

**Elephants and Donkeys on Campus: Political Campaigns and Colleges and Universities**  
**Celia Roady, Morgan, Lewis & Bockius LLP**  
**Siobhan Rausch, Hogan & Hartson L.L.P.**

**Friday, April 7, 2006**

**I. Restrictions on Political Activities Under Section 501(c)(3)**

Although Section 501(c)(3) allows organizations to engage in an insubstantial amount of lobbying activities without loss of exemption, it contains an absolute prohibition on participation or intervention in political campaign activities in support of or in opposition to candidates. Organizations that violate this ban are subject to revocation of their tax exemption. They also risk the imposition of excise tax penalties on the organization itself, as well as on organization managers who approve the making of expenditures for impermissible political purposes. Because the stakes are so high in the case of noncompliance, it is critical for colleges and universities to understand what activities may violate the prohibition on political campaign intervention.

**A. Prohibition on Participation in Political Campaigns**

Section 501(c)(3) requires, as one of the conditions for exemption, that organizations “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.” This prohibition is absolute, unlike the lobbying restriction which states that “no substantial part” of an organization’s activities may include lobbying.

**1. Definition of Terms**

The statutory prohibition on political campaign intervention contains three key elements. There must be a “candidate” who is seeking “public office,” and the organization must “participate in, or intervene in” the candidate’s political campaign.

**a. Who is a “Candidate”?**

The IRS regulations define a candidate as “an individual who offers himself, or is proposed by others, as a contestant for an elective public office, whether such office be national, State, or local.” (Reg. § 1.501(c)(3)–1(c)(3)(iii).) This definition includes all persons who have already declared their intent to run for office, and most likely includes incumbents who may be presumptively treated as candidates until they announce an intention not to run. The phrase “proposed by others” expands the category to include persons who may not have declared an intention to run, but whose potential candidacy is the subject of intense public speculation. The formation of an exploratory committee or campaign committee is a signal that a person is a candidate, even if he or she has not clearly announced an intention to run.

The Federal Election Commission and the Federal Communications Commission provide clearer definitions of a “candidate.” The FEC provides that a person is a candidate only after he or she

has received contributions or made expenditures of \$5,000 or more. The FCC requires a public announcement of an intention to run for office to determine candidacy. However, the IRS has concluded that neither of those definitions may be used to determine whether an individual is a candidate for purposes of Section 501(c)(3).

**b. What is a “Public Office”?**

The IRS regulations provide no specific definition of “public office,” although they refer to an “elective public office, whether . . . national, State, or local,” in their definition of “candidate.” (Reg. § 1.501(c)(3)–1(c)(3)(iii).) The IRS has interpreted the term to encompass elective positions in political parties. However, an election need not be contested nor involve political parties to be counted as an election for “public office.” The IRS has held that the term “public office” includes a state precinct committeeman, where the position was created by statute, has a fixed term, is not occasional or contractual, and requires an oath of office. (G.C.M. 39811 (Jun. 30, 1989).)

**c. What is “Intervention in a Political Campaign”?**

Section 501(c)(3) defines participation in a political campaign as “including the publishing or distribution of statements.” IRS regulations further provide that “publication or distribution of written or printed statements or the making of oral statements on behalf of or in opposition to . . . a candidate” constitute intervention in a political campaign. (See Reg. § 1.501(c)(3)–1(c)(3)(iii).) However, the regulations note that intervention “[is] not limited to” these named activities.

Activities that may be intended as nonpartisan educational activities nevertheless may constitute a prohibited intervention in a campaign. The motive for the activity is irrelevant in determining whether or not it constitutes impermissible intervention. For example, the IRS has held that an organization formed to promote public education which conducted an objective review of the qualifications of school board candidates and announced the names of those it considered most qualified violated the prohibition on political campaign activities. (See Rev. Rul. 67-71, 1967-1 C.B. 125.)

