

Avoiding Accidental Political Activities

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Few, if any, non-profit organizations intentionally violate the proscription against political activities imposed by section 501(c)(3) of the Internal Revenue Code. Nonetheless, from July through November each election year, tax-exempt practitioners' phones light up on a regular basis to assist organizations with political activities "situations" they have found themselves in unexpectedly—situations that could potentially result in loss of tax-exempt status. Given the level of divisiveness currently gripping the country this election cycle, the possibility for accidental political activities this election season is particularly high.

This article will identify the most common questions that arise during each election cycle with respect to section 501(c)(3) organizations and potentially proscribed political activities. It also looks at voluntary actions non-profit healthcare organizations may wish to take to best protect themselves should accidental political activities occur.

Background

For background purposes, section 501(c)(3) organizations are strictly prohibited from intervening, directly or indirectly, in political campaigns of candidates for public office. Included within that proscription, organizations are precluded from forming or funding political action committees (PACs) to engage in such activities. For purposes of the prohibition against political activities, a "candidate for public office" is anyone who offers him/herself, or is proposed by others, as a contestant for an elective public office. It is irrelevant for purposes of the political activities proscription whether the public office is national, state, or local in origin. Individuals who have announced their candidacy for public office are clearly "candidates." In addition, however, even an individual who has not announced his/her candidacy may be considered to be a "candidate for public office" depending upon the facts and circumstances.

The prohibition on political activity includes not showing financial or other support for a candidate. Thus, non-profit hospitals and health systems may not make contributions to a PAC or a candidate's campaign committee (even if otherwise permitted under applicable election laws), purchase tickets to political fundraisers, or provide non-financial support (such as providing space or mailing lists, sponsor a political event, or permitting its name to be used to solicit contributions) to a PAC or candidate's campaign committee.

In addition to prohibiting direct political activities, the Internal Revenue Code prohibits indirect political activities as well. For example, it is not acceptable for individual employees of the organization to make a contribution or pay to attend a fundraiser, and then be reimbursed for this expenditure by the organization (either directly or through a disguised bonus payment designed to reimburse such expense). Likewise, it is not acceptable for a non-profit healthcare organization to transfer funds to a non-exempt organization (for example, a coalition or a for-profit subsidiary) and then have the non-exempt organization make the contribution. The IRS scrutinizes exempt organization political activities closely to curb and prevent abuses in this area. In applying this scrutiny, the IRS has been aggressive in treating indirect transactions as political activity of the exempt organization.

Frequently, individuals closely associated with section 501(c)(3) organizations make statements or engage in actions that may be interpreted as intervention in a political campaign. In order to avoid attribution of such political activities, any individual who is closely associated with the organization and who engages in political activities should make it clear that his or her views being expressed are the individual's views, and that they are not speaking on behalf of the organization. Moreover, while the prohibition against political campaign activity is not intended to curtail an individual's freedom of expression, individuals closely associated with

non-profit hospitals and health systems should avoid expressing their personal views in their organization's publications or at their organization's expense.

Frequently Asked Questions

Can a board member or senior executive start a PAC and ask other board members, officers, and/or employees for contributions?

As noted above, a section 501(c)(3) organization is prohibited from forming a PAC. Individuals, however, are free to associate together and form a PAC (provided it's consistent with Federal Election Commission rules and applicable state laws). Not surprisingly, board members and certain senior executives of non-profits frequently desire to form a PAC and solicit contributions from other board members, officers, and/or key employees of the organization.

While formation of PACs by individuals closely associated with non-profit healthcare organizations is permissible, it is fraught with potential tax-exemption (and campaign finance) issues and must be carefully planned and scrutinized. If a PAC is formed by a board member or senior executive in their individual capacity, PAC solicitations should not take place at the organization's facilities during official work hours or official staff meetings. Further, no facilities or equipment should be used in connection with such solicitations. For example, the organization's email system should not be used for solicitation purposes, administrative staff should not be used in preparing or delivering solicitation requests, and, more generally, no organizational funds or personnel should be used directly or indirectly in preparing solicitation requests, collecting funds, or otherwise administering the PAC. Finally, contributions to the PAC must be voluntary. Accordingly, no direct or indirect influence should be placed on employees in requesting contributions.

May we invite a candidate for political office to speak at our events?

Depending upon the facts and circumstances of the event, a non-profit hospital or health system may invite a candidate to speak at an event without participating or intervening in a political campaign. However, careful consultation with

experienced counsel is recommended prior to inviting candidates to speak at events.

If the candidate is invited to speak in an individual capacity, there is no requirement to provide equal access to other candidates. In these circumstances, however, the organization must take steps to make sure that campaign activity does not occur.

If a candidate is invited to speak in the capacity of a candidate, additional precautions are in order. For example, the healthcare organization should expressly disclaim any endorsement of the candidate in written materials for the event. The disclaimer should note that the hospital or health system does not participate or intervene in any political campaign and neither supports nor opposes any candidate for public office. In addition, when the candidate is introduced, the organization must avoid using any language that could be interpreted as supporting the individual as a candidate. If the organization invites one candidate to speak in the capacity of a candidate, it should also provide equal access to other candidates. This may be accomplished by inviting all candidates to one event or inviting each candidate to successive events.

A candidate for political office wants to tour our facilities/attend a public function and bring the media with him or her?

