



Nonprofit Organizations Client Bulletin



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In this issue

Guidelines For Determining Whether Support Of Issue Campaigns Will Be Deemed Supporting Or Opposing Political Candidates

- Factors The IRS Will Review
- Revenue Ruling 2004-6 Examples

Other Recent Developments

- IRS, FEC Crack Down on "Section 527" Groups
- Another Church Accused of Partisan Political Activity
- Meanwhile, Some in Congress Continue to Advocate for Increased Church Political Activity
- IRS Retroactively Revokes Church Exemption
- IRS Imposes "Intermediate Sanctions" on Church, Founder and Family

IRS Guidelines for Determining Whether Support of Issue Advocacy Campaigns Will Be Deemed Supporting or Opposing Political Candidates

During this election season, organizations may be requested to contribute to issue campaigns. Tax-exempt organizations are generally permitted to engage in advocacy or lobbying on behalf of, or in opposition to, ballot, or public policy, issues that are important to their mission. However, participation in political campaign activity can trigger unintentional tax consequences.

It is not always clear as to what constitutes issue or public policy advocacy and what constitutes political activity. This is particularly true when public policy advocacy also involves discussion of the positions of candidates for public office. The IRS has issued Revenue Ruling 2004-6 to provide some guidelines to determine when supporting issue campaigns will be considered non-taxable lobbying activities versus taxable political activities for 501(c)(4), 501(c)(5) and 501(c)(6) organizations.

For 501(c)(3) organizations, direct or indirect participation in political campaigns can be grounds for loss of tax-exempt status. Although Revenue Ruling 2004-6 does not specifically address 501(c)(3) organizations, it is likely that the IRS will use a similar analysis to determine whether a 501(c)(3) organization has engaged in prohibited political activities. Therefore, 501(c)(3) organizations should also be mindful of how the IRS analyzes this issue.

Factors The IRS Will Review

All facts and circumstances must be evaluated to determine whether an expenditure for an advocacy communication relating to a public policy issue is considered a political activity.

Factors that tend to show that an advocacy communication on a public policy issue is considered a political activity include, but are not limited to, the following:

- a) The communication identifies a candidate for public office;
- b) The timing of the communication coincides with an electoral campaign;
- c) The communication targets voters in a particular election;
- d) The communication identifies that candidate's position on the public policy issue that is the subject of the communication;
- e) The position of the candidate on the public policy issue has been raised as distinguishing the candidate from others in the campaign, either in the communication itself or in other public communications; and
- f) The communication is not part of an ongoing series of substantially similar advocacy communications by the organization on the same issue.

Factors that tend to show that an advocacy communication on a public policy issue is not considered a political activity include, but are not limited to, the following:

- a) The absence of any one or more of the factors listed in a) through f) above;
- b) The communication identifies specific legislation, or a specific event outside the control of the organization, that the organization hopes to influence;

- c) The timing of the communication coincides with a specific event outside the control of the organization that the organization hopes to influence, such as a legislative vote or other major legislative action (for example, a hearing before a legislative committee on the issue that is the subject of the communication);
- d) The communication identifies the candidate solely as a government official who is in a position to act on the public policy issue in connection with the specific event (such as a legislator who is eligible to vote on the legislation); and
- e) The communication identifies the candidate solely in the list of key or principal sponsors of the legislation that is the subject of the communication.

Revenue Ruling 2004-6 Examples

The following situations illustrate factors to be taken into account when determining whether expenditures for issue advertising are taxable. Each of the following situations assumes that:

1. All payments for the described activity are from the general treasury of the organization rather than from a separate segregated fund, or PAC.
2. The political activity is not the primary purpose of the 501(c) organization.
3. All advocacy communications described also include a solicitation of contributions to the organization.

