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Dos and Don'ts for Nonprofits Active in the Public Square

10.15.2018

With the election around the corner, nonprofit organizations – especially charities – should review the rules about public policy, lobbying, and political activities. Tax exempt nonprofit organizations must be careful about the types of public and political activities they undertake, but charities and other nonprofit organizations don't have to give up the ability to take positions on public issues or to take action to influence public policy merely because of its exempt status. Federal tax limits on the political activities of tax-exempt organizations are, in fact, often narrower than many people think. Tax-exempt organizations have the right to engage in public debate and make their positions on important issues known, and even 501(c)(3) charities, which are the most heavily regulated, may engage in some political activities that further their tax-exempt, charitable purposes.

The main restrictions on the political activities of tax-exempt organizations involve lobbying (trying to convince Congress or a legislature to enact or reject specific legislation) and intervening in political campaigns (supporting or opposing candidates for election to office). But even when these restrictions apply, they leave a great deal of room for nonprofit organizations to participate in the public policy activities.

Part of the difficulty exempt organizations face is that the restrictions are very subjective—the IRS rules apply a “fact and circumstances” test, and there are other legal concepts such as “no substantial part of activities” that can come into play. Over the years, many nonprofit organizations and legal professionals have criticized the IRS's approach as being too vague and too difficult for many nonprofits to confidently comply.

Exempt organizations are left trying to figure out the subjective standards. To do so, it's important to distinguish among education and advocacy for policies (generally permitted); lobbying for or against specific legislation or referenda (which

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may be permitted but is more closely scrutinized)[1]; and directly engaging in campaign activities or endorsements (never permitted for charities, but may be possible for other types of exempt organizations so long as they are not “primarily” engaged in election campaigning). Make sure the rules are incorporated into your policies and procedures, and review them with board members and employees annually. Here’s a list of permissible and prohibited activities.

Do’s (things that your organization can pursue without consulting an experienced attorney)

- Continue to speak out and educate the public on public issues more than 90 days before an election. To be safe, avoid mentioning specific legislation or naming specific public officials. And remember that charities must stick to educational activities and avoid partisan messages.
- Sponsor candidate debates or forums at which all of the candidates for a particular office are invited to attend or participate.
- Encourage others to vote, so long as your message is generic and not targeted in any way that could be interpreted in any way as intending to benefit particular candidates or political parties
- Advocate for public policies for the good of society. But if you are a charity, consult an attorney first to learn how to frame your message so that it is considered educational (permissible) and not impermissibly partisan.

Do’s (so long as you consult with counsel first – these activities raise issues that can be legally complex)

- Sponsor non-partisan activities candidate forums or debates
- Publish voter guides
- Sponsor public officials to speak at your organization’s conventions or other gatherings
- Issue position papers or legislative policy agendas that mention specific legislation or name public officials who are campaigning for election
- Educate the public about current events and issues within 90 days of an election (including primaries, general elections, runoff elections, etc.).

Don’ts (especially for charities. Most other nonprofits must avoid some of these activities, but can engage in others so long as they consult with counsel in advance)

- Endorse candidates for federal, state, or local office
- Show preference with content or conduct
- Make or solicit campaign contributions
- Make written or oral statements that encourage people to vote for or against a candidate
- Place political ads
- Mention the upcoming election when advocating for your issue

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- Make campaign statements on your website
- Board members and CEOs: don't speak on behalf of the organization when supporting candidates.

Now is a good time for tax-exempt organizations to review their policies and practices. Organizations that know and understand the rules of the road can actively participate in the political process without undermining their tax exempt status.

If you have questions regarding the rules on lobbying and political activity for your tax-exempt organization, please contact your regular Butzel Long attorney, a member of the Butzel Long Nonprofit Organizations group, or the authors of this alert.

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[1] Nonprofit organizations that lobby are sometimes required to register as lobbyists, but these restrictions don't usually apply to most nonprofit organizations. However, other rules may apply to organizations that receive governmental grants or funding. If your organization hires a lobbyist, pays an employee to influence the government, makes significant expenditures to influence government decisions, is regularly in contact with government officials, or receives grants or other assistance from the government, you should consult with counsel to determine what other restrictions apply to your organization.