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Election-Year Issues for 501(c)(3) Organizations: How You Can and Cannot Get Involved in the Political Process

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The presidential election is less than 45 days away. Federal tax law strictly prohibits 501(c)(3) organizations from engaging in activities to support or oppose candidates for public office. However, there are still a number of ways that 501(c)(3)s can be involved in the political process without running afoul of the law.

Unfortunately, the line between prohibited and permissible activities is murky and can be easily crossed if proper managers of the 501(c)(3) are not careful in how they plan and execute the activities. Now might be a good time to review the rules that will help stay on the right side of the line while involved in the process.

If done correctly, 501(c)(3) organizations can:

- Help register voters;
- Conduct get-out-the-vote activities;
- Publish voter guides;
- Create candidate questionnaires;
- Host candidate appearances;
- Host debates;
- Conduct issue advocacy;
- Allow leadership and staff to be politically active; and
- Create an affiliated organization to engage in political activities that it cannot.

The key is to remember that these activities must be non-partisan, and not favor one candidate over another.

Prohibited Intervention

The Internal Revenue Code prohibits 501(c)(3) organizations from engaging in political campaign intervention. Political campaign intervention includes any direct or indirect activities in support of or opposition to any candidate for elective public office. The ban applies to elections at any level of government, whether federal, state, or local.

This prohibits 501(c)(3) organizations from endorsing candidates or making other public statements of support or opposition to a candidate for office. Distributing – or even in some cases linking to – statements prepared by others that favor or oppose candidates for elective office also constitutes prohibited campaign intervention.

Furthermore, a 501(c)(3) organization may not allow a candidate to use the organization's facilities, staff, or other resources (whether monetary or in-kind). This means that the organization's offices, computers, photocopiers, telephones, and other supplies and equipment should not be used for prohibited campaign activities, and that staff should not engage in prohibited campaign intervention during work time.

Stiff consequences await organizations that violate the ban. The Internal Revenue Service (IRS) may deny or revoke the organization's exempt status, may impose excise taxes on the organization, and, in some cases, impose those excise taxes on responsible individuals within the organization.

The potential for adverse consequences does not end with the IRS, however. Federal and many state campaign finance laws prohibit corporations from making campaign contributions. Because many, if not most, 501(c)(3) organizations are corporations, they are subject to corporate contribution bans under the campaign finance laws. Contributing use of the organization's facilities, staff, or other resources to

support or oppose a candidate could result not only in adverse tax consequences, but also could result in fines or other penalties imposed by the Federal Election Commission (FEC) or applicable state election authorities.

Much has been made of the U.S. Supreme Court's January 2010 *Citizens United v. Federal Election Commission* decision overturning many restrictions on corporations. Specifically, it allowed corporations to make independent expenditures in support of or in opposition to candidates. Remember, however, that *Citizens United* did not change the tax code: 501(c)(3)s may not fund and provide materials (whether TV, radio, mail, or websites) that support or oppose a candidate. A social welfare organization or a trade association may be able to spend millions on ads attacking a candidate, but a 501(c)(3) still cannot do so.

Permissible Activities

A variety of nonpartisan activities may be conducted by 501(c)(3) organizations during or in connection with an election if properly structured in accordance with IRS guidance. Permissible activities include nonpartisan and unbiased efforts to provide voter education and encourage voter participation in the electoral process. Organizations may also continue to discuss and engage in advocacy on policy issues of interest to the organization. The parameters of these and other permissible activities are discussed below.

Voter Registration and GOTV – 501(c)(3) organizations may conduct nonpartisan get-out-the-vote and voter registration drives. The efforts must be focused solely on the importance of voting and how to register. There can be no evidence of bias for a particular candidate or political party.

Voter Guides and Candidate Questionnaires – 501(c)(3) organizations may prepare and distribute unbiased and nonpartisan materials intended to help voters compare candidates' positions on a broad range of issues, such as legislative scorecards, candidate surveys, and similar voter education materials. However, the IRS views these materials as a high-risk activity. To minimize risk, the materials should follow these guidelines:

- Questions and any other descriptions of issues should be unbiased in structure and content;
- Questions and topics should cover most major issues of interest to the entire electorate;
- Questions and responses should be presented as they were asked and received, without editing by the organization;
- Candidates should be provided the opportunity to respond to questions in their own words, and not limited simply to yes/no or support/oppose responses;
- All candidates seeking election to the same office should be invited to participate in the survey;
- The questions and accompanying materials should not comment on the candidates' positions; and
- Candidates should not be asked to pledge to support a particular position, as this could convey the organization's endorsement of that candidate.

