



PERMISSIBLE AND IMPERMISSIBLE ACTIVITIES OF NON-PROFIT ORGANIZATIONS AND PUBLIC CHARITIES UNDER FEDERAL CAMPAIGN FINANCE AND TAX LAWS

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SPECIAL GUIDANCE TO PUBLIC CHARITIES TAX-EXEMPT UNDER SECTION 501(c)(3)

According to the Internal Revenue Service (IRS), any organization that is exempt from income taxation under *Internal Revenue Code (IRC)* section 501(c)(3)¹ may not “participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or opposition to) any candidate for public office.”² This political campaign intervention ban applies equally to both direct and indirect efforts on behalf of a political candidate.³ An organization that does, in fact, violate the political intervention ban may be subject to an excise tax on their political expenditures or loss of their tax-exempt status under section 501(c)(3).⁴

To determine whether a particular 501(c)(3) organization has engaged in impermissible campaign intervention, the IRS considers the “facts and circumstances” of the organization and its activities.⁵ In other words, the IRS does not view an organization’s activities in isolation, but rather, considers the entire context in which such activities occur.⁶ Unfortunately, in recent years, this “facts and circumstances” standard has proven rather ambiguous, leaving public charities without much guidance concerning the extent to which they may engage in political expression, issue advocacy, and election-year activities. As such, more and more sectarian nonprofit organizations are finding themselves at the center of IRS scrutiny concerning whether or not such organizations have violated the political campaign intervention ban.

¹ 26 U.S.C. § 501(c)(3) (2010).

² Rev. Rul. 2007-41, 2007-25 I.R.B. 1421, quoting 26 U.S.C. § 501(c)(3).

³ *Id.*

⁴ Internal Revenue Service, Tax Guide for Churches and Religious Organizations, <http://www.irs.gov/pub/irs-pdf/p1828.pdf> (last visited Oct. 21, 2010).

⁵ Internal Revenue Service, Election Year Activities and the Prohibition on Political Campaign Intervention for Section 501(c)(3) Organizations, Feb. 2006, <http://www.irs.gov/newsroom/article/0,,id=154712,00.html>; Rev. Rul. 2007-41, 2007-25 I.R.B. 1421.

⁶ *Geared up this Election Year? What Every 501(c)(3) Public Charity Should Know about Election-Year Activities*, NONPROFIT AGENDA, (Center for Nonprofit Advancement, Washington, D.C.), Mar./April 2008, at 6.

Accordingly, the American Center for Law and Justice (ACLJ) continually asserts the need for bright lines to clarify this ambiguous area of the law. The ACLJ is particularly concerned with clarifying the rights of churches, synagogues and other sectarian organizations to engage in political expression, particularly when such expression concerns moral issues of the day. While this particular area of the law is, for the moment, plagued with gray areas and imprecisely drawn lines,⁷ the following presents an overview of permissible activities and events in which all public charities, churches and synagogues may participate without violating the political campaign intervention ban encompassed in *IRC* section 501(c)(3).⁸

Public Charities May Conduct Voter Registration and Get-Out-The-Vote Drives

Voter registration and get-out-the-vote drives do not constitute impermissible political campaign intervention if they are conducted in a neutral, unbiased and nonpartisan manner.⁹ If, however, they are conducted in a way that favors one candidate over another, whether directly or indirectly, such activities will be deemed to have violated the campaign intervention ban.¹⁰ A 501(c)(3) organization must comply with the following factors when conducting a voter registration or get-out-the-vote drive to ensure that its political activities remain neutral, unbiased and nonpartisan so as not to offend the tax code:

- The voter registration or get-out-the-vote communication must name or depict all candidates (or no candidate) in a manner that does *not* favor any one candidate over another;
- The communication must not name any political party, except to identify the party affiliation of *all* candidates named or depicted;
- The communication may only encourage conduct such as voting and registering to vote and describe the hours and place of registration and voting; and
- The voter registration and get-out-the-vote drive services must be made available without regard to the voters' political preference.

