PROHIBITION OF POLITICAL CAMPAIGN INTERVENTION BY § 501(c)(3) ORGANIZATIONS

A Position Paper Submitted to the Commission on Accountability and Policy for Religious Organizations

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SHORT RESPONSES TO COMMISSION ISSUE 17

Should the current prohibition of political campaign intervention by 501(c)(3) organizations be relaxed or modified in some way to permit limited speech in support of or opposition to political candidates?

The prohibition should not be relaxed. Any modification should be focused on further clarification of the existing policy, as described in the final response below.

Should the prohibition be replaced with a limitation similar to the existing lobbying restrictions?

The prohibition should not be replaced with a limitation similar to the lobbying restrictions because there are fundamental distinctions between lobbying and participating or intervening in a political campaign ("electioneering"), which justifies different treatment. Fundamentally, lobbying seeks to effect policy change and electioneering seeks to effect political/electoral change. To allow 501(c)(3) organizations to electioneer would result in organizations diverting resources which were solicited and exempted from tax under the assumption of "public benefit" to directly impact the results of an election; a violation of the public trust and a misuse of public funds.

If so, should churches be permitted to make an election to measure covered activities in dollars spent like other organizations may do pursuant to Section 501(h)?

Because our position is that the prohibition should not be replaced, this type of election is not applicable.

Should the prohibition be retained but the terms "participate in" or "intervene in" be defined in terms of expenditures and electioneering communications per federal election law?

In order to ease the burden of enforcement and the uncertainty as to what constitutes a violation, there should be further definition of what establishes "participation" or "intervention," but they should not be defined in terms of expenditures and electioneering communications.

BACKGROUND

BoardSource fully supports the Commission on Accountability and Policy for Religious Organizations' ("Commission") effort to identify strategies to help nonprofit boards increase accountability as the governing body of their organizations. For 25 years, BoardSource has been active in educating nonprofit boards and helping to strengthen board leadership and governance throughout the nonprofit sector. In this paper, we address Commission Issue #17 related to the prohibition of political campaign intervention by section 501(c)(3) organizations.

This paper presents the views of BoardSource regarding the prohibition on political campaign intervention and analyzes the impact of the prohibition on the nonprofit sector. We do not address the constitutionality of the provision, but will focus solely on the impact of the prohibition on the sector and the impact that eliminating or modifying the prohibition would have on the nonprofit sector.

This paper is divided into three sections:

- Political Campaign Prohibition Defined
- Responses to Issue #17
- Recommendations

POLITICAL CAMPAIGN PROHIBITION DEFINED

Definition

Section 501(c)(3) of the Internal Revenue Code applies to organizations, including churches and houses of worship, that serve "religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition ..., or for the prevention of cruelty to children or animals..."[1] The IRS provides these organizations an exemption to federal income taxes and the eligibility to receive tax-deductible contributions[2], provided that the 501(c)(3) organizations do 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[3]."

Penalty for Participation or Intervention in a Political Campaign

[1] IRC § 501(c)(3).
[2] IRC §§ 501(a), 170(a), (c)(2).
[3] IRC § 501(c)(3).

The penalty for a section 501(c)(3) organization that engages in any amount of electioneering is revocation of its 501(c)(3) status.[4] In addition to or in lieu of revocation, the Internal Revenue Service ("IRS") may tax the organization on its political expenditures.[5]

What Constitutes Participation or Intervention?

The Internal Revenue Code does not specifically outline activities that would constitute "participation" or "intervention"[6]; however, the Treasury regulations provide that "[a]ctivities 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"[7].

The IRS has clarified that statements that do not expressly mention a candidate may still violate the prohibition if they identify the candidate in another way, such as "showing a picture of the candidate, referring to political party affiliations, or other distinctive features of a candidate's platform or biography."[8]

Determining whether an activity would violate the political campaign prohibition is based on the facts and circumstances of each case.[9]

Activities that are Permitted

The IRS has provided some guidance on activities that would be permitted. The key characteristic in all of these permitted activities is ensuring that all candidates are treated on an equal basis and making sure the activity does not show bias or indicate a preference towards any candidate.

Voter Education Materials and Candidate Appearances:

- Organizations are permitted to distribute voter education materials or to invite candidates to appear at functions; however, the organization

[4] *See* IRC § 501(c)(3) (in order to qualify as a 501(c)(3) organization, the entity cannot "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").
[5] IRC § 4955.
[6] *See* IRC § 501(c)(3).
[7] 26 C.F.R. §1.501(c)(3)-1(c)(3)(iii).
[8] IRS Publication 1828, Tax Guide for Churches and Religions Organizations, at 8.
[9] Rev. Rul. 2007-41, 2007-1 C.B. 1421.

must not show bias or indicate a preference towards any candidate (i.e. by not including all candidates on an equal basis).[10]

Issue Advocacy:

- Section 501(c)(3) organizations may take positions on public policy issues, including issues that divide candidates in an election for public office. However, the organizations must avoid any issue advocacy that functions as political campaign intervention; if there is any message favoring or opposing a candidate, the activity is not permitted.[11]

Individual Activity by Organization Leaders:

- Individuals working at the organization are not prohibited from participating or intervening in a political campaign in their individual capacity,[12] but leaders cannot make partisan comments in official organization publications or at official functions of the organization[13].

