

MINIMIZING RISK IN NONPROFIT ISSUE COALITIONS

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In seeking the advantages associated with coalition membership, nonprofits must ensure that they do so in a manner consistent with their tax status.

Tax-exempt organizations form issue coalitions to leverage their existing strengths and resources, thereby promoting their tax-exempt missions in a more efficient and cost-effective manner. This was the case as nonprofits sought to make “their” issues a subject of public debate during the last federal election cycle, and it is increasingly true as nonprofits seek to weather the current economic downturn while providing their tax-exempt services to the public.¹ As issue coalitions become more commonplace, coalitions may now include members with one or more different tax statuses—Section 501(c)(3) private foundations and public charities, Section 501(c)(4) social welfare organizations, and even Section 527 political organizations (“527s”).

While such mixed-status coalitions are not *per se* prohibited, each type of organization operates under a different set of legal constraints and, therefore, each participant must take great care to participate, whether directly or indirectly, only in coalition activities that it is permitted to engage in directly. Importantly, 501(c)(3) organizations cannot engage in any political campaign intervention, including funding. While Section 501(c)(3) organizations classified as “public charities” can engage in a limited amount of lobbying, those classified as “private foundations” can

engage in absolutely no lobbying activities.² Section 501(c)(4) social welfare or advocacy organizations, on the other hand, can engage in unlimited lobbying and limited campaign intervention.³ If a 501(c)(3) violates these prohibitions, it may be subject to tax or revocation of its tax-exempt status.⁴ A 501(c)(4) that engages in too much campaign intervention risks being subject to tax, losing its tax-exempt status, potentially being reclassified as a 527 organization, or even being penalized for not having registered as a political committee or having complied with political committee restrictions pursuant to the Federal Election Campaign Act (FECA) or comparable state election laws.⁵

Thus, although these mixed-organization coalitions may offer additional opportunities, there are serious risks inherent to this type of structure:

- A tax-exempt organization cannot engage in coalition activities that it could not engage in individually—for example, by participating directly in coalition projects or by providing funds or other support for other coalition members to undertake those activities.
- Activities of the coalition as a whole or of other coalition members potentially may be attributed to other coalition members—even where a coalition member has not participated in, endorsed, or provided funds or other support to the specific activity.

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While it may be technically possible for a 501(c)(3) organization to participate in a coalition with members that engage in political activity as part of their coalition activities (including 501(c)(4) or 527 organizations), if the 501(c)(3) organization avoids funding, participating in, or having attributed to it any non-501(c)(3)-appropriate political activity, implementing this type of coalition structure will be very difficult in practice. If a 501(c)(3) organization wishes to participate in a coalition whose members engage in political or lobbying activity, the coalition members should agree in advance to a series of ground rules protecting the 501(c)(3) members from excessive lobbying or any political campaign intervention under the Code, or any activity covered by FECA (or state law equivalents). They should also agree to ground rules protecting the 501(c)(4) members from excessive political campaign intervention or any FECA-covered activities.

The following discussion explores several principles that a nonprofit might wish to consider when seeking to reduce risk to its tax-exempt status if it participates in a coalition with members of differing tax classifications. These principles are by no means exhaustive, nor does adherence to these principles guarantee elimination of risk.⁶ Whether or not coalition participation or activity is permissible for a given tax-exempt organization—a 501(c)(3) organization in particular—is extremely fact specific. Thus, any tax-exempt organization that wishes to work in a mixed-tax status coalition should consult with legal counsel both prior to joining such coalition and on an ongoing basis regarding the permissibility of its participation and the coalition's activities.

Principle 1: Importance of branding and public perception

A major risk for a particular participant in a nonprofit coalition is the other members' activities. Other members may engage in activities in the name of the coalition that, though permissible under such other members' own tax classifications, might violate the legal restrictions on the particular participant. For example, a 501(c)(4) member could engage in lobbying activities on behalf of the coalition, which activities could then be attributed to a 501(c)(3) private foundation member. Alternatively, a 501(c)(4) member might make partisan political statements in the name

of the coalition, which statements may then be attributed to a 501(c)(3) member. Thus, although a particular member may not have actually participated in or contributed funding to a specific activity, it is possible that its constituents, funders, or regulators may incorrectly assume this to be the case, simply due to its participation in the coalition and use of the coalition's name by other members.

