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Rules Governing Nonprofits and Political Activity: A Brief Overview.

If you've read the news at all this week, you've likely read about the escalating controversy regarding the IRS' seemingly selective scrutiny of certain organizations, including Tea Party organizations. Without delving into the motivations behind the IRS' actions, the central question they were attempting to answer is whether the groups were operating in a manner consistent with the rules governing the activity of 501(c)(4) nonprofit organizations, the tax status for which they had applied (and were all ultimately granted, to the best of our knowledge). Given the increased attention on the topic, below is a brief overview of the permissible activities and characteristics of nonprofits that engage in political activities.

This is meant to be a basic overview, and there is a tremendous amount of nuance and detail not included here. If you need more detailed information, please see the references at the end and/or consult a specialist in nonprofit or political law. That said, there are three basic types of organizations that engage with the political system:

501(c)(3) Organizations – Public Charities

There are two types of 501(c)(3) organizations: Public Charities and Private Foundations. This section focuses exclusively on Public Charities, which are allowed to participate in the civic sphere in ways that are in line with their charitable mission.

Permitted activities: Voter education, voter registration, policy analysis, issue education, and related nonpartisan activities. Allowed to conduct limited lobbying (defined as "insubstantial") activities.

Organizations have the option to choose an official test (501H election) that sets a concrete limit on lobbying expenditures.

Advantages: Greater fundraising capacity through charity status. Can accept contributions of any size from individuals, corporations, and other nonprofits. Not required to disclose donors to the public, although the information is shared with the IRS on Forms 990.

Disadvantages: Restrictions on allowable political activities. Cannot directly engage in elections. Cannot be involved in lobbying as a primary organization activity.

Examples: League of Women Voters, The Urban Institute

501(c)(4) – Social Welfare Organizations; 501(c)(5) – Labor Unions; 501(c)(6) – Business Leagues

While many, if not most, 501(c)(4) organizations do not engage heavily in lobbying or political activity, the ones that do are supposed to exist in order to "promote the social welfare." 501(c)(5) and 501(c)(6) organizations are membership-based associations capturing labor/agricultural entities and business entities, respectively.

Permitted activities: Nonpartisan issue and legislative advocacy, lobbying, endorsement of specific legislation.

Advantages: Not required to disclose donors to the public, although shared with the IRS on Forms 990. Can accept contributions of any size; the Citizens United decision allowed for unlimited corporate contributions. Can engage in nonpartisan election campaign-related activity, but that must not be the primary purpose of organization. Can endorse candidates in communication with members, although not with public.

Disadvantages: Must be nonpartisan. Cannot publicly (outside of membership) endorse or overtly support or oppose political candidates. No contributions to 501(c)(4) organizations for lobbying or political activity are tax-deductible, by individuals or businesses. In 501(c)(6) organizations, the portion of membership dues used for lobbying and political expenditures cannot be claimed by members as a business expense and deducted from tax liability.

Examples: AARP (c4), Crossroads GPS (c4), Tea Party Patriots (c4), SEIU (c5), Chamber of Commerce (c6)

527 Organizations – Political Action Committees

Section 527 of the tax code encompasses all forms of organizations engaged directly in electoral politics, including candidate and political party committees. This section focuses on independent Political Action Committees that are predominantly–though not exclusively–organized under Section 527, both "traditional" PACs and the newer SuperPACs that emerged following the 2010 Citizens United decision. There is another notable type of independent spending committee known informally as the "527" that can raise and spend money on elections in unlimited amounts without endorsing specific candidates, but these organizations are now significantly less prevalent and influential than they were around a decade ago.

Permitted activities: Partisan-oriented activities to influence elections. Explicit support of or opposition to individual candidates.

Advantages: "Traditional" PACs can engage in direct political activity and endorse candidates. SuperPACs can raise money in unlimited amounts from individuals or corporate/organizational donors.

Disadvantages: Required to disclose donors to the public through the Federal Election Commission. "Traditional" PACs have $5000 contribution limits. SuperPACs are not allowed to coordinate with candidate committees. Lobbying activities are not necessarily tax-exempt.

Examples: EMILY's List (PAC), American Crossroads (SuperPAC)

Each structure serves a specific function within the political sphere, but reviewing applications of all politically oriented organizations to ascertain whether the proposed activities fit into the allowable activities of the organization type they have chosen seems prudent. However, many of the lines between these organizational types are blurry. Of particular relevance to the current controversy, 501(c)(4) social welfare organizations in practice run issue-based attack ads that look a lot like attempts to influence the outcome of an election. With little guidance from Congress, the IRS is left with the unenviable task of sorting out whether organizations engaged in such activities are merely toeing that blurry line or outright crossing it in some objective way.

If you want to learn more, here are some resources:

Chapter 10 of the 2006 book Nonprofits and Government: Collaboration and Conflict, published by Urban Institute Press, is devoted to permissible activities for politically active nonprofits.

The Alliance for Justice offers details about the permissible political activities of 501(c)(4) organizations.

The National Center for Charitable Statistics website has more general information about 501(c)(4), c5, and c6 organizations.

The IRS offered detailed guidance on the “Political Campaign and Lobbying Activities of IRC 501(c)(4), (c)(5), and (c)(6) Organizations” in 2003.

The Congressional Research Service released a more recent study looking at the role of SuperPACs in federal elections and their relation to other types of political organizations.

The IRS 2012 Data Book has details on the number of 501c organizations by type, including those applying for tax exemption and how many were reviewed more closely and ultimately rejected. See the tables on pages 55 and 56.

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