**PARTISAN POLITICAL ACTIVITIES**

Question: OK, we’ve talked about lobbying and advocacy and the 501(h) election. Earlier in the podcast, we talked about the issue called electioneering. If I understand it correctly, non-profit groups cannot engage in electioneering, but what is electioneering?

Answer:

To begin, many people are unaware that as a 501(c)(3) nonprofit, the organization is not permitted to engage in electioneering. So what is electioneering? Electioneering is participation or intervention in any political campaign on behalf of or in opposition to any candidate for public office. And groups cannot engage in this sort of advocacy: that is, picking sides and supporting a candidate in a partisan election. And a group that violates this requirement, faces the risk that it can lose its tax-exempt status.

Question: So, is there nothing a group can do when it comes to elections?

Answer:

Non-profit groups can engage in what is called voter education and issue advocacy as long as they are not supporting a particular candidate. They can also engage in non-partisan voter registration and “Get Out the Vote” efforts that are not designed to support or favor a particular candidate. The line between partisan activity that violates the limits on the law and non-partisan activity is not always clear and a group that wants to engage in these sorts of acts and wants to ensure it is staying within the limits of the law should definitely check in with its attorney to make sure the group’s actions are lawful and the organization is not endangering its non-profit status.

Question: OK. It’s pretty clear that a non-profit group cannot engage in electioneering activity, but what is the penalty if it does?

Answer:

With electioneering, there are actually several penalties. First, a group’s expenditures on partisan political activities are subject to a tax. Initially, the organization will be taxed at 10% of each total expenditure amount. After that, the organization can additionally be taxed at 100% of the expenditure amount if expenditures are not corrected within the taxable period.

In addition, managers of non-profit groups can also face taxes on their activities in their individual capacity.

Question: OK. So a group and even some of its leaders can face a tax for political activities. Is that all? Are those the only potential penalties for political activities? It doesn’t sound like that’s really much of a penalty.

Answer:

You are right. It’s not. But these are not the only penalties. Just like with violating the lobbying limits described earlier, a group can also lose its non-profit status altogether for violating the limit on electioneering? So, that’s one of the most serious penalties the IRS can impose. A group has to really be careful about not engaging in any electioneering whatsoever and should always consult its attorney if it has any questions about whether what it is doing or plans to do might be considered electioneering by the IRS.

Question: That makes a lot of sense, but I’m still having a little trouble understanding when a group can engage in advocacy generally, like the type we discussed earlier, and electioneering. A lot of non-profit groups I can think of engage in what seems to me to be designed to affect the political process. I can’t imagine that they are all in violation of the law. Can you go over the different between advocacy and electioneering?

Answer:

Of course. A group is engaged in general or issue advocacy when it professes public support for a particular cause or policy without a call to action on specific legislation or does not express support for or opposition to a particular candidate for elected office. Electioneering, on the other hand, is campaign intervention, which occurs when an organization supports or opposes a candidate for public office.

Question: How can an organization ensure that it is not operating in a manner that crosses what might seem to some to be a fine line between issue advocacy and electioneering?

Answer:

First, the organization should always consult its lawyer when it is concerned it might be engaging in advocacy that might place its tax-exempt status in jeopardy, like engaging in political activities that might be construed as improper electioneering. It is important to note that § 501(c)(3) organizations may take positions on public policy issues including issues that divide candidates in an election for public office, but organizations must avoid any issue advocacy that functions as a partisan political act by appearing to intervene on behalf of or in opposition to a particular candidate for elected office. When looking to whether an organization has engaged in behaviors giving rise to a determination that it has engaged in campaign intervention, the IRS will assess what it calls the “facts and circumstances” of the context in which the activity arises.

Question: Can you give some examples to help me understand how the IRS might look at the facts and circumstances of different situations?

Answer:

Of course. To begin, let’s take voter education. Non-profit groups are permitted to conduct certain voter education activities (including the presentation of public forums and the publication of voter education guides) so long as such conduct is carried out in a non-partisan manner. The activities and materials generated in them cannot recommend or favor a particular candidate for elected public office. Take a voter registration drive, for example. When it is conducted in a way that only seeks to register members of a particular party or only those people who profess support for a particular candidate, this is improper campaign intervention. However, if an organization sets up a booth at, say a music festival, and the representatives of the organization register any and everyone, regardless of party affiliation or who they might support as a candidate, this is proper, because the activities have been carried out in a manner that is not biased towards one candidate or party. At the same time, if a group believes that people in a given neighborhood might have a tendency to vote for a particular candidate, there is nothing stopping the group from trying to organize a voter registration drive in that neighborhood provided the group does not try to identify only voters who might support a particular candidate or does not discriminate against voters who do not support a particular candidate. At the same time, while running a voter registration drive, the organization, even where not expressly telling a target audience to vote for or against a specific candidate, must take precautions to avoid inadvertently engaging in campaign intervention on behalf of a specific candidate.

Question: That’s a really helpful example. Does the IRS offer any guidance that can assist a group in understanding what it can and cannot do?