Tax-exempt organizations must carefully adhere to these guidelines. Indeed, the IRS has ruled that voter registration materials which referred to a “conservative” agenda and offered specific examples of “liberal” groups and politicians posing threats to that agenda violated the political prohibition even though the registration materials did not refer to any conservative candidate by name.¹¹ Furthermore, coordinating registration activities with a political committee

⁷ See The IRS Political Activities Enforcement Program for Charities and Religious Organizations: Questions and Concerns, July 2006, http://www.ombwatch.org/pdfs/paci_full.pdf.

⁸ 26 U.S.C. § 501(c)(3).

⁹ Rev. Rul. 2007-41, 2007-25 I.R.B. 1421. See *Internal Revenue Manual*, Section 7.25.3.7.11.5 (February 23, 1999); Judith E. Kindell and John Francis Reilly, *Election Year Issues* (2002), <http://www.irs.gov/pub/irs-tege/eotopici02.pdf>.

¹⁰ Rev. Rul. 2007-41, 2007-25 I.R.B. 1421.

¹¹ I.R.S. Priv. Ltr. Rul. 9117001 (Sept. 5, 1990).

should be avoided as this would clearly violate the political intervention prohibition.¹² Focusing registration efforts on particular geographical areas, however, does not constitute campaign participation or intervention even if it is known that the area contains predominantly supporters of a particular party or candidate.¹³ Finally, voter registration lists may be used to identify unregistered voters, but 501(c)(3) organizations must not target voters registered as belonging to a particular party.¹⁴

Public Charities May Prepare and Distribute Voter Guides

Public charities, churches and synagogues may prepare and distribute voter guides that include *all* viable candidates for an office, provided they strictly follow certain guidelines when doing so. As with voter registration and get-out-the-vote drives, voter guides must be neutral, unbiased and nonpartisan. Under no circumstances may they endorse a candidate, directly or indirectly, or direct individuals to vote for or against a particular candidate. Additionally, voter guides must *not* contain editorial comments about any political party that would induce voters to vote in any particular way.

The specific guidelines, as enunciated in IRS *Revenue Ruling* 78-248¹⁵ and amplified in *Revenue Ruling* 80-282,¹⁶ state that voter guides must:

- Include the voting records of all incumbent members of the legislative body who represent the local area;
- Not identify which incumbents are candidates for reelection;
- Withhold any remarks concerning a candidate's overall qualifications for office;
- Withhold any remarks that would endorse or reject, either expressly or impliedly, any incumbent or other candidate for public office;
- Not be linked to any election campaign by, for example, widely distributing the voter report on the eve of an election; and
- Cover a broad range of issues, rather than targeting issues that track the organization's known "agenda."

Public charities, churches and synagogues must also avoid rating candidates. The IRS considers rating candidates to be the equivalent of endorsing candidates and, as such, a clear violation of the political campaign intervention ban.¹⁷

¹² *Id.*

¹³ *Id.*

¹⁴ Kindell and Reilly, *supra* note 9.

¹⁵ Rev. Rul. 2007-41, 2007-25 I.R.B. 1421.

¹⁶ Rev. Rul. 78-248, 1978-1 C.B. 154.

¹⁷ *Association of the Bar of the City of New York v. Commissioner*, 858 F.2d 876 (2nd Cir. 1988); *General Counsel Memorandum* 39441 (November 7, 1985); *Tax Advice Memorandum* 963503 (conference of citizens that issued a rating of candidates based on their positions on issues violated the political prohibition).

Public Charities, Churches and Synagogues May Link to Candidate Information on Third-Party Websites

Tax-exempt organizations may link to candidate-related material on other websites for the singular, nonpartisan purpose of educating voters. As such, the IRS has determined that for a 501(c)(3) organization to avoid engaging in impermissible campaign intervention, the organization must not link to a website that contains *partisan* information. The IRS holds the organization providing the link responsible for ensuring that the linked-to website does not contain partisan information. Accordingly, tax-exempt organizations must monitor any website to which it links to ensure that the website does not contain partisan information and thus cause the tax-exempt organization to violate its tax-exempt status. When applying its “facts and circumstances” standard to internet communications such as links to third-party websites, the IRS considers the following factors when determining whether a tax-exempt organization has engaged in impermissible campaign intervention by linking to candidate information on third-party websites:

