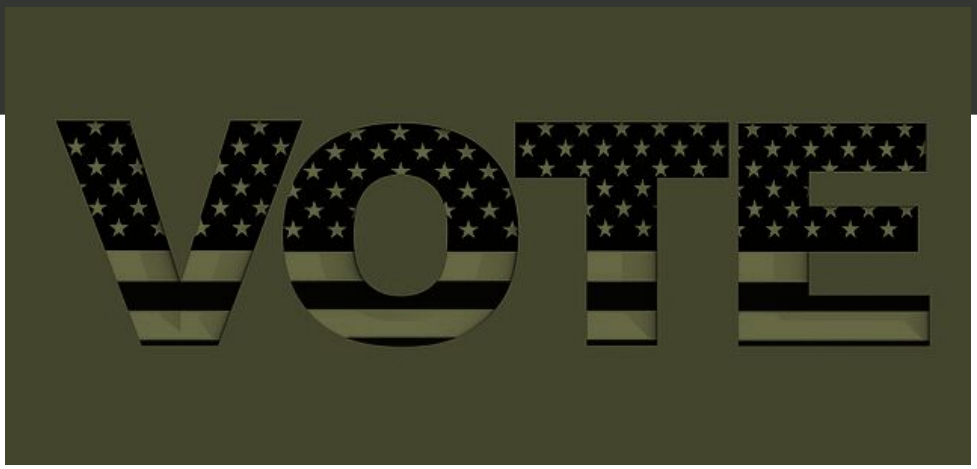
NONPROFITS: INTERNAL REVENUE SERVICE

Political Activities and 501(c)(3)s: What's Allowable, Part 3

08.23.16 | Linda J. Rosenthal, JD



Now that we're in the last few months of an election season that is one of the most highly charged in recent memory, it's important to review the application of the political campaign activities ban in section 501(c)(3).

The mere 31 words of the 132-word section 501(c)(3) – tacked on almost as an afterthought by floor amendment in the 1954 overhaul of the tax code – may appear clear on its face, but it's tough to apply.

In *Part 1* and *Part 2* of this series, we reviewed certain categories of activities that are outside the scope of the politics ban; that is, (1) voter-registration and "get-out-the-vote" drives (conducted in a neutral, nonpartisan manner); and (2) candidate participation in nonpartisan forums or voter-education events.We used examples primarily from IRS Revenue Ruling 2007-41.

Other Appearances by Candidates

Here, in Part 3, we focus again on certain hypotheticals presented in Revenue Ruling 2007-41. – this time, though, on the dicier situations that can arise by a candidate attendance at events where the person's candidacy is not mentioned or is irrelevant, or a candidate's attendance at 501(c)(3)-sponsored events that are open to the public.

First, let's again review the statutory language in question. Section 501(c)(3) of the Internal Revenue Code is a definitional section; it describes which entities are eligible for this highly favorable category of tax exemption.

The politics ban is the final phrase, here **bolded**: "Corporations, and any community chest, fund, or foundation, organized and operated exclusively for [...exempt...] purposes ... no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), **and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.** ***(bolding added)***

As we explained in Part I, "[t]he challenge, then, is to understand what that last phrase means," and which activities are within this ban or not. A few examples that are clearly prohibited include:

- Hosting a political candidate for a campaign speech
- Using organizational funds to create and distribute information in support or in opposition to a candidate
- Writing a check from the organization's bank account to a political campaign.

Those are the easy ones; the clear-cut violations.

Others are not as simple.

First, many candidates for office already hold elected positions, and are expected as part of their current official duties to attend and participate in many events, year-round – close to election day or not. Second, certain elected officials, including members of the U.S. House of Representatives, have such short terms – just two years – that they are effectively running for reelection in early January following their November victories.

Examples from Rev. Rul. 2007-41

"A candidate's presence at an organization-sponsored event does not, by itself, cause the organization to be engaged in political campaign activity," according to tax officials. If "the candidate is publicly recognized by the organization, or if the candidate is invited to speak," here are some of the factors that the IRS considers in analyzing whether the 501(c)(3) event sponsor is engaged in prohibited "political campaign intervention":

- "Whether the individual is chosen to speak solely for reasons other than candidacy for public office;
- Whether the individual speaks only in a non-candidate capacity;
- Whether either the individual or any representative of the organization makes any mention of his or her candidacy or the election;
- Whether any campaign activity occurs in connection with the candidate's attendance;
- Whether the organization maintains a nonpartisan atmosphere on the premises or at the event where the candidate is present; and
- Whether the organization clearly indicates the capacity in which the candidate is appearing and does not mention the individual's political candidacy or the upcoming election in the communications announcing the candidate's attendance at the event."

Of the 21 hypothetical situations presented in *Rev. Rul. 2007-41*, the following examples are particularly helpful in analyzing the types of scenarios considered in this post.

- ***Situation 10.*** Historical society P is a section 501(c)(3) organization. Society P is located in the state capital. President G is the president of Society P and customarily acknowledges the presence of any public officials present during meetings. During the state gubernatorial race, Lieutenant Governor Y, a candidate, attends a meeting of the historical society. President G acknowledges the Lieutenant Governor's presence in his customary manner, saying, "We are happy to have joining us this evening Lieutenant Governor Y." President G makes no reference in his welcome to the Lieutenant Governor's candidacy or the election. Society P has not engaged in political campaign intervention as a result of President G's actions.
- ***Situation 11.*** Chairman H is the chairman of the Board of Hospital Q, a section 501(c)(3) organization. Hospital Q is building a new wing. Chairman H invites Congressman Z, the representative for the district containing Hospital Q, to attend the groundbreaking ceremony for the new wing. Congressman Z is running for reelection at the time. Chairman H makes no reference in her introduction to Congressman Z's candidacy or the election. Congressman Z also makes no reference to his candidacy or the election and does not do any political campaign fundraising while at Hospital Q. Hospital Q has not intervened in a political campaign.
- ***Situation 12.*** University X is a section 501(c)(3) organization. X publishes an alumni newsletter on a regular basis. Individual alumni are invited to send in updates about themselves which are printed in each edition of the newsletter. After receiving an update letter from Alumnus Q, X prints the following: "Alumnus Q, class of 'XX is running for mayor of Metropolis." The newsletter does not contain any reference to this election or to Alumnus Q's candidacy other than this statement of fact. University X has not intervened in a political campaign.

Situations 10, 11, and 12 get a "thumbs-up" from the Internal Revenue Service. Situation 12 does not.

- ***Situation 13.*** Mayor G attends a concert performed by Symphony S, a section 501(c)(3) organization, in City Park. The concert is free and open to the public. Mayor G is a candidate for reelection, and the concert takes place after the primary and before the general election. During the concert, the chairman of S's board addresses the crowd and says, "I am pleased to see Mayor G here tonight. Without his support, these free concerts in City Park would not be possible. We will need his help if we want these concerts to continue next year so please support Mayor G in November as he has supported us." As a result of these remarks, Symphony S has engaged in political campaign intervention.

Situation 13, by contrast with 10, 11, and 12, gets a "thumbs-down from tax officials.

Conclusion

Coming up in Part 4, we'll discuss a category of activities – "advocacy vs. political campaign intervention" – that makes the analysis here in Part 3 look like a walk in the park.

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