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It's all Political - or is it? What Nonprofits Can and Can't Do in Campaigns

With election season heating up, not-for-profits must take care not to stray into prohibited political activity that could jeopardize their tax-exempt status. The IRS has addressed the acceptability of several common activities. Knowing the agency's position on these activities could save you tax trouble down the road.

Ban on political campaign intervention

The Internal Revenue Code is clear: For a nonprofit to maintain its status, it can't "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."

But that doesn't mean your hands are completely tied. If certain conditions are met, not-for-profits can indeed be active - though nonpartisan - players in the political arena.

Voter contact

Nonprofits can conduct voter registration and get-out-the-vote drives if they're conducted in a neutral, nonpartisan manner. But you can't, for example, refer to any candidate or party, either in support or opposition.

Voter education activities, such as the preparation and distribution of voter guides, are similarly allowed if conducted in a nonpartisan way. The IRS will consider whether the questionnaire used to solicit candidate positions or the guide itself demonstrates a bias or preference in content or structure with respect to the views of a particular candidate. The timing and distribution of voter education materials also could be relevant.

Candidate appearances

A not-for-profit can invite a candidate to speak at an event in his or her capacity as a candidate if 1) it provides to all of the candidate's rivals an equal opportunity to participate, 2) it doesn't indicate support for or opposition to any candidate (including in introductions and communications about a candidate's attendance), and 3) no political fundraising takes place.

When evaluating whether equal opportunity to participate has been provided, the IRS will consider both the manner of presentation and the nature of the event to which each candidate is invited. You'll probably violate the prohibition if, for example, you invite one candidate to speak at a heavily attended annual banquet but invite her opponent only to a poorly attended general meeting.

In This Issue

What Nonprofits Can and Can't Do in Campaigns

How to Embrace Accountability

Generating Revenue from Foreign Sources

Premium Uniformity Requirement for the Small Employer Health Insurance Tax Credit / Refund

In the Spotlight – Peace of Mind from an Employee Benefit Audit

Newsbits

If you invite a candidate to appear in his or her individual, noncandidate capacity, you must ensure that:

- The candidate is chosen to speak solely for reasons other than candidacy (for example, because he's an expert on a certain topic),
- The candidate speaks only in a noncandidate capacity,
- Neither the candidate nor any representative of your organization refers to the candidacy or election,
- No campaign activity occurs,
- Your organization maintains a nonpartisan atmosphere, and
- Your nonprofit clearly indicates the capacity in which the candidate is appearing, without reference to the candidacy or election, in the communications announcing the appearance.

Candidates also may attend a not-for-profit's event that's open to the public as long as the organization doesn't publicly recognize the candidate or invite him or her to speak.

Business activities

An activity such as selling or renting mailing lists, leasing office space or accepting paid political advertising may constitute prohibited activity. The determination will depend on several factors.

These may include whether the good, service or facility is available to rival candidates on an equal basis, whether it's available to the general public, whether the fees charged are the nonprofit's usual rate, and whether the activity is an ongoing activity of the organization (as opposed to conducted for only a particular candidate).

Proceed with caution

Violation of the ban on political activity could result in the denial or revocation of your nonprofit's tax-exempt status, as well as the imposition of an excise tax on the amount spent on the prohibited activity. The determination of whether an activity is political will ultimately depend on the specific facts and circumstances. But remember, the underlying criterion for an activity not to be political is generally that the activity clearly be nonpartisan.

How to Embrace Accountability

There is much talk about accountability, especially financial accountability for charitable and other exempt organizations.

Nonprofits need to embrace accountability to protect the organization and its people, to demonstrate openness and forthrightness in external dealings and to support the greater good. Embracing accountability also helps nonprofits fulfill their fiduciary responsibilities to donors, constituents and the public. But how can nonprofits truly embrace this abstract term?

Draw the big picture

There can be no accountability without good governance. Absent owners, governance is key to set in place the means and measures to keep your organization in compliance with all applicable laws and rules as well as best practices and to steward mission accomplishment. And most important, your nonprofit must keep in line with its mission and guiding principles, including integrity.

