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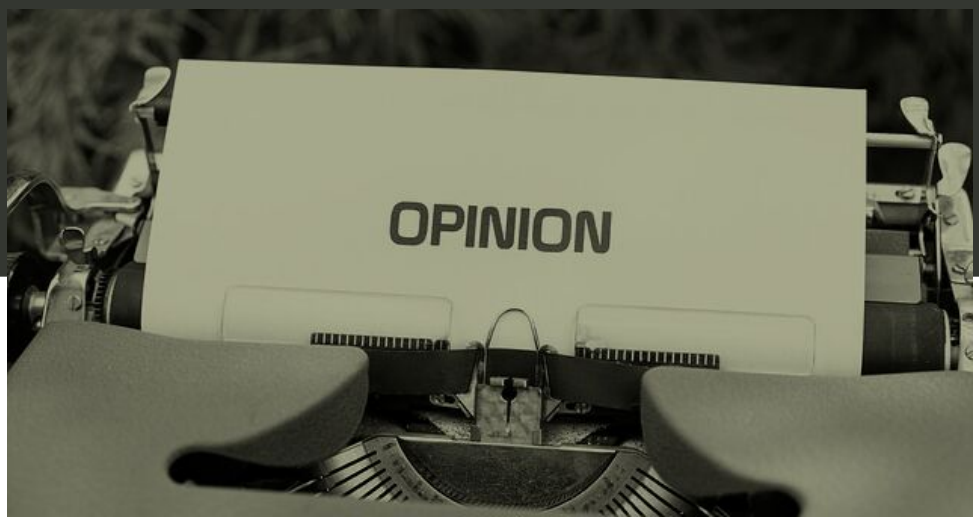
NONPROFITS: POLITICAL ISSUES

Whose Opinion is it, Anyway?

03.20.15 | Linda J. Rosenthal, JD



In *One of Those Days…*, we introduced a hypothetical board chairman who – loudly and proudly – told his social media circles about his key role in a local charity and his devotion to the cause. On Facebook one day, he spouted off about a politician who opposed the group's objective, denouncing the official, and endorsing the opponent in the upcoming election.

The Executive Director worried that this quite-public rant would be considered prohibited political activity and that the chairman's writings would attributed to the charity. Was she right to worry that this would jeopardize the group's tax exemption?

The General Rule

In *It's That Time of Year Again*, we explained that 501(c)(3) organizations "may 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."

This is the exact — and only — language in the federal tax statute governing charitable organizations that deals with political activity. It's short and to the point: political activity is absolutely prohibited. There's no exception if it's just an insubstantial part of the 501(c)(3)'s operations.

It's not okay. Ever.

The Organization's Role

This restriction on political activity applies to the organization itself. But an organization acts through its key people: the founders, directors, officers, and high-ranking staff. So does everything that these people do and say — even on their own time and in their personal lives — stick to the organization?

People who are associated with a charity don't give up their right to have and express their own opinions, or to engage in the political process. "The political campaign intervention prohibition is not intended to restrict free expression on political matters by leaders of organizations speaking for themselves, as individuals. Nor are leaders prohibited from speaking about important issues of public policy."

So how do these key people — and their organizations — keep this distinction clear enough to stay clear of any troubles with the IRS about the tax exemption?

In short, " . . . for their organizations to remain tax exempt under section 501(c)(3), leaders cannot make partisan comments in official organization publications or at official functions of the organization."

Walking the Tightrope

The governing statute, Internal Revenue Code section 501(c)(3), has just that one short phrase about prohibited political activity. The official Treasury regulations aren't much longer. An organization cannot be tax exempt if it – "participates or intervenes, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office . . ."

Activities which constitute participation or intervention in a political campaign on behalf of or in opposition to a candidate include, but are not limited to, the publication or distribution of written or printed statements or the making of oral statements on behalf of or in opposition to such a candidate.

Groups that do these things are one of three categories of "action organizations." Not really much more help here.

Revenue Rulings to the Rescue

But the IRS regularly issues documents called revenue rulings that help explain the law in more practical terms.

Revenue Ruling 2007-41 describes 21 different hypotheticals that illustrate various aspects of the political activity prohibition: which types of activities will be ok under the rules and which ones won't pass muster.

Four of the 21 examples are presented here to highlight when a key person's statements or activities will or will not be attributed to the organization.

- ***The Case of the Enthusiastic Executive***: The CEO of a 501(c)(3) hospital, along with several other prominent healthcare industry leaders, personally endorsed a candidate in a large newspaper ad paid for by the candidate. While listing their names, the ad included a disclaimer that the titles and affiliations of each of the endorsing healthcare executives were provided for "identification purposes" only.

How did the IRS view this situation? The hospital's tax exemption was safe. The ad wasn't paid for by the hospital, and didn't appear in an official hospital publication. And the executive's endorsement

was made in a "personal capacity."

- ***The Case of the Prominent Pastor***: There was a similar result when a hypothetical minister — just a few weeks before an important election — attended a press conference held at a politician's campaign office. The well-known pastor spoke at the event, endorsing the candidate. He didn't say he was speaking on behalf of his church, but the endorsement was reported on the local newspaper's front page, and he was identified in the article as minister of that church.

Like the hospital executive, this church minister did the right things: he didn't make the endorsement at an official church function, or in an official church publication. He also didn't use any of the church's assets, and didn't say he was speaking as a representative of the church. Under these facts and circumstances, the church's tax exemption was not in jeopardy.

Thumbs Down

In two more examples, though, there were significant differences and unfavorable results.

- ***The Case of the Chatty Chancellor***: Each month, a university president writes a column called "My Views" in the alumni newsletter. Just before an election, the educator wrote: "It is my personal opinion that Candidate X should be reelected." In an abundance of caution, he personally paid for the portion of the newsletter's cost attributable to this column.

But it wasn't enough for the man to have put up his personal funds, since the newsletter is an official university publication. His personal endorsement put the university's tax exemption in peril.

- ***The Case of the Chirpy Chairman:*** Just before an election, the Board Chairman of an environmental group discussed a number of issues, including why it was important to vote. "It is important," he concluded, "that you all do your duty in the election and vote for Candidate Y."

This was a huge mistake; the endorsement was made during an official organization meeting, so the Chairman's statement was attributed to the group.

In the third and fourth examples, the candidate endorsements and support occurred at official organization functions or in official organization publications, or were paid for with organization funds.

So What Should Happen to our Big-Mouthed Board Member?

Our board member's actions are much closer to the first two examples than to the second two. Although this Chairman wasn't shy about letting his social media circles know about his key position, reminding them repeatedly about his passion for the mission, his candidate endorsement was unconnected with the organization. He didn't make his statement at an official function or in an official publication.

Conclusion

The IRS makes clear that in deciding how to rule in these types of situations, it carefully considers all of the circumstances, and makes a fact-specific determination each time.

— Linda J. Rosenthal, J.D., FPLG Information & Research Director