NONPROFITS: INTERNAL REVENUE SERVICE

Executive Orders, Protest Rallies: What's a 501(c)(3) To Do?

05.25.17 | Linda J. Rosenthal, JD

Recently, the big news about the politics ban on 501(c)(3) organizations is that it may disappear.

> ***Update**: On May 4, 2017, the President issued an executive order that referred, in part, to the politics ban in section 501(c)(3), the so-called "Johnson Amendment." Whether that document will have any significant effect on the existing politics ban is being evaluated by, and discussed among, legal and philanthropy experts. The early consensus seems to be that it's too vague and toothless to make much difference. We'll publish a blog post in the next week or so about it.*

We discussed this possibility in "Will The 501(c)(3) Politics Ban Be Repealed?" and follow-up posts featuring the proponents' and opponents' views on the matter. But no one knows right now when – or if – this proposal will be moved back up the front burner in Congress. We also don't know whether a vote on one of the existing bills will be successful. After the GOP bill to "repeal and replace" Obamacare was withdrawn because there were not enough "aye" votes, it's not a sure thing that any and all legislation scheduled for a Congressional vote will pass.

The charitable sector has mobilized strongly to oppose any change to the Johnson Amendment (i.e.,

the politics ban). And recent polls indicate there is only tepid public support to repeal it.

So – for now – the existing statute remains law; it cannot be erased by executive order. There must be Congressional action. In summary, "charities (religious and otherwise) are strictly prohibited from *participating or intervening in a political campaign in support or opposition of a political candidate." (emph. added)*

Of course, there's one important wrinkle that is always relevant in American politics. Election season seems to go on forever; as soon as one is over, people and pundits start yapping about who will run in the next election. House members, in particular, are already gearing up and begging for money for November 2018. And the day after the Inauguration, the 2020 GOP presidential candidate announced his reelection bid.

Advocacy: Needed Now More Than Ever

Notwithstanding whether the proposed repeal of the Johnson Amendment happens sooner or later, 501(c)(3)s should remember that advocacy/lobbying is different than political campaign/candidate activity. There is no 100% prohibition; lobbying, within certain limits, is permitted. See, for example, publications like this or this that explain these lobbying rules.

As a general rule,

> *[c]harities can and should engage in lobbying so long as the lobbying is an insubstantial part of the charitable organization's activities, and the charity keeps good records related to lobbying. Lobbying is communicating with legislators and the public in support of or opposing specific legislation. (emph. added)*

Especially because the new Administration has proposed dramatic cuts in the type of spending relied on by many social service and progressive nonprofits, philanthropic leaders have urged organizations and individuals to step up their advocacy efforts to fight these new policies.

The New Activism Focus

In any event, 501(c)(3)s have questions right now about certain activities not previously given much attention but which now have moved center-stage since the November 2016 election.

Executive Orders

In the first weeks of this new Administration, many of the policy objectives have been put into place – or at least the attempt was made – by a rapid-fire string of presidential executive orders. It seems likely that many more will follow soon.

501(c)(3) organizations, "particularly those active in the issue areas addressed

by the executive orders, have been rightly concerned about whether and to what extent they can against or for these executive orders. In general, –

> *charitable organizations are limited in their ability to engage in lobbying activities. The applicable restrictions focus on attempts to influence action by Congress, a state legislature, any local council or similar governing body, or the public in a referendum, initiative, constitutional amendment, or similar procedure. Notably, these rules do not prohibit attempts to influence the executive branch or administrative agencies with respect to regulatory matters—including executive orders.*

Charities that "wish to speak out,

> *or to encourage individuals to speak out, against or for the policy changes embodied in these executive orders may generally do so without triggering the lobbying restrictions. However, Section 501(c)(3) organizations should be mindful that communications with employees of executive branch agencies who have legislative responsibility over certain matters may be subject to the lobbying restrictions if the ultimate goal of such communications is to influence legislation. Similarly, charitable organizations should be careful when communicating with legislators or their staff members about potential legislative action relating to an executive order. Therefore, charities, and in particular private foundations, should carefully monitor their outreach and pay attention to what they are asking for or seeking to accomplish. (emph. added)*

Because of the precipitous announcement of the 2020 candidacy, 501(c)(3)s –

> *should be careful that their criticisms or support for the President's administrative actions or his performance in office do not reference his 2020 candidacy (e.g., organizations should avoid statements like 'No More Years,' [or] 'One and Done,') and should focus on the President's activities and policies as the incumbent.*

Protests, Rallies, and Media

There has been a dramatic surge in protest marches and rallies on a variety of subjects, some of which are key to the missions and goals of many 501(c)(3)s. There is some danger that charities participating in these events may improperly dip into prohibited political waters. 501(c)(3)s are prohibited from "participating or intervening in a political campaign in support or opposition of a political candidate." But how is a "political candidate" defined for purposes of section 501(c)(3)?

> *The IRS regulations define a 'political candidate' as a person who has proposed him or herself, or has been proposed by others, as a candidate for public office. This definition is very broad.*

Since the White House incumbent has already announced his 2020 reelection bid, including filing necessary documents to start that campaign, he may well fit within the expansive "political candidate" definition.

Accordingly, a "charity should not arrange, sponsor, or participate in an event, rally, or protest that explicitly supports or opposes any political candidate *by name*. Charities can and should participate in events supporting or opposing *a policy issue* in alignment with their mission." (emph. added)

A charity "should not have a pro- or anti-candidate message (including songs or pictures/memes) on its website or on any other public display – including social media – in the charity's name." Instead, the organization should describe its "policy priorities."

As for letters and policy statements, charities may –

> *voice their opinions about policies in support of their respective missions by writing letters and position statements. But participating in public policy debates in a manner that identifies a candidate and a specific candidate's positions will become increasingly risky for charities as the next election approaches….A charity should not suggest, for example, that any candidate/elected official will be rewarded or penalized by the charity, its constituents, or voters at large in the next election as a result of a policy position.*

Conclusion

Care should be taken, particularly in connection with any actions that may cross the line over into the politics prohibition of section 501(c)(3). Of course, if the Johnson Amendment is repealed in whole or in part, that will entirely change an organization's stance with regard to these activities.