’s tax exempt status so long as:

1. They do not make partisan comments in official organization publications or at organization events;
2. They do not in any way use the organization’s financial resources, facilities (including email), or personnel; and,
3. They clearly and unambiguously indicate that their comments or actions are made on behalf of themselves and not the organization.

Officers, directors or staff who endorse a particular candidate should not disclose the organization’s identity in connection with the statements to avoid attribution of the endorsement to the organization. However, if an individual endorses a candidate somewhere other than the official publication or event of the organization, and the organization is mentioned, it should be made clear that the endorsement is being made in a private capacity and not on behalf of the organization.

The IRS has advised that an appropriate disclaimer would be: “Organization is shown for identification purposes only; no endorsement by the organization is implied.” Of course, if the endorsement is made in an organization’s official publication or at one of its events, a disclaimer would be insufficient to avoid attribution of the endorsement to the organization.

#### CANDIDATE APPEARANCES

Depending on the facts and circumstances, 501(c)(3) organizations can invite a candidate to speak at events without violating the prohibition against political campaign activity. Political candidates may be invited in their capacity as candidates or in their individual capacity, and they may be either invited by the organization or they may appear without an invitation to events open to the public.

In either case, 501(c)(3) organizations should proceed cautiously by taking steps to ensure that there is no indication of support of or opposition to the candidate by the organization as a result of the appearance.

When a person is invited to speak in the capacity as a political candidate, the organization should state explicitly that it does not support or oppose the candidate during introductory remarks and any other communication concerning the candidate’s appearance.

Other steps should be taken to avoid the risk of violating the prohibition, such as providing an equal opportunity for other candidates seeking the same office to participate, either at the same event or a comparable one. Under no circumstance should political fundraising occur at events where candidates appear.

In a public forum setting, where an organization invites several candidates for the same office to attend, a 501(c)(3) organization should consider inviting all legally qualified candidates to avoid a political campaign intervention violation. The organization should also consider a number of other factors ahead of time, such as:

- Whether questions for the candidates are prepared and presented by an independent nonpartisan panel;
- Whether the topics discussed by the candidates cover a broad range of issues of interest to the public; and,
- Whether each candidate is given an equal opportunity to present views.

In some circumstances, candidates may be invited to speak at a 501(c)(3) organization’s event in some other capacity (i.e., a candidate who is also a celebrity or has a distinguished military or legal career) or a candidate may attend an event that is open to the public without any invitation at all. When a candidate makes an appearance as a “non-candidate,” the candidate’s presence alone does not cause the organization to be engaged in political campaign intervention. In this case, a 501(c)(3)

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would not be required to invite the opposition. However, the organization should take steps to make sure the event does not turn into a campaign appearance by avoiding any mention of the individual's candidacy or the upcoming election at the event.

### VOTER REGISTRATION AND MORE

A 501(c)(3) organization can organize voter registration and get-out-the-vote drives, so long as the activity is designed to educate the public about the importance of voting and does not suggest any bias for or against any candidate or political party. When undertaking these kinds of activity, an organization and its volunteers, as well as the materials made available to the public, should not refer to any candidate or political party. Official voter registration forms allowing registrants to select a party affiliation does not violate the prohibition.

Some 501(c)(3) organizations compile voters' guides, which include summaries of candidates' voting records or questionnaires reporting candidates' responses to various questions asked by the organization. The organization must be sure that the guide educates voters in an impartial and nonpartisan way to avoid violating the political campaign activity prohibition.

### ISSUE ADVOCACY

In the case *Federal Election Commission (FEC) v. Wisconsin Right to Life, Inc.*, the United States Supreme Court ruled that the electioneering communication ban contained in the BRCA was unconstitutional with respect to such issue advocacy advertisements. (127 S. Ct. 2652.) The case involved a Wisconsin organization that argued that its ads on federal judicial nominations, which encouraged vot-

ers to contact specific senators and were planned to air before the 2004 elections, were genuine issue ads run as part of a permissible grassroots lobbying campaign and should be exempted from the ban. The court's majority opinion stated: "An ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."

As a result of the ruling, corporations, including 501(c)(3) organizations, are entitled to broadcast genuine issue advocacy communications, which address public issues (as opposed to "express advocacy" communications which promote a specific candidate's election or defeat), within 30 days of a primary election or within 60 days of a general election for federal office. Although express advocacy is never permissible by 501(c)(3) organizations, this decision is a significant step toward expanding the right to freedom of speech and participation by nonprofit organizations in political activity. In light of the recent decision, the FEC has published proposed revisions to its rules governing electioneering communications to implement the U.S. Supreme Court's decision. The FEC plans to issue a final rule by the end of November 2007.

A 501(c)(3) organization can take positions on issues of moral, social and economic concern and election season is an appropriate time to garner greater exposure for these issues. However, even if a statement does not expressly mention a specific candidate, an organization is at risk of violating the political campaign intervention prohibition if there is a message opposing or supporting a candidate.

For example, a 501(c)(3) organization should ensure that its issue advocacy does not cross the line into political campaign intervention by avoiding the

use of "coded language" about an election or candidate like "conservative" or "liberal" or "pro-life" or "pro-choice." The IRS considers this kind of language, coupled with references to an upcoming election or a candidate's name, unlawful electioneering.

When assessing these kinds of situations, the IRS reviews the facts and circumstances to determine whether the organization is commenting on a candidate, rather than speaking about an issue. Among the key factors the IRS looks to in determining if the political campaign intervention prohibition has been violated are:

- Whether the statement identifies one or more candidates or expresses approval or disapproval for a candidate's position;
- Whether it is delivered close in time to the date of the election; and,
- Whether the issue has also been raised as a campaign issue distinguishing candidates for a particular office.

Because a given situation might involve only one type of activity or a combination of a few, it is impossible to say that the presence or absence of certain factors will determine whether an activity is prohibited electioneering. In each case the factual situation is unique and the IRS will look to all the surrounding facts and circumstances in making a determination.

Organizations that are planning to invite candidates to make appearances at fundraisers or events, participate in voter registration activities or engage in issue advocacy should consult with legal counsel prior to engaging in such activities. *NPT*

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