- The tax-exempt organization’s purpose for linking to candidate information on another website;
- Whether all candidates are represented;
- The content of the linked-to page;
- The context for the link on the tax-exempt organization’s website; and
- The extent to which the tax-exempt organization has monitored the content appearing on the linked-to page.¹⁸

It should be noted that a 501(c)(3) organization may link directly to a candidate website only when 1) it is for the sole purpose of educating voters, and 2) the organization provides a link to every candidate’s website. In this case, the organization must not present the links in a partisan manner or present them in such a way that would cause readers “to directly compare a candidate’s platform to the charity’s positions on issues.”¹⁹

Public Charities May Sponsor Candidate Appearances

Public charities, churches and synagogues may sponsor candidate forums or debates without violating the campaign intervention ban. The fundamental requirement is that candidate forums or debates educate voters, rather than asserting the virtues of particular candidates. Simply stated, such forums or debates should be conducted in such a way that does not favor or oppose one particular candidate.²⁰ Accordingly, all candidates should be treated in a fair and impartial

¹⁸ Internal Revenue Service, Election Year Activities and the Prohibition on Political Campaign Intervention for Section 501(c)(3) Organizations, Feb. 2006, <http://www.irs.gov/newsroom/article/0,,id=154712,00.html>; *See also* *Geared up this Election Year? What Every 501(c)(3) Public Charity Should Know about Election-Year Activities*, at 7, *supra* note 6.

¹⁹ *Geared up this Election Year? What Every 501(c)(3) Public Charity Should Know about Election-Year Activities*, at 7, *supra* note 6

²⁰ Rev. Rul. 86-95, 1986-2 C.B. 73.

manner. The standards applicable to voter guides noted above similarly apply to candidate forums. In light of its “facts and circumstances” standard of evaluation, the IRS has also set forth the following factors for determining whether a particular candidate forum constitutes impermissible campaign intervention under section 501(c)(3):

When one candidate is invited to speak:

- The organization should provide an equal opportunity for all candidates for the same office to speak at other *similar* events;
- The organization should not express support for or opposition to the candidate; and
- No political fundraising on behalf of the candidate should occur.

When several candidates for the same office are invited to speak:

- All “legally qualified candidates” for the same office should be invited to participate;²¹
- Each candidate should be provided an equal opportunity to present his or her views;
- The topics of discussion should cover a broad range of issues;
- Questions posed to candidates should be “prepared and presented by a non-partisan, independent panel of knowledgeable persons”;
- The candidates should not be asked to agree or disagree with the positions of the organization;
- The moderator should communicate at both the beginning and end of the program that the views expressed are those of the candidates and not of the organization and that sponsorship of the forum does not constitute an endorsement of any candidate by the organization; and
- The moderator should not comment on the questions or answers so as to explicitly or implicitly convey approval or disapproval of any one candidate.²²

For these purposes, a “broad range of issues” is not limited to any particular number. The IRS has held that a forum covering only three issues, each of which was an important topic in the campaign, was still neutral.²³ Additionally, the range of issues may include issues that are of particular importance to the organization itself.²⁴ It should be noted that limiting a forum or debate in a *primary* election to the candidates of one party does not violate the political

²¹ If a candidate(s) declines this invitation, public charities should consider whether the event will appear partisan as a result. See *Geared up this Election Year? What Every 501(c)(3) Public Charity Should Know about Election-Year Activities*, *supra* note 6.

²² *Id.*; Rev. Rul. 2007-41, 2007-25 I.R.B. 1421.

²³ I.R.S. Priv. Ltr. Rul. 9635003 (April 19, 1995).