Public communications regarding coalition structure. To make it less likely that the public might be confused as to whether a specific coalition member has undertaken a given activity, the nonprofit coalition may wish to issue clear communications regarding the structure of the coalition and which members undertake which coalition activities. For example, the coalition's Web site might contain a description of the structure of the coalition on its "About Us" page, including a description of the tax status of the members (and whether it has any Section 501(c)(3), 501(c)(4), or 527 organization members), as well as to specify that any 501(c)(3) members have not endorsed or sponsored any communications that support or oppose any candidate for public office, and that they do not provide any

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funds used in producing or distributing any political speech. To the extent that the coalition's press releases, reports, or other public statements describe the coalition, they could also include a similar description of the coalition's structure.

Control over coalition name. To reduce the risk that a member's individual activities are incorrectly attributed to the coalition or its members, the coalition may consider a requirement that the use of the coalition's name be subject to a policy agreed on in advance by coalition members.

Where coalition members desire a greater degree of control or are apprehensive about other members' activities, the coalition might require that its members review—and have an ability to prevent—all uses of the coalition name or materials. First, if a statement will be made, or activities conducted, in the name of the coalition, or mentioning the names of coalition members, each member could be given the opportu-

¹ Many funders have also encouraged such coalitions. Some examples of coalitions that have been active in recent years include America Votes and Americans for Stable Quality Care.

² See Sections 501(c)(3), 4945(d)(2).

³ See Section 501(c)(4).

⁴ See Sections 501(c)(3), 4911, 4912, 4945(d)(2), 4955.

⁵ See, e.g., Sections 501(c)(4), 527; 2 U.S.C. § 431, *et seq.*

⁶ Among other things, this discussion does not cover legal risks stemming from noncompliance with laws or regulations other than the Code's restrictions on lobbying or political activity by tax-exempt organizations. Such other laws include the Federal Election Campaign Act, 2 U.S.C. § 431, *et seq.*; and the Lobbying Disclosure Act, 2 U.S.C. § 1601, *et seq.*

nity to review and object to such statement or activity or the use of the name of the coalition or such individual member's name. To enable a more substantive review, coalition members could be given the opportunity to review a full draft of a proposed statement or a detailed analysis of a proposed activity, not just a summary or overview. The application of the tax rules regarding lobbying and political activity are very fact-specific, and context can easily transform a 501(c)(3)-appropriate educational statement into lobbying or political speech.

Second, each member could be provided with veto power, such that no statement could be made, or activity carried out, in the name of the coalition if any single member objects. Similarly, no individual member's name would be used if such member objects.

Alternatively, members might require an in-depth review for only certain types of uses of the coalition name or materials—saving a detailed review for those types of activities in which the risk to the specific coalition's members is perceived to be higher. To ensure such a filtering process is sufficient, the following procedures could be followed. First, any member or group of members could be permitted to release pre-approved statements or statement types referencing the coalition name or using coalition materials without prior coalition permission, provided that certain rules were observed. Such a set of rules might cover materials with the coalition name that contain:

1. Discussion of policy issues or educational materials.
2. No direct or indirect mention of any candidate or election.
3. No comparison of a candidate's views to the coalition's views, coalition member views, or the views of other candidates.
4. No statements approving or disapproving of any candidate, or any candidate's views or qualifications for office.
5. No views on specific legislation or, when distributed to members of the general public, no request that a legislator be contacted regarding such legislation.⁷

For example, pre-approved materials would not be permitted to contain any lobbying or statements in support or opposition to any candidate for public office.

Second, the rules could require that copies of all statements made or materials circulated using the

coalition name or materials be sent to the other coalition members as soon as released. This would provide coalition members with the opportunity to indicate which past statements or activities, if any, were objectionable. It also would provide the coalition with the opportunity to develop a policy pursuant to which such activities may not be continued in the future.

Third, if a member or group of members intends to conduct activities using the coalition name or using coalition materials that are not in a category pre-approved by the coalition, the process described earlier could be used, whereby each member is given the opportunity to review and, if it chooses, veto a statement prior to release.

Finally, if the coalition entity is a separately incorporated organization, the coalition entity itself might control the review and approval of the use of its name and materials, pursuant to a set policy, which could incorporate some of the elements previously described.

