CHARITIES AND POLITICS: A REVIEW OF THE IRS GUIDANCE

Charles M. Watkins, Esq.
ABA Section on Taxation
Committee on Exempt Organizations
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Organizations that are exempt from federal income tax under §501(c)(3) 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 monograph reviews the interpretation and application of this rule by the IRS to §501(c)(3) organizations (“EOs”). Of course, the Federal Election Campaign Act and comparable state and local laws may require registration and reporting of contributions received and expenditures made, and other federal, state, and local laws, also regulate various aspects of political activities—e.g., the placement of candidate campaign signs, or the amount that a radio or television station may charge for political advertising. These non-tax laws are outside the scope of this monograph. Of course, leaders of tax-exempt organizations that are considering engaging in political activity, including activities that may be permitted under §501(c)(3), should take these other laws into account, as well.

The guidance discussed in this memo also apply when determining whether an EO exempt under any other paragraph of §501(c) is primarily engaged in political activity, and would not be exempt under §501(c).

I. INTRODUCTION

A. History

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1 I.R.C. §501(c)(3).
Before 1954, the IRS and the courts generally recognized that participation in a political campaign is not a charitable activity, and an organization whose principal purpose was to do so could not be exempt under §501(c)(3). However, an organization whose principal purpose was religious or otherwise charitable could engage in incidental political activity without jeopardizing its exemption.

In the course of the overhaul of the Internal Revenue Code in 1954, the then-Senate Minority Leader, Lyndon Johnson, persuaded his colleagues to approve a floor amendment, adding the prohibition quoted above to §501(c)(3). Although, for this reason, there is no legislative history, it has been reliably reported that Senator Johnson was angry at members of the Bass family, who used several charities they controlled to oppose his election in 1948. The new prohibition would prevent a recurrence.

B. **Scope**

1. **Attempts to influence legislation**

   The prohibition against participating or intervening in a political campaign applies only to elections for public office, and does not apply to attempts to influence legislation,\(^3\) or to attempts to influence appointments to office that are not subject to Senate confirmation.\(^4\)

2. **Revocation of exemption**

   In addition, unlike the *restriction* on lobbying, the *prohibition* on political activity is absolute. In theory, exemption under §501(c)(3) may be revoked for even the smallest amount of prohibited

\(^2\) Thus, the “Johnson Amendment.”

\(^3\) Section 501(c)(3) public charities may engage in such attempts to influence legislation as an insubstantial part of their activities. I.R.C. §501(c)(3); 26 CFR §1.501(c)(3)-1(c)(3)(ii). However, private foundations are prohibited from attempts to influence legislation except as permitted by §4945(e). “Legislation” includes ballot initiatives or referenda, 26 CFR §53.4911-2(b)(1)(ii), and the legislative confirmation of executive branch nominees to judicial or other public office. IRS Notice 88-76, 1988-2 C.B. 392; IRS Announcement 88-114, 1998-37 I.R.B. 26 (expenditures for influencing Senate confirmation of federal judges are subject to tax under §527(f)). Lobbying efforts may require §501(c)(3) organizations to register and report under the federal Lobbying and Disclosure Act of 1995, and analogous state laws.

\(^4\) Attempts to influence appointments to office that are not subject to Senate confirmation may be subject to tax under §527(f).
political activity. However the IRS rarely revokes exemption for prohibited political activity, despite frequent reports of, e.g., church involvement in political campaigns. Surprisingly, in the mid-1990s, ministers from several churches in the Tidewater area around Norfolk, Virginia complained publicly after being visited by IRS agents whose purpose was merely to explain the rules prohibiting political activity, not to open an audit or revoke the churches’ exemptions.

C. Elective public office

The regulations under §501(c)(3) elaborate on the prohibition only slightly, by defining the term “candidate for public office,” limiting it to candidates for elective office:

The term candidate for public office means an individual who offers himself, or is proposed by others, as a contestant for an elected public office, whether such office be national, State, or local. 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.

D. Foreign candidates

The IRS has ruled that support for candidates in elections in foreign countries is intervention in a political campaign for purposes of determining whether an EO is exempt under §501(c)(4).

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5 The IRS can also assess excise taxes on the EO and its leadership, and can obtain an injunction against continuing flagrant political activity. See text on page 4.

6 In February 2006, the IRS released a report on its “Political Activity Compliance Initiative.” The report indicated that improper political activity occurred in 59 cases in 2004-2006, 37 churches and 22 others. Revocation of exemption was not proposed against any churches, and was proposed against only 3 non-church charities. See, e.g., TAM 200446033 (June 14, 2000) (proposing excise tax assessment against hospital system that sponsored employee contributions to trade association PAC).


8 PLR 201214035 (Jan. 11, 2012).
E. Legislative confirmation of nominees for public office

In contrast, a §501(c)(3) EO may engage in attempts to influence the nomination, appointment, or confirmation of individuals to non-elective offices without jeopardizing its exemption. These activities include, e.g., attempts to influence the legislative confirmation of executive branch nominees to executive or judicial office, or attempts to influence executive branch appointments that are not subject to legislative confirmation. However, the expenses incurred for such activities are subject to tax under §527(f).

Section 527 generally exempts “political organizations” from federal income tax. For purposes of §527, a political organization is an organization operated primarily to influence or attempt to influence “the selection, nomination, election, or appointment of any individual to any Federal, State, or local office or office in a political organization, or the election of Presidential or Vice-Presidential electors.” However, §527 also imposes two taxes. Section 527(b) imposes a 21% tax on certain net income of political committees. Conversely, when an exempt organization that is not a political organization spends money for political purposes—called “exempt functions” in §527—§527(f) imposes a 21% tax on the lesser of (1) the political expenditures, or (2) the organization’s net investment income. Thus, although these attempts to influence nominations or appointments to non-elective offices are not political activity that is prohibited by §501(c)(3), the amounts spent for those activities are subject to tax under §527(f).

F. Other tax penalties for prohibited political activity

In addition to revocation of exemption, the IRS has several other tools with which it may address violations of the prohibition against political activities by §501(c)(3) organizations. Section 4955 imposes a 10 percent excise tax on amounts paid by §501(c)(3) organizations to participate or intervene in a political campaign (“political expenditures”). If the organization is formed primarily for purposes of promoting the candidacy (or prospective candidacy) of an individual for public office (or if it is effectively controlled by a candidate or prospective candidate and is availed of primarily for those purposes), taxable political expenditures include amounts paid to the individual as compensation or for travel expenses; expenses of conducting polls, surveys, or studies for use by the individual; expenses of advertising, publicity, or fundraising for the

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9 I.R.C. §527(e).

10 This issue first gained significant attention among exempt organizations in the wake of the lobbying engaged in by many exempt organizations to support or oppose the confirmation of Judge Robert Bork to the U.S. Supreme Court in 1987. IRS Notice 88-76, 1988-2 C.B. 392; IRS Announcement 88-114, 1988-37 I.R.B. 26 (expenditures for influencing Senate confirmation of federal judges are subject to tax under §527(f)). The tax is imposed at the highest corporate tax rate, which is currently 21%. I.R.C. §527(b)(1).
individual; and any other expense whose primary effect is to promote public recognition or otherwise primarily benefit the individual.

Section 4955 also imposes a 2.5 percent excise tax on an organization manager who knowingly agrees to make a political expenditure, and additional taxes of 100% and 50% respectively, on the organization and managers if the expenditure is not “corrected” in a timely fashion. Section 6852 authorizes the IRS to terminate a §501(c)(3) organization’s taxable year and make an immediate assessment of income tax and the §4955 excise tax on a §501(c)(3) organization that has made political expenditures (as defined in §4955) that are a “flagrant violation of the prohibition against making political expenditures.”

