

**Election Involvement by Section 501(c)(3) Organizations
(including Churches)**

[BOBBY]

Good morning (afternoon). Welcome to Exempt Organization's phone forum on "Election Involvement by 501(c)(3) organizations, including Churches." Making today's presentation are two EO managers: Judy Kindell, a manager in Rulings and Agreements in Washington, DC; and Jason Kall, an Examinations Manager in, Houston, TX.

Each of you should have received two documents for today's phone forum presentation: first, the power point slides that our speakers will follow; and second, Fact Sheet 2006-17, entitled "Election Year Activities and the Prohibition on Political Campaign Intervention for Section 501(c)(3) Organizations." If you printed the slides or if you have them up on your computer, follow along as Judy and Jason deliver their presentations. They'll let you know what slide they're on as they proceed.

In preparation for today's presentation, we solicited your questions on this topic. Asking for your questions in advance allows us to address those that

are relevant to the group as a whole. Toward the end of today's presentation, our speakers will address each of those questions.

Let's begin. Jason?

[JASON]

Good morning (afternoon). Our session today is about the prohibition on political campaign activity by organizations recognized as 501(c)(3) tax-exempt organizations. Please refer to Slide Number Two. I'll first provide some background on the history of the prohibition; next, Judy will describe some specific situations where political campaign intervention may be present – or not – and then I'll talk about what IRS has been doing and will be doing to promote compliance and enforce the rules in this area.

Turning to Slide 3, let's start by talking about the specific language in the code that gives rise to the prohibition. The gist of the provision was added by amendment during the Senate floor debate over the Revenue Act of 1954. The amendment was proposed by Texas Senator Lyndon B. Johnson, who was then the Senate minority leader. The provision was accepted and became part of the code. There's no legislative history

explaining Senator Johnson's reasons for proposing the amendment, but nonetheless, the provision has been in the code for 52 years now.

And to the extent Congress has revisited it over the years, it has in fact strengthened it. Most recently in 1987, Congress amended the language to clarify that the prohibition also applies to statements opposing candidates.

So the current language applicable to 501(c)(3) organizations reads, ... "[an organization] which does 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." Note that the prohibition includes publishing and *distributing* statements – so the distribution by a section 501(c)(3) organization of biased material prepared by a third party could jeopardize the organization's tax-exempt status.

The prohibition applies only to organizations exempt under 501(c)(3), and not those exempt under other subsections, such as social welfare organizations exempt under (c)(4), labor unions exempt under (c)(5), or business leagues, exempt under (c)(6). These types of organizations –

and others – can engage in some political campaign activity, although taxes may apply to the expenditures for such activities.

Another important distinction – the prohibition applies to intervention in political campaigns, and not all activity that might be described as “political.” For example, 501(c)(3) organizations may engage in a limited amount of lobbying activity, which is defined as the attempt to influence legislation.

Legislation includes action by Congress, or by a state legislature or local council, with respect to acts, bills, resolutions, or similar items, including legislative confirmation of appointive office. It also includes action taken by the public in referenda, ballot initiatives, constitutional amendments, or similar procedures.

An organization will be regarded as attempting to influence legislation if it contacts, or urges the public to contact, members or employees of a legislative body for the purpose of proposing, supporting, or opposing legislation, or if the organization advocates the adoption or rejection of legislation. So although lobbying is something that we typically think of as

in the political realm, it is not prohibited by the Code section I read earlier, because none of these activities involve a political campaign by a candidate running for public office. There are other rules that govern lobbying activities by 501(c)(3) organizations, however, we won't have time to get into those this morning (afternoon).

Let me stress here that the prohibition applies to Section 501(c)(3) organizations as a condition for exemption. It's not directed just at churches or any other particular type of organization, and it's not a freedom of speech or free exercise of religion issue. It is a requirement imposed by Congress for the privilege of being recognized as exempt from federal income tax under this specific sub-section of the Code.

So now that you know a little bit about where the prohibition came from, what it applies to and who it affects, let's go to Slide 4 and talk specifically about what activities may constitute political campaign intervention, and under what circumstances.

The Code does not contain a "bright line test" as to what constitutes political campaign intervention. So the IRS considers all the "facts and

circumstances” of a particular situation, striving to interpret and apply the laws enacted by Congress, regulations written by the Treasury Department and decisions reached by the courts. And now, to illustrate the application of the facts and circumstances, Judy Kindell will discuss some specific scenarios.

