

IRS ISSUES NEW GUIDANCE ON POLITICAL ACTIVITIES

By Eileen M. Johnson

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After analyzing complaints received from the 2004 election, the IRS is taking a proactive role to help organizations in this election year. The IRS has drafted new guidance to better

assist charities from inadvertently becoming involved in political activities.

Separate guidance for this election year is provided for: charities, churches and educational organizations; social welfare organizations; labor and agricultural organizations; business leagues; and political organizations. These resources are available at <http://www.irs.gov/charities>.

Charities, in particular, should pay special attention to FS-2006-17, a fact sheet on Election Year Activities and the Prohibition on Political Campaign Intervention for Section 501(c)(3) Organizations. The fact sheet provides real world examples of activities that charities may want to engage in, and is surprisingly easy to understand. It also advises charities on how to handle requests from a political campaign or candidate.

FEC Rules Differ

Although somewhat counterintuitive, the IRS and the Federal Election Commission have different rules on participation in political activities. It is up to charities to safeguard their tax exempt status by knowing the IRS rules on political activities. While candidates are usually well-versed in federal election law restrictions, they are not typically familiar with the IRS

rules. For example, a candidate may tell an organization that a particular activity is allowed in terms of his or her knowledge of the Federal Election Commission rules. The charity must then review the proposed activity against the IRS guidance on political intervention and determine for itself whether the activity is permitted so as not to risk losing its tax exempt status.

Personal Comments

The IRS has confirmed that a charitable leader may endorse or oppose a candidate in his or her personal capacity. As one IRS official recently said, charitable leaders are not on duty 24/7. However, the way the endorsement or opposition is presented can convert what was intended to be a purely personal action into unauthorized political activity by the charity. Any charity leader considering making a personal statement in support of or in opposition to a candidate should be aware of the rules before making any comments.

Voter Education and Motivation

Voter education, registration, and "get out the vote" drives are allowed so long as they are conducted in a nonpartisan manner with no preference being shown for a particular candidate or party. There is abundant guidance on how to stage these activities in a way considered nonpartisan by the IRS. Organizations should exercise care in planning and carrying out these activities in order to stay within approved limits.

Candidate Appearances

Organizations may invite candidates to speak at public events so long as they follow some strict rules. First and foremost, no fundraising may be conducted at the event. Secondly, the organization cannot show a preference for any candidate and all candidates for that office must be invited to participate. If the event is a public forum such as a debate, there are specific rules that apply to what questions may be asked and how the event should be conducted.

Sometimes a candidate is invited to participate in an

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organization's event because of factors other than his or her candidacy. For example, the candidate may be a public official or a member of the organization. In those situations, the charity should work closely with the candidate to review the ground rules so that the candidate makes no mention of the election or candidacy, and speaks in a strictly nonpartisan manner.

Uninvited Guests

What happens if a candidate shows up at an event uninvited and unannounced? The IRS offers charities guidance on how to handle that situation. The organization may choose to follow its standard custom of acknowledging important visitors but not mention the candidate's candidacy or the election. If the candidate is given an opportunity to speak, the speech must be non-political in nature and may not mention the election or the speaker's status as a candidate.

Issue Advocacy vs. Political Campaign Intervention

Many organizations are actively engaged in issue advocacy every day, and the IRS fully recognizes that fact. It also knows that some organizations only advocate issues during election years, and so it offers guidance to those organizations. Following the federal election law proscription, organizations should avoid issue advocacy during the "red zone" - that is 60 days before a general election and 30 days before a primary election - unless they can meet a strict test. Organizations not actively engaged in issues who choose to launch an advocacy campaign during an election year will be closely examined by the IRS.

Voter Guides

Voter guides - publications that help to sort out the candi-

dates' positions on the issues - may be created and distributed by charities under certain conditions. The guides must be non-partisan and cover a broad range of issues. Additionally, all questions posed must be clear and unbiased, and they must be posed to all candidates for a particular office with sufficient time allowed for their responses. An organization's position on an issue may not be included in the guide, nor may the organization rate candidates. Additional rules too numerous to summarize must also be followed. Furthermore, organizations should be cautious about distributing guides prepared by other parties,

and they may not distribute guides prepared by a candidate or a political party.

Business Activity

Nonprofit organizations have many assets that make them attractive to candidates, not the least of which is their membership and donor list. Organizations may make their list available to political candidates only if they make it available to the general public and all candidates on the same terms and conditions, including payment of a fair market rental fee. Similarly, an organization may allow candidates to use its facilities, such as a conference room or office space, so long as the facilities are made avail-

able to all candidates and the public on the same terms and conditions. An organization that allows a candidate to use, at fair market rate, an asset is engaged in a political campaign activity if it does not make it available to other candidates.

Web sites

An organization's web site is considered by the IRS to be just

Q Our organization is a nonprofit charity and we sell various items to raise funds. Do we need to collect sales tax on these sales?

A While charitable organizations are generally exempted from paying sales tax on personal property they purchase in Maryland, the reverse is usually not true.

In Maryland, sellers of tangible personal property are required to collect and remit sales tax to the State, unless a specific exemption applies. There is no blanket sales tax exemption for sales made by charitable organizations in Maryland, even if the funds are to be used for charitable purposes. A recent law change (MD House Bill 1624), however, will allow the charitable contribution portion of sales made at auction by charitable and religious organizations to be exempted from sales tax, provide the proceeds are used for exempt purposes. This new (but limited) exemption became effective on July 1, 2006.

another form of communication, and activity on a web site is judged by the same rules as other media. A communication supporting a candidate that would not be allowed on the radio is not allowed to be made on the organization's web site. Special care must be made in linking to web sites maintained by candidates or their supporters or opponents. Linking is allowed in certain cases if done in a nonpartisan manner. The IRS applies a facts and circumstances test in determining if the posting or link constitutes political campaign intervention.