Finally, §7409 authorizes the Justice Department to sue for an injunction when the IRS Commissioner personally determines that a §501(c)(3) organization had “flagrantly participated in, or intervened in a political campaign, and injunctive relief is appropriate to prevent future political expenditures,” i.e., the organization is likely to continue to make political expenditures. The IRS must notify the organization of its findings, after which the organization has 10 days to establish that it will immediately cease its political activity or demonstrate that the activities are not “flagrant.”

G. **21st Century Concerns**

Since the mid-1990s, the involvement of §501(c)(3) EOs on all sides of the political spectrum in political activities has become increasingly visible. The volume of complaints increased in 2004 to the point that the IRS established a “Political Involvement Project,” designed to enable the IRS to respond quickly to complaints of political activity by churches and other charities. This effort was institutionalized as the “Political Activities Compliance Initiative” (“PACI”). The publicity given to the PACI probably generated an increase in the number of complaints about improper political activity, as ideological opponents were (and are) motivated to provoke an IRS examination (audit). Even if the IRS finds that no political activity occurred, any such audit is disruptive, requires the subject EO to spend significant funds defending itself, and may lead the subject EO to avoid political activities in the future.

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11 Neither the Code nor the regulations define “flagrant.” Accordingly, the ordinary definition must be relied on, e.g., “shockingly noticeable or evident; . . . notorious; scandalous.” [https://www.dictionary.com/browse/flagrant](https://www.dictionary.com/browse/flagrant).
As part of the PACI, in early 2006, the IRS issued Fact Sheet 2006-17, and subsequently, Revenue Ruling 2007-41, explaining its view of the law and providing numerous examples illustrating the application of the rules. These materials, along with many other IRS reports and articles about political campaign activity by §501(c)(3) EOs are available at https://www.irs.gov/charities-non-profits/charitable-organizations/political-campaign-intervention-by-501c3-tax-exempt-organizations-educating-exempt-organizations, and should be reviewed by the responsible personnel of every §501(c)(3) organization that is considering becoming involved in voter education, voter registration, or get-out-the-vote activities. Although not precedential, the 2002 CPE article by Jack Reilly and Judy Kindell is a very important source of guidance and insight.

Suffice it to say that the statute and regulations provide little practical guidance to the charity leader who is diligently attempting to ascertain which activities are permitted, and which are not. Although the IRS and the courts have issued a number of rulings and judicial opinions addressing these issues (discussed below), except for three activities that are prohibited per se, the question turns on a review of all of the relevant facts and circumstances, and slight variations in the facts might well produce a different result.

For this reason, as it did in Rev. Rul. 2004-6 with respect to the distinction between lobbying and political activity, the IRS needs to issue more guidance. Practitioners routinely field questions from clients for which the guidance discussed in this monograph provides no clear answers, primarily because most of the issues are decided on the basis of all the relevant facts and circumstances.

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14 The Political Activities Compliance Initiative has since been terminated as a separate program. However, the IRS remains sensitive to complaints about improper political activities by §501(c)(3) EOs, and since the Supreme Court has permitted corporations to make independent expenditures in elections, Citizens United v. Federal Election Commission, 558 U.S. 310 (2010), about whether certain §501(c)(4) EOs are engaging in political activity as their primary activity.

IRS Reticence to Litigate

The good news for practitioners and their clients is that when opposed on First Amendment grounds, or confronted with a reasonable challenge to its facts and circumstances analysis, the IRS often backs down. For example, in one audit, a medical membership association (exempt under §501(c)(3)) concerned with Medicare reimbursement rates for certain procedures published in-district billboards thanking certain legislators for supporting their position, generally during the summer and early fall. The billboards did not mention any impending election, whether the legislator was a candidate for re-election, or the legislator’s opponent (if any). The IRS determined that those ads, when published in a non-election year were not campaign intervention (even though all of the legislators were candidates for re-election), but the same ads, published in the election year, were campaign intervention. The organization protested the proposed assessment of the §4955 excise tax, claiming that the ads were not campaign intervention under the facts and circumstances analysis announced in Rev. Rul. 2004-6; that the IRS inconsistently treated the legislators as non-candidates in one year, and candidates in the next; and that the statute and regulations, as applied, were void for vagueness because no reasonable person could have known that the billboard ads were campaign intervention. A year later, the IRS notified the EO that it had determined that the ads were not campaign intervention, and the audit was being closed without change.

H. Applicability to other exempt organizations

The IRS’ treatment of various kinds of activities as “intervention in a campaign for public office” is important for other kinds of tax-exempt organizations. The IRS considers political activity to be outside the exempt purposes of non-§501(c)(3) EOs, and thus, if political activity is their primary activity, their exemption under §501(c) may be revoked, and they may be reclassified as a political committee described in §527. In addition, any EO (other than one exempt under §501(c)(3)) is subject to a tax on its expenditures for political activities equal to 21% of the lesser of (1) its expenditures for political activities or (2) its net investment income.

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16 See text at pages 10-11.

17 PLR 20124035 (Jan. 11, 2012)(applicant denied exemption under §501(c)(4) due to support for foreign candidate); GCM 34985 (Aug. 10, 1972)(political activity is not a “fraternal” activity for purposes of §501(c)(8) and §501(c)(10)).

18 The tax imposed by §527(f) is reported on Form 1120-POL and paid when the return is filed.
II. **PER SE PROHIBITED ACTIVITIES**

Three types of activities are prohibited *per se*: Candidate endorsements or denouncements; candidate ratings; and contributions of cash, goods, the use of property, or services to a campaign.

A. **Candidate endorsements and denouncements**

An EO may not, as a matter of its official position, endorse or oppose a candidate for public office. Thus, a pastor speaking from the pulpit or otherwise in his capacity as the pastor, may not urge his audience to vote for or against a particular candidate. Likewise, a church may not publish an article in its newsletter, or place an advertisement exhorting readers to vote for or against a particular candidate. The rule is well-illustrated by the case of *Branch Ministries v. Rossotti*, involving the denouncement by a church of Bill Clinton, then a candidate for President. In 1992, only days before the election, The Church at Pierce Creek, in Binghamton, New York, placed a full-page advertisement in *USA Today* and the *Washington Times*. The advertisement highlighted Mr. Clinton’s support for abortion on demand, civil rights for homosexuals, and the distribution of condoms to high school students, and then asked, “How then can we [Christians] vote for Bill Clinton?” (The Church’s advertisement did not tell Christians whether to vote for then-President George H.W. Bush, running for re-election, or for Ross Perot, running as the candidate of the Reform Party.) Ironically, the advertisement also stated, “Tax-deductible contributions for this advertisement gladly accepted.”

Despite its reticence to act against §501(c)(3) EOs on account of their political activities, the IRS did not shrink from this challenge and, in 1995, revoked the Church’s exemption. The Church litigated the issue and the trial court summarily upheld the IRS’ revocation. On appeal, the Court of Appeals gave equally short shrift to the Church’s arguments.

The Church first argued that the Internal Revenue Service did not have statutory authority to revoke a church’s tax-exempt status, because the Church’s exemption is derived not from §501(c)(3), but from the lack of any provisions in the Internal Revenue Code for the taxation of churches. The Court of Appeals concluded that the Church Audit Protection Act expressly

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19 G.C.M. 39414 (Feb. 29, 1984); Rev. Rul. 2007-41, Example 21 (statement on website).

20 At that time, actions against EOs for political activity were (and except for the short-lived PACI, still are) rare.

21 211 F.3d 137 (D.C. Cir. 2000).

22 Codified at I.R.C. §7611.
authorizes the IRS to revoke the tax-exempt status of a church in certain circumstances, including when a church is not exempt by reason of its failure to satisfy §501(c)(3).

