

# IRS Again Warns Charities About Political Campaign Activity

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For over 50 years, the Internal Revenue Code has prohibited Section 501(c)(3) organizations ("Charities") from engaging in any political campaign activity. Religious institutions are in a particularly precarious position because many politicians use Sunday morning as an opportunity to engage potential voters. In an age where a politician's "faith" is becoming a litmus test for holding office, both the politician and the church must play close attention to the IRS' rules governing charities and political campaign activity. The consequences of a misstep could be severe.

The Code denies tax exempt status to a Charity that participates or intervenes in (including the publishing or distributing of statements) any political campaign on behalf of or in opposition to a candidate for public office. The political campaign activity prohibition applies to both direct and indirect activities. Contributions to campaign funds or public statements (verbal or written) made by or on behalf of a Charity in favor of, or against, a specific candidate risk substantial sanctions, including revocation of the organization's tax exempt status and the assessment of excise taxes against the Charity as well as its leadership personally. This includes a Pastor and/or the Board members of the charity or congregation. As with many issues which affect Charities, the facts of a situation can make all of the difference in determining whether an activity is permissible.

- IRS Enforcement Activity and Resources

The concern is real! Over the past few election cycles the IRS has increased its visibility in investigating Charities engaged in potentially prohibited political campaign activity. In particular, the IRS initiated a Political Activity Compliance Initiative ("PACI") staffed by IRS specialists to deal with campaign issues. Foulston Siefkin LLP successfully defended organizations selected by the PACI team in the 2006 election cycle and understands the IRS is increasing enforcement activity this election cycle. Of the charities selected nationally for audit (and possible further actions) by the PACI team in the 2006 election cycle, approximately 56% were not churches while approximately 44% were churches. High-profile churches who have attracted IRS' attention include the United Church of Christ and All Saints Episcopal Church, but there are certainly many more churches under scrutiny. The distinction between church and non-church Charities can be important when the IRS initiates an inquiry, since churches are afforded additional procedural protections.

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A little over a month ago the IRS instructed its revenue agents regarding the review of websites operated by charities. The IRS instructed agents to pay particular attention to political links on a Charity's website and consider whether the linked material may be attributable to the Charity. As noted above, the specific facts and context will be determinative, but Charities should be aware that the PACI team is particularly focused on links between Charities and unrelated organizations (whether or not exempt).

In addition to publicizing the ban on political campaign intervention by Charities, the IRS has enhanced a number of educational and informational materials available to Charities. For example, Revenue Ruling 2007-41 (which is available at the IRS website, [www.irs.gov](http://www.irs.gov)) provides guidance on political campaign activities and includes 21 examples of permissible and impermissible activities. The Tax Exempt and Government Entities division of the IRS (the organization which enforces the political activity prohibition applicable to 501(c)(3) organizations) also provides several educational and informational materials, including the recently updated Publication 1828 - "Tax Guide for Churches and Religious Organizations." This Publication may also provide helpful information to Charities that are not churches.

- Recognizing the Issue and Some Suggested Considerations

The central issue in examinations of Charities regarding political campaign activity is whether the resources of the Charity were directly or indirectly used to support/oppose a candidate. The issue may present itself when key officials within the Charity make statements in support of or in opposition to a candidate, since it may not be clear whether they are doing so in their individual capacity or on behalf of the organization. Statements made over the pulpit which oppose or support a candidate are prohibited. Similarly, the issue may present itself when an organization engages in voter education, voter registration, or "get out the vote" drives, since those activities might not be conducted in a nonpartisan manner. Such "get out the vote" drives are seen with increased frequency in communities which have lower historical voting participation and whose constituents tend to support one party or the other. In those instances, the churches from which the registration effort is launched may see a great deal of scrutiny. Another area for concern is where the Charity allows a particular campaign to use the Charity's facilities to organize and launch political activity.

