

PERMISSIBLE ACTIVITIES OF 501(c)(3) ORGANIZATIONS DURING A POLITICAL CAMPAIGN

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Introduction

The purpose of this statement is to explain briefly and in lay language what a 501(c)(3) organization can and cannot do during a political campaign. In 1954 Congress wrote into Section 501(c)(3) of the Internal Revenue Code, the section granting tax-exempt status to public charities, the proviso that the organization must "...not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office."

Congress did not elaborate on the above language, and for a number of years there has been considerable uncertainty as to just what a 501(c)(3) organization could and could not do during a campaign. Rulings by the IRS, four of them in direct response to questions asked by Independent Sector, have greatly clarified the situation. Although these are private rulings (that is, technically they apply only to the organization asking the question), they are useful to other organizations of the same character inasmuch as they indicate the current position of the IRS.

Background

To remove any possible doubt, it should be stated at the outset that it is perfectly legitimate and highly appropriate for a 501(c)(3) organization to work for the passage of legislation that would further its cause, whether during a campaign or not, assuming of course the organization complies with other applicable statutes, especially the lobbying limitations set forth by Congress in the tax amendments of 1976.

On the other hand, working for the election of a political candidate—federal, state, or local—is strictly prohibited and may cause the organization to lose both its tax-exempt status and its ability to assure donors that their contributions are tax deductible.

Timing

A basic concept underlying the IRS rulings is that it is what an organization does during a campaign that is the determining factor. In other words, what is done before or after a campaign is not a consideration, with the possible exception of an activity so timed as to deliberately circumvent the law.

What, then, is "during a campaign"?

Generally, a campaign for a given office is deemed to begin either (1) when someone announces either by public statement or, in the absence of a statement, by filing notice with the election commission that he or she is a candidate for that office; or (2) when a person is proposed as a candidate by others, even if the individual has not directly declared his or her candidacy.

Electioneering

Starting with the obvious, you cannot as a 501(c)(3) organization endorse, contribute to, work for, or otherwise support a candidate for public office. Conversely, it follows that neither can you oppose one.

This in no way prohibits any of your officers, individual members, or employees from participating—provided that anything they say or do is done as private citizens and not as spokespersons for your organization. If they choose to identify themselves with the organization, they must make it plain that they are speaking solely for themselves and not for the organization. If they do not identify themselves but the media does, they have done nothing wrong.

Candidates' Statements

It is entirely proper for your 501(c)(3) group to inform candidates of your position on issues of the day, to urge candidates to support your position if elected, and to ask them to go on record as pledging their support. In fact, getting the issues into the campaign, getting them discussed by both candidates and media before the election often proves to be a highly effective device for subsequently obtaining the legislation you favor.

It is what you do with the candidates' responses that may lead to problems. First, each candidate is free to respond in any manner he or she chooses and to distribute the response not only to your organization but to the general public. On the contrary, however, you do not have the same freedom. Section 501(c)(3) itself contains the prohibition against "the publishing or distributing of statements." It is crystal clear from this that you cannot distribute a candidate's statement to the media or the general public. Ordinarily it would seem that an organization could distribute such statements at least to its own members. The law makes no such exception. (See also the sec-

tion Membership Lists, below.) Of course, if the response from the candidate who ultimately wins the election is favorable, you may want to dig it up later and remind the victor of his or her promises.

The same considerations apply to any statement volunteered by a candidate even if you did not ask for one. He or she may distribute it at will, but you are governed by the language of Section 501(c)(3).

Questionnaires

Questionnaires pose a ticklish problem. If you are a 501(c)(3) organization with a broad range of interests, such as the League of Women Voters or the United Way, you are on safe ground in issuing questionnaires to candidates and disseminating the responses. The questions must cover a wide range of subjects, be framed without bias, and be given to all candidates for a given office.

On the other hand, if your organization has a relatively narrow focus—and this probably includes the majority of 501(c)(3) organizations—you can still submit a questionnaire to candidates, but there could be serious problems if you disseminate the results. In the first place, framing questions without emphasizing your special interest is extremely difficult. In the second place, and probably the more compelling, the IRS has taken the position that the very narrowness of your focus implies your endorsement of those candidates whose replies are most favorable. The wisest course for the vast majority of 501(c)(3) groups would be to refrain from publishing the results of questionnaires. The same rationale applies when candidates are asked to respond to a position paper drawn up by the organization. The position-paper-with-response-requested is in effect an elaborate form of questionnaire.

Voting Records

Many organizations follow the practice of telling their members after a key vote on an issue of concern to the organization how each member of the legislature voted. This serves to show the membership how well or how poorly the proposal fared, which legislators they should thank, and which ones they still need to convince. There is no problem with this, provided the information is presented and disseminated during the

campaign in the same manner as other times. Any new twists or slants to the procedure can result in a determination that the organization has engaged in improper electioneering. In presenting the results, do not say "voted for us" or equal; simply indicate whether the legislator voted for or against the particular motion on which the issue was decided. In some cases, this may require an explanation of the parliamentary significance of the motion, such as "the motion to table had the effect of killing the bill for this session."