In addition, instead of forming as a section 501(c)(3), the organizations can form themselves under § 501(c)(4) as a social welfare organization[14]. These organizations are tax exempt,[15] but they are not permitted to receive tax-deductible contributions[16]. A section 501(c)(4) organization may engage in political campaigns on behalf of or in opposition to candidates for public office provided that such intervention does not constitute the organization's primary activity.[17] A 501(c)(4) organization cannot contribute to a political campaign; however, it may form a Section 527 political action committee ("PAC") that would be free to contribute to political campaigns.[18]

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[10] *See* Rev. Rul. 2007-41, 2007-1 C.B. 1421.
[11] Rev. Rul. 2007-41, 2007-1 C.B. 1421.
[12] *See* Rev. Rul. 2007-41, 2007-1 C.B. 1421.
[13] Rev. Rul. 2007-41, 2007-1 C.B. 1421.
[14] IRC § 501(c)(4) ("[O]rganizations not organized for profit but operated exclusively for the promotion of social welfare . . . and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.").
[15] IRC § 501(a).
[16] *See* IRC § 170(a), (c)(2) (provides tax deduction for charitable contributions but limits the definition of "charitable contribution" to the purposes outlined in § 501(c)(3)).
[17] § 1.501(c)(4)-1(a)(2)(i) ("An organization is operated exclusively for the promotion of social welfare if it is *primarily* engaged in promoting in some way the common good and general welfare of the people of the community.")(emphasis added).
[18] 26 C.F.R. § 1.527-6(f), (g) ("[A]n organization described in section 501(c) that is exempt from taxation under section 501(a) may, [if it is not a section 501(c)(3) organization], establish and maintain such a separate segregated fund to receive contributions and make expenditures in a political campaign.")

RESPONSES TO ISSUE #17

Should the current prohibition of political campaign intervention by 501(c)(3) organizations be relaxed or modified in some way to permit limited speech in support of or opposition to political candidates?

No, the prohibition should not be relaxed. Because the public benefit is a vital reason for providing tax benefits to section 501(c)(3) organizations, and allowing these organizations to electioneer would greatly reduce this public benefit, the prohibition should not be relaxed.

As discussed above in the Definition section, 501(c)(3) organizations must serve "religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition ..., or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual..."[19] As a section 501(c)(3) organization, the organization is then tax exempt, and contributions made to the organization are tax deductible.[20] Implicit in this exchange is the idea that these organizations provide a public benefit, and in return for that public service, they receive certain tax benefits.

If these organizations were to participate or intervene in political campaigns, the "public" benefit would be lessened because they would engage in partisan politics, which by its nature promotes candidates on only one side or the other. The benefit would then only be to a portion of the public (those who happen to agree with that particular side). These organizations can already provide voter education materials, so long as they treat each candidate equally, which maintains the public benefit by providing both sides of the political campaign. If, however, we were to allow them to include only one side of the campaign, then the public is no longer served and this negates the rationale for providing them with tax benefits.

In addition, if section 501(c)(3) organizations were allowed to electioneer, there would be a risk of significant resources being diverted from the core purpose of the organization and its mission into electoral activities. Instead of using contributions to feed the hungry or shelter the homeless, these contributions would instead be used to support or oppose a candidate. The money contributed to the organization would be tax deductible, and instead of serving the public, it would be used to influence an election. This would subsidize a political campaign through tax benefits, rather than subsidizing the organization's public service. Subsidizing this

[19] IRC § 501(c)(3).
[20] IRC §§ 501(a), 170(a), (c)(2).

type of activity does not serve the public and would be a misuse of tax benefits. Section 501(c)(3) organizations are already permitted to engage in issue advocacy and voter education, and the organizations are free to form as a 501(c)(4) organization if they want to specifically participate in or intervene in a campaign.

Lastly, if the prohibition were relaxed, 501(c)(3) organizations would be opened up to potential political pressure to support or oppose specific candidates as a quid pro quo for government funding or other support; or, more subtle pressure or retaliation against previous political positions. Roughly one-third of nonprofit revenues come from government funding.[21] If section 501(c)(3) organizations engage in electioneering, government agencies distributing grants may choose not to select a section 501(c)(3) organization who supported a candidate from the opposing party.

Should the prohibition be replaced with a limitation similar to the existing lobbying restrictions?