Likewise, the issue may also present itself when a candidate is invited or permitted to speak at the organization since it may not be clear whether the candidate is speaking as a candidate or in an individual capacity and/or whether the Charity is expressly or impliedly supporting/opposing the candidate. The IRS reviews these issues by considering all of the facts and circumstances surrounding the activity in question. Accordingly, it is the specific manner in which these activities are conducted that will make the difference between the activities being permissible and the Charity being in jeopardy of losing its exempt status.

Again, understanding that a small nuance in the facts can make a big difference in the outcome, a few suggestions to consider:

- When an organization's officers or directors (or others closely identified with the organization) are speaking in favor of or in opposition to a candidate, they should do so in their individual capacity and make it clear that they are speaking in their individual capacity and not on behalf of the organization. Also, do not permit such individuals to use the organization's resources (facilities, letterhead, staff, etc.) to make communications regarding the candidates.

- Remember that endorsing/opposing a candidate can occur even where a candidate's name is not used. For example, a picture of the candidate, references to party affiliations, associations with issues, and other distinctive features or information associated with the candidate may constitute an indirect violation of the rules. Be sensitive to taking positions on issues which are closely identified with particular candidates in the election.

While Charities may engage in an insubstantial amount of lobbying activity, the IRS takes the position that using code words or issues which are closely identified with a candidate constitutes indirect campaign intervention.

- When inviting candidates to speak at organization events, be sensitive to whether they are speaking in their individual capacity or as candidates. A number of factors should be considered including, if the person is speaking as a candidate, whether the organization provides an equal opportunity to other candidates, whether fundraising occurs in connection with the event, whether the candidate is chosen to speak for reasons other than those related to his or her candidacy, and the like. Important issues also include how the candidate is introduced/discussed by the organization and whether the appearance is in the context of a non-partisan atmosphere. If the candidate is appearing in his/her individual capacity, both the candidate and organization should clearly so indicate.

- When analyzing voter education activities and "get out the vote" drives, the IRS considers issues such as whether: (i) the voter guide includes a broad range of issues the general public would likely be interested in; (ii) the issues are described in a neutral manner, and whether "code" words are used; (iii) all candidates for an office are afforded the opportunity to participate/be compared; (iv) candidates are permitted to include their own responses, or whether any editing that occurs is made in a neutral and unbiased manner.

- Consider adopting a policy reflecting your organization's commitment to comply with the political campaign prohibition. In addition to reviewing the policy periodically to provide a good reminder of the rules and the very serious consequences of violating them, the IRS is generally more inclined to work with Charities that have adopted policies and attempted to comply with them.

- **Conclusion**

The specific facts and circumstances associated with any activity that may constitute intervention in a political campaign must be reviewed very carefully and with the specific context of the activity in mind. The organization's true motives for the activity must also be examined - is the organization merely trying to circumvent the rules or does it in good faith believe the activity should be permissible? While the IRS' materials provide helpful examples of how the IRS views different situations, the risk of jeopardizing an organization's tax exempt status and the possible assessment of excise taxes on its leadership are significant. Organizations would be wise to analyze and structure any activities which may be a "close call" well in advance of conducting them. The PACI team at the IRS is very active and focused on enforcement activities, particularly during the remainder of this election cycle. In the event that your organization receives an inquiry from the IRS regarding political campaign activities, a thoughtful first response to that inquiry is critical to enhance the likelihood of a favorable outcome.

### **For Further Information**

Foulston Siefkin regularly counsels clients on issues relating to tax-exempt organizations. If you are interested in additional information regarding these issues, please visit our website at [www.foulston.com](http://www.foulston.com) or if you would like to discuss specific ways in which the authors can help you, call or email **Kevin J. Arnel** at (316) 291-9761, [karnel@foulston.com](mailto:karnel@foulston.com), **Karl Hesse** at (316) 291-9554, [khesse@foulston.com](mailto:khesse@foulston.com) or **C. Edward Watson** at (316) 291-9589, [cewatson@foulston.com](mailto:cwatson@foulston.com).

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