

Caplin & Drysdale

Political Activity Compliance Review
Open Society Institute

June 28, 2010

Campaign Prohibition

- No 501(c)(3) organization may intervene in an election campaign on behalf of, or in opposition, to any candidate for public office.

Contrasts with Lobbying Prohibition

- No allowance for insubstantial activities
- Harsher penalties
- Few bright-line rules, just “facts and circumstances”
- Prohibition applies to OSI and grantees equally
- No safe harbor for grants to public charities

Open Society Policy Center

- OSPC is subject to the same campaign prohibition as OSI
- A board decision to protect OSI

Nonpartisan Voter Education

- Charities can educate voters about the election but their activities must be “nonpartisan.”
- All activities must be neutral among candidates, not showing any preference for or against any particular candidate or party.

Candidate Forums

- 501(c)(3) organizations may conduct nonpartisan candidate forums.
- The IRS will consider all the facts and circumstances, including:
 - Whether the questions are prepared and presented by an independent, nonpartisan panel;
 - **Whether the forum covers a broad range of issues;**
 - Whether each candidate has an equal opportunity to present his or her views on each issue;
 - Whether the candidates are asked to agree or disagree with the positions, agendas, or statements of the organization; and
 - Whether the moderator comments on the questions or otherwise implies approval or disapproval of the candidates.

Voter Guides

- 501(c)(3) organizations may distribute nonpartisan voter guides.
- Example of a nonpartisan voter guide:
 - An organization annually publishes voting records of all Members of Congress on a wide range of legislative issues. The publication does not contain any editorial opinion and its contents and structure do not imply approval or disapproval of any Members. **League of Women Voters**

Voter Guides

- Example of an impermissible voter guide:
 - A conservation organization publishes a voter guide reporting how incumbent candidates voted on a set of conservation bills.
 - IRS has revoked an organization's c/3 status that looked a lot like the Christian Coalition

Candidate Questionnaires

- 501(c)(3) organizations may distribute nonpartisan candidate questionnaires.
- Example of a nonpartisan candidate questionnaire:
 - An organization sends questionnaires to all candidates for governor soliciting a brief statement of each candidate's position on a wide variety of issues, selected solely on the basis of importance to the electorate as a whole. No editorializing.

Candidate Questionnaires

- Example of an impermissible candidate questionnaire:
 - An organization sends a questionnaire to candidates. Some questions show a bias on certain issues.
 - Where do you stand on “abortion on demand?”
 - What’s your view on the “death tax?”
 - Do you agree with U.S. values that marriage is the union of a man and a woman?

Get Out The Vote Drives

- 501(c)(3) organizations may conduct nonpartisan GOTV drives.
- The IRS will consider whether:
 - Any candidate is named or depicted or all candidates are named or depicted without favoring any candidate over another;
 - The communication names any political parties except for identifying the party affiliation of all candidates;
 - The communication is limited to urging people to vote and to describing the hours and places of voting; and
 - All GOTV services are made available regardless of the voter's political preference.

Get Out The Vote Drives

- Example of nonpartisan GOTV:
 - An organization conducts a GOTV drive in neighborhoods with historically low voter turnout.
 - Publishes the hours and locations of the polling places.
 - Offers rides to the polling places.
 - Phones residents reminding them to vote.
 - Does not provide any information or other reference to any candidate or political party.

Get Out The Vote Drives

- Example of impermissible GOTV:
 - A civil rights organization sets up a telephone bank shortly before the election to call voters in a district where civil rights has become a wedge issue distinguishing the candidates. The organization discusses civil rights issues with respondents, and only encourages those voters who agree with its positions to vote in the upcoming election.

Candidate Pledge

- A 501(c)(3) organization cannot ask candidates to pledge to support a particular position if elected.
- IRS will see the pledge as intervening on behalf of the candidates who take the pledge.

Candidate Pledge

- An organization opposed to political influence over government scientists issues a statement calling on all presidential candidates to promise to issue guidelines limiting action by political appointees reviewing scientific research at executive branch agencies.

Interaction with Campaigns

OSI can:

- Provide publicly available information to all candidates or parties—either upon request or at the organization's initiative.
- Issue press releases or post information on its websites describing nonpartisan voter outreach plans and strategies or concerns about voter intimidation or voting problems in particular districts.
- Share research on a particular topic with campaigns, including information about voter-protection problems, as long as it is made generally available to the public **or** is offered to all candidates in a race or all viable political parties in a jurisdiction.

Interaction with the campaigns

- A 501(c)(3) organization prepares a voter outreach plan and wants to share it with the candidates running in the jurisdiction.
- Make public or give to all campaigns

Interaction with the campaigns

- A public charity grantee hears about voter intimidation efforts in a particular state, and calls both political parties to alert them to this.
- Should be ok.

Single Issue Advocacy

- What can organizations say about their issues during the campaign?
 - Can continue their regular issue advocacy
 - Context matters
 - Cannot comment on or evaluate candidates' positions (overt or implied)
 - Encourage candidates to address the organization's issues(?)

Single Issue Advocacy

- Close to an election, progressive organization hosts a panel discussion of education policy focusing on the success of the school lunch program. A candidate has made the program a focus of his campaign.
- Don't mention the candidate?
- Don't mention the election?

Single Issue Advocacy

- An educational organization maintains a web site where it reports candidates' statements on healthcare. The organization supports single-payer universal health insurance.

Single Issue Advocacy

- A national charity conducts a public campaign highlighting immigration enforcement as a policy issue. The campaign encourages all congressional candidates to address this issue. The campaign does not evaluate candidates' positions on immigration, but encourages voters to ask candidates questions about this issue. **Encourages candidates to support fair treatment of immigrants.**

Single Issue Advocacy

- OSI is asked to prepare a report on AIDS policy; the report will be distributed through a website that endorses Obama.
- The report itself is nonpartisan
- The IRS see providing content to a partisan site as supporting campaign intervention.

Voter Registration

- OSI cannot fund **voter registration** drives unless the grantee:
 - Is exempt under section 501(c)(3);
 - Works in 5 or more states and more than 1 election cycle;
 - Spends substantially all of its income on its own activities;
 - Receives substantially all of its support (other than gross investment income) from exempt organizations, the general public, or governmental units, and no one exempt organization provides more than 25%; and
 - Does not accept any funds earmarked for any particular states or election periods.

Voter Registration

- The “five state” requirements do not apply to GOTV activities, only to voter registration.

Political Activity on Your Own Time

- The campaign prohibition does not apply to employees acting as private individuals
- **BUT** must avoid attribution to OSI:
 - Use no OSI resources;
 - Act on your own time; and
 - Make clear OSI does not endorse your political activity.

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Thank You

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