

PRESENTED AT

4th Annual Higher Education Taxation Institute

June 5-7, 2016

Austin, Texas

Advocacy and Political Campaign Activities in the University Setting

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In the midst of the 2016 election cycle, it is important for Section 501(c)(3) organizations¹, both public charities like universities and private foundations, to review the prohibition on political campaign activities prescribed by the Internal Revenue Code. Universities face unique challenges with regards to complying with this prohibition given their many politically active constituencies, including students, faculty, staff, and alumni. This outline is intended to provide basic guidelines to enable Section 501(c)(3) organizations to carry on their advocacy activities in a way that does not violate the prohibition against “political or electoral” activities.² The rules discussed below apply specifically to private universities exempt from federal income tax under Section 501(c)(3). However, public universities which are subject to similar prohibitions under state law many also find the rules and examples in this outline useful.

Section 501(c)(3) provides that an otherwise charitable organization is eligible for federal tax exemption so long as it “does not participate in, or intervene in . . . any political campaign on behalf of (or in opposition to) any candidate for public office.”³ This statutory prohibition on involvement by Section 501(c)(3) organizations in electoral or political campaign activity is absolute. Unlike in the case of lobbying activities, it does not matter that a political activity constitutes an insubstantial part of an organization’s activities. Failure to abide by these restrictions may result in significant penalty taxes imposed on the organization and any responsible organizational managers. In certain circumstances, engaging in political activity may result in the revocation of the organization’s tax exemption.

A. Defining Prohibited Political Activities

Activities that constitute “intervention in a political campaign” include⁴ “the publication or distribution of written or printed statements or the making of oral statements on

¹ Unless stated otherwise, all “Section” and “Code” references are to the Internal Revenue Code of 1986, as amended.

² The scope of this outline is confined to the political activities prohibition for Section 501(c)(3) organizations; it does not address the permissible political activities of organizations that are tax-exempt under other subsections of Code Section 501(c), nor does it address the restrictions on lobbying for Section 501(c)(3) organizations.

³ Code § 501(c)(3).

⁴ Other prohibited political campaign activities, some of which are discussed in this memorandum, include: (1) the presence of links on the organization’s website to a candidate’s website or another website that may encourage individuals to vote for a particular candidate; (2) the dissemination of improper voter guides or candidate ratings that encourage readers to vote for a particular candidate (see Rev. Rul. 78-248, 1978-1 C.B. 154); (3) the placing of signs on the property of a Section 501(c)(3) organization that shows that the organization supports a particular candidate (see IRS News Release IR-

behalf of or in opposition to” a candidate for public office.⁵ Accordingly, a Section 501(c)(3) organization must refrain from: (1) endorsing or opposing a candidate or group of candidates or political party; (2) publicizing candidate endorsements of the organization’s positions; or (3) evaluating or “rating” their fitness for public office (no matter how objective or nonpartisan the rating process is).

The regulations define a candidate for public office as any individual who offers himself or herself, or is proposed by others, as a contestant for an elective public office at the federal, state or local level.⁶ Neither the Code nor the relevant treasury regulations define “public office.” The IRS has, however, determined that a position qualifies as a “public office” if it: (a) was created by statute; (b) is continuing; (c) is not occasional or contractual; (d) has a fixed term; and (e) requires an oath of office.⁷ This definition includes an individual whom others have proposed as a contestant for public office even when the individual has announced that he does not intend to seek election to the office. For example, in the 1992 New Hampshire Democratic Presidential Primary, there was a well-publicized Draft Cuomo Committee that urged voters to support Mario Cuomo as a write-in candidate. Although Cuomo had indicated that he was not running for office, he was a “candidate” within the meaning of Section 501(c)(3), and a Section 501(c)(3) organization could not have supported or opposed him as a candidate for the presidency without violating the prohibition on political campaign activity.⁸

The definition of “candidate” does not, however, include appointed officials.⁹ Accordingly, because federal judges are appointed and not elected, a Section 501(c)(3) organization would not be prohibited from attempting to influence the United States Senate confirmation of an individual nominated by the President to be a federal judge. Note that, although attempts to influence Senate confirmation would not constitute political activities, they could be subject to the lobbying rules applicable to Section 501(c)(3) organizations.¹⁰

For example, assume that President Obama has nominated Mary Smith to a seat on the United States Supreme Court. If a university invites Ms. Smith to speak, the university does not need to worry about violating the prohibition on political activities. On the other hand,

2006-36); (4) the giving of preferential treatment to certain candidates by permitting them to speak at functions (*see* IRS Fact Sheet FS-2006-17, “Election Year Activities and the Prohibition on Political Campaign Intervention for Section 501(c)(3) Organizations (Feb. 2006) (hereinafter, “2006 Fact Sheet”)); and (5) the making of cash contributions to a candidate’s political campaign (*see id.*).

⁵ Treas. Reg. 1.501(c)(3)-1(c)(3)(iii). The IRS has indicated that the prohibition on intervention in a political campaign applies to foreign, as well as domestic, campaigns.

⁶ *Id.*

⁷ *See* Gen. Couns. Mem. 39811 (Feb. 20, 1990).

⁸ *See* Judith E. Kindell and John Francis Reilly, “Election Year Issues,” IRS Exempt Organizations Continuing Professional Education (CPE) Technical Instruction Program (2002) (hereinafter, “2002 CPE Text”) at 342-44.

⁹ *See* Notice 88-76, 1988-2 C.B. 392; G.C.M. 39694 (Feb. 1, 1988).

¹⁰ Such activities could also result in exempt function expenditure taxes under Code § 527(f). *See* Gen. Couns. Mem. 39694 (Feb. 1, 1988).

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First appeared as part of the conference materials for the

4th Annual Higher Education Taxation Institute session

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