Author and nonprofit expert J. Steven Ott describes an organization's governance as "a product of its purposes, people, resources, contracts, clients, boundaries, community coalitions and networks, and actions as prescribed (or prohibited) in its articles of incorporation and bylaws, state laws and codes, and the IRS codes and rules."

Other "Political" Involvement - Know the Limits

Many people think of any involvement in government as "political," but tax law distinguishes between politics involving candidates and lobbying involving legislation. Certain involvement, including making certain contributions, is permissible.

A 501(c)(3) organization can make a contribution to a ballot measure committee, for instance, because it's a type of lobbying that supports or opposes initiatives or referenda. The nonprofit must, however, include such contributions in its lobbying calculations to determine if a substantial part of its activities consists of attempting to influence legislation.

Tax-exempt organizations other than 501(c)(3)s can have limited involvement with politics. A 501(c)(4) organization, for example, is allowed to favor candidates when that accomplishes the organization's exempt purpose.

A 501(c)(3), however, can't make a contribution to a 501(c)(4) for political activity - or to certain political organizations, including candidate committees, political party committees or political action committees. In addition, a 501(c)(3) can't establish a separate segregated fund under Section 527 of the Internal Revenue Code, "Political Organizations."

When it comes to accountability and governance, the buck unquestionably stops with your board. Therefore, it's critical that you help the board understand its responsibilities and focus its attention on carrying out the not-for-profit's mission - not the process-oriented details best handled at the staff level.

Watch the numbers

Keeping the financials spotless is critical. So make sure you conduct regular, board-approved audits that are attested to by the executive director and principal financial manager.

Management should present internal financial statements to the board - or its audit or finance committee - and review performance against approved budgets on at least a quarterly basis. In addition, the board should establish and regularly assess financial performance measurements.

Your nonprofit must comply with all legally required reporting procedures - and certain financial practices that may apply to a specific activity. For example, one of your major funders or a national affiliate of your organization might require you to provide key performance indicators or other reports linking operational results with financial information.

Respect your mission

As you carry out your initiatives, do so fairly and in the best interests of your constituents and community. Your status as a not-for-profit means you're obligated to use your resources only toward your mission and to benefit the community that you serve. Programs should be evaluated accordingly, both in respect to the activities and the results or outcomes.

Make it clear

Communication is a big part of accountability. Your annual report, for example, should reflect your mission and summarize the year's activities. It's best practice for the report to also provide financial data for the year and other information, such as a list of board members, management staff and other key employees.

As a public document, your nonprofit's Forms 990 for the previous three years will give your public a good overview of your organization's exempt activities, finances, governance, compliance and compensation methods.

Accountability pays off

Your organization's demonstration of accountability is likely to generate a positive response from your constituents, whether it's in the form of donations, funding, volunteering or simply spreading the word about the merits of your nonprofit. And that's the kind of outcome worth pursuing.

Nonprofits without borders Generating Revenue from Foreign Sources

As the U.S. economy continues its rocky course, many not-for-profits struggle to increase or even maintain their revenues. More and more organizations are thinking creatively and reaching beyond traditional geographic borders to pump up donations, membership, product sales and conference attendance - the activities that often drive revenue. While these initiatives can certainly pay off, you should consider several factors to determine whether they're right for you.

Why look abroad?

The balance of economic power around the globe is undergoing dramatic shifts. According to Merrill Lynch's *World Wealth Report 2011*, for example, the population of high net worth individuals in Asia is now second only to that in North America. Such emerging markets are increasing their levels of giving while other markets are leveling or dropping off.