The Church also challenged the IRS’ authority, based on the Free Exercise Clause of the First Amendment and the Religious Freedom Restoration Act. The court found that under either rule the Church must first establish that its Free Exercise rights had been substantially burdened. The court denied the Church’s predicate that “withdrawal of a conditional privilege for failure to meet the condition is in itself an unconstitutional burden on its Free Exercise Right.” The Church’s assumption is true only when “the receipt of the privilege (in this case the tax-exemption) is conditioned upon conduct proscribed by a religious faith, or...denie[d]...because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs.” Because the Church did not also argue that withdrawing from electoral politics would violate its beliefs, and the sole effect of the loss of exemption might be some decrease in the amount of money available to the Church for its religious practices, that burden was not constitutionally significant. In fact, the court suggested that even that burden was overstated, because no tax is assessed on gifts, and if the Church does not intervene in future political campaigns, it may hold itself out as a §501(c)(3) organization without re-applying for exemption.

Finally, the court noted that the Church had alternate means by which to communicate its sentiments about candidates for public office. Following the Supreme Court’s decision in 

Regan v. Taxation With Representation, the court observed that the Church could form a related §501(c)(4) organization, which could then sponsor a political action committee in order to participate in political campaigns.

Because the church had failed to show that its religious activities were substantially burdened by revocation of its tax-exempt status, the court did not consider whether the prohibition serves a compelling government interest, or, if so, whether revocation of exemption was the least restrictive

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23 42 U.S.C. §2000bb et seq. The federal government “may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least retroactive means of furthering that compelling government interest.” 42 U.S.C. §2000bb-1(b).


means of furthering that interest.\textsuperscript{26}

In an earlier case, \textit{Christian Echoes National Ministry, Inc. v. United States}\textsuperscript{27} the court agreed with the IRS that a religious corporation whose publications attacked candidates and incumbents considered to be too liberal, and urged its followers to elect conservatives, including Strom Thurmond and Barry Goldwater, violated the prohibition on participation in political campaigns. The court in \textit{Christian Echoes} overruled the trial court's Free Exercise analysis (prohibiting the IRS from evaluating the organization's activities as "religious" or "political" for purposes of denying tax-exempt status), and concluded that revocation of exemption was the least restrictive means of upholding the Government's "overwhelming and compelling...interest: That of guarantying [sic] that the wall separating church and state remain [sic] high and firm."\textsuperscript{28}

Notwithstanding these precedents, the IRS has repeatedly failed to revoke exemptions or assess the §4955 excise tax against churches and other organizations whose leaders have endorsed or denounced candidates from their pulpits.

\textbf{All Saints Episcopal Church, Pasadena, California.} On the Sunday before the 2004 presidential election, the Church’s retired rector, Rev. George Regas, preached a sermon that was critical to some degree of both President Bush (then campaigning for re-election) and his opponent, Senator Kerry. However, although Rev. Regas disclaimed endorsing any candidate, or telling the congregation for whom they should vote, the sermon was far more critical of President Bush than of Senator Kerry, and a reasonable person could easily have interpreted it as an implicit endorsement of Senator Kerry. Upon learning of the sermon, the IRS audited the Church, and issued Information Document Requests and, subsequently, summonses, to the Church. The Church refused to respond to these demands, arguing that any alleged violation of the prohibition on political activity was protected by the Free Exercise Clause.\textsuperscript{29} When the IRS asked the Justice Department to enforce the summonses, it declined to do so, and the IRS was forced to drop the audit.

\textsuperscript{26} In \textit{Regan v. Taxation With Representation}, the court agreed that the government had a compelling interest in protecting the integrity of the tax code.

\textsuperscript{27} 470 F.2d 849 (10th Cir. 1972).

\textsuperscript{28} \textit{Id.} 470 U.S. at 857. The problem with this analysis is that it makes protecting a particular (and in this author’s opinion, probably incorrect) interpretation of the First Amendment a "compelling state interest."

\textsuperscript{29} Another complicating fact is that the speaker was the \textit{retired} rector, and the IRS may not have been able to successfully attribute his remarks to the Church.
NAACP. In 2004, the IRS opened an audit of the NAACP, based on allegations that the speech made by its then-Chairman, Julian Bond, at its convention in the summer of 2004 included statements critical of President Bush’s policies on education, the economy, and the war in Iraq. Like All Saints Church, the NAACP refused to cooperate with the audit, and in August 2006, the IRS closed the audit without adverse action.

Pulpit Freedom Sunday. Since 2008, Alliance Defending Freedom, a public interest law firm that litigates on behalf of religious liberty, has sponsored an annual “Pulpit Freedom Sunday,” about a month before Election Day. ADF encourages pastors to expressly endorse and/or denounce candidates, and to send transcripts or videos of their sermons to the IRS. As many as 1800 churches have participated. To date, to the best of anyone’s knowledge, the IRS has not taken any action against participating churches.

The IRS’ retreat from the field has led to calls (to date, unsuccessful) to repeal or limit the prohibition on campaign intervention, most notably to permit churches and other charities to endorse or oppose candidates, provided they do so in the ordinary course of their exempt-purpose activities and they incur no substantial expense to do so.30 H.R. 781 (115th Congress) would have permitted any §501(c)(3) organization to make election-related statements “in the ordinary course of the organization’s regular and customary activities in carrying out its exempt purpose” for which it did not incur “more than de minimis incremental expenses.” The advantage of these proposals is that they codify the IRS current enforcement stance, and remove the in terrors effect that otherwise chills speech. Opponents claim they would subject charities to demands from major donors to make such statements. The actual effect of such statements is unknown.

B. Candidate ratings

Another form of endorsement is the rating of candidates, usually based on the extent to which the candidates’ views or qualifications on those issues that the EO views as important align with those of the EO. These, too, are prohibited per se, because they both endorse those candidates who are rated favorably, and implicitly oppose those candidates who are rated unfavorably.

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In *Association of the Bar of the City of New York v. Commissioner*, the issue of whether the Association’s activities in rating candidates for appointed and elected judgeships at the municipal, state, and federal level disqualified it from exemption under §501(c)(3). The Association’s Committee on the Judiciary considers a candidate’s professional ability, experience, character, temperament, and the possession of such special qualifications as the Committee deems desirable for judicial office. It then rates the candidate as either “approved”, or “not approved” or “approved as highly qualified.” The ratings are communicated to the public in the form of press releases and are published in *The Record of the Association of Bar of the City of New York*, a regular publication of the Association which is sent out to the Association members and approximately 120 other subscribers, including libraries and law schools. A “not approved” rating may be accompanied on occasion by a short statement explaining the reasons for the rating.

The Association, which was already exempt under §501(c)(6), applied for exemption under §501(c)(3), and the IRS denied the application on the basis that the Association’s ratings of judicial candidates constituted impermissible participation in or intervention in a political campaign. Although the Tax Court held that the Association’s ratings were not prohibited political activities, the Court of Appeals reversed, citing the Tax Court’s conclusion that it is “obvious that the ratings were published with the hope that they will have an impact on the voters.” That the Association’s ratings were published without reference to any party affiliation did not help the Association, because an individual may campaign for public office as an independent candidate, apart from any political party nomination or endorsement. The court also countered the Association’s assertion that its rating activity involved merely the collection and limited dissemination of objective data, by pointing out that the Tax Court concluded “that ratings, by their very nature, necessarily will reflect the philosophy of the organization conducting such activities,” and they are simply expressions of ‘professional opinion’ concerning the candidate’s qualifications.


32 858 F.2d at 877.

