



INDEPENDENT SECTOR
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Policy Action Network Issue Briefing – April 21, 2006 **IRS Nonprofit Political Activity Guidance**

Lois Lerner, IRS Director of Exempt Organizations Division and Judith Kindell, Tax Law Specialist with Tax Exempt and Government Entities, joined the Policy Action Network to discuss the new IRS guidance on nonprofits' election year activities.

Background

- Express advocacy has been defined very broadly and simply in the past, but the courts have tightened that definition over the years.
- Congress tightened the rules on 527 organizations since they are not regulated by the FEC. Though some new regulations are in place, people continue to look for new avenues to influence the political process and some view 501 (c)s as a potential vehicle for getting money into the political process.

Program Initiative/Need for New Guidance/Results of Examination

- In response to an increase in referrals related to campaign activity by (c)(3) groups in the 2004 election cycle, the IRS distributed information to clarify the rules on nonprofit involvement in political activities for the public, churches and political parties. They sent letters explaining intervention, educational publications and discussed the issue at workshops and forums. They also set up a political compliance initiative to expedite referrals and quickly determine the need for examinations. The agency's goal was to contact each organization quickly after having received a complaint in order to stop further prohibited activities and to educate the organization.
- In 2004, the IRS received 132 referrals that were assigned as exams. Of this number, the IRS examined 110 groups, 50% of whom were churches. The agency found some type of prohibited activity in about ¾ of the organizations it investigated. The activities included distributing campaign materials; making improper statements in church services; inviting only one candidate to a church service or forum; distributing improper voter guides; posting political signs on property; links on website to candidates' sites; and making campaign donations.
- Most infractions involved distributing improper materials and endorsing candidates. Also in most cases the violations were unintentional and the result of people not knowing the rules. Many of the cases were closed by giving the groups advisory notices that included the changes the group agreed to abide by. Those groups will be re-examined to ensure continued compliance.

Board Members and Political Participation

- The IRS has recognized a problem (especially among churches) with staff or volunteer leaders who share their personal political opinions at organizational

meetings and other speaking engagements because it's presumed that the person is speaking in their official capacity. In individuals' capacities as board members, they represent the voice of that organization and are prohibited from making statements about candidates. Individuals can engage on a personal level, but it is not possible for them – in an official function – to give their personal opinions. It is permissible to make social commentary, but not to mention candidates.

- It is incumbent upon the nonprofit sector to educate our boards of directors about their responsibilities and obligations to abstain from discussing campaigns and candidates.

GOTV

- In an effort to deter skeptics who consider a group's work as partisan because of its issue areas, organizations must present their work objectively. Additionally, you must follow specific rules if you're using private foundation funds.
- The rules for GOTV are clear: you can have a point of view, but you can't reference a candidate or party (directly or indirectly) and your voter registration activities cannot be limited to areas where people of a certain political orientation concentrate.
- If a group represents low-income tenants, it is permissible to conduct voter registration activities in low-income areas. It is also permissible to restrict voter registration efforts to the constituents that your organization serves and to target areas with low voter turnout.
- An organization's activities must be clear and fair. Each case will be judged on its particular facts and circumstances.

Debates and Forums

- It is not necessary to hold debates during the primary election for both political parties if one party's candidate has already effectively been decided.
- A 501 (c)(3) organization that is jointly hosting a forum with a (c)(4) could be impugned if the (c)(4) engages in other, more political activities such as distributing buttons. The electioneering activity would be attributable to both groups.
- Organizations should address a broad range of issues so that their activities will not to be considered political intervention. Forums or candidate guides should not focus on one issue (unless candidates are running for an office that deals only with a single issue). Nonprofits' charitable purpose can involve encouraging political participation, but it can not involve political intervention.

Issue Advocacy

- The difference between issue advocacy and electioneering is best addressed in revenue ruling 2004-6. The agency considers several factors in distinguishing between issue advocacy and electioneering including the timing of the message, whether a candidate is mentioned and whether the organization is taking a new point of view.
- An organization's campaign could be considered political intervention if a group's presentation of an issue seems to closely align with a candidate's presentation of him or herself. A determination could only be made after considering all of the facts and circumstances associated with the case.

- An act counts as intervention if a group suggests how voters should vote, including directing voters to choose candidates who support the organization's issues. It is permissible to say, "I care about cancer and I vote," because that statement does not directly mention a candidate.
- Groups must be careful to conduct their work through the right type of organization. Nonprofits can advocate for their causes and encourage voting and political involvement by setting up (c)(4) organizations.
- Political activity doesn't fall under the purview of (c)(3) groups – (c)(3)s are charitable and (4)s are educational. (c)(4)s, however, will be subject to a 527 tax if they engage in electioneering activities. (c) 4 groups should consider establishing 527s if much of their work will be electioneering. (c)(3) groups cannot form 527s.

Expenditures/Penalties/Sanctions

- 501 (c)(4)s that engage in impermissible electioneering are subject to a tax on the expenditures related to those non-exempt activities. The tax is currently 35%.
- Determine the expenditures by determining the actual cost of the project (e.g., vendors, postage, etc.)

Expenditures/Penalties/Sanctions (cont)

- Currently, only two solutions exist for addressing 501(c)(3)s organizations' political expenditure infractions – one that is extremely harsh (revocation of tax exempt status) or another that is very lenient (paying the Section 4955 tax –10% of the expenditure).
- Independent Sector will be looking at the issue of appropriate sanctions – particularly through LRAC – and will encourage members' input in this discussion.

Additional Resources

- IRS Revenue Ruling 2004–6 http://www.irs.gov/irb/2004-04_IRB/ar10.html provides guidance on the tax implications of certain exempt organizations' advocacy activities including 501 (c)(4)s.
- **Attached** Congressional Research Service Report on Tax-Exempt Organizations' Political Activity