Branding in the name of the coalition. To allow members flexibility while protecting other coalition members from activities that are incompatible with their tax status or risk tolerance, it may be advisable that any activities or public statements—such as press releases, research reports, advertisements—be attributed solely to the members who are participating in or funding the activity (not the coalition as a whole). However, all activities branded in the name of the coalition—including print or television advertisements, press releases, e-mails, public rallies, or the coalition's Web site—could be conducted according to the “lowest common legal denominator” of the coalition's membership (i.e., in compliance with the limitations placed upon the most legally constrained coalition members, generally 501(c)(3) private foundations or public charities). For example, if the coalition includes 501(c)(3) private foundations, no coalition statements or activities could be incompatible with the legal restrictions imposed on private foundations and, therefore, could not contain any lobbying speech or material in support of or opposition to any candidate for public office.⁸

In the event the coalition or its members determine that they wish to make public communications in the name of the coalition that might be considered lobbying (and, hence, not appropriate for private foundation members) or political speech (not appropriate for any 501(c)(3) organization), the coalition should consider ways in which it can potentially minimize the risk that these communications are incorrectly attributed to the 501(c)(3) members. For example, non-501(c)(3)-appropriate communications that are branded in the name of the coalition

⁷ See, e.g., Reg. 56.4911-2(b)(2)(ii); Rev. Rul. 2004-6, 2004-4 IRB 328.

⁸ See Sections 501(c)(3), 4945(d)(2).

⁹ See Letter from Lois G. Lerner, Director, Exempt Organizations to Marsha Ramirez, Rob Choi, and Bobby Zarin re: 2008 Political Campaign Season (April 17, 2008), available at http://www.irs.gov/pub/irs-tege/2008_paci_program_letter.pdf.

¹⁰ Sections 501(c)(3), (4), 527(f).

could be required to state clearly which coalition members are funding or conducting the activity and specify that the communications were not endorsed or funded by any 501(c)(3) members.

Another potential risk-minimizing restriction would be to permit communications appropriate for the coalition's 501(c)(3) members only on the main coalition Web site, with any non-501(c)(3)-appropriate communications housed on a separate, segregated site. This structure is analogous to that of a 501(c)(3) with a related 501(c)(4) organization. While the 501(c)(3) currently may, in some cases, link to its related 501(c)(4) organization's Web site, it cannot display any of that related organization's political speech on its own site, or reference the 501(c)(4)'s political speech and link directly to it.⁹

Regardless of what approach is adopted, however, it is worth noting that 501(c)(3) and 501(c)(4) member organizations may have very different risk tolerances regarding what is and is not viewed as political campaign intervention. Some 501(c)(4) organizations may be more aggressive than 501(c)(3) organizations in classifying activities as other than political campaign intervention because the risk to a 501(c)(4) of being "wrong" (i.e., misclassifying political activity as non-political) is much different than the risk to a 501(c)(3) member. Section 501(c)(3) organizations can lose their tax exemption if they engage any political activities, while 501(c)(4) organizations that are comfortably below the limits on their amount of political campaign intervention are usually only risking having to pay a tax on the expenditures for any activities incorrectly categorized as not political campaign intervention.¹⁰ Therefore, 501(c)(3) member organizations might find it prudent to do their own analysis of whether an activity is or is not political campaign intervention.

Principle 2: No contributions by 501(c)(3)s to impermissible coalition activities

Where a coalition consists of 501(c)(3) organizations, as well as 501(c)(4) organizations that engage in political activity (or even 527 organizations), extreme caution should be taken to ensure that no 501(c)(3) financial resources are used to support political campaign intervention activity or lobbying if the 501(c)(3) members include private foundations or public charities that do not engage in lobbying. Where coalition members contribute funds or in-kind resources to a central depository, 501(c)(3) member contributions could be held separately from those of the other members, and funds distributed only for 501(c)(3)-appropriate activities. As further protection against funds being spent for impermissible activities,

the 501(c)(3) members may wish to contribute their funds to, and enter into an agreement with, another 501(c)(3) organization that will oversee and monitor how the funds are being spent.

Section 501(c)(3) organizations participating in coalition activity should consider other ways in which their participation might be viewed as "contributing" to activities not appropriate to their 501(c)(3) status. For example, a 501(c)(3) member organization should consider whether any of its non-cash resources might be used to support political activities or, in the case of a private foundation, to support any lobbying activities. Such resources might include use of staff time or office space, equipment, e-mail services or Web hosting, or mailing lists. A 501(c)(3) organization might also wish to consider whether any of its intellectual property may be improperly used by the coalition or its members. For example, it could be undesirable for the name and logo of the coalition and the domain name of the Web site to be owned by a 501(c)(3) member if non-501(c)(3) members will be permitted to use the name, logo, or Web site for non-501(c)(3)-appropriate activities.