A problem does arise, however, if the organization waits until the campaign is underway to disseminate voting records. The better part of wisdom in this area is to disseminate voting records during a campaign only if it has been your practice to do so at other times. Reaching back during a campaign and publishing a recap of legislators' votes for the entire session or session to date would be unacceptable. It would be unobjectionable, however, after the election. As for distributing voting records to the public at-large, that would be unwise at any time unless you are one of the very few 501(c)(3) "broad focused" groups as described above.

Voter Registration Drives and Get Out The Vote Campaigns

The IRS has long recognized that section 501(c)(3) organizations can play an important role in fostering participation in the political process by conducting voter registration drives and Get Out The Vote (GOTV) campaigns. Of course, a tax-exempt charity's work on these activities—like everything else it does—must be non-partisan. A section 501(c)(3) organization can, for example, operate a voter-registration table at a local shopping center or run a phonebank encouraging voters to go to the polls, provided it can demonstrate that its activities were not conducted in a manner intended to benefit or harm any particular candidate.

Importantly, section 501(c)(3) organizations can target their voter registration GOTV activities at particular groups even if those groups are statistically more likely to favor a particular candidate, so long as the group is selected on nonpartisan grounds. Thus, it is perfectly permissible for a tax exempt charity to register members of a politically under represented group, such as the poor or minorities, despite the fact that these groups may be expected to vote predominately for one party or candidate. Similarly, a GOTV or

voter registration campaign directed at the group an organization is operated to serve, such as the residents of a particular geographic area, will not be a partisan activity. On the other hand, voter registration or GOTV activities directed at a particular group chosen because of the way it is likely to vote—individuals who voted for the Democrat in the last election, for example—are clearly prohibited.

Voter registration drives and GOTV campaigns typically involve significant one on one interaction between an organization's staff or volunteers and the general public. Such unstructured interaction creates opportunities for inadvertent electioneering. Therefore, it is a good idea to provide all workers participating in these activities with training to explain that they may not do or say anything while acting on behalf of the organization that appears to endorse or oppose a candidate. A record of such training kept in an organization's files will also show that the purpose of its voter registration or GOTV activities was non-partisan and, thus, prevent attribution of any inadvertent electioneering that does occur to the organization.

Public Forum

There can be no objection to a 501(c)(3) organization inviting candidates to attend a meeting of the organization or a public forum sponsored by the organization and state their views on subjects of interest to the organization. Obvious even-handedness must be maintained in all aspects of promoting and holding the meeting or public forum. Avoid stating your organization's position or commenting on the candidates' responses. If there is a question period, each candidate must be given the opportunity to answer all questions put by your organization. In an open meeting, members of the general public of course are not bound by the same considerations, but the moderator for your group should do his or her best to assure balance.

Of course, all bona fide candidates must be invited, and it would be best to invite them simultaneously and to use identical language in the invitations. It is not necessary that they all attend as long as all are invited.

As for distributing copies of candidates' speeches or other remarks, the IRS position is that if you regularly publish a newsletter and limit its circulation generally to your own members, you may report candidates' statements as news

items. All candidates must be given equal opportunity to appear, those who do must be given equal coverage, and news stories must be presented without editorial comment. Make it plain that the views being reported are those of the candidates and that all candidates for the given office were afforded the same opportunity to participate in the forum.

Membership Lists

Some organizations give, sell, trade, or lend lists of their members to others. If your organization wishes to make its membership list available to candidates, there is no objection to its doing so, provided of course that all candidates are made aware of the opportunity and are given the same access. However, two other considerations enter the picture. If an organization gives or lends its membership list to a candidate, it is in effect making a campaign contribution; to avoid this, it must receive something of fair value in return. Also, before selling or renting membership lists, 501(c)(3) groups would do well to check rules on unrelated business income.

Further Information

The following sources of further information may be helpful:

1. Your own counsel.
2. IRS letter rulings of September 4 and October 8, 1980, to Independent Sector; copies are available from the Independent Sector office, 1828 L Street, NW, Washington, DC 20036; (202) 223-8100.
3. "Advocacy is Sometimes An Agency's Best Service: Opportunities and Limits Within Federal Law," available from Independent Sector at \$2.50.
4. "Tax-Exempt Organizations' Lobbying and Political Activities Accountability Act of 1987: A Guide for Volunteers and Staff of Nonprofit Organizations." Available from Independent Sector at \$1.75 per copy for members/associates; \$2.50 per copy for nonmembers.

Caveat

The foregoing analysis is a simplified explanation of a highly complex subject. It is in no way intended as a substitute for professional legal advice.

*The Independent Sector is a coalition of corporate, foundation and national voluntary organization members. Its mission is to create a national forum to encourage giving, volunteering, and not-for-profit initiative.