The prohibition should not be replaced with a limitation similar to the lobbying restrictions because there are fundamental distinctions between lobbying and electioneering, which justifies different treatment.

Fundamentally, lobbying seeks to effect policy change and electioneering seeks to effect political/electoral change. Section 501(c)(3) organizations – including churches – should be and are allowed to engage in advocacy (including limited lobbying) in support of public policy positions that are aligned with their fundamental purpose, mission or belief. These activities seek to raise public awareness about issues of importance, and one can reasonably argue that doing so supports an organization's stated purpose in their 501(c)(3) determination. To allow 501(c)(3) organizations to electioneer, would result in organizations diverting resources which were solicited and exempted from tax under the assumption of "public benefit" to directly impact the results of an election; a violation of the public trust and a misuse of public funds.

Practically speaking, if section 501(c)(3) organizations were allowed to electioneer, 501(c)(3) organizations would be created and managed for the express purpose of influencing elections, and this would increase – rather than decrease – the costs associated with enforcement; an issue cited as a rationale for a relaxing of the restrictions.

[21]The Nonprofit Almanac 2011, prepared by the National Center for Charitable Statistics at the Urban Institute (8.9% from government grants and 23.2% from government fees for services and goods).

If the prohibition is replaced with a limitation similar to the existing lobbying restrictions, should churches be permitted to make an election to measure covered activities in dollars spent like other organizations may do pursuant to Section 501(h)?

Because our position is that the prohibition should not be replaced, this type of election is not applicable.

Should the prohibition be retained but the terms "participate in" or "intervene in" be defined in terms of expenditures and electioneering communications per federal election law?

In order to ease the burden of enforcement and the uncertainty, there should be further definition of what constitutes "participation" or "intervention". Providing more guidance will lessen the risk of a section 501(c)(3) organization losing its exempt status.

The IRS currently uses a facts and circumstances test to analyze whether a particular section 501(c)(3) organization has violated the prohibition.[22] This test is burdensome to enforce because it requires time and resources to learn the facts and circumstances and evaluate whether those circumstances would constitute a violation. Providing a list of expressly permitted activities, expressly prohibited activities, and the rationale which would guide decision-making about any activities not expressly permitted or prohibited would reduce the requirement to evaluate every alleged violation under the facts and circumstances test, and it would provide guidance to section 501(c)(3) organizations around what activities they can and cannot do.

The prohibition should not be defined in terms of expenditures and electioneering communications. Defining the prohibition in terms of expenditures and electioneering communications would allow section 501(c)(3) organizations to participate or intervene in political campaigns so long as the amount of expenditures or the number of communications is below a certain defined level. As outlined above, allowing 501(c)(3) organizations to electioneer at all would greatly reduce the public benefit they provide thus eliminating the rationale behind the tax benefits.

[22] Rev. Rul. 2007-41, 2007-1 C.B. 1421.

RECOMMENDATIONS

KEEP THE PROHIBITION IN PLACE

The prohibition is vital to maintaining the public trust and to ensuring that section 501(c)(3) organizations are providing a public benefit, thus entitling them to receive tax benefits. This reciprocity must be maintained, so the Commission should keep the prohibition against political campaign intervention for all section 501(c)(3) organizations. In addition, because there is a fundamental distinction between lobbying and electioneering, the prohibition should not be altered to match the current restriction placed on lobbying.

PROVIDE MORE GUIDANCE AROUND PERMITTED ACTIVITIES

Enhanced guidance around prohibited activities and permitted activities will help all section 501(c)(3) organizations meet the requirements of section 501(c)(3) and lessen the risk of losing their exempt status. While the IRS has provided some guidelines in this area[23], the facts and circumstances test often makes it difficult to know exactly what is and is not permitted, and it makes it more burdensome for the IRS to enforce.

As a result, it would be helpful for the statute or the regulations to include a list of activities that would be prohibited and those that would be permitted along with the rationale for why those activities are either permitted or prohibited, which could be applied to any activities not expressly permitted or prohibited. For example, Revenue Ruling 2007 specifies that voter education materials are permitted, but only if the materials do not show bias or indicate a preference towards any candidate (i.e. by not including all candidates on an equal basis). Providing clarity around the other types of activities that would be permitted would provide a safe harbor to allow organizations to engage in these activities without fear of losing their tax exempt status. This guidance would reduce the burden of enforcement because the IRS would not need to use the facts and circumstances test to evaluate every single instance of an alleged violation, but could instead determine whether the activity falls into one of the permitted or prohibited activities.

In addition, providing the rationale for why those activities are permitted or prohibited would provide greater guidance to allow 501(c)(3) organizations to evaluate whether an activity that is not on the list would likely be permitted or prohibited. And, if the instance did not fall into either category, the IRS could then use the facts and circumstances test to evaluate that situation.

[23] *See* Rev. Rul. 2007-41, 2007-1 C.B. 1421.