²⁴ Rev. Rul. 86-95, 1986-2 C.B. 73.

prohibition. The sponsoring organization does not jeopardize its exempt status by excluding a third party candidate from the two debates among, respectively, the Democratic party candidate and a Republican party candidate.²⁵ Limiting debate participants to only “significant” candidates in a party primary, however, is impermissible, and is considered a subjective factor.²⁶

According to the IRS, tax-exempt organizations may invite candidates to speak in a non-candidate capacity, provided they do so for reasons other than the speaker’s candidacy for public office. Such reasons might include the speaker’s current role as a public official or expertise in a particular field. In this situation, it is essential that 501(c)(3) organizations maintain a “nonpartisan atmosphere” so as not to offend the political campaign intervention ban. Accordingly, organizations should consider the following guidelines provided by the IRS:

- The organization should choose the candidate to speak for reasons other than his or her candidacy for public office;
- The organization should communicate the specific capacity in which the candidate is appearing;
- The organization should not mention the election or the candidate’s candidacy in any communications regarding the candidate’s appearance at the organization event;
- The candidate should speak only in a non-candidate capacity;
- The candidate should not mention the election or his or her candidacy; and
- Campaign activity should not occur in relation to the candidate’s appearance at the event.²⁷

Organization Leaders May Individually Engage in Political Campaign Intervention

As a general rule, political campaign intervention is *permitted* by leaders of public charities, churches and synagogues, provided that such partisan efforts are conducted without giving others the reasonable impression that the leader makes them on behalf of the organization or in his or her official capacity at the organization.²⁸ The IRS has expressly stated that the prohibition against partisan electoral activities by tax-exempt organizations was not intended to restrict the “free expression on political matters by leaders of organizations speaking for themselves, as individuals.”²⁹ Indeed, organization leaders may speak out on important issues of public policy and even endorse candidates for public office. Nevertheless, to do so without forfeiting their organization’s tax-exempt status, 501(c)(3) leaders must not make any partisan remarks in such a way that they could be attributed to the organization itself.

²⁵ Fulani v. League of Women Voters, 684 F. Supp. 1185 (S.D.N.Y. 1988), *affirmed*, 882 F.2d 621 (2d Cir. 1989).

²⁶ Fulani v. Brady, 809 F. Supp. 1112 (S.D.N.Y. 1993).

²⁷ Rev. Rul. 2007-41, 2007-25 I.R.B. 1421.

²⁸ Rev. Rul. 2007-41, 2007-25 I.R.B. 1421.

²⁹ *Id.*

The IRS has expressly approved a certain number of partisan practices by 501(c)(3) leaders acting in their personal capacities.³⁰ As stated, among these approved practices are personal endorsements of political candidates. Such endorsements, however, must not appear on organization letterhead or in publications officially sponsored by the organization even if the leader personally pays for the portion of the cost of the publication attributable to the endorsement. The IRS also prohibits such personal endorsements from appearing in *another* organization's publication if the organization paid for the particular portion of the publication containing the endorsement. It should be noted that permissible political endorsements under these guidelines *may* contain the endorser's official title and affiliation if for identification purposes only. Organization leaders should likewise not make personal political endorsements at official functions sponsored by the organization. A leader's political endorsements are permissible, however, at functions not sponsored by the organization, provided that the leader in no way gives the reasonable impression that he or she is speaking on behalf of or as a representative of the organization. "To avoid potential attribution of their comments outside of organization functions and publications," the IRS advises "organization leaders who speak or write in their individual capacity . . . to clearly indicate that their comments are personal and not intended to represent the views of the organization."³¹

It should also be noted that employees and volunteers of public charities, churches and synagogues may engage in partisan campaign intervention, but they must do so in such a way that does not give the reasonable impression that their efforts are made on behalf of their organization. Like organization leaders, the employees and volunteers of a tax-exempt organization may only engage in partisan campaign efforts in their individual capacities.³²

Public Charities, Churches and Synagogues Need Not Restrict Their Discussion of Issues During Campaign Seasons

The ban on political campaign intervention does not restrict the discussion or presentation of issues during a campaign season. Public charities, churches and synagogues need not limit or alter their discussion of issues during such times, and the fact that candidates may align themselves on one side or another of an issue does not adversely affect the right to engage in discussion or presentations of the issue.³³

Public Charities, Churches and Synagogues May Participate in Referendums, Constitutional Amendments and Ballot Propositions and Initiatives

Public charities, churches and synagogues may engage in an "insubstantial" amount of activities that attempt to influence legislation (lobbying activities) without risking imposition of

³⁰ *Id.*

³¹ Internal Revenue Service, Election Year Activities and the Prohibition on Political Campaign Intervention for Section 501(c)(3) Organizations, Feb. 2006, <http://www.irs.gov/newsroom/article/0,,id=154712,00.html>.