Situation I

N, a labor organization recognized as tax exempt under § 501(c)(5), advocates for the betterment of conditions of law enforcement personnel. Senator A and Senator B represent State U in the United States Senate. In year 200x, N prepares and finances full-page newspaper advertisements supporting increased spending on law enforcement, which would require a legislative appropriation. These advertisements are published in several large circulation newspapers in State U on a regular basis during year 200x. One of these full-page advertisements is published shortly before an election in which Senator A (but not Senator B) is a candidate for re-election. The advertisement published shortly before the election stresses the importance of increased federal funding of local law enforcement and refers to numerous statistics indicating the high crime rate in State U. The advertisement does not mention Senator A's or Senator B's position on law enforcement issues. The advertisement ends with the statement "Call or write Senator A and Sena-

tor B to ask them to support increased federal funding for local law enforcement." Law enforcement has not been raised as an issue distinguishing Senator A from any opponent. At the time this advertisement is published, no legislative vote or other major legislative activity is scheduled in the United States Senate on increased federal funding for local law enforcement.

Under the facts and circumstances in Situation I, the advertisement is not considered political activity. Although N's advertisement identifies Senator A, appears shortly before an election in which Senator A is a candidate, and targets voters in that election, it is part of an ongoing series of substantially similar advocacy communications by N on the same issue during year 200x. The advertisement identifies both Senator A and Senator B, who is not a candidate for re-election, as the representatives who would vote on this issue. Furthermore, N's advertisement does not identify Senator A's position on the issue, and law enforcement has not been raised as an issue distinguishing Senator A from any opponent. Therefore, there is nothing to indicate that Senator A's candidacy should be supported or opposed based on this issue. Based on these facts and circumstances, the advertisement is not a political activity.

Situation II

O, a trade association recognized as tax exempt under § 501(c)(6), advocates for increased international trade. Senator C represents State V in the United States Senate. O prepares and finances a full-page newspaper advertisement that is published in several large circulation newspapers in State V shortly before an election in which Senator C is a candidate for nomination in a party primary. The advertisement states that increased international trade is important to a major industry in State V. The advertisement states that S. 24, a pending bill in the United States Senate, would provide manufacturing subsidies to certain industries to encourage export of their products. The advertisement also states that several manufacturers in State V would benefit from the subsidies, but Senator C has opposed similar measures supporting increased international trade in the past. The advertisement ends with the statement "Call or write Senator C to tell him to vote for S. 24." International trade concerns have not been raised as an issue distinguishing Senator C from any opponent. S. 24 is scheduled for a vote in the United States Senate before the election, soon after the date that the advertisement is published in the newspapers.

Under the facts and circumstances in Situation 2, the advertisement is not considered a political activity.

O's advertisement identifies Senator C, appears shortly before an election in which Senator C is a candidate, and targets voters in that election. Although international trade issues have not been raised as an issue distinguishing Senator C from any opponent, the advertisement identifies Senator C's position on the issue as contrary to O's position. However, the advertisement specifically identifies the legislation O is supporting and appears immediately before the United States Senate is scheduled to vote on that particular legislation. The candidate identified, Senator C, is a government official who is in a position to take action on the public policy issue in connection with the specific event. Based on these facts and circumstances, the amount expended by O on the advertisement is not a political activity expenditure and, therefore, is not subject to tax.

Situation III

R, an entity recognized as tax exempt under § 501(c)(4), advocates for improved public education. Governor E is the governor of State X. R prepares and finances a radio advertisement urging an increase in state funding for public education in State X, which requires a legislative appropriation. The radio advertisement is first broadcast on several radio stations in State X beginning shortly before an election in which Governor E is a candidate for re-election. The advertisement is not part of an ongoing series of substantially similar advocacy communications by R on the same issue. The advertisement cites numerous statistics indicating that public education in State X is under-funded. While the advertisement does not say anything about Governor E's position on funding for public education, it ends with "Tell Governor E what you think about our under-funded schools." In public appearances and campaign literature, Governor E's opponent has made funding of public education an issue in the campaign by focusing on Governor E's veto of an income tax increase the previous year to increase funding of public education. At the time the advertisement is broadcast, no legislative vote or other major legislative activity is scheduled in the State X legislature on state funding of public education.

Under the facts and circumstances in Situation 4, the advertisement is considered a political activity. R's advertisement identifies Governor E, appears shortly before an election in which Governor E is a candidate, and targets voters in that election. Although the advertisement does not explicitly identify Governor E's position on the funding of public schools issue, that

issue has been raised as an issue in the campaign by Governor E's opponent. The advertisement does not identify any specific legislation, is not part of an ongoing series of substantially similar advocacy communications by R on the same issue, and is not timed to coincide with a legislative vote or other major legislative action on that issue. Based on these facts and circumstances, the advertisement is a political activity expenditure and, therefore, is subject to tax.

