



KROKIDAS & BLUESTEIN LLP

CLIENT ALERT

POLITICAL PARTICIPATION REMINDER

With November approaching, many tax-exempt organizations become more active in political activities, including voter registration and “get-out-the-vote” campaigns, issue advocacy, public education, legislative lobbying, and advocacy for candidates for public office. Tax-exempt organizations that wish to engage in such activities should be aware of the limitations imposed on their political activities in order to avoid penalties, including possible loss of tax-exempt status.

Lobbying vs. Political Campaign Activities

The Internal Revenue Code (the “Code”) distinguishes between “lobbying activities” and “political campaign activities.” Different rules apply to lobbying and political campaign activities depending on the subsection of 501(c) under which an organization’s tax exemption derives.

There is no single definition of lobbying or political campaign activities under the Code. Lobbying activities, however, generally include non-partisan educational activities and activities intended to influence legislation or voting on initiative petitions or referendums. Political campaign activities, on the other hand, generally include activities intended to influence the election of candidates for public office.

Political Campaign Activities

A. Section 501(c)(3) Organizations

Section 501(c)(3) imposes an absolute prohibition against participation or intervention in any political campaign on behalf of, or in opposition to, any candidate for public office. Clear examples of prohibited activities include oral statements made, or publication of pamphlets, in support of or opposition to, a candidate for public office, soliciting campaign contributions, providing publicity or volunteer assistance, and paying expenses of a political campaign. Intervention may also be less obvious, however, such as when a nickname or code word is used as a stand-in for a candidate’s name, or an organization provides a platform for others to promote a candidate. Implicit intervention may be found when allegedly neutral statements about, or evaluations of, candidates appear to be biased in favor of a particular candidate or party.

This prohibition applies equally to both private foundations and non-private

foundations. Any amount of political campaign activities may result in a loss of tax-exempt status, and a 10% excise tax is imposed on the amount of any political expenditure. Organizations that are classified as private foundations and their managers, however, can also be subject to additional excise tax penalties for violations of this prohibition.

B. Other 501(c) Organizations

Tax-exempt organizations other than those described in Section 501(c)(3) are generally allowed to engage in political activities, provided that such activities are not the primary activity carried on by the organization. Nevertheless, engaging in political activities will result in the organization being taxed on the lesser amount of its investment income or the amount expended on political activities. Such organizations may, however, establish a segregated fund which may be treated as a separate organization so that expenditures and investment income of the fund will not be attributed to the sponsoring organization.

Lobbying Activities

A. 501(c)(3) Organizations

Section 501(c)(3) organizations may engage in some lobbying activities, provided that such activities are not substantial. Different rules apply, however, to private foundations, non-private foundations that elect under Section 501(h) to be subject to special rules (an “electing charity”), and non-private foundations that do not make a Section 501(h) election (a “non-electing charity”). Private foundations that engage in such activities may be subject to excise taxes even for engaging in insubstantial lobbying activities unless a statutory exception (such as that for nonpartisan analysis) applies. Electing charities and non-electing charities may engage in lobbying activities, but may be subject to penalties if such activities are deemed “substantial.”

For non-electing charities, there is no bright line rule as to what is substantial. Substantiality is determined by reference to the particular facts and circumstances relative to all of the organization’s activities, and no numerical test is determinative. As such, this standard is imprecise and can be difficult to apply. If the activities are deemed substantial, the only penalty available to the IRS for a non-electing charity is revocation of exempt status.

Electing charities are subject to mathematical tests set forth in the Code. If the limits are exceeded, an electing charity will be subject to an excise tax equal to 25% of the amount of the excess lobbying expenditures. If lobbying amounts normally exceed 150% of the allowable amounts, the organization will also lose its tax-exempt status. The election, therefore, takes the guesswork out of determining whether activities are substantial, and allows for intermediate penalties short of revoking tax-exempt status.

B. Other 501(c) Organizations

Other 501(c) organizations are not subject to any specific provision that restricts their

lobbying activities. In general, lobbying activities must be relevant to the accomplishment of the organization's exempt purposes. Some lobbying activities, however, could lead to the imposition of taxes under Section 527(f) of the Code.

Speech by Individuals

The prohibitions and limitations described above apply to activities conducted by or on behalf of a tax-exempt organization. Individuals acting in a private capacity are not subject to the same restrictions. When an individual affiliated with a tax-exempt organization engages in political activities, however, questions can arise as to whether the individual's activities should be attributed to the organization. Similar questions arise when an organization exempt under Section 501(c)(3) is affiliated with an organization that is exempt under another subsection of 501(c).

Conclusion

Exempt organizations should remain informed about the role they may have in the political process. Despite the restrictions described above, however, nonprofits may still play a critical part in the political process on behalf of their organizations and causes. Most importantly, nonprofit organizations must remember to keep their participatory efforts nonpartisan. Recognizing the difficulties this presents, here are just a few ways nonprofits can participate in the political process without jeopardizing their tax-exempt status:

- Nonpartisan voter education activities, including preparation and distribution of nonpartisan voter guides and voter registration
- If the organization is providing a forum for candidates to discuss their positions or candidacy, ensuring that equal time is given to each candidate by providing a range of nonpartisan questions
- While advocating for issues important to the organization, refraining from referencing voting, political candidates or their positions on the issue
- Lobbying on issues important to the organization so long as the lobbying is not a "substantial" part of the organization's activities

Whether a nonprofit organization is participating impermissibly in a political campaign or election depends on the totality of the circumstances as determined by the IRS. Fortunately, the IRS has published a couple of revenue rulings to provide guidance to nonprofit organizations. See [Rev. Rul. 78-248](#) illustrating the extent to which organizations publishing compilations of candidates' positions and voting records have participated in the political process, and [Rev. Rul. 80-282](#) regarding timing and distribution of voter education materials.

Nonprofit organizations are encouraged to carefully review the IRS examples and guidance on political participation. The IRS published 21 hypothetical scenarios that cover a broad range of political situations that a nonprofit may encounter, available [here](#). If you have any questions about the role your organization may play in the political process, and what activities are permissible, seek the advice of counsel.

If you have any questions about the IRS guidance and the political actions of your organization generally, please contact Attorneys Elka Sachs (esachs@kb-law.com) or Eric Reustle (ereustle@kb-law.com).

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