³² *Geared up this Election Year? What Every 501(c)(3) Public Charity Should Know about Election-Year Activities*, *supra* note 6.

³³ Kindell and Reilly, *supra* note 9.

an excise tax or loss of their tax-exempt status under section 501(c)(3).³⁴ In this context, “legislation” refers to actions by Congress, state legislatures, local councils and similar governing bodies.³⁵ It also encompasses public referendums, voter initiatives, constitutional amendments, ballot propositions and other similar procedures.³⁶

While neither the *IRC* nor IRS regulations expressly define what “insubstantial” means in terms of any specific percentages, court rulings indicate that between five and fifteen percent (5%-15%) of total activities would be insubstantial.³⁷ The IRS reports that it “considers a variety of factors, including the time devoted and expenditures devoted by the organization to the activity, when determining whether the lobbying activity is substantial.”³⁸ Additionally, public charities other than churches and synagogues, may elect to be subject to a sliding scale of defined limitations on lobbying activities and expenditures.³⁹ The limitations are based on the size of the organization making the election. To make this alternative “expenditure” election, public charities must file IRS Form 5768.

The Facilities of Public Charities, Churches and Synagogues May be Used for Civic or Political Events

Public charities, churches and synagogues may permit the use of auditoriums, meeting rooms and gymnasium facilities to be used as polling places on Election Day without violating the political intervention ban. Such facilities may also be rented to candidates or political parties. The IRS has established the following factors to determine whether a 501(c)(3) organization has engaged in impermissible campaign intervention by leasing office space to political candidates or parties:

- Whether the facilities are leased at the organization’s customary fee (they should not be provided free of charge);
- Whether a similar use of the facilities is made available to all candidates or parties on the same and equal basis;
- Whether a similar use of the facilities is available to the general public; and
- Whether the organization promoted or advertised the candidates’ or parties’ use of the facilities.⁴⁰

³⁴ 26 U.S.C. § 501(c)(3).

³⁵ Treas. Reg. § 1.501(c)(3)-1(c)(3)(ii).

³⁶ *Id.*

³⁷ See *Haswell v. United States*, 500 F.2d 1133 (Ct. Cl. 1974) (16% to 20% of total budget was too much); *Seasongood v. Commissioner*, 227 F.2d 907 (6th Cir. 1955) (less than 5% of time and effort spent on lobbying within acceptable limit).

³⁸ Internal Revenue Service, Compliance Guide for 501(c)(3) Public Charities, <http://www.irs.gov/pub/irs-pdf/p4221pc.pdf> (last visited Oct. 22, 2010).

³⁹ See 26 U.S.C. §§ 501(h), 4911.

⁴⁰ Rev. Rul. 2007-41, 2007-25 I.R.B. 1421.

A Public Charity, Church or Synagogue May Sell or Rent Its Mailing List to a Candidate or Political Party

A public charity, church or synagogue may sell or rent its mailing list to a candidate or political party without violating the political intervention ban. The factors for determining compliance are similar to those noted above:

- Whether the list is provided at the organization's customary fee (it should not be provided free of charge)
- Whether a similar use of the list is available to all candidates or parties in the same election on the same and equal basis;
- Whether a similar use of the list is available to the general public; and
- Whether the organization promoted or advertised the candidates' or parties' use of the list.⁴¹

It should be noted that mailing lists provided free of charge or on a selective or preferred basis violate the in-kind contribution ban.⁴²

Public Charities, Churches and Synagogues May Engage in Political Issue Advocacy

The IRS expressly permits public charities, churches and synagogues to discuss public policy issues, such as party platforms and candidates.⁴³ To maintain their tax-exempt status, such organizations must engage in such issue advocacy in a fair and impartial manner than does not - either directly or indirectly - favor one candidate over another.⁴⁴ The IRS has set forth the following guidelines to organizations wishing to engage in political speech:

Section 501(c)(3) organizations may take positions on public policy issues, including issues that divide candidates in an election for public office. However, section 501(c)(3) organizations must avoid any issue advocacy that functions as political campaign intervention. Even if a statement does not expressly tell an audience to vote for or against a specific candidate, an organization delivering the statement is at risk of violating the political campaign intervention prohibition if there is any message favoring or opposing a candidate.⁴⁵

In practice, this means that 501(c)(3) organizations engaging in political speech should discuss issues, candidates or party platforms without editorial comments and without endorsing or opposing one over the other.