Upcoming Events

Please visit our website for more information and to register today!
www.capincrouse.com

December

Tuesday, December 6

2011 Financial Forum for Ministries
Presented by CapinCrouse & ECCU
Colorado Springs, CO

Thursday, December 15

2011 Not-for-Profit Tax Update
Online Tax Webcast
1pm EST

January

Tuesday, January 17

North Texas - First Annual Nonprofit Seminar
Plano, Texas

Thursday, January 26

Ten Things Tax Exempt Organizations Should Know for 2012
Online Tax Webcast
1pm EST

March

Thursday, March 1

Higher Education Roundtable
Columbia, South Carolina

Friday, March 16

Annual Nonprofit Seminar
Anderson, IN

Tuesday, March 20

Higher Education Roundtable
Dallas, Texas

Wednesday, March 21

Higher Education Roundtable
Brea, California

Thursday, March 22

Higher Education Roundtable
San Diego, California

Tuesday, March 27

Higher Education Roundtable
Atlanta, GA

Most U.S. nonprofits can't afford to keep a narrow domestic focus in the face of a global economy. In addition, by connecting with foreign donors, members and customers, an organization can diversify its portfolio of supporters. Doing so will likely leave it less vulnerable to sudden or prolonged economic downturns in its base country.

Critical considerations

As not-for-profit leaders know, building relationships is a key to building a donation base. Relationships are especially important when dealing with foreign donors, who generally lack the tax deduction incentive U.S. donors enjoy. (The United States does, however, have a tax treaty with Canada that allows Canadians who donate to U.S. nonprofits to offset their contributions against their U.S. income for Canadian tax purposes.)

The need to build relationships has prompted some organizations to hold conferences or even open offices in target countries. Local offices in foreign countries can form boards of directors, advisory councils and other bodies that encourage participation and fundraising by individuals in those countries.

A local entity may be more attractive to foreign donors than one based in the United States. Getting his or her "hands dirty" working with an organization is often the turning point in solidifying a donor's relationship with that not-for-profit. Local contributions also lessen the need for grants from U.S. organizations.

Bear in mind, though, that such a level of activity abroad will likely require you to register as a U.S. company doing business in the foreign country. Even if you have only one employee, you may need to set up a taxable subsidiary in the country or retain an independent contractor. Requirements vary from country to country.

Activities abroad also can ramp up your Form 990 reporting obligations, specifically those related to Schedule F, "Statement of Activities Outside the United States." You must file Schedule F if you had aggregate revenues or expenses of more than \$10,000 during the tax year from grant making, fundraising, business (including investments), unrelated trade or business, program services, and maintaining offices, employees or agents.

Additionally, the organization must report (by region) the number of offices; the activities conducted; the number of employees, independent contractors and agents; the total expenditures and investments; and, for program service activities, the specific type of service.

Payment issues

If you solicit foreign donations or payments, you'll need a system that can process multiple types of currency. In recent years, numerous nonprofits have turned to the online payment company PayPal to handle incoming payments, both domestic and foreign.

The allure is clear - PayPal offers qualifying charitable organizations a discount on their processing rates for donations. It also provides donors with an immediate receipt, quickly confirming the money was received.

But the company does impose added fees for international transactions. Further, while PayPal can accept money from other PayPal accounts throughout the world in various currencies, the local PayPal company will release money only to a bank in the same country. PayPal France, for example, will only release an organization's money from French individuals to a bank account in France.

Brave new world?

Reaching across borders for revenue isn't as simple as it might appear. The costs could end up outweighing the benefits. Before making any decisions, it's critical to thoroughly investigate and evaluate your options, consulting your financial advisor and legal counsel where appropriate.

We Can Help!

The staff at CapinCrouse LLP works with hundreds of churches and not-for-profit organizations. This experience base allows us to quickly identify areas for improvement in many organizations. If your organization desires to improve its efficiency, please contact your Capin Crouse representative or one of our offices to discuss how we may help you.

About CapinCrouse LLP

With more than 700 not-for-profit organizations and 1,500 tax clients, CapinCrouse is the country's leading accounting and advisory firm primarily serving the Christian not-for-profit community.

Since 1972, CapinCrouse has been serving not-for-profit entities including megachurches, institutions of higher education and secondary schools, and international missions agencies by providing a full range of audit, review, tax, and advisory services.

CapinCrouse is dedicated to helping our clients operate with financial integrity so that they can dedicate themselves to fulfilling their mission.