Candidates, like other members of the community, may attend functions that are open to the public. A candidate's presence, by itself, does not cause the organization to be engaged in a political campaign intervention. If a candidate appears at the hospital or health system's public event, it is permissible for the organization to recognize his or her attendance. It is not permissible, however, to refer to the candidate's candidacy or the upcoming election.

A board member has been asked to make a speech/hold a fundraiser at his/her house, can they do so?

As noted above, individuals are permitted to engage in political activities in their individual capacities. The board member should make it clear that they are acting in their individual capacity and not as a representative of the healthcare organization. No funds, facilities, or assets of the organization should be used in connection with the event (including, for example, donor lists, use of email server, etc.).

The state hospital association we otherwise support has asked for our contribution to its PAC. May we make the contribution?

Most likely, the state hospital association is a section 501(c)(6) organization for which political contributions made by such organization are not an absolutely proscribed activity. Nonetheless, as noted above, a proscribed political activity by a section 510(c)(3) organization can be a direct activity or an indirect activity. Accordingly, and even though the non-profit healthcare organization may generally support the state hospital association's activities throughout the year, the organization should not make an earmarked contribution for a political campaign. The board and/or senior executives may make contributions in their individual capacities but, if they do so, such individuals shouldn't be reimbursed by the hospital or health system for these contributions.

What about Internet activities? Someone endorsed a candidate on our Facebook page, what do we have to do?

A section 501(c)(3) organization's social media sites are potential grounds for accidental political activities. With respect to social media sites, it is not uncommon these days for the most innocuous post on a social media site to break out into spontaneous (and heated) political arguments supporting or opposing a particular candidate. If a non-profit healthcare organization's social media site become a political battleground, the issue then becomes what is the organization's legal responsibility to remove all such political chatter, especially those statements expressly supporting (or opposing) a candidate. Stated simply, provided the person(s) posting the political endorsements/comments is not a representative of the organization, the healthcare organization has no legal responsibility from a tax-exemption standpoint to delete such comments from its social media page. While the social media site belongs to the organization, the content placed on such site by other persons do not necessarily represent the views of the organization and should not be attributed to it. In fact, attempting to monitor and delete political comments made by the general public could actually prove problematic if such monitoring and removal, whether intentionally or unintentionally, was not done in a non-partisan way. In short, the organization should simply enforce its existing social media policies as it normally would do and should not attempt to

delete third-party content simply because it is politically motivated.

Preparing for the "Oops"

As noted above, most potential violations of the political activities prohibition are not intentional acts. Instead, potential violations are the result of unfortunate circumstances, accidental misstatements, or misperceptions by the media or the public. An organization's best offense (and hopefully best defense if needed) against such transgressions is a robust overall compliance plan to minimize the likelihood of such accidents occurring and to demonstrate to the IRS and/or the media and general public that while a proscribed political activity may have occurred, the healthcare organization had done everything that it could do to prevent such transgressions from happening and that while an individual may have made a mistake, the organization itself did not engage in a political activity. Set forth below are separate components of an overall compliance plan, none of which are legally required, that could be used either individually or in combination with others to create a robust overall compliance program:

- **Periodic education.** Periodic education of board members, senior executives, and even employees regarding the organization's limitations on participation in political activities is an important component of any compliance plan. The education can be formal with respect to the board and senior executives (e.g., short educational sessions at board or staff meetings) and more informal with respect to employees (e.g., emails or periodicals). The purpose of the educational component is to demonstrate that even if an individual makes a mistake and engages in proscribed political activity, the organization itself had done everything possible to prevent such improper activity from occurring.
- **Adopt a robust policy and procedure.** The adoption of a robust policy and procedure regarding permissible and impermissible conduct by board members, officers, and employees with respect to political activities can be strong evidence of overall compliance on the part of the organization. A well-drafted policy can demonstrate to the IRS (or any other regulatory body) that the organization is aware of the legal limitations imposed on such entity and has made every effort to ensure that it will not engage in impermissible political activities.

- **Educate the communications team.** The organization's media/communications team should be educated with respect to the political activities prohibition for two main reasons. First, by educating the communications team, they will be less likely to release a statement, press release, or tweet that implies the organization is endorsing (or opposing) a particular candidate. Second, if the local media misinterprets or misstates a statement made by an official of the organization as being supportive of a candidate, or the local media mistakenly indicates that the organization is supporting a particular candidate for public office, the communications team will already be briefed on how and whether to respond to such misstatements.
- **Conduct periodic review of materials.** Every election year, consider conducting periodic reviews of newsletters, social media pages/actions, and local media to ensure that any accidental misstatements are identified and, if needed, clarified or corrected.
- **Steps to take before candidates visit campus.** If a candidate for public office is invited to an event, or if the candidate requests to visit the organization's facilities during an election period, it may be beneficial to send the candidate a letter ahead of time that includes an express

statement that the organization may not endorse any candidate for public office, that the candidate should not discuss his or her candidacy while on campus, and that no fundraising or distribution of campaign materials should be conducted during the visit.

As may be gleaned from the above, board members must appreciate that their actions are potentially attributable to their non-profit organizations and, accordingly, must use caution when exercising their right to participate in the political activities in their individual capacities. In addition, board members need to ensure that the organizations they govern are best prepared to both avoid direct participation in political activities as well as accidental participation in such proscribed activities. To that end, boards should ensure that fellow board members and senior executives understand the proscription against political activities, that their non-profit organization has adequate policies and procedures (including social media policies) in place to protect against such activities, and that someone periodically monitors social media sites and media reports that could suggest the hospital or health system has participated in a political activity.

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