



IRS Issues Guidance on Prohibited Political Activities for 501(c)(3) Organizations and Reports on Violations During 2004 Election

On February 24, 2006, the Internal Revenue Service (“IRS”) released the results of its examinations of prohibited political activity by section 501(c)(3) exempt organizations during the 2004 elections.¹ On the same date, the IRS also released guidance for these exempt organizations regarding how to avoid engaging in political campaign intervention in advance of the 2006 election cycle.²

All organizations exempt under section 501(c)(3) of the Internal Revenue Code are absolutely prohibited from “directly or indirectly participating in, or intervening in, any political campaign on behalf of (or in opposition to) any candidate for elective public office.”³ This prohibition of political campaign intervention includes any activities that support or oppose any candidate for public office, whether at the local, state or federal level. If a section 501(c)(3) organization violates this prohibition, the organization may be subject to excise taxes or lose its tax-exempt status.

IRS REVIEW OF TAX EXEMPT ACTIVITIES IN 2004 ELECTION CYCLE

The IRS has published the results of its examination of political activity by section 501(c)(3) organizations during the 2004 election campaign, dubbed the Political Activity Compliance Initiative (“PACI”).⁴ The PACI was initiated in June 2004 as a result of the IRS’ concerns about possible intervention by section 501(c)(3) organizations in political campaigns during the 2004 election cycle. In 2004, the level of overall election spending rose, and the IRS received reports that some 501(c)(3) organization were, in fact, engaging in political activities.⁵ The IRS conducted examinations of 110 organizations as part of the PACI program.⁶ Of the 82 examinations completed to date, the IRS has determined that 59 of the organizations it examined engaged in prohibited political campaign intervention. The IRS has recommended that three of these organizations have their tax exempt status revoked but has determined that the remaining 56 organizations

MARCH 2006

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engaged in one-time violations that do not merit revocation.

The prohibited political campaign activities engaged in by organizations examined as part of the PACI program include the following:

- Organizations distributed printed materials supporting candidates in formats including newsletters, church bulletins or letters to members;
- Organizations endorsed candidates on their websites or included a link on their websites to other sites that endorsed candidates;
- Religious leaders made statements during church services tending to endorse or oppose a candidate, even if not by express statements;
- Officials of non-church organizations made verbal endorsements of candidates;
- Organizations allowed non-candidates to endorse candidates at organization functions;
- Organizations gave preferential treatment to candidates by allowing them to speak at official organization functions that were not part of a candidate forum or part of an established policy in which all candidates were permitted to address the organization's membership on equal terms;

- Organizations posted signs on their property endorsing a candidate;
- Organizations distributed improper voter guides or candidate ratings through their websites or links to other websites, or by physical distribution such as tables at the back of a church; and
- Organizations used their own funds to contribute to candidates' political campaigns.

Because of the high percentage of violations uncovered during the 2004 PACI program, the initiative will be continued for future elections. The IRS will start the PACI project earlier in the 2006 election cycle and publicize the project in advance.

GUIDANCE ON TAX EXEMPT ACTIVITIES DURING 2006 ELECTION CYCLE

In recently released Fact Sheet 2006-17, the IRS provides an outline and examples of the types of activities that may cause section 501(c)(3) organizations to run afoul of the Internal Revenue Code's prohibition on political campaign intervention (please retrieve the Fact Sheet [here](#)).⁷ The activities described in this release are as follows.

Organization Leaders' Activities

If a leader of a section 501(c)(3) organization makes statements supporting or opposing candidates for public office, those statements can adversely impact the tax exempt status of the organization. Leaders must not make partisan statements at official organization functions or in official organization publications. Leaders may, in some cases, make partisan statements as an individual outside of these situations. However, to avoid having those statements attributed to the organization, leaders should clearly state that the statements are not being made in their official capacities.

Candidate Appearances

A candidate for public office may make an appearance at a section 501(c)(3) organization event as a candidate, but the organization must take certain precautions. First, candidates for the same office must be given equal opportunity to appear at comparable organization events. Second, if a candidate is to appear at an event, the organization must not display a bias for or against the candidate. The organization must handle the candidate's appearance in a neutral manner—communications cannot indicate approval or disapproval of the candidate and any questioning of the candidate must be done in an unbiased fashion.