33 See GCM 39441 (Sept. 27, 1985).

34 858 F.2d at 880. See also Rev. Rul. 67-71, 1967-1 C.B. 125 (nonprofit organization created to improve a public educational system does not qualify for §501(c)(3) status when it publicly announces a slate of favored candidates); TAM 9635003 (April 19, 1996).
More recently, the Assistant Chief Counsel (Employee Benefits and Exempt Organizations) concluded that a church may have engaged in prohibited political activities in connection with an insert in the church bulletin “recommending” certain candidates. The facts indicate that the church bulletin was routinely provided to those attending church services. On one particular Sunday, the bulletin included a one-page document insert indicating that certain candidates were “recommended” for office. The Office of the Chief Counsel concluded that revocation of exemption may be appropriate unless the church “provides evidence sufficient to show that the distribution of the insert was inadvertent, unauthorized, or otherwise not attributable to the church.”

C. Campaign contributions

Finally, although it may seem to be so obvious as to be unnecessary to address, charities may not contribute cash, goods, or services in support of a candidate for public office. Thus, for example, a charity may not contribute money, nor permit a campaign committee to use its office equipment or supplies without charging an amount at least equal to the value provided. Likewise, a charity may not permit its employees to provide services to a campaign during their work time, or to use the charity’s resources in the course of their work for the campaign. Of course, this would not preclude an employee from working for a campaign after hours, on weekends, or while taking normal vacation or other permissible leave from his or her duties for the charity.

III. OTHER ACTIVITIES

Aside from endorsements, ratings, and contributions, whether an organization has engaged in prohibited participation in a political campaign depends on all of the facts and circumstances, focusing specifically on whether an activity, or some significant aspect of it, is “biased” in favor of or against one or more candidates.

In addition, the IRS has declared that it will not follow the “express advocacy” rule established by the Supreme Court in interpreting the Federal Election Campaign Act.

M has argued that there must be more than evidence of bias in this fundraising letter for or against candidates running for public office in order for M to be found

35 Field Service Advice 1998-209 (Sept. 21, 1993). See text accompanying footnotes 69 and 70.

36 Such activities, when conducted by a corporation, may also violate prohibitions against corporate contributions to candidates in applicable federal or state election laws.
to have violated the section 501(c)(3) political intervention prohibition. However, in respect to this prohibition there is no “express advocacy” rule as was required by the Supreme Court in *Buckley v. Valeo*, 424 U.S. 1 (1976) and *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986), in regard to influencing federal elections under the jurisdiction of the Federal Election Commission. For purposes of section 501(c)(3), intervention in a political campaign may be subtle or blatant. It may seem to be justified by the press of events. It may even be inadvertent. The law prohibits all forms of participation or intervention in “any” political campaign.  

However, distributing bumper stickers saying “I’m Fed Up With Congress” “does not rise to the level of expressing a position on any individual candidate or candidates.”

Although the communication refers to no specific candidate, this question presents a close call. A communication may attempt to influence a political campaign without naming a specific candidate. Such communication, however, should contain some relatively clear directive that enables the recipient to know the organization’s position on a specific candidate or a specific slate of candidates. The “I’m Fed Up With Congress” communication does not clearly indicate whether X supports or opposes a specific candidate or slate of candidates. While it expresses a general dissatisfaction with Congress, it does not rise to the level of expressing a position on any individual candidate or candidates. This communication could be viewed as focusing attention on the perceived abuses of the Congress or as a way to send a message of disgust to members of Congress. The fact that no statement was made on an individual’s qualifications, or lack thereof, for public office supports this view. Moreover, not all members of Congress were candidates for office in the elections of the year aa. This communication does not clearly support or oppose any single candidate or identifiable group of candidates (such as by party or a geographic location). Additionally, there is no indication in the file that the letter was sent only to specific states or congressional districts in which congressional elections targeted by the organization were occurring. Our determination with respect to this communication might be different if evidence in the file indicated that the communication was aimed at a specific candidate, specific candidates, or a specific ticket of candidates.  

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37 Technical Advice Memorandum 9609007 (Dec. 6, 1995). See also TAM 8936002 (May 24, 1989) (“We are not convinced that the Supreme Court’s express advocacy standard is controlling in interpreting section 501(c)(3)...”).

38 TAM 199907021.
A. **Voter guides**

The most contentious area that arises when a church seeks to involve itself in the political process without violating the Internal Revenue Code is the extent to which voter guides may be considered to evidence bias in favor of or against a candidate.

1. **Rev. Rul. 78-248**

The principal IRS ruling addressing this issue is Rev. Rul. 78-248. In that ruling, the IRS considered four situations.

**Situation 1**

Organization A has been recognized as exempt under section 501(c)(3) of the Code by the Internal Revenue Service. As one of its activities, the organization annually prepares and makes generally available to the public a compilation of voting records of all Members of Congress on major legislative issues involving a wide range of subjects. The publication contains no editorial opinion, and its contents and structure do not imply approval or disapproval of any Members or their voting records.

The "voter education" activity of Organization A is not prohibited political activity within the meaning of section 501(c)(3) of the Code.

The IRS' conclusion in Situation 1 is not controversial, but it addresses a relatively uncommon fact pattern. First, the publication is not, technically speaking, a "voter guide." Instead, it is a "legislative scorecard" that reports on the voting records of incumbent legislators. Second, few organizations are willing to devote the resources necessary to prepare and publish a compilation of the voting records of all incumbents on a significant number and wide range of legislative issues. And finally, in any election campaign, some incumbents are not running for re-election, and this type of "voter guide" would provide no useful information with respect to those campaigns.

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Situation 2

Organization B has been recognized as exempt under section 501(c)(3) of the Code by the Internal Revenue Service. As one of its activities in election years, it sends a questionnaire to all candidates for governor in State M. The questionnaire solicits a brief statement of each candidate’s position on a wide variety of issues. All responses are published in a voters guide that it makes generally available to the public. The issues covered are selected by the organization solely on the basis of their importance and interest to the electorate as a whole. Neither the questionnaire nor the voters guide, in content or structure, evidences a bias or preference with respect to the views of any candidate or group of candidates.

The “voter education” activity of Organization B is not prohibited political activity within the meaning of section 501(c)(3) of the Code.

Situation 2 is also relatively noncontroversial, but, again, it does not frequently occur in campaigns. In addition, the IRS has usually taken the position that an EO may not report that a candidate failed to respond to its questionnaire. Unfortunately, the IRS has refused to explain why such a truthful response cannot be published or why the publication of that information is evidence of bias against a candidate who has chosen, perhaps after repeated attempts to contact the campaign, not to respond to the EO’s questionnaire.

Situation 3

Organization C has been recognized as exempt under section 501(c)(3) of the Code by the Internal Revenue Service. Organization C undertakes a "voter education" activity patterned after that of Organization B in Situation 2. It sends a questionnaire to candidates for major public offices and uses the responses to prepare a voters guide which is distributed during an election campaign. Some questions evidence a bias on certain issues. By using a questionnaire structured in this way, Organization C is participating in a political campaign in contravention of the provisions of section 501(c)(3) and is disqualified as exempt under that section.

Situation 3 is controversial, precisely because the IRS fails to address the question regarding how the questions evidence bias on certain issues. Situation 3 also shares the weakness of Situation 2 in that the IRS takes the position that an EO publishing a voter guide is not permitted to report that a candidate failed to respond to its questionnaire.
Situation 4

Organization D has been recognized as exempt under section 501(c)(3) of the Code. It is primarily concerned with land conservation matters.

The organization publishes a voters guide for its members and others concerned with land conservation issues. The guide is intended as a compilation of incumbents' voting records on selected land conservation issues of importance to the organization and is factual in nature. It contains no express statements in support of or in opposition to any candidate. The guide is widely distributed among the electorate during an election campaign. While the guide may provide the voting public with useful information, its emphasis on one area of concern indicates that its purpose is not nonpartisan voter education.

By concentrating on a narrow range of issues in the voters guide and widely distributing it among the electorate during an election campaign, Organization D is participating in a political campaign in contravention of the provisions of section 501(c)(3) and is disqualified as exempt under that section.

