

Election Year Rules Additional Notes and Examples

(1) “Zero Tolerance”

An IRS Technical Advice Memorandum, issued on March 4, 1996, describes a 501(c)3 organization which used a fundraising letter which implied, but did not state, that the philosophy of certain politicians was in line with that of the 501(c)3 organization. The fundraising letters were mailed to persons “mainly” on one side of the political spectrum (labeled “CC” – as opposed to “DD” – in the IRS memo). The company used a for-profit direct-mail firm for the solicitation.

The exempt organization argued that it had engaged in legitimate issue advocacy – which is permitted to 501(c)3 organizations within specific limits. The IRS position was that inclusion of statements such as “Together we can change the shape of American politics” added “bias” to the description of the election, made it clear that the organization favored a certain candidate, and implicitly urged to reader to act accordingly. Other fundraising letters included language urging people to register to vote – and noting that a particular candidate had won his last race by a narrow margin and could, therefore, be considered “vulnerable.” The exempt organization argued that it had intended only to add urgency to its messages and that communicating these messages only to its own membership was “preaching to the choir.”

The March 4, 1996, memorandum includes this language: “The prohibition against participation or intervention in a political campaign is absolute. Therefore, it is not material that the intervention is an insubstantial part of an organization’s activities or that the other activities of the organization would, by themselves, support exemption under section 501(c)3 of the Code.”

Following some detailed discussion of the arguments presented by the exempt organization, the memorandum goes on as follows: “ In *United States v. Dykema, supra*, the Seventh Circuit stated: ‘It should be noted that exemption is lost...by participation in any political campaign on behalf of any candidate for public office. It need not form a substantial part of the organization’s activities.’ The Second Circuit agreed with this position when it held that an organization did not qualify as a section 501(c)3 organization because it rated candidates as a very minor part of its total activities. *Association of the Bar of the City of New York v. Commissioner, supra*. The court rejected the organization’s contention that the substantiality requirement from the lobbying activity limitations be applied to the political campaign activity restriction.

Citing *United States v. Naftalin, 441 U.S. 768, 773 (1979)*, the court stated: ‘The short answer [to this argument] is that Congress did not write the statute that way.’ ...Subsequent enactments of sections 504 and 4955 indicate that the Congress continues to support a zero tolerance of political intervention infractions by section 501(c)3 organizations.”

(2) IRS Scrutiny of online activity

The Daily Tax Report (The Bureau of National Affairs, Inc.), November 23, 1999, includes the following notes:

“The online activities of tax-exempt organizations are under close scrutiny by the Internal Revenue Service – and political intervention of any kind by an exempt charity in the electronic universe will not be tolerated, IRS Exempt Organizations Director Marcus Owens said in a recent interview.” In reporting on the November 12 interview with Owens, the newsletter goes on: “For charities exempt under I.R.C. Section 501(c)3, IRS would consider even the presence of a hot link to a political organization or candidates to be an intervention meriting revocation of exemption, Owens said. ‘A link is an implied endorsement,’ he said. ‘If an organization printed something similar in its newsletter, we would consider it grounds for revocation as well.’”

(3) Penalties

A June 20, 2000, memo to the ALA Executive Board from Paula Cozzi Goedert, Jenner and Block, reads as follows:

“The prohibition against political activities is absolute. There is no *de minimus* test for low levels of activity. The IRS has used the phrase “zero tolerance” to describe the absolute prohibition on political activities by Section 501(c)(3) organizations.”

“The penalty for violation of prohibition is severe. First, and most importantly, the IRS can revoke the tax-exempt status of the organization. This means that all dues, educational revenue, etc. would become taxable. In addition, the IRS can charge an excise tax on the amount spent on political intervention. The IRS does not have the flexibility to impose the excise tax without also revoking tax-exempt status.”

“Given the severity of the punishment, the IRS does not frequently invoke it. But it has been done. For example, a medical society had its tax-exempt status revoked when it included a favorable article in its newsletter about the candidacy of two of its members for a state legislature.”

“Tax-exempt organizations often ask how the IRS would find out about a political activity, especially given the low incidence of IRS audits of non-profits. The answer is that this is not an issue that typically arises during an IRS audit. It typically comes to the attention of the IRS when a candidate feels that his or her opposition is being supported by a non-profit organization. A phone call to the local IRS office is often all that is needed to start an investigation.”

“This is one area where it does not pay to be too aggressive or skate too close to the edge. Especially at a time when ALA has important legislative agendas to move forward, loss of tax-exempt status would be not only a public embarrassment, but a major setback to ALA’s legislative work.”