Premium Uniformity Requirement for the Small Employer Health Insurance Tax Credit / Refund

In 2011, many businesses and exempt organizations received a substantial benefit for the health insurance premiums they paid in 2010. Businesses received a credit against taxes otherwise owed, and exempt organizations received a refund.

We described how employers determined eligibility and calculated the credit or refund in a previous Email Alert found at http://capincrouse.com/nfp_insights/. This article describes the premium uniformity requirement effective for 2011. For fiscal year taxpayers, this applies for years starting in 2011.

Background

The variety of non-discrimination requirements for health benefits is confusing. Currently, there are three distinctly different requirements, each with its own application. The following summarizes key elements of each, but is not intended as complete guidance.

- 1. Self-Insured and Medical Reimbursement Plans.** These plans cannot discriminate in favor of “highly compensated” employees in either eligibility for a benefit, or amount of benefit. For this requirement, “highly compensated” means the highest-paid 25% of employees. Medical reimbursement plans that only benefit salaried employees or pastors might be discriminatory under this provision. The discriminatory benefit received by highly compensated employees under a self-insured or medical reimbursement plan is taxable, but there is no employer penalty, and non-highly compensated employees are not affected.
- 2. Insured Medical Plans.** Insured plans became subject to non-discrimination requirements under the Health Reform Acts of 2010. When the requirements go into effect, they will use a similar definition of highly compensated employee. Like a self-insured plan, an insured medical plan will not be able to discriminate in either eligibility or benefits. If a plan is discriminatory, the plan or plan sponsor may be subject to an excise tax (up to \$100 a day, per employee discriminated against), civil money penalty (up to \$100 a day, per employee discriminated against), or a civil action to compel it to provide nondiscriminatory benefits. Enforcement of this provision is delayed until after the IRS issues final regulations. Nothing has been issued as of October 25, 2011.
- 3. Small Employer Insurance Premium Credit/Refund.** To be eligible for the creditor refund, the employer must pay a uniform portion of the premium that is not less than 50% of the premium for each participant. Non-discriminatory eligibility is not required, which is a major difference from the two laws above. There also is no reference to “highly compensated” employees. The employer-paid portion of the premium simply must be uniform for all. Failure to comply results in ineligibility for the credit or refund. There is no penalty or other consequence.

This chart helps compare the requirements:

Uniform Premium

The variety of health plan options results in some potentially complicated applications

	Self-Insured and Reimbursement Plans	Insured Medical Plans	Premium Credit or Refund
Non-discriminatory in eligibility	Yes	Yes	No
Non-discriminatory in benefit	Yes	Yes	Yes ¹
Tested against highly compensated	Yes	Yes	No
Definition of “highly compensated”	Highest-paid 25% of employees	Highest-paid 25% of employees	Not applicable
Consequence of non-compliance	Taxation of benefit to highly compensated	Substantial penalties to employer	Ineligible for credit or refund
Law currently in effect	Yes	No	Yes ²

¹ Uniform premium required — described below.

² Credit/refund continues in the same format through 2013. Format changes in 2014.

Atlanta
678.518.5301

Chicago
630.682.9797

Colorado Springs
719.528.6225

Dallas
817.328.6510

Denver
720.283.7326

Indianapolis
317.885.2620

Los Angeles
714.671.9300

New York
212.653.0681

Orlando
407.883.4671

San Diego
858.638.7220

Tax Department
317.885.2620

of a uniformity requirement. IRS guidance provided in Notice 2010-82 distinguishes among coverage for employees only and variations on dependent coverage, employers offering single or multiple plan options, and premiums established for each employee and for the entire group. Among these plan variations, the IRS identifies three possible ways of achieving uniformity:

1. Paying the same percentage of premium for each employee
2. Paying the same amount of premium for each employee
3. Paying the same percentage or amount of a preferred plan (called a “reference plan” in the Notice) for each employee, even though employees may select a more expensive plan

There are restrictions on each. Uniformity must be met separately for each plan an employer offers, except where the requirements for a reference plan are met. When an employer pays premiums based on a reference plan, the premium for employee-only coverage must be at least 66% of the premium for employee-only coverage of the more expensive plans.