Situation 4, which arguably presents the most common fact pattern, is also quite controversial, because it prohibits an exempt §501(c)(3) EO that is concerned with a single issue or a set of related issues from educating the public about the candidates’ positions with respect to that issue or issues. That this conclusion is probably wrong is also indicated by the fact that a “widely distributed” voter guide is virtually certain to be distributed to a large number of people who may be opposed to the EO’s positions on those issues, and who may thereby be motivated to vote for a candidate who may in fact be opposed by the EO.

2. Rev. Rul. 80-282

Two years later, the IRS amplified Rev. Rul. 78-248 by publishing Rev. Rul. 80-282. Rev. Rul. 80-282 considers the publication of summary of the voting records of all incumbent members of Congress on selected legislative issues important to the organization publishing the summary, together with an expression of the organization’s position on those issues. Each member’s votes were to be recorded in a way that illustrates whether he or she voted in accordance with the organization’s position on the issue.

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Like Situation 1 in Rev. Rul. 78-248, this publication was not a voter guide, but a legislative scorecard. The reason is that—

[1]he newsletter is to be politically non-partisan, and will not contain any reference to or mention of any political campaigns, elections, candidates, or any statements expressly or impliedly endorsing or rejecting any incumbent as a candidate for public office. No mention will be made of an individual’s overall qualifications for public office, nor will there be any comparison of candidates that might be competing with the incumbent in any political campaign. The voting records of all incumbents will be presented and candidates for re-election will not be identified. The newsletter will point out the limitations of judging the qualifications of an incumbent on the basis of a few selective votes and will note the need to consider such unrecorded matters as performance on subcommittees and constituent service.

The ruling also noted that “publication usually will occur after congressional adjournment and will not be geared to the timing of any federal election. The newsletter will be distributed to the usual subscribers, and will not be targeted towards particular areas in which elections are occurring.”

After reviewing Situations 3 and 4 of Rev. Rul. 78-248, the IRS concluded that although the format and content of the publications are not neutral, because the organization (1) did not refer to election matters; (2) pointed out that other factors should be considered in determining the qualifications of an incumbent; and (3) distributed the publication only to the normal readership of the newsletter, a few thousand people nationwide, the publication did not constitute participation or intervention in a political campaign.

3. **Fact Sheet 2006-17**

Although Fact Sheet 2006-17 provides no examples of voter guides, it does elaborate on the factors the IRS will consider in determining whether a voter guide violates the prohibition on campaign intervention:

Voter guides are usually pamphlets or other short documents, often in chart form, intended to help voters compare candidates’ positions on a set of issues. Preparing or distributing a voter guide may violate the prohibition against political campaign intervention if the guide focuses on a single issue or narrow range of issues, or if the questions are structured to reflect bias. Although any document that identifies candidates and their positions close in time to an election has the potential to result in political campaign intervention, preparation or
distribution of voter guides, because of their nature, present a particular risk for non compliance [sic]. The following factors are key considerations in whether a voter guide can be distributed to educate voters without violating the prohibition on political campaign intervention.

- Whether the questions and any other description of the issues are clear and unbiased in both their structure and content.

- Whether the questions posed provided to the candidates are identical to those included in the voter guide.

- Whether the candidates are given a reasonable amount of time to respond to the questions. If the candidate is given limited choices for an answer to a question (e.g. yes/no, support/oppose), whether the candidate is also given a reasonable opportunity to explain his position in his own words and that explanation is included in the voter guide.

- Whether the answers in the voter guide are those provided by the candidates in response to the questions, including whether the candidate's answers are unedited, and whether they appear in close proximity to the question to which they respond.

- Whether all candidates for a particular office are covered.

- Whether the number of questions, and the subjects covered, are sufficient to encompass most major issues of interest to the entire electorate.

In assessing whether a voter guide is unbiased and nonpartisan, every aspect of the voter guide's format, content and distribution must be taken into consideration. If the organization’s position on one or more issues is set out in the guide so that it can be compared to the candidates’ positions, the guide will constitute political campaign intervention.

One question not resolved is whether a voter guide must provide information about all qualified candidates. The IRS has provided some guidance applicable to the exclusion of legally qualified candidates from debates or forums. While this is helpful, because of the distinctions between a candidate debate or forum and a voter guide, organizations publishing voter guides may have less flexibility to exclude candidates than those sponsoring candidate debates and forums.

41 See text accompanying footnote 44.
B. Candidate forums and debates

Another way in which churches and other charities may influence public opinion during election campaigns is to sponsor candidate forums and debates where candidates can address issues of interest to the electorate. By having one or more candidates present in the same event, those attending (in person or by electronic media) are better able to compare and contrast the candidates’ views.

The IRS issued guidelines regarding the conduct of such forums and debates in Rev. Rul. 86-95. In Rev. Rul. 86-95, the IRS concluded that the conduct of candidate forums that provide fair and impartial treatment of candidates, and that do not promote or advance one candidate over another, do not constitute participation or intervention in a political campaign on behalf of or in opposition to any candidate for public office. The facts indicate that the §501(c)(3) sponsor would invite all legally qualified candidates for the office in question to participate. The agenda would cover a broad range of issues, including, but not limited to, those issues considered to be important to the sponsors and sponsor’s members; questions to the candidates would be presented by a nonpartisan, independent panel of knowledgeable persons composed of representatives of the media, educational organizations, community leaders, and other interested persons; each candidate would be allowed an equal opportunity to present his or her views on each of the issues discussed; the moderator would ensure that the ground rules are followed by all participants; and at the beginning and end of each forum, the moderator would state that the views expressed are those of the candidates and not those of the organization, and that the organization’s sponsorship of the forum is not intended as an endorsement of any candidate.

The IRS has also concluded that in some cases, it is not necessary for an organization to invite all legally qualified candidates to participate in candidate forums and debates.

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42 1986-2 C.B. 73.

43 See also Rev. Rul. 74-574, 1974-2 C.B. 160 (a nonprofit educational broadcasting station is not participating in political campaigns by providing reasonable amounts of air time equally available to all legally qualified candidates for office, in compliance with the then-prevailing “reasonable access” provision of the Communications Act of 1934); Fulani v. League of Women Voters Educational Fund, 882 F.2d 621 (2nd Cir. 1989) (League’s failure to permit independent party candidate for President to participate in separate primary-season debates for Democratic Party candidates and Republican Party candidates did not constitute impermissible political activity because plaintiff was not a candidate for the nomination of either party); Rev. Rul. 62-156, 1962-2 C.B. 47 (a business’ expenditures to sponsor and promote a “politically impartial” candidate debate were not expenditures for a “political campaign purpose”).

In circumstances where the number of legally qualified candidates for a particular office is large, a sponsoring organization exempt under section 501(c)(3) of the Code might determine that holding a debate to which all legally qualified candidates were invited would be impracticable and deter [sic] from the educational purposes of the organization. In determining whether a section 501(c)(3) organization participates or intervenes in a political campaign when it holds a candidate debate to which not all legally qualified candidates are invited, all the facts and circumstances must be considered including the following:

(1) Whether inviting all legally qualified candidates is impracticable;

(2) Whether the organization adopted reasonable, objective criteria for determining which candidates to invite;

(3) Whether the criteria were applied consistently and non-arbitrarily to all candidates; and

(4) Whether other factors, such as those discussed in Rev. Rul. [86-95], indicate that the debate was conducted in a neutral, non-partisan manner.

M’s decision to invite only the candidates from O and P parties and up to four candidates who had reached a 15 percent share of popular support as reflected in at least one recognized credible and independent State-wide poll would appear to accentuate the educational nature of the forums and still ensure a meaningful field of candidates for worthwhile forums, while allocating for [sic] the organization’s limited space and time.