[JUDY]

Thank you. As Jason discussed, whether a charity has violated the political campaign prohibition is determined based on all the facts and circumstances. Perhaps the most helpful way to show how this works is to describe situations and tell you where the IRS comes out as to whether or not there is prohibited political campaign activity. The scenarios I’m going to discuss in this part of the presentation come from Fact Sheet 2006-17, which the IRS released this past February, although I won’t be covering all of the examples from the fact sheet. The fact sheet was distributed to you prior to this forum. You can also download the fact sheet from the EO page of the IRS website. That’s “irs.gov” forward slash “EO,” and the fact sheet number is 2006-17.

First, understand that the prohibition on political campaign intervention extends beyond simple candidate endorsements or contributions to political campaign funds. Those acts are clearly campaign intervention, as are written or verbal public statements made by or on behalf of an organization in favor of or in opposition to any candidate for public office. The scenarios I will be discussing involve the tougher calls where all of the facts and circumstances must be considered to determine whether the organization has intervened in a political campaign.

Moving on to Slide 5, let's look first at activities some organizations engage in to encourage people to participate in the electoral process by educating voters, registering voters, or encouraging higher voter turnout at the polls. These kinds of activities can be legitimate, permissible activities of a 501(c)(3) organization if they are carried out in a non-biased manner.

So, in Example 1 of the fact sheet, an organization established to promote 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. Under these circumstances, the organization is not engaged in political campaign intervention when it operates its voter registration booth. This is an example of a situation where an organization can be involved in the election process without violating the prohibition.

Contrast that situation with Example 2 from the fact sheet dealing with an organization that educates the public on environmental issues. A candidate for the state legislature is challenging the environmental policies of the incumbent as an important element of her platform. Shortly before the election, the organization sets up a telephone bank to call registered voters in the district in which the candidate is seeking election. In the phone conversations, the organization's representative discusses the importance of environmental issues, asking questions about the voter's views on these issues. If the voter appears to agree with the incumbent's position, the organization's representative thanks the voter and ends the call. If, on the other hand, the voter appears to agree with the candidate's

position, the organization'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. Even though the organization's representative never makes an express endorsement of the candidate during the calls to the voters, the organization has intervened in the campaign on behalf of the candidate through the manner in which it conducted its get-out-the-vote drive.

Next, we will look at slide 6 dealing with activity by the leaders of an organization. Statements made by an organization's leader can sometimes cause concern and confusion. The question is, when is the leader speaking only for him or herself as an individual on political matters, – which he or she can certainly do – and when are his or her statements attributable to the organization, and therefore political campaign intervention? After all, an organization acts through its individual members.

Consider Example 4 from the fact sheet. A section 501(c)(3) university publishes a monthly alumni newsletter that is distributed to all alumni of the university. In each issue, the president of the university has a column titled "My Views." The month before an election, the president states in the "My

Views” column, “It is my personal opinion that Candidate U should be reelected.” For that one issue, the president uses his personal funds to pay the portion of the cost of the newsletter attributable to the “My Views” column. Even though he paid part of the cost of the newsletter, the newsletter is an official publication of the university so the remarks by the president are attributable to the university and constitute campaign intervention by the university.

Turning to Slide 7, how about appearances by candidates at exempt organizations’ functions? Depending on the facts and circumstances, an organization may invite political candidates to speak at its events without jeopardizing its tax-exempt status, but the factors to be considered are based on the capacity in which the candidate appears. Political candidates may be invited in their capacity as candidates, or in their individual capacities. Candidates may also appear without an invitation at organization events that are open to the public.

A candidate may seek to reassure the organization that it is permissible for the organization to do certain things in connection with the candidate’s appearance. An organization in this position should keep in mind that the

candidate may not be familiar with the organization's tax-exempt status and that the candidate may be focused on compliance with the election laws that apply to the candidate's campaign rather than the federal tax law that applies to the organization. The organization will be in the best position to ensure compliance with the prohibition on political campaign intervention if it makes its own independent conclusion about its compliance with federal tax law.

When a candidate speaks at an organization's event as a political candidate, the organization must take steps to ensure that:

- It provides an equal opportunity to political candidates seeking the same office;
- It does not indicate any support for or opposition to the candidate. This should be stated explicitly when the candidate is introduced and in communications concerning the candidate's attendance; and
- No political fundraising occurs.

In determining whether candidates are given an equal opportunity to participate, an organization should consider the nature of the event to which each candidate is invited, in addition to the manner of presentation.

For example, an organization that invites one candidate to speak at its well attended annual banquet, but invites the opposing candidate to speak at a sparsely attended general meeting, will likely have violated the political campaign prohibition, even if the manner of presentation for both speakers is otherwise neutral.