The following four examples taken from the IRS Notice illustrate common options for compliance with the uniformity requirement. In all of these, the plan meets the requirement that the employer pay a uniform percentage of the premium that is not less than 50% of the premium.

Example 1.

(i) In 2011, Employer offers one health insurance plan, Plan A. The premiums for Plan A are \$5,000 per year for self-only coverage, and \$10,000 for family coverage. Employees can elect self-only or family coverage under Plan A.

(ii) Employer pays \$3,000 (60% of the premium) toward self-only coverage under Plan A and \$6,000 (60% of the premium) toward family coverage under Plan A.

(iii) Employer’s contributions of 60% of the premium for each tier of coverage satisfy the uniformity requirement in § 45R (d)(4) [the tax codes section for the uniformity requirement].

Example 2.

(i) Same facts as Example 1, except that Employer pays \$3,000 (60% of the premium) for each employee electing self-only coverage under Plan A and pays \$3,000 (30% of the premium) for each employee electing family coverage under Plan A.

(ii) Employer’s contributions of 60% of the premium toward self-only coverage and the same dollar amount toward the premium for family coverage satisfy the uniformity requirement in § 45R (d)(4).

Example 3.

(i) In 2011, Employer offers two health insurance plans, Plan A and Plan B, both of which use composite billing. The premiums for Plan A are \$5,000 per year for self-only coverage and \$10,000 for family coverage. The premiums for Plan B are \$7,000 per year for self-only coverage and \$13,000 for family coverage. Employees can elect self-only or family coverage under either Plan A or Plan B.

(ii) Employer pays \$3,000 (60% of the premium) for each employee electing self-only coverage under Plan A, \$3,000 (30% of the premium) for each employee electing family coverage under Plan A, \$3,500 (50% of the premium) for each employee electing self-only coverage under Plan B, and \$3,500 (27% of the premium) for each employee electing family coverage under Plan B.

(iii) Employer's contributions of 60% of the premiums for self-only coverage and the same dollar amount toward the premium for family coverage under Plan A, and of 50% of the premium for self-only of coverage and the same dollar amount toward the premium for family coverage under Plan B, satisfy the uniformity rule on a plan-by-plan basis; therefore the employer's contributions to both plans satisfy the uniformity requirement in § 45R (d)(4).

Example 4.

(i) Same facts as Example 3, except that Employer designates Plan A as the reference plan. Employer pays \$2,500 (50% of the premium) for each employee electing self-only coverage under Plan A and pays \$2,500 of the premium for each employee electing family coverage under Plan A or either self-only or family coverage under Plan B.

(ii) The self-only composite rate for Plan A (\$5,000) is greater than 66% of the self-only composite rate for Plan B (\$7,000). ($\$5,000 \div \$7,000 = 71\%$).

(iii) Employer's contribution of \$2,500 toward the premium of each employee enrolled under Plan A or Plan B satisfies the uniformity requirement in § 45R (d)(4).

Most small health plans are probably covered by the above examples, since smaller employers tend to have simpler programs. The Notice and other guidance, however, address additional situations. Failure to meet the uniformity could cause loss of a substantial benefit, so please contact one of our tax professionals if you have any questions.

In the Spotlight: Peace of Mind from an Employee Benefit Audit

Annual audits are required for some, but not all, employee benefit plans. But even if an audit isn't legally required for your plan, it may be very beneficial. A quality audit can ensure your plan is in a sound financial position and give your plan administrator and human resources staff confidence in their reporting and management.

The standards and regulations for employee benefit plans are complex and change often. That's why it is important to choose an audit firm with the expertise and processes to deliver a complete, accurate audit that demonstrates compliance with financial reporting and regulatory standards.

