

## **POLITICAL ACTIVITIES OF 501(C)(3) ORGANIZATIONS**

### **Background**

Non-profit organizations have been getting more questions about their ability to advocate in the public policy arena. To assist tax-exempt organizations, the IRS has recently announced the “political activities compliance initiative for 2008,” which will coincide with the upcoming election season. Non-profit organizations have been getting more questions about this issue.

### **Campaigning**

The general rule is that all section 501(c)(3) organizations are prohibited from participating in, or intervening in (including the publication or distribution of statements), any political campaign on behalf of (or in opposition to) any candidate for public office. This is an absolute prohibition, violation of which results in denial or revocation of exempt status and/or the imposition of certain excise taxes, if applicable. Political candidates often appear at various charitable functions during the election campaign. Leadership of non-profit organizations should be careful not to take action that could be interpreted as an endorsement of any political candidate.

### **Advocacy**

However, a 501(c)(3) can engage in advocating for or against issues and, to a limited extent, ballot initiatives or other legislative activities. There are limitations however on how much time can be devoted to advocacy, based on one of two tests.

#### **A. Substantial Part Test**

1. **Factors.** Whether an organization’s attempts to influence legislation constitute a substantial part of its overall activities is determined on the basis of all the pertinent facts and circumstances in each case. The IRS considers a variety of factors, including the time devoted (by both compensated and volunteer workers) and the expenditures devoted by the organization to the activity, when determining whether the lobbying activity is substantial.
2. **Penalties.** Under the substantial part test, an organization that conducts excessive lobbying activity in any taxable year may lose its tax-exempt status, resulting in all of its income being subject to tax. In addition, a religious organization is subject to an excise tax equal to five percent of its lobbying expenditures for the year in which it ceases to qualify for exemption.
3. **Excise Tax.** Further, a tax equal to five percent of the lobbying expenditures for the year may be imposed against organization managers,

jointly and severally, who agree to the making of such expenditures knowing that the expenditures would likely result in the loss of tax-exempt status.

4. Case Law. Cases have tended to avoid any attempt at a percentage, but in two often-cited cases, Seasonwood and Haswell, the courts have said that 5% is okay, and 16% - 22% was too much. They look at several factors, including time and/or money spent as a percentage of the overall numbers.)

## **B. Expenditure Test**

1. Election. Organizations other than churches and private foundations may elect the expenditure test under section 501(h) as an alternative method for measuring lobbying activity. Under the expenditure test, the extent of an organization's lobbying activity will not jeopardize its tax-exempt status, provided its expenditures, related to such activity, do not normally exceed an amount specified in section 4911. This limit is generally based upon the size of the organization and may not exceed \$1,000,000.
2. IRS Form. Organizations electing to use the expenditure test must file Form 5768, Election/Revocation of Election by an Eligible IRC Section 501(c)(3) Organization to Make Expenditures to Influence Legislation, at any time during the tax year for which it is to be effective. The election remains in effect for succeeding years unless it is revoked by the organization. Revocation of the election is effective beginning with the year following the year in which the revocation is filed.
3. Penalty. Under the expenditure test, an organization that engages in excessive lobbying activity over a four-year period may lose its tax-exempt status, making all of its income for that period subject to tax. Should the organization exceed its lobbying expenditure dollar limit in a particular year, it must pay an excise tax equal to 25 percent of the excess.
4. Limits. For a tax year, the lobbying nontaxable amount is the sum of the following:
  - 20% of the first \$500,000 of the organization's exempt purpose expenditures for the year,
  - 15% of the second \$500,000,
  - 10% of the third \$500,000,
  - 5% of any additional expenditures.

But the limit in any year is \$1,000,000.

5. Grassroots. The permissible expenditure for grass roots lobbying (the “grass roots nontaxable amount”) for a tax year is one-fourth of the “lobbying nontaxable amount,” as determined under the formula above, for that year.

**C. Advocacy**

Legislation includes action by Congress, any state legislature, any local council, or similar governing body, with respect to acts, bills, resolutions, or similar items (such as legislative confirmation of appointive offices), or by the public in a referendum, ballot initiative, constitutional amendment, or similar procedure. It does not include actions by executive, judicial, or administrative bodies. A 501(c)(3) will be regarded as attempting to influence legislation if it contacts, or urges the public to contact, members or employees of a legislative body for the purpose of proposing, supporting, or opposing legislation, or if the organization advocates the adoption or rejection of legislation. A 501(c)(3) may, however, involve themselves in issues of public policy without the activity being considered as lobbying. For example, a 501(c)(3) may conduct educational meetings, prepare and distribute educational materials, or otherwise consider public policy issues in an educational manner without jeopardizing their tax-exempt status.

**D. Advocacy vs. Campaign Activity**

1. Examples. The prohibition against political campaign activity does not prevent candidates from being invited to speak at an event of an organization described in section 501(c)(3). If a candidate is invited to speak in his or her capacity as a candidate, then other candidates running for the same office must also be invited to speak and there should be no indication of support for, or opposition to, any candidate by the organization. Also, the prohibition does not prevent an organization's officials from being involved in a political campaign, so long as those officials do not in any way utilize the organization's financial resources, facilities, or personnel and clearly indicate that the actions taken or the statements made are those of the individuals and not of the organization.
2. Public Policy Issues. Section 501(c)(3) organizations may take positions on public policy issues, including issues that divide candidates in an election for public office. However, section 501(c)(3) organizations must avoid any issue advocacy that functions as political campaign intervention. Even if a statement does not expressly tell an audience to vote for or against a specific candidate, an organization delivering the statement is at risk of violating the political campaign intervention

prohibition if there is any message favoring or opposing a candidate. A statement can identify a candidate not only by stating the candidate's name but also by other means such as showing a picture of the candidate, referring to political party affiliations, or other distinctive features of a candidate's platform or biography. All the facts and circumstances need to be considered to determine if the advocacy is political campaign intervention.

3. Factors. Key factors in determining whether a communication results in political campaign intervention include the following:
  - a. Whether the statement identifies one or more candidates for a given public office;
  - b. Whether the statement expresses approval or disapproval for one or more candidates' positions and/or actions;
  - c. Whether the statement is delivered close in time to the election;
  - d. Whether the statement makes reference to voting or an election;
  - e. Whether the issue addressed in the communication has been raised as an issue distinguishing candidates for a given office;
  - f. 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 any election; and
  - g. Whether the timing of the communication and identification of the candidate are related to a non-electoral event such as a scheduled vote on specific legislation by an officeholder who also happens to be a candidate for public office.
  
4. Communications. A communication is particularly at risk of political campaign intervention when it makes reference to candidates or voting in a specific upcoming election. Nevertheless, the communication must still be considered in context before arriving at any conclusions.