C. Candidate appearances and speeches

Appearances by individual candidates at activities of §501(c)(3) EOs—apart from a multi-candidate forum or debate—can pose thorny issues for the EO. Again, the “neutrality” principle must be used to determine whether the activity is prohibited.

- Do all candidates have an equal opportunity to speak in the same kind of event? The IRS confirmed that a charity will not be treated as intervening in a political campaign because an invited candidate declines to participate.\(^{45}\)

If the candidate’s presence is merely acknowledged, is equal treatment accorded to all candidates who may be present at other times?

If the candidate is permitted to speak or is acknowledged because she is an incumbent, is there any mention of the individual’s candidacy, the election, or voting?

Do any campaign activities—e.g., distributing promotional literature, buttons, or bumper stickers—occur on the EO’s premises in connection with the candidate’s attendance or speech?

D. **Appearances as a non-candidate**

A §501(c)(3) organization may invite a candidate to speak or otherwise participate in an event as an individual; as a public official; or as an expert in a subject. In such cases, the organization will not be considered to have participated or intervened in a political campaign if—

- The individual is chosen to speak solely for reasons other than candidacy for public office;
- The individual speaks only in a non-candidate capacity;
- Neither the individual nor any representative of the organization makes any mention of his or her candidacy or the election;
- No campaign activity occurs in connection with the candidate’s attendance; and
- The organization maintains a nonpartisan atmosphere on the premises or at the event where the candidate is present.

In addition, the organization should clearly indicate the capacity in which the candidate is appearing and should not mention the individual’s political candidacy or the upcoming election in the communications announcing the candidate’s attendance at the event.46

E. Constituent activity

An EO may encourage its members and other constituents to be active in the political process. To this end, it may generally teach about the importance of democracy, engagement in the electoral process, activity in political campaigns, and campaigning for public office.47

F. Voter registration drives and “get-out-the-vote” activities

The IRS has infrequently addressed the conduct of voter registration drives and get-out-the-vote (“GOTV”) activities by public charities.48 In any event, like most other activities, voter registration and GOTV drives must be conducted in a nonpartisan manner, without bias for or against any candidate. The IRS has identified four factors that it would consider in making this determination:49

1. Whether no candidate is named or depicted, or all candidates for a particular Federal office are named or depicted without favoring any candidate over any other in the voter registration or get-out-the-vote drive communication;

2. Whether the communication names no political party except that [sic] for identifying the political party affiliation of all candidates named or depicted;

3. Whether the communication is limited to urging acts such as voting and registering and to describing the hours and places of registration and voting; [and]

4. Whether all voter registration and get-out-the-vote drive services are made available without regard to the voter’s political preference.50

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47 See Rev. Rul. 72-512, 1972-2 C.B. 246 (political science course may require students to participate in the political campaign of their choice without jeopardizing university’s exemption under §501(c)(3)).

48 Special rules apply to private foundations, but not to other §501(c)(3) EOs. I.R.C. §4945(d)(3), (f); 26 CFR §53.4945-3.


50 Id., Example 2 (transportation offer made only to voters who agree with EO’s position on key issues is campaign intervention).
The IRS also indicates that other facts and circumstances may be considered.

A charity may use voter registration lists to identify unregistered voters, but it may not use a voter registration list to target get-out-the-vote efforts to those who are registered with a particular party.

These principles are illustrated by two examples:

Situation 1. B, a section 501(c)(3) organization that promotes community involvement, sets up a booth at the state fair where citizens can register to vote. The signs and banners in and around the booth give only the name of the organization, the date of the next upcoming statewide election, and notice of the opportunity to register. No reference to any candidate or political party is made by the volunteers staffing the booth or in the materials available at the booth, other than the official voter registration forms which allow registrants to select a party affiliation. B is not engaged in political campaign intervention when it operates this voter registration booth.

Situation 2. C is a section 501(c)(3) organization that educates the public on environmental issues. Candidate G is running for the state legislature and an important element of her platform is challenging the environmental policies of the incumbent. Shortly before the election, C sets up a telephone bank to call registered voters in the district in which Candidate G is seeking election. In the phone conversations, C’s representative tells the voter about the importance of environmental issues and asks questions about the voter’s views on these issues. If the voter appears to agree with the incumbent’s position, C’s representative thanks the voter and ends the call. If the voter appears to agree with Candidate G’s position, C’s representative reminds the voter about the upcoming election, stresses the importance of voting in the election and offers to provide transportation to the polls. C is engaged in political campaign intervention when it conducts this get-out-the-vote drive.

The IRS has approved a public charity’s financial support for a nonpartisan voter registration program to be conducted--

in multiple jurisdictions based on the demographic concentration of individuals who have historically shown low voter response. Trained staff and volunteers

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51 Rev. Rul. 2007-41, Examples 1 and 2
will set out in these areas to register voters with a focus not on candidates or parties, but on participation and involvement.

The public charity planned to enter into agreements with unidentified local organizations (which are not identified as being exempt under Sec. 501(c)(3)) which would actually carry out the voter registration program, using a field manual and quality control manual developed by the public charity.52

The IRS has also ruled that payments for politically impartial advertising designed to encourage the public to register and vote, and the expenses incurred to give employees paid time off to register or vote, are not expenditures “for a political campaign purpose.”53

In an audit, the IRS did not object to a voter registration drive carried on by a church on multiple Sunday mornings, even though the demographic profile of the congregation would lead a reasonable observer to conclude that the vast majority of those registered would probably support candidates from one political party. Various reasons for this position could include the absence of any express partisan statements or restrictions; or the fact that the church was dealing with its own constituents with respect to voting as a civic duty. The former is inconsistent with the IRS’ general approach to campaign intervention, which does not require express advocacy. The latter doesn’t have any basis in the law or regulations.

**Query:** Would the IRS change its position if, e.g. a church conducted a registration drive in a neighborhood with similar demographics on the other side of the city, and where it has no parishioners and conducts no other religious or charitable activity?

**Private foundations.** In addition to being prohibited from engaging in any activity in support of or in opposition to any candidate for elective public office, private foundations are generally prohibited from making any expenditure to influence the outcome of any specific public election, or to carry on, directly or indirectly, any voter registration drive.54 However, a private foundation may make a grant to a public charity for voter registration or “get-out-the-vote” activities, provided the public charity has all of the following four characteristics:55

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52 PLR 201137012 (June 21, 2011). This ruling was probably requested so the public charity could request grants from private foundations to conduct the voter registration activity.


54 I.R.C. §4945(d)(2).

55 I.R.C. §4945(f).
Its activities are nonpartisan, are not confined to one specific election, and are carried on in five or more states;

Substantially all [at least 85%] of its income is expended directly for the active conduct of the activities constituting its purpose or function [as opposed to making grants to other charities];

Substantially all [at least 85%] of its support (other than gross investment income) is received from other exempt organizations, the general public, government agencies, or any combination of those; not more than 25 percent of its support is received from any one exempt organization; and not more than half of its support is received from gross investment income; and

The contributions to which for voter registration drives are not subject to conditions that they may be used only in specified jurisdictions, or that they may be used in only one specific election period.

G. Facilitating contributions by employees

A charitable employer may enable employees to make contributions by payroll to the candidate of their choice without violating the prohibition on political activity. However, a charitable employer cannot offer payroll deduction contributions to only one political action committee or candidate committee. But, pursuant to a collective bargaining agreement, a charity may administer a payroll deduction plan for contributions only to union-sponsored PACs, provided it is reimbursed by the PAC for all expenses it incurs in doing so. The rationale was that the charity was simply acting as the agent of its unionized employees.

H. Internet-related activities

The “neutrality principle” also applies to an EO’s communications on its website. For example, if the EO includes statements by candidates regarding their position on one or more public policy

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57 Technical Advice Memorandum 200446033 (June 14, 2004)(hospital system permitted employees to contribute by payroll deduction only to PAC sponsored by trade association of which it was a member).