Answer:

Yes, in evaluating whether statements made or actions taken by an organization constitute an improper campaign intervention, the IRS looks at seven factors. These factors include:

1. Whether the statement identifies one or more candidates for a given public office;
2. Whether the statement expresses approval or disapproval for one or more candidates’ positions and/or actions;
3. Whether the statement is delivered close in time to the election;
4. Whether the statement makes reference to voting or an election;
5. Whether the issue addressed in the communication has been raised as an issue distinguishing candidates for a given office;
6. Whether the communication is part of an ongoing series of communications by the organization on the same issue that is made independent of the timing of any election; and
7. Whether the timing of the communication and the identification of the candidate are related to a non-electoral event such as a scheduled vote on specific legislation by an officeholder who also happens to be a candidate.

Question: Can you give some examples to help me understand how the IRS might look at these factors?

Answer: Of course! Let’s say we have Candidate A and Candidate B and they are both candidates for the state senate in District W of State X. The issue of State X funding for a new mass transit project in District W is a prominent issue in the campaign. Both candidates have spoken out on the issue. Candidate A supports the new mass transit project. Candidate B opposes the project and supports State X funding for highway improvements instead. P is the executive director of C, a section 501(c)(3) organization that promotes community development in District W. At C’s annual fundraising dinner in District W, which takes place in the month before the election in State X, P gives a lengthy speech about community development issues including the transportation issues. P does not mention the name of any candidate or any political party. However, at the conclusion of the speech, P makes the following statement, “For those of you who care about quality of life in District W 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 District W. Use that power when you go to the polls and cast your vote in the election for your state senator.” C has violated the political campaign intervention as a result of P's remarks at C's official function shortly before the election, in which P referred to the upcoming election after stating a position on an issue that is a prominent issue in a campaign that distinguishes the candidates.

Question: These are really helpful. What about when a group might invite a local elected official to speak at one of its events. Can that constitute improper electioneering?

Answer:

In order to avoid crossing the fine line between issue advocacy and campaign intervention, organizations should also be cognizant of their actions when inviting a candidate to speak at a group event. A group may have a legitimate reason for inviting a local elected official to attend one of its events. Let’s say it is a neighborhood association that is concerned with traffic safety or street crime. It is completely consistent with that group’s purpose to invite a local elected official to speak to the group to hear about the group’s concerns. When an elected official is asked to speak to a group in his or her official capacity, the group should be careful not to appear to express support or opposition to the elected official’s position in an election if he or she is facing election or re-election. In addition, if the group invites a candidate for elected office to speak to the group, that group should offer equal opportunity to other candidates for the same office to speak to the group as well.

Question: OK. What about campaign fundraising for a candidate for elected office?

Answer:

Whether a current elected official or a candidate for office, the group should not permit any campaign fundraising to take place at any event sponsored by the group.

Question: That makes sense. What about when a candidate or elected official is speaking in his or her personal and non-official capacity?

Answer:

There are also instances when an elected official or a candidate for public office is asked to speak to the group in an unofficial capacity. Such appearances are generally permitted. For example, if a candidate for office has an inspirational life story, like he or she was a veteran or an astronaut who spent time in the International Space Station and wants to speak to the audience about those experiences, if that individual does not discuss his or her candidacy, such appearances are generally not considered offering improper support for the candidate’s partisan activities. In any event, when a group might want to invite a candidate or elected official to speak to its constituents, it should always consult its attorney to make sure its activities could not be construed as improper electioneering.

Question: This is all very interesting and something a group should definitely keep in mind, but do these restrictions apply to individual leaders, staff members, members or other constituents of a group? Are they prohibited from engaging in partisan political activities as well?

Answer:

Non-profit groups should bear in mind that activities carried out by their employees or anyone identifying themselves as acting on behalf of the organization could be attributed to the organization. If those activities are considered improper electioneering, it could affect the organization’s non-profit status. While non-profit employers or other constituents of an organization have rights, especially when those rights are exercised on the employee’s free-time, the organization must protect itself from having those actions attributable to the organization, jeopardizing its non-profit status.

Question: So, what should a group do to avoid having the acts of its employees or other constituents who want to engage in partisan political activities attributed to the group?

Answer:

To avoid having the IRS attribute these activities to a non-profit, and thereby jeopardizing its non-profit status, a group should have clear policies in place detailing what an individual employee or other constituent can say or do on behalf of the organization. Groups should also provide their employees with training on these policies. To avoid political campaign intervention by employees in their official capacity as employees of the organization, a group should make it clear that employees are not permitted to use the organization’s assets, facilities, or resources for their partisan work, and yes, this includes not allowing employees to use their organizational emails to engage in partisan work. Organizations should not publicize an individual’s political preferences or affiliations in its organizational materials, and it should not support or oppose candidates at an organization-sponsored event. A non-profit leader, acting in his or her individual capacity, and not as a representative of the group, is permitted to engage in all forms of political activity, from voting to endorsing candidates for public office. What the leader, or even an employee or member of a non-profit cannot do is use their position or relationship to the organization to support a candidate for public office.

Question: That’s all really helpful. Thanks for all of this information. I definitely found it helpful and I’m sure our listening audience did as well.