**2. Permissible Political Activities**

Some activities that are political in nature are permissible under Section 501(c)(3) as “educational” activities. The regulations provide that in order to be considered “educational,” activities must present “a sufficiently full and fair exposition of the pertinent facts.” (See Reg. § 1.501(c)(3)–1(d)(3).) The presentation of information must not be biased and must “permit an individual or the public to form an independent opinion or conclusion.” Further guidance is found with the definition of “educational” as “the instruction or training of the individual for the purpose of improving or developing his capabilities.” Activities which further this purpose may be more likely to be considered “educational” as opposed to “political.”<sup>1</sup>

---

<sup>1</sup> For a good discussion of permissible political activities, see Gregory Baird, “Independent Institutions of Higher Education and I.R.C. § 501(c)(3): Guidelines for Conducting Political Campaign Activities on Campus,” 49 Baylor L. Rev. 129 (1997). See, also, Judith E. Kindell and John F. Reilly, “Election Year Issues,” 2002 Exempt Organizations Continuing Professional Education Technical Instruction Program 335.

**a. Candidate Debates and Forums**

Colleges and universities may provide forums for candidate debates without those activities constituting impermissible political activity. In general, the sponsoring organization must ensure a fair and neutral forum and provide equal time to all qualified candidates. The IRS takes the position that the following factors should be considered in determining whether a debate is a permissible political activity. (See Rev. Rul. 86-95, 1986-2 C.B. 73.)

- (1) The debate should include all legally qualified candidates for the contested office. Exceptions may be made to this guideline if inviting one or more of the candidates is impracticable, or does not further the organization's educational purpose. For example, a college may invite only candidates from one party if the contested election is a primary election.
- (2) The debate topics should cover a broad range of issues, including those issues of importance to the organization sponsoring the debate.
- (3) The questions presented to the candidates should be composed by an independent, non-partisan group. Such a group could include members of the educational organization, the media and community leaders.
- (4) A moderator should be selected by the sponsoring organization and his or her role should be limited to ensuring that the debate ground rules are followed. The moderator should refrain from commenting on the candidates' statements in a way that demonstrates approval or disapproval of their ideas.
- (5) The debate should begin and end with a clear statement to the effect that the views presented are those of the candidates and not of the sponsoring organization.

**b. Student Newspaper Endorsements**

Student newspapers may publish editorials which oppose or endorse specific legislation and/or candidates for political office without endangering a college or university's tax exemption. (See Rev. Rul. 72-513, 1972-2 C.B. 246.) The newspaper must clearly state that the views reflected are those of the student editors and not of the educational institution. For the content to be permissible, neither the institution's administration or faculty may exercise any control over the newspaper's editorial content.

Other potential trouble spots with student newspapers may include endorsements of certain candidates or the use of political cartoons to communicate a message. Colleges and universities may minimize the risk of tax controversy with respect to political statements in student newspapers by ensuring that all content and editorial decisions remain in the hands of the students and by printing a statement to that effect in every issue of the newspaper.

**c. Use of Institutional Facilities**

Colleges and universities are often viewed as at least quasi-public forums, and candidates for public office may be invited to -- or may seek permission to visit -- the campuses to make public appearances in connection with their campaigns. If a candidate uses a campus visit as an occasion to make a campaign speech, the college or university should make it clear that the institution does not support or oppose the candidate in all promotional materials related to the event, and state this disclaimer again when introducing the candidate at a public forum. The college or university should also ensure that there is absolutely no political fundraising at the event. It is extremely important that colleges and universities not appear to favor one candidate - - or one political party -- over another. Although candidates do not all have to be invited to the same event, they should be invited to equally publicized events with approximately equal expected attendance. The appropriate role of colleges and universities, consistent with their tax exempt status and in furtherance of their educational purposes, is to serve as a neutral and fair forum for all candidates.

Persons who are candidates for public office may also be invited to speak at campus in their individual capacities. For example, an incumbent state governor running for re-election, who is also an alumna of a college, may be invited to speak in her capacity as an alumna without the activity constituting an impermissible political activity. During the speech, no reference should be made to the governor's status as a candidate for public office nor should any campaign activity occur in concurrence with the speech. Any promotional material related to the speech should make clear that the governor is appearing in her capacity as an alumna, without any mention of her candidacy for re-election.

Campus radio stations and newspapers may accept paid political advertising by candidates as long as several guidelines are followed. The acceptance of the advertising must be made on the same basis as other non-political advertising and the advertisements should be preceded by a statement that they are paid advertising and not reflective of the institution's views. Including an explicit statement before the advertisement to the effect that the college or university is not permitted to endorse candidates for public office and that the advertisement should not be considered an endorsement is a good safeguard. Ads should be solicited in a fair manner according to established guidelines, and equal time should be given to all candidates who wish to use the broadcast medium for paid political advertising. (See Rev. Rul. 74-574, 1974-2 C.B. 160.)