Moving on to Slide 8, candidates may also appear or speak at organization events in a non-candidate capacity. For instance, a political candidate may be a public figure who is invited to speak because he or she

- currently holds, or formerly held, public office;
- is considered an expert in a non political field;
- is a celebrity or has led a distinguished military, legal, or public service career.

Thus, an incumbent running for reelection may continue to act in his or her capacity as the officeholder and an organization that is hosting a forum on the history of space flight may invite a former astronaut to speak, without regard to the fact that the astronaut is also running for office without jeopardizing the organization's exempt status.

A candidate may also choose to attend an event that is open to the public, such as a lecture, concert or worship service. The candidate's presence at an organization-sponsored event does not, by itself, cause the organization to be engaged in political campaign intervention. For example, the IRS has never taken the position that candidates can not attend church services while running for office. However, if the candidate is publicly recognized by the organization, or if the candidate is invited to speak, the organization must ensure that:

- 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.

Illustrating this is Example 10 from the fact sheet. A section 501(c)(3) historical society is located in the state capital where state officials occasionally come to its meetings and the president of the society customarily acknowledges their presence. During the state gubernatorial race, the Lieutenant Governor, who is also running for Governor, attends a meeting of the historical society where the president acknowledges the Lieutenant Governor's presence in his customary manner, saying, "We are happy to have joining us this evening Lieutenant Governor Y." The president makes no reference in his welcome to the Lieutenant Governor's candidacy or the election. The historical society has not intervened in a political campaign due to the president's acknowledgement.

The last topic from the fact sheet that I want to cover is on Slide 9 and is one of the most difficult issues: the difference between issue advocacy and political campaign intervention. Under federal tax law, 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. A statement can identify a candidate not only by stating the candidate's name but also by other means such as showing a picture of the candidate, referring to political party affiliations, or other distinctive features of a candidate's platform or biography. All the facts and circumstances need to be considered to determine if the advocacy is political campaign intervention.

For our last scenario, consider Example 16 from the fact sheet: There are two candidates for the state senate in a district where the issue of state funding for a new mass transit project in the district is a prominent issue in the campaign. Both candidates have spoken out on the issue. One candidate supports for the new mass transit project, whereas the other opposes the project and supports more funding for highway improvements instead. At the annual fundraising dinner of a section 501(c)(3) organization that promotes community development, which takes place in

that district the month before the election, the executive director gives a lengthy speech about community development issues including the transportation issues. He does not mention the name of any candidate or any political party. However, at the conclusion of the speech, he makes the following statement, "For those of you who care about quality of life in our district and the growing traffic congestion, there is a very important choice coming up next month. We need new mass transit. More highway funding will not make a difference. You have the power to relieve the congestion and improve your quality of life in our district. Use that power when you go to the polls and cast your vote in the election for your state senator."

The organization has violated the prohibition on political campaign intervention as a result of its executive director's remarks. This is so because the act occurred at its official function shortly before the election, its executive director referred to the upcoming election after stating a position on an issue, and the issue is a prominent one that distinguishes the candidates.

I encourage you to review Fact Sheet 2006-17 after this forum, both the examples I just covered and the rest. Now, Jason Kall will discuss our enforcement efforts in this area.

[JASON]

Okay, we are on slide 10 now.

Some of you may be aware that we have been expending many resources in this area recently, and you may be wondering why the IRS considers it to be such an important topic. The answer is that in recent election cycles – and particularly prior to the 2004 election cycle – the IRS experienced a growth in the number and variety of allegations of prohibited political campaign intervention by section 501(c)(3) organizations. This increase in allegations, coupled with the dramatic increases in spending overall during political campaigns, raised concerns about whether prohibited funding and activity were becoming an emerging non-compliance problem among section 501(c)(3) organizations. IRS officials believed that if this situation were left unaddressed, there was potential for charities, including churches, to be improperly used as arms of political campaigns and parties. This sort

of misuse could, over time, severely erode the public's confidence and trust in these institutions.

Enforcement of the prohibition against political campaign intervention by section 501(c)(3) organizations presents unique challenges for the IRS for a number of reasons:

- The activities that give rise to questions of political campaign intervention also raise legitimate concerns regarding freedom of speech and religious expression;
- As we've already discussed, the Code contains no bright line test for evaluating political campaign intervention, so our agents must carefully gather and balance of all of the facts and circumstances;
- The questionable activities are public and occur within the compressed period of time of the election cycle. Since there are over one million 501(c)(3) organizations, media reports on the activities of just a few organizations can, rightly or wrongly, create an impression of widespread noncompliance; and
- The activities that must be evaluated for potential campaign intervention can be difficult to document, because they often involve

events and statements that may not be recorded or otherwise captured.