58 PLR 200151060 (Sept. 27, 2001).
issues, it should include statements, insofar as they are available, from all candidates for the office in question.\textsuperscript{59} Likewise, if an EO provides a link to a candidate’s website, a link should also be provided to the website of all other candidates for the office.\textsuperscript{60} However, a link on an EO’s website, to information related to its exempt purposes on the website of an unrelated organization, e.g., a magazine or newspaper, that otherwise endorses a candidate, does not necessarily lead to the conclusion that the EO has endorsed the candidate.\textsuperscript{61}

**Related organizations.** Charities that are related to §501(c)(4) or other exempt organizations that may engage in some political activity need to be careful that the political activities engaged in by the related organization are not attributed to the charity. This is usually not a problem, as long as the non-charitable sponsor of the political activities is clearly identified and the activities are actually paid for by the non-charitable organization. However, in one case, a charity was found to have intervened in a political campaign because information about political activities conducted by a §501(c)(4) organization controlled by the charity was included on web pages on the charity’s website, and there was not sufficient visual cues to make it clear that the pages in question belonged to the §501(c)(4) organization.\textsuperscript{62}

**Links to other websites.** Charities also need to be careful about linking to political information on other websites. On July 28, 2008, the IRS issued a memorandum to all exempt organizations revenue agents, discussing how examination agents should evaluate the effect of links from a charity’s website to information about election campaigns on the websites of related and unrelated organizations.\textsuperscript{63}

There are several possible characterizations of such links. One suggests the link is akin to a referral from one source of information to another that the viewer can pursue or not pursue at his or her discretion. Another suggests the link is analogous to a distribution by the section 501(c)(3) organization of the information contained on the linked Web page. However, neither of these characterizations appropriately reflects the facts and circumstances in all cases, nor offers a single approach to resolving all such cases. As Revenue Ruling 2007-41 notes, the context for the link

\textsuperscript{59}See text accompanying footnotes 42-45.

\textsuperscript{60} Rev. Rul. 2007-41, Example 19.

\textsuperscript{61} Id., Example 20.

\textsuperscript{62} Technical Advice Memorandum 200908050 (Feb. 20, 2009).

\textsuperscript{63} This memorandum is not on the IRS website. A copy is in the author’s file.
on the organization’s Web site matters, as does the directness of the links between the section 501(c)(3) organization’s Web site and a Web page favoring or opposing a candidate. The principles articulated in the revenue ruling are reinforced by work on these cases which suggests that electronic proximity – including the number of “clicks” that separate the objectionable material from the section 501(c)(3) organization’s Web site – is a significant consideration. To best employ resources in this area, EO will distinguish between cases involving unrelated organizations and those involving related organizations.

Cases Involving Links Between Unrelated Organizations
Where a case involves a link between a section 501(c)(3) organization’s Web site and the site of an unrelated organization (whether or not exempt), EO will pursue the case if the facts and circumstances indicate that the section 501(c)(3) organization is promoting, encouraging, recommending or otherwise urging viewers to use the link to get information about specific candidates and their positions on specific issues. Again, analysis of the context around the link is a key factor. Further, where the facts and circumstances suggest that a section 501(c)(3) organization is using a link between Web sites (other than a link to a related section 501(c)(4) organization, which is discussed below) to indirectly communicate a message that could well be a violation of the law were it done directly, EO will pursue the case.

Cases Involving Links Between Related Organizations
Additional considerations exist, however, in the case of related organizations. Enforcement in this area requires EO to consider the implications of Taxation with Representation of Washington, particularly Justice Blackmun’s concurring opinion. That opinion emphasizes the formal corporate separation between a section 501(c)(3) organization and its related section 501(c)(4) organization. Because this added consideration can complicate the analysis in this area, EO will focus on analyzing the context around a link in the unrelated organization cases, and not pursue, at this time, cases involving a link between the Web site of a section 501(c)(3) organization and the home page of a Web site operated by a related section 501(c)(4) organization.

I. Business activities

As noted above, an EO may not contribute money, or goods or services, such as the use of its mailing list, to a candidate. However, a church or charity may sell or rent goods, or sell services, or the use of facilities, to candidates, provided it deals with all candidates for the same
office on the same terms and, preferably, on the same terms that it deals with other non-political customers for the same goods or services. The following principles apply:

- Services or facilities offered to one candidate must be offered to all.
- Services provided to one candidate (upon request by the candidate) must be available to all (upon request).\(^{64}\)
- Advertising may be sold on the same terms made available to other advertisers.
- The mailing list may be rented on the same terms made available to other users.

The permitted business activities are generally a one-way street. They protect activities in which a political campaign pays for goods or services provided by a §501(c)(3) EO, but not necessarily when an EO pays for commercial services provided by a political party or campaign. In one audit, a §501(c)(3) public policy “think tank” paid for an advertisement in a program for an annual dinner held by a local political party in a state that permits corporate contributions to state or local parties or candidates. The EO’s purpose for advertising was to make itself known to wealthy people attending the dinner who might be inclined to also contribute to the EO. On audit, the IRS suggested the payment was an intervention in a political campaign, but was satisfied with evidence that the payment had been deposited in the party’s general account, and did not benefit any particular candidate.

J. Campaign Ethics

In Rev. Rul. 76-456,\(^{65}\) the IRS considered an organization

formed for the purpose of elevating the standards of ethics and morality that prevail in the conduct of campaigns for election to public office at the national, state, and local levels. In furtherance of this purpose, the organization, on a nonpartisan basis, collects, collates, and disseminates information concerning


\(^{65}\) 1976-2 C.B.151 (superseding Rev. Rul. 66-258). See also Rev.Rul. 60-193, 1960-1 C.B. 195, which held that an organization whose purpose was to educate the public “to stimulate people to a greater degree of interest and participation in governmental and political affairs,” was not exempt under §501(c)(3), but could be exempt under §501(c)(4). Rev. Rul. 60-193 was modified by Rev. Rul. 66-258, and remains modified after Rev. Rul. 76-456.
general campaign practices through the press, radio, television, mail, and public speeches. In addition, the organization furnishes “teaching aids” to political science and civics teachers to help stress the need for ethical conduct in political campaigns.

The organization has proposed a code of fair campaign practices. Although need for the code is extensively publicized, the organization does not solicit the signing or endorsement of the code by candidates for political office.

On these facts, the IRS concluded that the organization could qualify for exemption.

In contrast, in GCM 36557,66 the Office of the Chief Counsel concluded that an organization that publicized the names of candidates who signed, or did not sign, its proposed code of campaign ethics had intervened in a campaign and did not qualify for exemption under §501(c)(3).

IV. **ADVOCACY: POLITICAL OR LEGISLATIVE ACTIVITY?**

A. **Background**

Section 501(c)(3) permits EOs to engage in attempts to influence legislation (lobbying) as an *insubstantial part* of their activities, but *absolutely prohibits* them from intervening in political campaigns. Similarly, organizations that are exempt from federal income tax under §501(c)(4) (“social welfare” or advocacy groups), §501(c)(5)(labor unions), or §501(c)(6)(trade associations) may not engage primarily in political activities, but may engage in lobbying as their primary or exclusive activity. In addition, when an exempt organization influences or attempts to influence “the selection, nomination, election or appointment of any individual to any Federal, State, or local public office,” it becomes subject to tax under §527(f) of the Code.

When looked at in light of the rise of organizations whose activities are, on the surface, limited to lobbying or issue advertising, but which target their advertising in a manner designed to affect elections, these provisions of the Code raise the question of when ostensible attempts to influence legislation may be treated by the IRS as political activity that adversely affects exemption or becomes subject to tax under §527(f).