There are two major areas of concern with questionnaires and voter guides. First, if they are focused on a set of issues that are tied to the organization, then it is very easy for the questionnaire to convey the organization's endorsement. For example, a hypothetical group called Save the Starfish may ask a series of questions about how a candidate will preserve shallow coastal waters to protect starfish. The IRS would likely view this as attempting to endorse the candidate who answers the questions "correctly."

Second, if the materials are structured or edited to reflect bias in favor of a particular position of one or more candidates, then the organization also risks violating the ban on political campaign intervention.

That being said, organizations that prepare and distribute legislative scorecards on a single or narrow set of issues of particular interest to the organization on a regular and ongoing basis – i.e., not just during political campaign season – may continue to do so during campaign season, as long as it is done in the same manner as at other times throughout the year. If the organization has not published this kind of voting record regularly throughout the year, however, it may not start during the campaign.

Candidate Appearances and Debates – 501(c)(3) organizations may sponsor nonpartisan and unbiased candidate debates and appearances. To minimize risk of violating the ban on political campaign intervention in connection with such events, the following guidelines should be followed:

- Do not indicate support for or opposition to any candidate, explicitly or through biased presentation of topics or questions;
- Questions and topics should cover most major issues of interest to the entire electorate;
- Do not allow political fundraising to take place at the event; and
- Provide an equal opportunity to all candidates seeking election to the same office to speak or be a

part of the debate. The organization may establish reasonable, objective criteria to limit the number of participants (such as a polling threshold or qualification to be on a ballot).

Also, even someone who is a candidate may address a 501(c)(3) if the address is unrelated to his or her candidacy. For example, a sitting official may be asked to speak in an official capacity, or an expert on a particular topic may be asked to present to the organization. However, the candidacy and the election may not be mentioned by the speaker or by the organization.

Issue Advocacy – Organizations may generally continue to engage in public issue advocacy. For example, they may air commercials urging Congress to support legislation. Note that there are limits on the amount of grassroots lobbying in which a 501(c)(3) may engage. Organizations may use social media to discuss an issue, or publish newsletters about issues.

However, the organization must be careful that these efforts do not cross the line into campaign intervention. Any time issue advocacy mentions a candidate, there is a risk that it will be considered to be engaged in campaign intervention. Also remember that the federal campaign finance laws, and many state laws, require disclosures in connection with issue ads that clearly identify a candidate for federal office.

At the federal level these disclosures for “electioneering communications” are required when an organization conducts radio or TV ads that refer to a clearly identified candidate for federal office either 30 days before a primary election or 60 days before the general election. An ad saying “Call Congressman Jones and tell him to vote yes on H.R. 1” can trigger such a report.

Personal Activities by Organization Leaders or Staff – The ban on 501(c)(3) political campaign intervention does not prohibit the officers, directors, members, or employees of the organization from participating in a political campaign. They must, however, say or do everything for the campaign as private citizens and not as spokespersons for or agents of the organization. They absolutely cannot use the organization’s resources or assets in any manner.

Establishing a clear policy governing political activities for leaders and staff is a good practice to facilitate compliance with tax and campaign finance law restrictions. The policy should prohibit leaders and staff from making political statements on behalf of the organization in any manner, whether on official letterhead, at official functions, or in official media outlets, including newsletters, or on the organization’s website and social media sites. The policy should also prohibit personal political activities during work time, and prohibit use of the organization’s facilities or resources for personal political activities at any time.

Activities of Affiliate Entities – Although 501(c)(3) organizations are prohibited from directly engaging in political campaign intervention activities, the U.S. Supreme Court has ruled that 501(c)(3)s can establish affiliated 501(c)(4)s, 501(c)(6)s, or other tax-exempt affiliates to carry on lobbying activities and political campaign activities. They may not set up Section 527 organizations, which include political action committees (PACs). In fact, an affiliated 501(c)(4) or (c)(6) entity could itself establish a connected PAC. The affiliated entity generally must have independent funding sources for which no charitable tax deduction will be available. Also, any political activities must be carried out in accordance with applicable federal or state campaign finance laws.

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At the end of the day, 501(c)(3) organizations must be very careful in how they conduct activities that involve political candidates and elections, but they still have many opportunities to be engaged in the political process.

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