Situation IV

T, an entity recognized as tax exempt under § 501(c)(4), advocates to abolish the death penalty in State Z. Governor H is the governor of State Z. Beginning shortly before an election in which Governor H is a candidate for re-election, T prepares and finances a television advertisement broadcast on several television stations in State Z. The advertisement is not part of an ongoing series of substantially similar advocacy communications by T on the same issue. The advertisement provides statistics regarding developed countries that have abolished the death penalty, and refers to studies indicating inequities related to the types of persons executed in the United States. The advertisement calls for the abolishment of the death penalty. The advertisement notes that Governor H has supported the death penalty in the past. The advertisement identifies several individuals previously executed in State Z, stating that Governor H could have saved their lives by stopping their executions. No executions are scheduled in State Z in the near future. The advertisement concludes with the statement "Call or write Governor H to demand a moratorium on the death penalty in State Z."

Under the facts and circumstances in Situation 6, the advertisement is for a political activity. T's advertisement identifies Governor H, appears shortly before an election in which Governor H is a candidate, targets the voters in that election, and identifies Governor H's position as contrary to T's position. The advertisement is not part of an ongoing series of substantially similar advocacy communications by T on the same issue. In addition, the advertisement does not identify and is not timed to coincide with a specific event outside the control of the organization that it hopes to influence. Based on these facts and circumstances, the amount expended by T on the advertisement is a political activity expenditure and, therefore, is subject to tax.

Recent Developments

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IRS, FEC Crack Down on “Section 527” Groups

On August 19, 2004, the Internal Revenue Service announced a new enforcement initiative targeting “section 527” groups that have submitted incomplete or late filings, or submitted amended filings materially different from their original filings. The IRS has contacted a cross-section of these groups seeking more information about these filings, and more of these “soft contacts” and audits are likely. *See* News Release IR-2004-110.

Discussing this initiative, the IRS indicated that increased enforcement is necessary to ensure that correct information about these groups is available to the public. Groups that fail to timely report, fail to include all required information about contributions and disbursements, or report incorrect information are required to pay a penalty of 35-percent of the amount involved.

In a related development, the Federal Election Commission voted on the same day to adopt rules requiring that section 527 groups use federally regulated “hard money” contributions to pay for at least half of their expenses.

Another Church Accused of Partisan Political Activity...

American United for Separation of Church and State has asked the Internal Revenue Service to investigate Miami-based New Birth Baptist Church based on a August 29, 2004 church event featuring Democratic Party personalities and elected officials who told attendees to oppose the re-election of President Bush. This is only the latest example of watchdog groups bringing political advocacy of churches and ministries to the attention of the IRS.

...Meanwhile, Some in Congress Continue to Advocate for Increased Church Political Activity

Some members of Congress continue to advocate including language in the export tax repeal legislation increasing the scope of permissible political activity by tax-exempt religious organizations. The measures, however, are disfavored by many religious organizations, as well as religious watchdog organizations.

IRS Retroactively Revokes Church Exemption

The Internal Revenue Service revoked the tax-exempt status of a church that discontinued its regular religious services, instead conducting seminars and discussion groups for substantial fees, sold books and tapes, solicited subscriptions to its newsletter and engaged in significant real estate activities.

The IRS concluded that, based on these activities, the organization was operated for substantial non-exempt purposes. As a result, the IRS determined that organization no longer qualified for tax-exemption and retroactively revoked its tax-exempt status. *See* Technical Advice Memorandum 200437040.

IRS Imposes “Intermediate Sanctions” on Church, Founder and Family

In five related technical advice memoranda, the Internal Revenue Service imposed “intermediate sanctions” penalties on a church and its disqualified individuals for a number of “excess benefit transactions”.

The transactions at issue included: (1) the use by the church’s founder and family members of various church vehicles for personal purposes; (2) the church’s payment of personal cellular phone charges incurred by the church’s founder and family members; (3) the personal use of various church properties by the church’s founder and family; (4) the personal use of church charge accounts by the church’s founder and family; and (5) the purchase of a computer for the founder’s son. *See* Technical Advice Memoranda 200435018, 200435019, 200435020, 200435021 and 200435022.

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