

Nonprofit Alert: Campaign Intervention September 2008

INTRODUCTION

During election years, the Internal Revenue Service takes a keen interest in whether charitable (501(c)(3)) organizations are intervening in political activities. This is particularly relevant in Presidential campaign years. One common characteristic to most charitable organizations is a passion about their respective causes. Since candidates for office are generally “issues” oriented, it is understandable that organizations, particularly those involved in advocacy for a cause, want to support the candidate that supports their position.

HOW THE IRS RESPONDS

Because of the increase in political involvement during election years, the IRS initiated the ***Political Activities Compliance Initiative*** (“PACI”) to respond in a faster, targeted fashion, toward allegations lodged against charitable organizations who get involved in political campaign intervention. During one test period, the IRS determined that approximately 50 percent of the allegations were with merit and needed further investigation. Under Code section 4955 of the Internal Revenue Code of 1986, if the IRS finds that a Code section 501(c)(3) organization has engaged in political campaign activities, the organization may be subject to tax on the amount of money it spent on the activity. In addition, the management of the organization may also be taxed if they knew the money was being spent for political campaign intervention and chose to authorize or support the activity anyway. In the most egregious of cases, the IRS can revoke the organization’s ability to attract tax deductible contributions or as an extreme measure, revoke the exempt status of the organization.

WHAT IS PERMISSIBLE AND WHAT IS NOT

Statement of fact – Code section 501(c)(3) organizations are prohibited from engaging in any political campaign activity. However, that does not mean that they can have no role in the election process. The current language applicable to Code section 501(c)(3) organizations reads, “...{an organization] which does not participate in or intervene in, including the publishing or distributing of statements, any political campaign on behalf of or in opposition to any candidate for public office.” As such, the Code section 501(c)(3) organization may not engage in any activities that support or oppose any candidates. This does however leave the door open as to what kind of activities can they participate in involving activities that do not favor or oppose candidates.

Note that advocating for or against ballot initiatives is not political campaign activity. It is considered lobbying. Code section 501(c)(3) organizations can engage in a limited amount of lobbying activities, including those on ballot initiatives. However this must be an insubstantial part of their activities. Additionally, 501(c)(3) organizations can participate in the electoral process by “educating” voters, registering voters, or encouraging higher voter turnout at the polls. These kinds of activities are legitimate, permissible activities of a Code section 501(c)(3) organization as long as they are carried out in a non-biased manner. The IRS, in its PACI investigation, considers the facts and circumstances in making their determination involving participation in a political campaign.

COMMON OFFENDERS

The PACI program found that the following prohibited activities were those most commonly found in Code section 501(c)(3) organizations:

- Distributing diverse printed materials that encouraged their members to vote for a preferred candidate;
- Religious leaders using the pulpit to endorse or oppose a particular candidate;
- Candidates speaking in their role as candidates at official functions of exempt organizations;

- Disseminating improper voter guides or candidate ratings;
- Placing signs on their property that show they support a particular candidate;
- Criticizing or supporting a candidate on their website or through links to another website;
- Organization officials verbally endorsing a candidate; and,
- Making cash contributions to a candidate's political campaign.

PROTECT YOUR ORGANIZATION

The IRS has recently finished significant revisions to the Form 990. One of the reasons for the revision is to increase transparency. Organizations are now required to report all of their political campaign and lobbying activities on one schedule, Schedule C. In addressing the questions on Schedule C, it would be virtually impossible to evade the issue should an organization choose to participate in a political campaign.

Whether an organization is participating or intervening, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office depends upon all of the facts and circumstances of each case. The IRS, in Revenue Ruling 2007-41 provides "situation" guidance in the following areas:

- Voter education, voter registration and get out the vote drives;
- Individual activity by organization leaders;
- Candidate appearances;
- Candidate appearances where speaking or participating as a non-candidate;
- Issue advocacy vs. political campaign intervention;
- Business activities; and,
- Websites.

CONCLUSION

The IRS evaluates political activity on a facts and circumstances basis. As noted above, during the test period 50 percent of all complaints had merit and were pursued. With the new reporting requirements found on Schedule C (Form 990), it will be much easier for the IRS to determine who is involved with campaign activities. As we get closer to the election, and candidate positions become more visible, it will be more tempting to take sides. Organizations and their officers and directors, in their official capacity, will have to take extra care to avoid involvement in campaign activities in order to protect the organization's exempt status.

FOR FURTHER INFORMATION

If you have any questions, please contact **Mike McNee**, Partner-in-Charge of Nonprofit and Government Services at 212.503.8954 or email at mmcnee@markspaneth.com or **Robert Lyons**, Managing Tax Director at 212.710.1736 or rlyons@markspaneth.com.

You can also always email our other group leaders:

Hope Goldstein, Partner

hgoldstein@markspaneth.com

Joseph J. Kanjamala, Partner

jkanjamala@markspaneth.com

Steven P. Monteferante, Partner

smonteferante@markspaneth.com

Warren Ruppel, Partner

wruppel@markspaneth.com

Howard Becker, Director

hbecker@markspaneth.com

Information about the Nonprofit and Government Services Group can be found on our website at www.markspaneth.com

© **Marks Paneth & Shron LLP** 2008 | www.markspaneth.com
MANHATTAN | LONG ISLAND | WESTCHESTER | CAYMAN ISLANDS
Privacy Policy & Legal Disclaimer