Principle 3: No 'building upon' permissible activity to conduct impermissible activity

All activities and communications by 501(c)(3) coalition members should be independently developed and not be designed to support current or planned lobbying activities (where the 501(c)(3) members include private foundation or public charities that do not engage in lobbying) or political activities, as this may "taint" the 501(c)(3) organization's activities or participation in the coalition. It is especially important to be cognizant of any discussions or paper trails that might incorrectly suggest that the 501(c)(3) organization's efforts are being used or are intended to be used to support or oppose the election of any candidate to public office.

Initial broad task allocation among coalition members. The coalition members may wish to agree in advance to a broad allocation of the types of tasks that each category of coalition members will undertake—and is permitted to undertake under tax and election law rules. For example, the coalition might agree that the 501(c)(3) members will engage only in educational activities, while the 501(c)(4) organization will engage only in lobbying and some limited political activities.

Guidelines regarding coalition meetings or discussions. The coalition should consider establishing rules to govern any meeting or discussion including members with different tax statuses, to protect those members from being present for discussions of topics

not permissible for their individual tax classifications. These rules could be re-iterated at the start of every meeting or discussion. For example, meeting agendas could specify which agenda items will include discussion of lobbying or political activities. This clear agenda will provide notice to 501(c)(3) organizations to leave the meeting when activities not appropriate to their exempt status are discussed. In addition, if 501(c)(3) coalition members attend meetings with 501(c)(4) organizations that engage in political activity, the 501(c)(3) organizations should not discuss plans or activities that they have not already communicated publicly, nor should the 501(c)(4) members discuss plans or activities that they have not already communicated publicly. Further, no 527 members should be permitted to provide any input into the 501(c)(3) goals or activities, nor vice versa, nor should 501(c)(3) organizations be permitted to alter their activities to support 527 goals or activities (including goals or activities of 527s classified as political committees under federal election law).

Principle 4: A coalition member may drop out of the coalition at any time

All members should consider monitoring coalition activities on an ongoing basis to determine whether those activities are appropriate to their individual tax status or legal risk tolerance. Where a member determines that participation is no longer prudent, the coalition should permit that member to immediately cease membership. If a member announces that it will leave the coalition, any reference to it as a coalition member should be removed from the Web site within a previously agreed-upon timeframe, nor should there be any reference to the former member's past membership in any future communications.

Principle 5: Pre-participation review of coalition

Prior to agreeing to become a member of a coalition of nonprofit organizations, a potential member might consider conducting an investigation regarding the coalition to determine the extent of risk that the coalition—or coalition members acting in the name of the coalition—will conduct lobbying or political activity not permissible to that prospective member, or other activities incompatible with that organization's tax-exempt mission. In certain cases, the prospective member organization may wish to involve legal counsel or senior management in its review.

Who are the coalition's members? The prospective member may consider requesting a list of all current and proposed members, as well as the qualifications for membership and which types of tax-exempt organizations are eligible for membership. For example, are and will the members be only 501(c)(3) organizations? Even if that is the case, a prospective member that is a 501(c)(3) private foundation should recognize that other 501(c)(3) organizations may, in some cases, conduct some lobbying activity as part of coalition membership. Will the coalition also consist of 501(c)(4) organizations? This may pose increased risk to either a 501(c)(3) private foundation or a public charity, as these 501(c)(4) social welfare organizations not only can engage in unlimited lobbying, but also can undertake substantial political campaign activities. Finally, will the members include 527 organizations (i.e., political groups)? This poses a very significant risk to a 501(c)(3) organization, as all of these organizations' activities are usually political—and, hence, their coalition activity will necessarily be political activity. If any such activity is attributed to the 501(c)(3) organization, the consequences could include tax penalties and even loss of tax-exempt status.

What activities will the coalition engage in? The prospective member may consider requesting a copy of internal planning documents and performing a review of relevant external communications, including the coalition Web site, fundraising solicitations, press releases, mass e-mail communications, and any videos available online. In addition, the prospective member may wish to discuss with the coalition representative the types of activities the organization will undertake or has undertaken. Do the past, current, or planned activities of the coalition include lobbying or political activities? If the organization engages in lobbying or political activities, what policies, procedures, or other safeguards does the coalition have in place to minimize the risk that such activities are incorrectly attributed to 501(c)(3) public charity or private foundation members?

Conclusion

By working in coalitions, nonprofits can leverage their own strengths and activities with others, avoid duplication of efforts, and more efficiently spread their nonprofit messages. In seeking the advantages associated with coalition membership, however, nonprofits must ensure that they do so in a manner consistent with their tax status, so that their coalition participation is not at the expense of their tax exemption. ■