B. **Rev. Rul. 2004-6**

In Rev. Rul. 2004-6,67 the IRS published a non-exclusive list of the factors that it will consider in determining whether an ostensibly legislative activity should be treated as a political activity that

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is subject to tax under §527(f), and reviewed their use in evaluating six examples of advocacy communications. Although the ruling expressly addressed only non-§501(c)(3) organizations, the IRS uses its analysis in Rev. Rul. 2007-41, and thus churches and other §501(c)(3) organizations that engage in lobbying at or near the time of elections should take heed.

The IRS listed six factors as indicating that an advocacy communication about a public policy issue is intended to influence the selection of an individual for public office:

1. The communication identifies a candidate for public office;
2. The timing of the communication coincides with an electoral campaign;
3. The communication targets voters in a particular election;
4. The communication identifies that candidate’s position on the public policy that is the subject of the communication;
5. The position of the candidate in the public policy issue has been raised as distinguishing the candidate from others in the campaign, either in the communication itself or in other public communications; and
6. The communication is not part of an ongoing series of substantially similar advocacy communications by the organization on the same issue.

The IRS also listed five factors as indicating that an advocacy communication is not intended to influence the selection of an individual for public office:

1. The absence of any of the six factors listed above;
2. The communication identifies specific legislation, or a specific event outside the control of the organization, that the organization hopes to influence;
3. The timing of the communication coincides with a specific event outside the control of the organization that the organization hopes to influence, such as a legislative vote or other major legislative action (for example, a hearing before a legislative committee on the issue that is the subject of the communication);

4. The communication identifies the candidate solely as a governmental official who is in a position to act on the public policy issue in connection with the specific event (such as a legislator who is eligible to vote on the legislation); and

5. The communication identifies the candidate solely in the list of key or principal sponsors of the legislation that is the subject of the communication.

A review of the IRS' evaluations of the activities discussed in the six examples in the ruling indicates that the IRS is significantly more likely to conclude that a communication is legislative advocacy, and not political advocacy, if the communication is part of an ongoing series of communications about the issue, if specific legislation is identified, or if the communication is timed to coincide with an impending event, such as a legislative hearing or vote on legislation related to the topic of the communication.68

V. WHO IS ACTING? PERSONAL vs. ORGANIZATIONAL ACTIVITIES

A. Agency

The IRS has addressed when the acts of an EO official or leader might be attributed to the EO because the individual was acting as an agent of the EO:

A section 501(c)(3) organization acts or communicates with others through the authorized actions of its employees or members. There must be real or apparent authority by the organization of the actions of individuals other than officials [whose authority is presumed] before the actions of those individuals will be attributed to the organization. In general, the principles of agency will be applied to determine whether an individual engaging in political activity was acting with the authorization of the section 501(c)(3) organization. Actions of employees within the context of their employment are considered to be authorized by the organization.

Acts of individuals that are not authorized by the section 501(c)(3) organization may be attributed to the organization if it explicitly or implicitly ratifies the

68 See Rev. Rul. 2007-41, Examples 14-16. Cf. TAM 8936002 (May 24, 1989)(IRS “reluctantly” concluded that organization that ran ads promoting “the liberal posture on war and peace issues,” mostly during the period surrounding an October 1984 debate between the presidential candidates about foreign and defense policy issues, “probably did not intervene in a political campaign”).
actions. A failure to disavow the actions of the individual under apparent authorization from the section 501(c)(3) organization may be considered a ratification of the action. To be effective, the disavowal must be made in a timely manner equal to the original action. The organization must also take steps to ensure that such unauthorized actions do not recur.\textsuperscript{69}

The IRS also noted that

revocation of exempt status is not automatically required, even if it is determined that the distribution of the bulletin insert constitutes a violation of the political intervention restriction attributable to the church. Although revocation is available, the Service may administratively determine that under the facts and circumstances revocation is not warranted. The Service could conclude that, rather than revocation, either assessment of section 4955 tax alone or some type of closing agreement setting forth standards the [organization] must follow or acts it must undertake in order to retain its exempt status, would be appropriate.\textsuperscript{70}

**B. Private actions**

The prohibition on political activities by EOs does not extend to the activities of individuals, even though those individuals are also officials or volunteer leaders of the EO. Individuals do not check their First Amendment and other personal rights at the door when they step into a leadership position in the EO. Accordingly, EO leaders may fully exercise their individual rights to participate in the political process without jeopardizing the EO’s income tax exemption. **However, it is very important to ensure that the individual is not acting as an agent of the EO, and is not using the EO’s resources while engaging in protected individual political activity.**

For example, suppose a candidate publishes a full-page ad in the local newspaper listing prominent individuals, including John Smith, who has personally endorsed the candidate. Mr. Smith is identified in the ad as the President of a local hospital. The ad states: “Titles and affiliations are provided for identification purposes only.” Because the ad was not paid for by the hospital, the ad is not otherwise in an official publication of the hospital, and the endorsement is made by Mr. Smith in his personal capacity, the ad does not constitute campaign intervention by the hospital.\textsuperscript{71} In contrast, if Mr. Smith had endorsed the candidate in the hospital’s

\textsuperscript{69} Field Service Advice 1998-209 (Sept. 21, 1993).

\textsuperscript{70} Id.

\textsuperscript{71} Id.
newsletter or during the hospital’s annual meeting for donors, those activities, because they were conducted in the context of Mr. Smith’s duties as President of the hospital, would be treated as prohibited political activity by the hospital.\textsuperscript{72}

Similarly, an EO’s president may contribute to a political candidate’s campaign committee from personal funds, may attend party conventions and other political meetings at his personal expense and on his own time, and may otherwise engage in volunteer activities in support of a candidate’s campaign, provided that the EO’s resources, such as its mailing list, facilities, and equipment, are not used in those efforts.\textsuperscript{73}

\section*{VI. CONCLUSION}

A §501(c)(3) EO may be very active in informing and influencing its constituents and the community about elections, candidates, and the electoral process. Aside from the prohibitions on contributions to candidates, and candidate endorsements and ratings, the EO’s involvement must be carefully neutral and unbiased in order to avoid jeopardizing its exemption under §501(c)(3). Unfortunately, the IRS has given little guidance on how to avoid bias in voter guides, which are a common area in which controversy arises.

An EO may also encourage its constituents to be active in political campaigns, provided it does not recommend any particular candidate or party. Finally, the president or other employees and volunteer leaders of a charity have the right to participate in political activities, provided they do not use the charity’s resources, and they are not acting as the charity’s agents, when they do so.

Because of the sensitivity of both the IRS and the public to perceived political activity by §501(c)(3) EOs, and the potential for complaints to be made to the IRS (or the Federal Election Commission or comparable state regulatory agencies) by ideological opponents, charities that wish to engage in permitted activities, such as non-partisan voter education, registration, or get-out-the-vote activities, should, in the planning phase of such a program, consult with legal counsel familiar with the rules.

\textsuperscript{71} Rev. Rul. 2007-41, Example 3.

\textsuperscript{72} Id., Examples 4 and 6. \textit{See also} Technical Advice Memorandum 200446033 (June 14, 2004), in which the IRS ruled that a video featuring a §501(c)(3) hospital system’s CEO, promoting voluntary payroll-deduction contributions to a PAC sponsored by a trade association of hospitals and health systems, whose purpose is “to endorse and support hospital industry-backed candidates” was an activity of the hospital system, not the CEO personally. The facts indicated that although the hospital system incurred minimal incremental expenses, the video was produced and distributed using the hospital system’s resources, and the CEO identified himself in the video as “president and CEO of the system.”

\textsuperscript{73} Rev. Rul. 2007-41, Example 5.
This will enable counsel to guide and review the program design and implementation to ensure that any charges of improper political activity are not sustained by the facts, and that the activities otherwise comply with applicable laws and regulations.