CapinCrouse's dedicated team of employee benefit plan auditors has the specialized knowledge and expertise to work with employee benefit plans within not-for-profit organizations. And as members of the American Institute of CPA's [Employee Benefit Plan Audit Quality Center](http://www.aicpa.org/InterestAreas/EmployeeBenefitPlanAuditQuality/Pages/EBPAQhomepage.aspx) (<http://www.aicpa.org/InterestAreas/EmployeeBenefitPlanAuditQuality/Pages/EBPAQhomepage.aspx>) we've committed to the highest quality standards by agreeing to the Center's membership requirements. This includes creating quality control programs, appointing a partner responsible for our employee benefit plans audit practice, conducting internal inspection procedures on an annual basis, and making our peer review findings available to the public.

Specifically, we offer:

- **Over 25 years of experience performing employee benefit plan audits for tax-exempt organizations**, including defined contribution retirement plans (401(k), 403(b), and profit-sharing plans), defined benefit plans, and health and welfare plans.
- **A dedicated team of employee benefit auditors** who receive specific training annually to help them stay abreast of the specialized requirements of these audits.

- **Expertise working with the third-party administrators most commonly used by not-for-profit** organizations, including, among others, AUL, Envoy, Fidelity, Principal, TIAA-CREF, and Vanguard
- **A convenient paperless audit platform**, which allows us to prepare most of your audit off-site and results in less disruption to your staff

CapinCrouse provides a range of employee benefit plan services designed for maximum efficiency and quality. These include:

- Audits of plans subject to the Employee Retirement Income Security Act (ERISA) under the regulatory authority of the U.S. Department of Labor, including defined contribution plans, defined benefit plans, and health and welfare plans
- Audits of plans not subject to ERISA
- Consulting services related to employee benefit plans
- Preparation of IRS Form 5500 and summary annual reports
- SSAE 16 audit engagements

The CapinCrouse team currently audits nearly 70 plans for organizations around the nation. According to recent Department of Labor statistics, among the 9,200 firms performing employee benefit plan audits CapinCrouse is in the top 200.

Employee benefit plans are appreciated by your staff and can be a powerful recruitment tool. And with the right assistance, they don't have to be a source of stress for you. To learn more about CapinCrouse's employee benefit plan services, please contact us at info@capincrouse.com.

Newsbits

Tax treatment of cell phones

New IRS guidance describes how employers can handle the cost of cell phones they provide to employees. The guidance, found in IRS Notice 2011-72 and the Sept. 14 memorandum to field examiners, "Interim Guidance on Reimbursement of Employee Personal Cell Phone Usage in light of Notice 2011-72," also describes how to handle reimbursement of cell phone costs if the employee provides the cell phone.

Providing a cell phone - or a cell phone allowance - to employees can be tax-free in many situations, including if your organization needs to be able to contact an employee at all times for work-related emergencies or if you require that an employee away from the office be available to speak with clients or constituents.

In other words, the cell phone must be needed for the nonprofit's benefit and can't be provided simply as a form of compensation. For more details, please contact our Tax Department.

Researching companies' giving histories

Want to find out who the biggest corporate givers are? The *Chronicle of Philanthropy* website provides results of its survey on the charitable giving activities of the nation's largest companies. The publication collected data on 180 of the 300 highest ranking Fortune 500 companies. The data shows not only the value of cash and product donations for the past three years, but also which charities the companies supported.

To gather data on the companies that declined to respond to the survey, researchers tapped into the informational tax forms that company foundations must file with the IRS each year. The *Chronicle* cautions that, because the numbers recorded on those

forms don't necessarily reflect all of a company's charitable giving, it may be difficult to make comparisons between companies. Changes in accounting methods, mergers and other factors can render year-to-year comparisons about an individual company's giving tricky, as well.

IRS issues form for determination requests

The IRS has published a new form that not-for-profits should use to request determinations - other than initial exemption applications - about their tax-exempt status. Organizations can use Form 8940, "Request for Miscellaneous Determination," for nine specific types of requests, such as advance approval of certain activities and exemption from the Form 990 filing requirements. The instructions for the one-page form indicate the respective information required to support each type of request.

Nonprofits applying for recognition of an exemption and simultaneously requesting advance approval of scholarship procedures or a Form 990 exemption should, however, include the request with their Form 1023, "Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code," rather than filing Form 8940.