Warning

An organization may safely conduct one of the allowed activities and not be engaged in political activity. The IRS warns that conducting multiple activities could have the unanticipated consequence of engaging in political activity that jeopardizes the organization's exempt status. Care should be given in planning each activity and in looking at the totality of the organization's activity to determine if it has crossed the line from what is allowed to what is prohibited.

Conclusion

While there are certainly constraints on a charity's ability to be actively engaged this election year, those constraints can be managed with thoughtful planning and consultation with tax counsel. Organizations should not be afraid to exercise their rights to engage in lobbying and nonpartisan political activity in furtherance of their missions, but they need to do so in a fully educated manner.

ARE CHARITABLE GIVING TAX INCENTIVES AND REFORMS A POSSIBILITY THIS YEAR?

By Eric A. Vendt

The Tax Increase Prevention and Reconciliation Act of 2005 (H.R. 4297) was signed into law by the President on May 17, 2006. Noticeably absent from the legislation were the charitable giving tax incentives and charitable reforms expected to be enacted. Ultimately, these measures were dropped because Congress was only authorized to cut \$70 billion in taxes under its budget resolution while the total cost of the measures under consideration totaled \$120 billion in tax cuts.

However, the general consensus is that some of the incentives and reforms may be included in a trailer bill being added to pension reform legislation (H.R. 2830) currently pending before Congress. But this is not a certainty. Congress must reach a final agreement concerning the broader pension legislation before it focuses on adding charitable reforms to the trailer bill. According to the Independent Sector of Charitable Organizations, House Ways and Means Committee Chairman William Thomas (R-Calif.) and Senate Finance Committee Chairman Charles Grassley (R-Iowa) have "agreed in principle to a package of charitable incentives and reforms" but have yet to work out the issues.

Another element of uncertainty is which reform measures would be included in such a trailer bill. There remains strong support for the charitable measures that were previously included in the Senate version of H.R. 4297. However, both Thomas and Grassley indicated that they may want to include some new elements. Grassley is likely to be interested in adding further provisions drawn from the Sector's prior recommendations, such as enhanced electronic filing requirements and funding for community education.

Congressman Thomas indicated to reporters on May 17 that the trailer bill had not been assembled. He suggested that many charitable provisions (both revenue raising reforms and incentives) may not be sufficiently examined by House tax writers in time for them to be included in the pension legislation package as intended. Thomas also indicated that some measures may require additional hearings in order for members to gain a full understanding of everything encompassed by these provisions.

Nevertheless, the principle of reform is generally supported. In a letter dated May 25, 2006, the Sector urged Congress to pass the package of charitable giving incentives and reforms included in the Senate version of H.R. 4297. The Sector indicated that such reforms would strengthen the work of the Sector by deterring and punishing abuses by individuals who exploit charitable organizations for their personal gain by improving the transparency and accountability of charitable organizations. They further stated, "[w]hile we sup-

port increased enforcement of current law, we firmly believe that these reforms are necessary to improve government oversight and prevent abuses by individuals, without imposing unnecessary costs or hardships on reputable charities. Moreover, the proposed reforms strike the right balance between legitimate government oversight and protecting the independence that charitable organizations need to remain innovative and effective."

WTP will continue to track and report on charitable reforms being considered by Congress. Should you have any questions or concerns regarding any specific measures or issues, we encourage you to contact us.

The Nonprofit Report is a Whiteford, Taylor & Preston service to clients and other friends of the firm. It is designed to provide general information on specific developments and issues; it is not intended to provide legal advice or opinion.

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THE NONPROFIT ORGANIZATIONS GROUP

We advise and counsel nonprofit organizations on a wide variety of legal issues, including obtaining tax-exempt status, fundraising, private foundation and public charity status, unrelated business income issues, corporate governance, intermediate sanctions, and labor and employment issues. For more information about Whiteford, Taylor & Preston's Nonprofit Organizations Group, please contact Jonathan May at (410) 347-8781 or jmay@wtplaw.com.

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INTRODUCING EILEEN MORGAN JOHNSON



Eileen Morgan Johnson, author of the first article, is an exciting new addition to our Nonprofit Organizations Group. Eileen, who has joined us as Counsel in our D.C.

office, is a savvy, nationally known practitioner with two decades of practical experience gained by guiding a national nonprofit through a variety of legal issues.

Eileen served as in-house counsel at the National Wildlife Federation for almost twenty years, the last eight of which were as general counsel and corporate secretary. During that time, NWF had 4 million members and supporters, with 47 state affiliates, and several subsidiaries.

She is active in the Virginia State Bar, where she served in various leadership positions of the Board of Governors of the Corporate Counsel Section, and in the National Association of Corporate Counsel. Additionally, Eileen is a frequent lecturer on issues related to both nonprofits and the general counsel function within an organization. She received her law degree from Brigham Young University in 1982, and her bachelor's degree from the College of William and Mary in 1979.

In making the move to our firm, Eileen was drawn by our approach to serving our nonprofit clients: "As a former general counsel, I liked the holistic approach that WTP attorneys bring to their nonprofit clients. The breadth of experience in the firm is amazing. WTP is a wonderful resource for the nonprofit legal community and I am looking forward to spreading the word about it."

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