

Client Alert

A report
for clients
and friends
of the firm **March 2006**

IRS RELEASES GUIDANCE ON PROHIBITED POLITICAL ACTIVITY BY SECTION 501(c)(3) ORGANIZATIONS

Under the Internal Revenue Code, all organizations exempt from federal income tax under section 501(c)(3), such as public charities, churches and universities, are prohibited from directly or indirectly participating in, or intervening in, a political campaign on behalf of (or in opposition to) any candidate for elective public office. Political campaign intervention includes any activities that favor or oppose one or more candidates for public office. Prohibited activities include contributions to campaign funds or public statements of position by or on behalf of the organization in favor or in opposition to any candidate. Violation of this prohibition may result in denial or revocation of the organization's tax-exempt status and the imposition of excise taxes. In preparation for the upcoming election season, the Internal Revenue Service has indicated that it will be focused on closely monitoring tax-exempt organizations to ensure that they are in compliance with these rules.

On February 24, 2006, the IRS issued Fact Sheet 2006-17, "Election Year Activities and the Prohibition on Political Campaign Intervention for Section 501(c)(3) Organizations." While the law prohibiting political activities by exempt organizations has not changed, the Treasury Regulations and other IRS notices and publications included very few "real world" examples on permissible and impermissible political activities. The Fact Sheet provides explicit detailed guidance on what constitutes impermissible political campaign

intervention by churches and other charitable organizations and includes over twenty examples. The Fact Sheet was released in conjunction with the publication of the Service's findings from its 2004 Political Activity Compliance Initiative, in which the Service investigated churches and other Section 501(c)(3) charities after receiving complaints of impermissible political activity during the 2004 election season. The Service found problems in nearly 75 percent of the 82 organizations it had examined. In fact, two organizations are at substantial risk of losing their tax-exempt status. The fact sheet can be accessed on the IRS website at:

<http://www.irs.gov/newsroom/article/0,,id=154712,00.html>.

The Fact Sheet provides numerous examples which help distinguish between permissible and impermissible activities in the most common types of political campaign-related activities that charities tend to conduct. These include voter registration and "get out the vote" drives, spoken or written political commentary by the organization's leaders in their individual capacity, candidate appearances at organization events, and the preparation or distribution of printed voter guides. The examples illustrate that charitable organizations can participate in these types of activities without risking their tax-exempt status - but only if the activities are carefully tailored and closely monitored to avoid favoring or opposing any party or candidate for office. The examples illustrate that such favoritism or opposition need not be overt to constitute impermissible political campaign intervention. Every activity or communication that is related to a political campaign or a public policy issue should be examined in light of all the facts and circumstances to determine whether it constitutes political campaign intervention.

Issue Advocacy vs. Political Campaign Intervention

The Fact Sheet also provides guidance on the limits of permissible "issue advocacy." In general, Section 501(c)(3) organizations are permitted to take positions on public policy issues, including issues that divide candidates in an election for public office.

Nevertheless, issue advocacy that favors or opposes a candidate would constitute prohibited political campaign intervention and could jeopardize the organization's tax-exempt status. The Fact Sheet provides a set of key factors that the IRS will use to distinguish between issue advocacy and political campaign intervention. The factors include the following:

- Whether the statement identifies one or more candidates for a given public office;
- Whether the statement expresses approval or disapproval for one or more candidates; positions and/or actions;
- Whether the statement is delivered close in time to an election;
- Whether the statement makes reference to voting or an election;
- Whether the issue addressed in the communication has been raised as an issue distinguishing candidates for a given office;
- Whether the communication is part of an ongoing series of communications by the organization on the same issue that are made independent of the timing of the election; and
- Whether the timing of the communication and the identification of the candidate are related to a non-electoral event such as a scheduled vote on specific legislation by an officeholder who happens to be a candidate for public office.

While the Fact Sheet emphasizes that the activity must always be considered in context and in light of all the facts and circumstances, it is very important to note that a communication is particularly at risk of political campaign intervention *when it makes reference to candidates or voting in a specific upcoming election.*

Business Activity

The Fact Sheet also illustrates that a business activity of a charitable organization, such as leasing office space, selling or renting of mailing lists, or the acceptance of paid political advertising, can constitute impermissible political campaign intervention. In this context, factors which help determine whether the business activity is improper include:

- Whether the product, service or facility is available to candidates in the same election on an equal basis;
- Whether the product, service or facility is available only to candidates and not to the general public;

- Whether the fees charged to candidates are at the organization's customary and usual rates, and
- Whether the activity is an ongoing activity of the organization or whether it is conducted only for a particular candidate.

In one example, a tax-exempt theater maintains a mailing list of all of its subscribers and contributors. Although the theater has never rented its mailing list to a third party, they are approached by the campaign committee of a particular candidate who supports increased funding for the arts. The theater agrees to rent its mailing list to the candidate for a fee which is comparable to fees charged by similar organizations. The theater declines similar requests from campaign committees of other candidates. The Fact Sheet states that under these facts, the theater has impermissibly intervened in a political campaign.

Websites

The Fact Sheet also provides some guidance on when an organization's website can constitute political campaign intervention. The guidance clarifies that if an organization posts something on its website that favors or opposes a candidate for public office, the organization will be treated as if it distributed printed material or made oral statements or broadcasts that favored or opposed the candidate. Links to candidate-related material, if posted in a neutral and unbiased manner, may not necessarily constitute impermissible political campaign intervention. Nevertheless, the IRS will consider several factors in determining whether a violation has occurred. These include the context in which the link is presented, whether all candidates are represented; whether presenting the link serves an exempt purpose, and the directness between the organization's website and a web page that contains material favoring or opposing a candidate. Posting links to candidate websites, where the context of the links provides an inference of support or opposition to a specific issue which divides the candidates, may constitute an impermissible intervention. Organizations are encouraged to continuously monitor the content on linked websites and to be mindful of the context in which the links are presented to determine whether the organization's website should continue to link to the other sites.

Conclusion

In an election year, an exempt organization must be extremely vigilant about not engaging in impermissible political activities. In light of the numerous violations found in the 2004 election season, we expect that the IRS will be intent on carefully monitoring exempt organizations in the upcoming election season. We recommend that you carefully review the examples set forth in Fact Sheet 2006-17 to ensure your activities are in compliance. We would be happy to discuss any proposed activity to make certain that you do not inadvertently violate the proscription against political campaign intervention.

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