



# Philanthropic NEWS

SPRING 2006

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## IRS RELEASES GUIDANCE ON NONPROFITS' POLITICAL ACTIVITIES

The Internal Revenue Service (IRS) has released a fact sheet to help educate charities regarding political activities prohibited by federal tax law. Many of the types of activities addressed reflect those that received heightened attention during the 2004 election cycle. The fact sheet is intended to help charities better understand what they can and cannot do during an election campaign.

Under the Internal Revenue Code (IRC), all section 501(c)(3) organizations are banned completely from participating or intervening in political campaigns on behalf of, or in opposition to, any candidate for any elected public office. In short, financial contributions, public statements on a candidate's behalf, distributing literature prepared by another in favor of a candidate, or allowing a candidate to use an organization's assets or facilities all violate the prohibition if other candidates are not given an equivalent opportunity.

Although 501(c)(3) organizations may engage in certain activities such as  
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## TREASURY DEPARTMENT ISSUES UPDATED ANTI-TERRORISM FINANCING GUIDELINES

The U.S. Department of Treasury issued the *Anti-terrorist Financing Guidelines: Best Practices for U.S.-based Charities* ("Guidelines") due to its concern that donations intended for humanitarian purposes would be funneled to terrorists and their support networks. In response to an outcry by the nonprofit sector, the Guidelines were slightly revised, and are now effective as of December 5, 2005.

Although the Guidelines are ostensibly voluntary, OMB Watch noted that the voluntary nature of the Guidelines is questionable, given the broad powers of the government under the Patriot Act and related Executive Orders to seize and freeze charitable assets through use of secret evidence and without meaningful recourse for affected charities.

Unfortunately, adherence to the Guidelines does not necessarily offer a safe harbor for charities, although charities who can demonstrate a good faith attempt to abide by the Guidelines would presumably be less likely to be subject to the government's "seize and freeze" powers. The lack of a definitive safe harbor provision has led to significant criticism within the nonprofit sector.

The Guidelines contain numerous provisions that appear to address issues well beyond the scope of the possible diversion of funds to terrorist organizations. Principles of charitable practice including governance, financial accountability, public disclosure and  
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### POLITICAL ACTIVITIES

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promoting voter registration, encouraging voter participation, and providing voter education, it is the manner in which these activities are undertaken that will determine whether a violation has occurred. The guidelines for seven areas of political intervention for 501(c)(3) organizations are summarized below. Although each of the activities described below are dealt with separately, the combination of activities and the interaction between them may affect a determination that the organization has engaged in prohibited political intervention.

- **Voter Education, Voter Registration and Get Out the Vote Drives** - If carried out in a non-partisan manner, certain voter education activities are permissible. These include presenting public forums and publishing voter education guides. Conducting these activities in a biased fashion that favors or opposes one candidate over another is prohibited.
- **Individual Activity by Organization Leaders** – The free expression on political matters by leaders of organizations is not prohibited when they are speaking for themselves as individuals. It is important for such leaders to make it clear that they are speaking for themselves and that their individual views are not intended to represent the views of the 501(c)(3) organization.
- **Candidate Appearances** – A 501(c)(3) organization can invite political candidates to speak at their events, but must take steps to ensure that their tax-exempt status is not jeopardized. This would include providing equal opportunity to political candidates vying for the same office; stating explicitly in literature regarding the event and during introductions that the information is presented for informational purposes only and in no way represents an endorsement of one candidate over another; and ensuring that no fundraising occurs in conjunction with the event.
- **Issue Advocacy vs. Political Campaign Intervention** – The line between issue advocacy and political campaign intervention is blurry at best. While 501(c)(3) organizations are permitted to take a position on public policy issues, any communication of such a position must be considered in context. Key factors in determining whether a communication will be considered a political campaign intervention include the timing of the communication (i.e. how close to the election it is made), and whether the

statement (a) identifies any candidates for an office; (b) expresses approval or disapproval for any candidate's position; and (c) is part of an ongoing series of communications on that issue, independent of the election.

- **Voter Guides** – Preparing or distributing a voter guide may violate the ban on political intervention if it focuses on a single issue or narrow range of issues and whether and to what extent it reflects bias. In assessing whether a voter guide is unbiased, every aspect of the format, content and method of distribution will be considered.
- **Business Activity** – In the right context, business activities such as selling or renting mailing lists, leasing office space, or accepting paid political advertising can constitute participation or intervention in a political campaign. Some factors that will be considered include whether the good, service, or facility has been made available to candidates on an equal basis; whether it has also been made available to the general public; whether the fees are consistent with past practices; and whether this activity is an ongoing activity of the organization.
- **Web Sites** – Posting information on a web site that favors one candidate over another will be treated the same as if flyers had been distributed. Additionally, links to candidate-related material may be considered political campaign intervention. The facts and circumstances considered by the IRS in this instance will include (a) the context for the link; (b) whether all candidates are represented; (c) whether an exempt purpose is served by offering the link; and (d) the directness of the link between the organization's web site and the web page that contains material favoring or opposing a candidate.

The IRS fact sheet (FS-2006-17, February 2006) may be accessed on the IRS web site at [www.irs.gov](http://www.irs.gov). For additional information, please contact Karen Chang at [karen@perlmanandperlman.com](mailto:karen@perlmanandperlman.com).