Colleges and universities may make their facilities available to individuals or groups who wish to use them to conduct political campaign activities. For example, a candidate may wish to rent a conference room at a university to hold a meeting, or a political party may wish to rent a large stadium to hold a political rally. The institution should ensure that all facilities are made available to political groups on the same basis as to other non-political groups or individuals. If rents and fees are normally charged, they should also be charged to the political group or candidate; no preferential treatment should be given. The institution should neither promote nor endorse any political event held by an outside organization on its campus. The institution should also require the candidate or organization holding the event to read a statement, at the start of the

event, that the use of the institution's facilities in no way constitutes an endorsement by the institution of the candidate or the organization. Institutions should also make sure that the facilities are equally available to all candidates and political parties. Guidelines should be on file detailing the procedures for making facilities available on a fair and neutral basis.

**d. Voter Registration on Campus**

Colleges and universities may wish to provide a forum for on-campus voter registration, either under their auspices or under the sponsorship of other organizations. Allowing or conducting voter registration on a college or university campus does not constitute impermissible political campaign activity so long as the drive is conducted in a non-partisan and fair manner. (See P.L.R. 9117001 (Apr. 26, 1991).) The Federal Election Commission has provided guidance on how to conduct a nonpartisan voter registration campaign. Its regulations require that either all candidates or no candidates be named, that all or no party affiliations be given, and all persons interested in registering be permitted to do so regardless of their party preference.

Colleges and universities should not give preferential treatment to particular groups seeking to conduct voter registration drives on campus. It is, of course, preferable to have voter registration drives conducted by other Section 501(c)(3) organizations, which are subject to the same constraints on political activities as the institutions themselves. Where groups affiliated with particular political parties seek to conduct voter registration drives on campus, colleges and universities should make sure that opposing parties have an equal opportunity. It is also helpful for colleges and universities to provide guidelines for organizations seeking to conduct a voter registration drive on campus, in order to ensure that such organizations conduct the activity in a fair and nonpartisan manner.

**e. Other Voter Education**

Organizations on a college or university campus may wish to engage in other forms of voter education, such as the dissemination of voter guides and incumbent voting records. Both voter guides and voting records may be permissible forms of political activity if certain guidelines are followed. In general, voting records and responses to candidate questionnaires may be distributed if done so without editorial comment and if they cover a broad range of issues. (See Rev. Rul. 78-248, 1978-1 C.B. 154.) However, formats that "evidence a bias" toward a certain candidate or that cover only a narrow range of issues may constitute impermissible voter education activities.

Voter guides which cover only a narrow range of issues may be permissible under certain circumstances. (See Rev. Rul. 80-282, 1980-2 C.B. 178.) The guides should be disseminated only to members of an organization. They should be made shortly after the close of a legislative session and should not identify which incumbents may be candidates for reelection. Also, guides should include a caveat about judging the qualifications of an incumbent based on a few selected votes.

**Example:** College Z's Student Environmental Club wishes to publish a voting record of state legislators on environmental issues. The voting record should be circulated only to members of the club and should not identify which legislators are up for reelection. The voting record should also state that it was prepared by the student organization and should include a caveat about judging legislators' qualifications based on a selected number of votes.

**f. Course Credit for Participation in Political Campaigns**

Some colleges and universities may wish to offer course credit to students who participate in political campaigns, either as interns or as part of an approved curriculum in a class. Such participation by students is permissible if the institution offering the credit retains no control over the students' selection of a campaign in which to participate. In addition, the course offering credit for campaign participation should be an elective, and not a mandatory part of the curriculum. Finally, the course curriculum should delineate how participation in the campaign relates to the educational goals of that particular course or department curriculum. (See Rev. Rul. 72-512, 1972-2 C.B. 246.)