A candidate for public office may make an appearance at a section 501(c)(3) organization event as a non-candidate but if the organization publicly recognizes the candidate at the event, it must take certain precautions, such as indicating clearly the non-election reason for the candidate's attendance and not permitting mention of the individual's candidacy or the election.

Issue Advocacy During an Election Cycle

Although section 501(c)(3) organizations are permitted to take positions on public policy issues, if an organization takes such a position in a communication that supports or opposes a candidate for public office, the organization may have engaged in prohibited political activity. The IRS will consider the following factors in determining whether the communication constitutes political campaign intervention:

- Whether the statement identifies one or more candidates for a given public office;
- Whether the statement expresses approval or disapproval for one or more candidates' positions and/or actions;
- Whether the statement is delivered close in time to the election;
- Whether the statement makes reference to voting or an election;

- Whether the issue addressed in the communication has been raised as an issue distinguishing candidates for a given office;
- Whether the communication is part of an ongoing series of communications by the organization on the same issue and is independent of the timing of any election; and
- Whether the timing of the communication and identification of the candidate are related to a non-electoral event such as a scheduled vote on specific legislation by an officeholder who also happens to be a candidate for public office.

Voter Guides, Voter Education, Voter Registration and Get-out-the-Vote Drives

While voter guides, voter education, voter registration or get-out-the-vote activities may be suitable for section 501(c)(3) organizations, they may constitute political campaign intervention if conducted in a biased or partisan manner. Distribution of a voter guide may constitute political activity if the guide focuses on a narrow set of issues or if questions are structured to reflect the organization's bias. Voter education or registration activities may constitute political activity if they are conducted in a biased manner that supports or opposes a candidate for public office.

Web Sites

A section 501(c)(3) organization must not post information on its web site that either supports or opposes a candidate for public office. Further, the organization may be deemed to be engaging in political campaign activity if it includes a link on its web site to another site that includes information supporting or opposing a candidate for public office. If an organization links to other sites, the organization should periodically monitor the site to which it has linked to ensure it remains nonpartisan.

Business Activities

If a section 501(c)(3) organization engages in business activities—such as selling or renting mailing lists, leasing office space or accepting paid political advertising—it must not do so in a manner that favors a given candidate. The organization must make the good, service or facility available to all candidates on the same basis that it makes it available to the general public.

ENDNOTES

- ¹ See *IRS Releases New Guidance and Results of Political Intervention Examinations*, IR-2006-36 (Feb. 24, 2006).
- ² See *id.*
- ³ Internal Revenue Code section 501(c)(3).
- ⁴ See *Political Activities Compliance Initiative Executive Summary and Final Report* (Feb. 22, 2006) ("PACI Executive Summary" and "PACI Final Report," respectively).
- ⁵ The Federal Election Commission reported that over \$10 billion was spent in the 2004 election cycle, up from \$4 billion in the 2000 election cycle. Similarly section 527 political organizations spent \$300 million in 2004, up from \$150 million in 2000. See *PACI Executive Summary*.
- ⁶ Originally, 132 organizations were selected for PACI review—68 organizations (52% of cases) were selected as a result of referrals received through the course of the PACI program through November 30, 2004, while 64 organizations (48% of cases) were already selected for examination prior to initiation of the PACI program. 22 cases were closed prior to examination as it was determined that they "did not merit further use of IRS resources." Referrals were handled by a panel of three IRS career employees; referred cases were only included as part of the PACI program where two of the three panel members determined that there was a "reasonable belief" that the organization had engaged in prohibited political activity. See *PACI Executive Summary and Final Report*.
- ⁷ See *Election Year Activities and the Prohibition on Political Campaign Intervention for Section 501(c)(3) Organizations*, FS-2006-17 (Feb. 2006).

Arnold & Porter LLP has strong expertise in advising nonprofit organizations on the extent to which they can engage in lobbying, nonpartisan voter education, issue advocacy and electioneering communications. We advise charities, educational institutions, social welfare organizations, labor unions and trade associations on the tax, as well as state and federal election law, implications of their planned activities. We also represent clients in audits or investigations being conducted by federal and state government regulators into improper electioneering activities. For more information, please contact:

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