If the IRS determines prohibited political campaign intervention has occurred, it faces additional challenges:

- The existing sanctions are limited to assessing penalties based on the amount spent on the intervention, which may be small or difficult to determine. The other option is revocation of an organization's tax-exempt status, which may not be in the public interest.
- And, the disclosure restrictions of section 6103 limit IRS's ability to discuss its enforcement actions.

In spite of these challenges, in 2004 IRS determined that it nevertheless had to augment its efforts in this area because of the strong indications of increasing political campaign activity by 501(c)(3) organizations. First, the IRS expanded its educational efforts to remind section 501(c)(3) organizations about the prohibition on political campaign activities and the consequences of engaging in such activities. The IRS conveyed this message through press releases, speeches, workshops, Nationwide Tax Forums, and in a letter to national political parties. Second, the IRS initiated

the Political Activities Compliance Initiative to respond in a faster, targeted fashion to specific credible allegations of political campaign intervention.

OK, now we are on slide 11

As part of the initiative, a “fast track” process was implemented for evaluating reports – we call them “referrals” – of potential prohibited political campaign activity by section 501(c)(3) organizations and for starting examinations, where appropriate. The fast track process enabled the IRS to meet the main objectives of the initiative--to intercede quickly in instances of alleged prohibited political campaign activity, address allegations of noncompliance in a manner that was balanced and evenhanded, educate the exempt organizations, and prevent potential future violations of the law by those contacted.

Referrals came to the IRS from many sources. As part of the fast track process, the initiative team developed procedures for expediting the review of these potential cases. Each week, a committee of three career employees reviewed referrals and decided whether they merited examination. Each member conducted a thorough technical review of the referral information to determine whether there was a “reasonable belief” that the organization may have engaged in political campaign activity

prohibited by section 501(c)(3), when considered fairly and in light of any other reliable information. An organization was selected for examination only if at least two members agreed that the referral met the “reasonable belief” criterion. All decisions were documented. In addition, all of the church cases went through the specific procedures of section 7611, which require a church tax inquiry prior to the opening of a church tax examination. Under this section of the law, the approval of the Director, EO Examinations is required before the initiation of any contact with a church.

The IRS reviewed 166 new referrals as part of the initiative. Sixty-eight of those were selected for examination. Additionally, 64 organizations were already in process for this issue when the project began. Thus, 132 organizations were included in the project for examination. Each case was designated either as non-complex, usually meaning it was a single-issue case that could be handled as a correspondence examination; or more complex, meaning it was a multi-issue case that was to be handled as a field examination. Fewer than half of the organizations ultimately contacted were churches.

132 cases were assigned to the EO field auditors for examination.

Twenty-two of those cases were closed after additional review conducted in preparation for the examinations indicated they did not merit further use of IRS resources. As of February, when the report on the 2004 project was issued, 82 of the remaining 110 examinations had been completed and the cases were closed.

- In three of the 82 cases, the IRS not only substantiated that prohibited political campaign activity occurred, but that the activity warranted, and the IRS proposed, revocation of the organization's exempt status.
- In 55 of the cases, the IRS issued written advisories indicating the IRS's view that prohibited campaign activity had occurred, but that revocation was not recommended. A written advisory is issued when the IRS believes the organization engaged in prohibited campaign activity, but the activity appeared to be a one-time, isolated violation, and the organization corrected the violation where possible and, in most cases, took affirmative steps to ensure it would not violate the prohibition in the future. The written advisory states the facts of the case and the applicable law. It also includes a warning that the

organization risks possible revocation of tax-exempt status should it become involved in political campaign activities in the future.

- In 5 cases, the IRS found non-political campaign intervention violations, including delinquent returns.
- In 18 cases, the IRS found that the organization did not engage in prohibited political campaign activity.
- In one case, the IRS assessed excise tax.
- Twenty eight cases remain open and are in various stages of process.

A review of the files indicates some of the more common types of prohibited political campaign activities alleged and found to date through the course of the examinations. Although taxpayer privacy rights preclude us from discussing specific instances, cases included miscellaneous alleged violations ranging from allowing candidates to put up signs at organization facilities to voter registration drives conducted in a way that favors or opposes certain candidates. Alleged violations included:

- Distributing diverse printed materials that encouraged their members to vote for a preferred candidate,

- Religious leaders using the pulpit to endorse or oppose a particular candidate,
- Criticizing or supporting a candidate on their website or through links to another website,
- Disseminating improper voter guides or candidate ratings,
- Placing signs on their property that show they support a particular candidate,
- Giving improper preferential treatment to certain candidates by permitting them to speak at functions, and
- Making cash contributions to a candidate's political campaign.