**3. Attribution of Individual Activities to Section 501(c)(3) Organizations**

A periodic source of concern for colleges and universities is how to ensure that the participation by a member of the institutional community -- a faculty member, a student organization, or indeed a senior university official -- is not attributed to the institution itself. Faculty members may serve as advisors to candidates, and may even run for office themselves. Where such participation is undertaken solely in an individual capacity, without making any use of the resources of the institution, the activity should not be attributed to the institution for purposes of the prohibition on political campaign participation. The practical problem, however, is how a large and complex institution like a college and university can make sure that its resources are not inappropriately directed to activities in support of or opposition to candidates. One approach is for colleges and universities to issue guidelines on this subject, either as part of their employee handbooks, at the beginning of election cycles, or both. The purposes of such guidelines are twofold: (1) to inform members of the institutional community about the rules applicable to the institution and what they are expected to do in compliance with such rules, and (2) to evidence the institution's awareness of the requirements under Section 501(c)(3) and its commitment to compliance with such requirements. The guidelines should cover at least the following matters:

1. The organization should remind its employees of the prohibition against its provision of any direct or indirect support to a candidate. Thus:
  - a. Employees who desire to participate in campaign activities during normal working hours must take vacation time or leave without pay to do so.

- b. Employees cannot use the organization's letterhead in connection with campaign activities. Employees should not use the organization's support services or supplies (secretarial, duplicating, messenger, etc.) in connection with campaign activities, unless the organization otherwise permits personal use with proper reimbursement and the employee reimburses the organization for any such use.
2. The organization should require any employee who participates in a political campaign to notify the campaign in writing (with a copy to the organization) that such participation is in his or her individual capacity. The organization should retain its copy of the letter in its files. The employee should seek, to the extent possible, to minimize any references to his or her position with the organization by the campaign. For example, the employee should use his or her home address for campaign-related mailings, etc.

## **B. Excise Tax Penalties Under Section 4955**

Section 4955 imposes an excise tax on impermissible political expenditures by Section 501(c)(3) organizations. Although the legislative history of Section 4955 indicates that one purpose was to provide an intermediate sanction -- short of revocation of exemption -- for minor violations of the prohibition on political campaign intervention, any such use is discretionary with the IRS, which retains authority to seek revocation for any violation, however small. The existence of Section 4955 makes it less likely, however, that the IRS will seek revocation of exemption in cases where the violation is minor or inadvertent.

The excise tax is a two-tiered tax -- an initial tax on the organization and an additional tax if the expenditure is not "corrected" within a specified period of time. The initial excise tax imposed on the organization is 10% of the amount of the impermissible expenditure; there is a second tier tax of 100% if the violation is not "corrected." The regulations define correction as "recovering part or all of the expenditure to the extent recovery is possible, establishment of safeguards to prevent future political expenditures and where full recovery is not possible, such additional corrective action as is prescribed by the Secretary . . ." (See Reg. § 53.4955-1(e).)

Section 4955 also imposes an initial excise tax of 2 1/2% on "organization managers" (including directors and officers) who knowingly approve an improper expenditure, subject to a \$5,000 cap per expenditure. Organization managers are jointly and severally liable for this excise tax, as well as a second-tier tax of 50%, up to a \$10,000 cap per expenditure, if the violation is not corrected as described above.

The regulations provide that the first-tier excise tax may be abated if an organization can show that the violation in question was due to reasonable cause and not willful neglect. (See Reg. § 53.4955-1(d).) Similarly, organization managers will not be liable if they can demonstrate that their approval of the expenditure was not "willful" or was due to a reasonable cause. (See Reg. § 53.4955-1(b)(1).)

### **C. Additional Tax Penalties for Political Activity Expenditures**

In addition to the Section 4955 excise tax, the IRS has termination assessment and injunctive powers to penalize “flagrant” political expenditures. (See I.R.C. § 6852, § 7409.) The statute does not define what will constitute a “flagrant” violation and it is hard to imagine a situation in which a college or university would be intervening or participating in a political campaign in such a manner. It is also worth noting that although the IRS has held these additional discretionary powers for more than a decade, it has never sought to exercise them.

### **II. New IRS Guidance and Results of Political Intervention Examination**

On February 24, 2006, the IRS released a report summarizing the results of its examination of political activity by 501(c)(3) organizations during the 2004 election cycle. In connection with the report, the IRS also released Fact Sheet FS-2006-17 (see Attachment A), which provides new procedures for the 2006 election season. The Fact Sheet does not replace or supersede existing authorities, but is a “living document” that may be periodically revised and is intended to provide additional guidance and examples for 501(c)(3) organizations as to what is permissible activity and impermissible political campaign intervention. A copy of the report and related materials can be found at [www.irs.gov](http://www.irs.gov), by clicking on “Charities & Non-Profits” and “IRS Reports on Political Activity Compliance Initiative”.

1-WA/2546025.1