



FEBRUARY 2016

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NON-PROFIT ALERT

LOBBYING/ADVOCACY AND POLITICAL CAMPAIGN ACTIVITY What Can Nonprofit Organizations and Leaders Say and Do?

During an election year, many organizations are unsure about the extent to which they can discuss issues of importance in the campaigns or interact with candidates. As political activity can jeopardize an organization's tax exempt status, it is important to know the rules. This alert is intended to help 501 (c) (3) public charities understand that there many activities that are permissible and to know what they cannot do and say.

I. Fundamental Definitions. Be clear about what you are doing and why.

Understanding what a nonprofit and its leaders can and cannot do requires knowing three fundamental definitions.

Political Campaign Activity. Any action or speech which favors or opposes candidates for elected public office, such as endorsements of candidates, contributions to candidates and political action committees (PACs), public statements for or against candidates and distribution of materials which favor or oppose candidates. If the purpose of the speech or activity is to help or hinder the election of an individual to a public office, it is political campaign activity.

Lobbying. Any action or speech which attempts to impact the adoption or defeat of legislation, such as direct contact with voting members of a legislative body to encourage them to vote for or against a particular bill, encouraging the public to contact the legislators about a particular bill, and advocating a position on a public referendum. If the purpose of the speech or activity is to influence how an individual member of a legislative body votes, it is lobbying.

Advocacy. Any action or speech directed to the public for informational or educational purposes regarding an issue of interest to the nonprofit and activities and speech directed to non-legislative governing bodies, e.g. regulators. If the purpose of the speech or activity is general education and information, it is advocacy.

II. Understand Your Tax Status. Different Rules apply to Different Types of Organizations

The rules applicable to different types of tax exempt nonprofits are easy to summarize.

IRC §501(c)(3)- Religious, Charitable, Educational, Scientific Organizations may NOT engage in ANY political campaign activity. Violation of this rule could result in a loss of 501(c)(3) status. These organizations may conduct some lobbying and unlimited advocacy.

IRC §501(c)(4)- Social Welfare, IRC §501(c)(5)- Labor, IRC §501(c)(6)- Business League and IRC §501(c)(7) – Fraternal and Social Organizations may engage in limited political campaign activity. They may engage in lobbying and advocacy without limits.

III. What Can Your Organization Do? Applying the Rules is Not Easy.

The IRS applies a facts and circumstances analysis to determine whether an organization has engaged in impermissible activities. In other words, the IRS looks at each situation individually and makes its determination based on the actual facts and circumstances. The examples here are intended to guide exempt organizations as to what constitutes political campaign activity. This is especially important for 501 (c)(3) organizations which may not engage in any political campaign activity, but also for social welfare (501 (c)(4)) and other exempt organizations which may engage in only limited political campaign activity. Therefore, it is helpful to understand what the IRS considers political campaign activity in the context of various types of programs.

a. Voter Registration and Get Out the Vote

Voter registration and get out the vote campaigns are permissible activities for 501(c)(3) organizations if they are carried out in a non-partisan manner. Printed materials and verbal communications must not be specific to any candidate. Staff and volunteers should be instructed that they cannot talk with voters about candidates, provide any endorsement about any candidate or seek any pledge of support for a candidate – financial or otherwise.

b. Candidate Questionnaires and Forums

501 (c)(3) organizations may provide questionnaires and make the responses available to the public so long as all candidates are provided the same questions and so long as the questions are clear and unbiased and not drafted to favor one candidate or another. The questionnaire must cover all major topics of interest and may not focus on any one issue applicable to a particular candidate. There can be no indication that the organization favors a position clearly identified with one candidate. Candidates must be provided a reasonable time to respond. If yes/no answers are requested, there must be an opportunity to explain the position. A 501(c)(3) organization cannot provide any grading of the responses or endorsement of any candidate based on the questions. If a guide is produced based on the questionnaire the format of the guide must display the questions exactly as presented to the candidates with their unedited responses presented next to the questions.

Candidate forums may be hosted by 501(c)(3) organizations if the facts and circumstances are like those outlined for permissible questionnaires. All candidates must be invited to the forum or offered similar speaking opportunities. No endorsements or petitions may be allowed at the event. No fundraising may be conducted at the event. The format of questions must be clear and unbiased, cover all major topics of interest and not be crafted to indicate support for one candidate over another. If all candidates do not appear at the same event, the format and questions of each event must be the same. Forum locations, audiences, moderators and topics must be neutral.

c. Voter Guides

It is permissible for 501 (c)(3) organizations to publish voter guides related to issues of interest to the organization. Voter guides can include legislative scorecards. Their content and format must assure that there is no direct or implied endorsement for any political candidate. Factors to consider include how close the publication is to an election and how closely the candidates are linked to the issues in the guide. Communications must not reference any candidates, parties or elections. Legislative scorecards must include all legislators and track a variety of issues. No editorial comments are permitted – just the voting record.

d. Individual Activity by Organization Leaders

Nonprofit leaders do not lose their free speech rights by virtue of their position, but they must be careful. This applies to board members and senior leadership who are widely associated with the exempt organization. Any political activity by a nonprofit leader must be clearly identified as being in the leader's individual capacity. To

avoid confusion, any political activity by a leader should be conducted outside the organization's property and events. Leaders may not include any personal opinions on campaign issues in any publication by the organization, even if the leader pays for the article. Leaders should not make any comments or endorsements about candidates at board meetings.

e. Issue Advocacy

All tax exempt organizations may take positions on public policy issues, including issues that divide candidates. However, in advocating on an issue, 501 (c)(3) organizations must be careful not to create an impression that they favor a candidate. Issue advocacy materials must not include anything that might identify a candidate or express approval or disapproval of a candidate. In considering the facts and circumstances to determine whether any activity is issue advocacy and not political campaign activity, the IRS would consider how close the activity is to an election, whether there is any reference to voting, and whether the activity is part of an on-going campaign by the organization related to the issue.

f. Web Sites

Web sites are important communication tools for nonprofit organizations. The IRS views a website like any printed material or personal speech by individuals in the organization, and all of the above rules regarding political communication apply to websites. Links on the website can create additional concerns. If a link connects directly to a campaign or endorsement of a candidate, the organization may have violated the prohibition on political campaign activity. However, a voter guide which is published on a website with links to all candidates for information purposes only would be permissible. Given the high stakes of violating the prohibition on political campaign activity, 501 (c)(3) organizations should monitor the links on their webpages.

This summary is not intended as legal advice. Application of the IRS rules to the specific facts and circumstances of any particular activity requires a case-by-case analysis. In addition, the information contained in this alert was accurate as of the day of publication. Regulations and their interpretation can change over time. Please consult one of our Firm's attorneys listed below or your own lawyers to understand the implications of any political, lobbying or advocacy activity.

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