### 2006 IRS "DIRTY DOZEN" INCLUDES TWO TAX-EXEMPT SCHEMES

The Internal Revenue Service's 2005 annual listing of notorious tax schemes included two schemes involving tax-exempt organizations.

First, the IRS is concerned that certain tax-exempt credit counseling agencies that claim they can fix credit ratings are instead pushing debt payment plans or

imposing high set-up fees or monthly service charges that may add to existing debt. The IRS is in the process of revoking the tax-exempt status of numerous credit counseling organizations operating under the guise of educating financially distressed consumers while charging them large fees and providing little or no counseling.

Second, the IRS has observed increased use of tax-exempt organizations to improperly shield assets from taxation. One example cited is the use of supporting organizations or donor-advised funds where the taxpayer maintains control over the assets or income, thereby obtaining a tax deduction without transferring a commensurate benefit to the charity. Another example is the contribution of historic facade easements to conservation organizations. The IRS states that in many cases, local historic preservation laws already prohibit alteration of the home's facade, making the easement superfluous. The IRS further stated that even if the facade could be altered, the deduction claimed may be far greater than the easement's impact on the value of the property.

## IRS RULING CREATES NEW OPPORTUNITIES FOR SOCIAL BUSINESS VENTURES

Social ventures – enterprises that combine that business and social objectives – are increasing in number through the country and the world. They include businesses run by nonprofit organizations, for-profit businesses that operate in a socially responsible manner, companies that donate a percentage of profits to charity, etc. A recent study by Aspen Institute estimated that the total size of the social enterprise market could be as much as *\$4 trillion*. One problem facing these enterprises is the lack of an appropriate legal structure. For-profit structures offer the ability to raise capital and profit participation, but their social missions take a back seat to the maximization of profit. Nonprofit structures offer tax advantages and the ability to accept charitable contributions, but they cannot easily enter into joint ventures and partnerships, and their business activities are hampered by IRS restrictions.

Recent IRS rulings (discussed in our Winter 2006 newsletter) have opened the door to innovative legal structures that allow social enterprises to combine their objectives in better, more creative ways. Perlman & Perlman lawyers are using these rulings to develop new types of “hybrid” business entities that allow the business purpose and the social purpose of social enterprises to co-exist peacefully within a single legal structure. If you would like more information about these efforts, please call Allen Bromberger at 212-889-0575.

## ANTI-TERRORISM GUIDELINES

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transparency are presented in some detail. Many of these suggested best practices are already required by the IRS, state law or are recommended by such organizations as the Wise Giving Alliance of the Better Business Bureau.

Under the heading of Anti-Terrorist Financing Best Practices, the Guidelines address:

- information that should be collected by U.S. charities prior to distributing funds;
- vetting practices for foreign charitable beneficiaries;
- vetting practices for the charity's employees;
- procedures to follow in the event the vetting of beneficiaries or employees leads to information which may indicate suspected terrorism activities; and
- methods and procedures to review the programmatic, distribution and financial operations of each beneficiary.

Comments filed on February 1, 2006 by a sector working group (consisting of OMB Watch, the ACLU, Independent Sector and others) called for the withdrawal of the Guidelines, offering as an alternative a document entitled *Principles of International Charity*. A copy of the Principles is available on the OMBwatch.org website.

For a full copy of the revised Anti-Terrorist Financing Guidelines please contact Seth Perlman or Karen Chang or go to: [http://www.treasury.gov/offices/enforcement/keyissues/protecting/docs/guidelines\\_charities.pdf](http://www.treasury.gov/offices/enforcement/keyissues/protecting/docs/guidelines_charities.pdf)

## NEW YORK AG PROPOSES REVISIONS TO CHARITY REGULATIONS

In March, the New York Office of the Attorney General posted new proposed regulations applicable to charities and fundraising professionals (including professional solicitors, fundraising counsel, and commercial co-venturers). The regulations govern the implementation of Article 7A of the Executive Law and Article 8 of the Estates, Powers and Trusts Law.

The proposed regulations incorporate information previously available in statutes, forms and instructions, define additional terms, and clarify procedures relating to registration and compliance. A copy of the proposed regulations is available at <http://www.oag.state.ny.us/charities/charities.html>.

## UPCOMING SPEAKING ENGAGEMENTS AND ANNOUNCEMENTS

**Seth Perlman** will be giving a presentation with Karin Goldman from the NYS Attorney General's office on multi-state reporting, registration and compliance at the **AICPA External Reporting Conference** on April 27, 2006.

**Cliff Perlman** will be giving a presentation on cause-related marketing issues at the **DMA Nonprofit Federation Conference**, "Critical Issues Facing Nonprofits," on April 19, 2006.

**Seth Perlman and Karen Chang** have written a two-part article entitled, "Fundraising in Cyberspace: The Current State of the Law of Internet Fundraising and Revenue Generation" which will be published in the May and June editions of the **Nonprofit Times**.

**David Samuels** will be giving a presentation on compensation and benefits at the **AICPA Not-For-Profit Governance Forum** in New York City on May 4-5, 2006. Mr. Samuels will also be co-chairing a continuing legal education program hosted by the New York City Bar Association, "Hot Topics on the Current Legal, Tax & Accounting Environment for Tax-Exempt Organizations" on May 19, 2006.

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