⁴¹ Rev. Rul. 2007-41, 2007-25 I.R.B. 1421.

⁴² See Internal Revenue Service, Tax Guide for Churches and Religious Organizations, <http://www.irs.gov/pub/irs-pdf/p1828.pdf> (last visited Oct. 22, 2010); Kindell and Reilly, *supra* note 9.

⁴³ Rev. Rul. 2007-41, 2007-25 I.R.B. 1421.

⁴⁴ *Id.*

⁴⁵ *Id.*

Express Advocacy and Electioneering Communications Are Prohibited

As discussed in greater depth below, a public charity, church or synagogue may not engage in “express advocacy” – communications that use the magic words such as “vote for” or “vote against” a candidate or party – or “electioneering communications” – paid broadcast, cable or satellite communications that refer to a clearly identified candidate within 60 days prior to a general election or 30 days prior to a primary election for a federal office.⁴⁶

Activity	Permissible?
Voter Guides / Candidate Questionnaires. May prepare, publish and disseminate voter guides and candidate questionnaires that only inform of candidates’ positions on specific issues	Yes
Voter Guides / Candidate Questionnaires with Advocacy. May prepare, publish and disseminate voter guides that indicate what is the ‘correct’ or ‘incorrect’ position on issues	No
Voting Records. May publicly disseminate information regarding voting records of candidates and officeholders, indicating which officeholders have good and bad records according to the organization, and urging support of and opposition to candidates / officeholders based on their voting records.	No
Public Advertising. May solicit, receive contributions from individuals and corporations and use corporate treasury funds to pay for public communications that publicly support / oppose candidates for office, legislation, government policies and proposals, including making both express advocacy and issue communications using any medium (television, radio, print, internet, mail, phones, etc.)	No
Taxation. May make political or candidate-related expenditures free from taxation	No
Deductions. May deduct political or candidate-related expenditures	No
Contributions. May make contributions to federal candidates, political parties and political action committees	No
Coordination. May make coordinated political expenditures	No
Public Forum. May sponsor candidate appearances at forums or debates.	Yes
Voter Registration and GOTV. May Conduct Voter Registration and Get-Out-The-Vote Drives	Yes
Organization Leaders. May have led by someone who is involved in a political campaign	Yes
Website Links. May link to candidate information on third-party websites	Yes
Mailing List. May sell or rent mailing list to candidate or political party at fair market value	Yes

⁴⁶ In the case of Congressional candidates only, the communication must be targeted to the relevant electorate and receivable by 50,000 people. 11 C.F.R. § 100.29(a) & (b).

Restricted Rental. May restrict rental of their mailing lists and facilities to certain candidates	No
Issue Advocacy. discuss public policy issues, such as party platforms and candidates	Yes
Referendums. May participate in referendums, Constitutional amendments, ballot propositions and initiatives	Yes
Timing. May Discuss Issues when campaign season is not occurring	Yes
Forum. May use its facilities for civic or political events	Yes
Foreign Contributions. May accept contributions from foreign corporations or foreign nationals to influence U.S. local, state or national elections	No
Canvassing. May canvass the public on issues	Yes
Education and Training. May conduct nonpartisan public education and training sessions about participation in the political process	Yes
Endorsement. May endorse candidates for public office	No
Pledges. May ask candidates to sign pledges on any issue	No
Increase Criticism. May increase the volume or amount of incumbent criticism as election time approaches	No

The foregoing outline and chart are intended as an informational overview of BCRA and the *Internal Revenue Code* with special emphasis on their implications for nonprofit organizations. This outline is not intended and should not be relied upon as legal advice with respect to any particular circumstance or set of facts.