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LOBBYING/ADVOCACY AND POLITICAL CAMPAIGN ACTIVITY

THE LIMITS ON NONPROFIT ORGANIZATIONS AND THEIR LEADERS



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During these interesting times, many nonprofit organizations are unsure about the extent to which they can discuss issues of political importance, or interact with elected officials or candidates in upcoming elections.

Because legislative and political activity may jeopardize an organization's tax exempt status, it is vital to know and comply with the rules. This article is intended to help public charities qualifying under Internal Revenue Code §501(c)(3) understand the lines between permitted and prohibited behavior.

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, contributions (to either candidates or political action committees, known as "PACs"), public statements for or against candidates, or distribution of materials which favor or oppose candidates. Simply stated, political campaign activity is any speech or activity intended to impact the election of an individual to a public office.

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 legislators about a particular bill, or advocating a position on a public referendum. Lobbying is any speech or activity intended to influence how an

individual member of a legislative body votes.

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

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

These types of nonprofits may not engage in any political campaign activity. Although enforcement of this prohibition is sporadic at best, 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
- IRC §501(c)(7)- Fraternal and Social Organizations

These types of nonprofits may engage in limited political campaign activity. They may engage in lobbying and advocacy without limits.

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 that it uncovers. The examples that follow are intended to guide exempt organizations as to what

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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.

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 specify any candidate. The organization should instruct staff and volunteers 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.

Candidate Questionnaires and Forums

501(c)(3) organizations may provide candidate questionnaires and make the responses available to the public, as long as:

- (1) all candidates are provided the same questions and*
- (2) 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, the questionnaire must include an opportunity for the candidate 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.

Voter Guides

501(c)(3) organizations may 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

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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.

Individual Activity by Organization Leaders

Nonprofit leaders, including board members and senior leadership, do not lose their free speech rights by virtue of their position, but they must be careful. 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 all or part of the publication. Leaders should not make any comments or endorsements about candidates at board or other meetings of the nonprofit.

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 not 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 in time the activity is to an election, whether there is any reference to voting, and whether the activity is part of an ongoing campaign by the organization related to the issue.

Websites

Websites 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 equally to them. Links on a 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. A voter guide which is published on a website with links to all candidates for information purposes only, however, is permitted. Accordingly, all 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.

PRESIDENT TRUMP'S RECENT EXECUTIVE ORDER

As an update to this article, on May 4, 2017, President Trump signed an executive order entitled "Presidential Executive Order Promoting Free Speech and Religious Liberty" that directs the executive branch to limit its enforcement of the "Johnson Amendment". Codified in Code Section 501(c)(3), the Johnson Amendment prohibits entities organized for religious or charitable purposes from participating or intervening in any political campaign on behalf of or in opposition to any candidate for public office as a condition of their status as organizations exempt from income taxation. The executive order restricts enforcement of the Johnson Amendment, and prohibits the executive branch from taking any other adverse action against any religious organization for promoting specific political opinions. It should be noted that the Johnson Amendment is famously unenforced and the issuance of the executive order may not change any real behavior. However, because only religious perspectives are exempted and all other secular, tax exempt organizations remain subject to the prohibition, the executive order may be indicating that the Trump administration intends to enforce secular violations of the Johnson Amendment in the future.

If you have any legal questions relating to the lobbying activities of your nonprofit organization, please contact Carrie Pollak at cpollak@hancocklaw.com.

IS YOUR DRINKING WATER CONTAMINATED?



HOLLY K. AUSTIN

In 2014, the Village of Hoosick Falls, New York identified the presence of elevated levels of a chemical known as PFOA in the public water supply. The contamination of drinking water in Hoosick Falls made national news and has raised public awareness of perfluorochemicals, known as PFCs.

PFCs are a group of chemicals used to make coatings and products that resist heat, oil, stains, grease, and water. They have been used in the manufacture of clothing, furniture, adhesives, paint and varnish, food packaging, heat-resistant non-stick cooking surfaces (such as Teflon™) and insulation of electrical wires.

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New York became the first state to designate certain PFCs as hazardous substances. This designation enabled the use of the State Superfund Program to investigate and remediate sites impacted by PFCs, and consequently hold polluters responsible for cleanups. Public water

contamination in places like Hoosick Falls and Flint, Michigan have caused many people to worry about the quality of their own drinking water. New York State has responded to the concerns by forming a response team, passing new regulations, obtaining funding for drinking water and watershed quality assessments, and assisting communities where contamination is found in drinking water supplies.

NYSDEC has stated that it will prioritize investigation of potentially contaminated drinking water supplies at or near types of sites where PFCs, dioxane, or other emerging contaminants are likely to be found. The types of sites DEC has so far identified include fire training centers, Department of Defense/military sites, airports, and closed and inactive landfills.

STATE ENVIRONMENTAL QUALITY REVIEW ACT UPDATE (Holly K. Austin)

After more than 20 years, the New York State Department of Environmental Conservation (NYSDEC) is proposing to amend the State Environmental Quality Review Act (SEQRA) regulations. The purpose of SEQRA, as stated in the regulations, is “to incorporate the consideration of environmental factors into the existing planning, review and decision-making processes of state, regional and local government agencies.”

SEQRA can be a cumbersome process for municipalities and applicants alike. To help “streamline” the process, NYSDEC is proposing to expand the list of projects that are exempt from SEQRA review, known as the Type II list.

Added to the Type II list are a variety of “green” projects, such as certain solar energy projects, renovation and reuse of existing structures, redevelopment of previously disturbed sites, building upgrades to incorporate green building standards or meet energy codes, and brownfield site cleanup agreements. Other notable additions

to the Type II list are General Municipal Law 239 referrals, installation of cellular antennas or repeaters on existing structures, and certain small subdivisions.

While the addition of projects to the Type II list diminishes the number of applications requiring SEQRA review, there will be an increase in the number of projects requiring the more extensive Type I review. NYSDEC has reduced a number of the thresholds that bump a project from being an “unlisted” to a Type I action. Some of the changed thresholds are the number of units that will be connected to existing water and sewage works, the number of parking spaces a project requires, and proximity to historic sites.

Significantly, the proposed regulations also make scoping of draft environmental impact statements (EISs) mandatory. The proposed regulations state that mandatory use of EISs will “result in EISs that are only focused on relevant, significant, and adverse impacts.”

If history is any indication, it could be some time before the amendments are officially adopted. To see all of the anticipated changes, the text of the proposed amendments is at <http://www.dec.ny.gov/permits/83389.html>.

If you have any legal questions regarding SEQRA updates or water contamination issues, please contact Holly Austin at haustin@hancocklaw.com.

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