The IRS determined that the facts supported the allegations of prohibited political campaign intervention in many cases, but that they did not support them in other cases.

Overall, the IRS found that nearly three quarters of the organizations examined under the initiative had engaged in prohibited political campaign activities. As a result, the IRS will continue the initiative for future election periods, and will focus on both education and enforcement.

EO has written new initiative procedures reflecting what we learned during the 2004 election cycle and which adopted some of the recommendations made by Treasury Inspector General for Tax Administration (TIGTA).

TIGTA reviewed the 2004 Initiative in response to public complaints questioning whether IRS methods of selecting cases for examination reflected a political bias or a response to political direction. The TIGTA report concluded that there was no evidence of political bias or direction, but did make several recommendations for improving the process.

We are now involved in the 2006 election cycle. As part of this election cycle, the IRS has:

- Distributed expanded educational material based on findings from the 2004 election cycle and made it widely available early in the election cycle,
- Started the project earlier in the election year to ensure consistent and timely referral selections and examinations,
- Publicized the project in advance so there is no surprise to organizations. Part of our publicity effort includes this Phone Forum.
- And, augmented the dedicated and trained team of examiners to assure prompt handling of project cases.

For more information, please refer to slide 12. Thank you

[JUDY]

Now that we have provided an overview of the law and our program, we'd like to address the questions that you submitted previously.

The first question is: can tax exempt charities promote political parties, as distinguished from individual candidates? The answer is no.

Section 501(c)(3) organizations cannot do indirectly what they can't do directly. Endorsing a political party would be a form of indirectly supporting candidates, and would constitute prohibited political activity. On the flip side, you need to remember that section 501(c)(3) organizations also may not intervene in campaigns where candidates are not identified by party affiliation. For example, many school board elections are conducted on a non-partisan basis. Nevertheless, section 501(c)(3) organizations may not support or oppose any of those candidates.

Our next question deals with whether a cultural arts section 501(c)(3) organization (such as a music or dance organization) can perform at a political or campaign event without violating the prohibition on campaign activity. Does it make a difference if the organization is paid for the

performance? Here, we would look to the types of factors discussed in the Business Activity section on page 7 of the fact sheet: Is the organization available to perform for all candidates on an equal basis; does it perform for the general public or only for candidates; does it charge candidates its usual and customary fees; and is the activity an ongoing one or did it begin its performances for that candidate.

We received a question about a website and whether a section 501(c)(3) organization could link to the website of an incumbent who is also a candidate. It was not clear whether the link was to the campaign website or one maintained as an officeholder. In any event, I would refer you to the discussion on pages 7 and 8 of the Fact Sheet dealing with web sites. The important thing to remember is that the same rules apply when the organization is creating a web page as apply in all of its other activities. It is responsible for what it puts on its pages, including the decision to link to another web site. Generally speaking, providing a link to a candidate's campaign web site would be intervening in a political campaign on behalf of that candidate, but Example 19 of the Fact Sheet gives an illustration of when such a link would not, because the organization is providing links to all of the candidates' web sites as part of a non-biased voter guide.

The next question is can a section 501(c)(3) sponsor a political candidate campaigning from an European Country? While we have not directly addressed this question, in Revenue Ruling 73-440, we addressed the similar question of whether the limitation on lobbying by section 501(c)(3) organizations applied to foreign as well as domestic lobbying and the answer was it did. I believe that we would take a similar position with respect to the political campaign prohibition.

The last question from our audience is may a charity present a candidate-prepared video that supports the candidacy to its membership at a meeting? If not, would it be legal to present the video if the charity also played a video prepared by the candidate's opponent? In this instance, the same rules apply whether the candidate appearance is live or on tape. Again, I refer you to the Fact Sheet, in particular the discussion of public forums on page 3 and 4.

[BOBBY]

Thank you, Judy and Jason. And, thank you all for joining us today. I hope you found the presentation helpful. I encourage you to log-on to the IRS

website at irs.gov/eo for a wealth of information on this topic, including access to a web-site video presentation on IRS' Tax Talk Today, the full PACI Report, and *The Tax Guide for Churches and Religious Organizations*.

Later today, we will email you a confirmation of your attendance. This email will also ask you for feedback on this session. Please take a few minutes to share your thoughts and provide comments. We use your feedback to improve and tailor our education and outreach programs. So please return the survey as soon as you can. Have a good (morning)(afternoon).