Rules and Tools of Nonprofit Lobbying

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Rules and Tools of Lobbying for Nonprofits

by Sharon Wilson, Esquire

I. Introduction

Although 501(C)(3) status is revered by many nonprofit organizations as the most favorable provision in the Internal Revenue Code because it exempts the organization from paying federal income taxes, and allows donors to deduct their contributions, one of the biggest disadvantages of achieving 501(c)(3) status is the limitation it places on the organization's ability to participate in political activity. Your government wants your organization to be neutral in this regard; it does not want to subsidize your political beliefs.

Yet, the reason that many get involved in nonprofit work is because they don't want to be on the sidelines; they have something to say. But 501(c)(3) status places limitations on what you can say and how you can say it. But so many organizations are really the embodiment of a stance on an issue:

“leadership, citizenship & life skills should be taught to young people” - 4H Club
“decent, affordable housing is a basic human right” - Habitat for Humanity
“healthcare is a basic need that should be supplied to all free of charge” - AHAPO
“All girls should know how to tie a knot” - Girl Scouts of America

II. The threat is real and penalties substantial

These very organizations were formed because like people shared a particular political view but when it comes to encouraging others to see the merit of that political view or sharing your organization's view of the world, tax-exempt organizations need to be careful of the landscape out there because it's dangerous to your organization's well being and it is becoming more treacherous all the time:

The League of Women Voters lost their tax exemption in 1960 due to lobbying (League of Women Voters of U.S. v. United States 148 Ct. Cl. 561, 180 F. Supp.379)

The League wanted to be treated as a tax exempt nonprofit in order to receive more favorable estate tax treatment for money bequeathed to it under the Will of Ann Webster who died in 1949. The League asserted it was operated for educational purposes and should be treated as a tax exempt entity. After the Court did an examination of its activities it found that while the The League of Women Voters qualified as an educational institution, since its main purpose was the influencing of legislation, it could not qualify for an estate tax deduction for failure to comply with the statutory condition providing that “no substantial part of the activities of which is carrying on propaganda or otherwise attempting to influence legislation.”

The court noted 22 separate instances of direct communication from the national League or its officials to persons in positions of authority with regard to legislation over a two period.

The court seemed to give great weight to the fact that at the national convention in 1948 many
hours were spent by the delegates deliberating over "what position, if any, should be taken on questions of public interest" [see page 4 of opinion]. The court reasoned that because agreement was reached at a national level about the stances it would take on these questions of public interest, then from that point forward "all of the action of all of the women of the League...is taken for the purpose of influencing legislation." [see page 4 of opinion]. This, despite the League presenting to the court a detailed accounting of all the work hours of the women documenting how few hours were attributed to efforts to influence legislation.

All was relatively quiet on this front until the bombshell of Branch Ministries v. Rossotti US Ct of Appeals, District of Columbia Circuit, 2000 211 F.3d 137 Branch Ministries v. Rossotti, Commissioner, Internal Revenue Service 211 F.3d 137, 341 U.S. App.D.C. 166

Branch Ministries, a church, sued the Internal Revenue Service after it revoked its tax exempt status. Four days before the presidential election, Branch Ministries placed full page advertisements in two newspapers in which it urged Christians not to vote for then Presidential candidate Bill Clinton because of his positions on certain moral issues concerning abortion, homosexuality, and the distribution of condoms to teenagers in school. The advertisements also solicited tax deductible donations to defray the cost of the advertisements. Then, for the first time in its history the IRS revoked a bona fide church's tax-exempt status because of its involvement in politics.

Branch Ministries argued to the Court that the revocation violated its right to freely exercise religion under the First Amendment and Religious Freedom Restoration Act and that it was a victim of selective prosecution, a violation of the Fifth Amendment.

The Court found that "withdrawal of a conditional privilege for failure to meet the condition" is not an unconstitutional burden on its free exercise right." [page 7 of opinion]. Branch Ministries can still practice religion, it just can't intervene in political campaigns. The Court also found there was no selective prosecution since Branch Ministries did not present any other similarly situated churches that did not have its tax exempt status revoked.

IRS v. NAACP: Anatomy of an IRS examination for political intervention

The case involving the National Association for the Advancement of Colored People (NAACP) was one of the most infamous involving allegations of lobbying against a tax exempt nonprofit organization. A detailed look at the progress of events surrounding the IRS investigation can provide a valuable template for others attempting to avoid the crosshairs of the IRS and help in the formulation of a game plan if your tax exempt organization is targeted caught despite your best efforts to comply with the prohibition against lobbying.

In July 2004, Julian Bond, Chairman of the NAACP, gave a speech at its 95th convention in Philadelphia. This speech, given during an election year, attacked the role of the Democrats and the Republicans in failing to push the agenda that the NAACP thought was crucial to improving the lives of its constituents.
Mr. Bond opened his speech with the following remarks:
“The NAACP has always been nonpartisan, but that doesn't mean we're not critical. For as long as we've existed whether Democrats or Republicans have occupied the White House, we've spoken truth to power.”

He then went on to criticize the administration's positions on affirmative action, the war in Iraq, civil rights and the economy. “They write a new constitution for Iraq and ignore the Constitution here at home.”

“If a president lies about having an affair, they say 'Impeach him!' If a president lies about going to war, they say, 'Reelect him!'

About the 2000 election he said “We must guarantee the irregularities, suppression, nullification and outright theft of black votes that happened on election day 2000 never, ever happen again.” Of the 2004 election “You cannot win this race by ignoring race. We know that if whites and nonwhites vote in the same percentages as they did in 2000, Bush will be re-defeated by 3 million votes.”

Republicans “appealed to the dark underside of American culture,” and “operate a perpetual-motion attack machine and squeal like stuck pigs if you answer back.”

The full text of the speech was posted on the NAACP website.

Then in a letter dated October 8, 2004 the IRS informed the NAACP that it was the subject of an examination focused on “whether or not your organization intervened in a political campaign.” On October 24 the NAACP went public with the information that the IRS had placed it under investigation. Anglela Cicciolo, an attorney for the NAACP, noted that the timing of the investigation was suspect since the remarks were made in July and in October when the NAACP registering African American voters. On January 14, 2005 the NAACP issued an audit summons seeking information normally reported on Form 990. This is the informational tax return most nonprofit tax-exempt organizations are required to file annually. The IRS asked for the costs of the convention and the names and addresses of each boardmember and to indicate how each voted.

By letter dated January 27 the NAACP informed the IRS that it would not respond to the audit notice and further alleged that the request for information, not normally furnished until the due date of the return (which was several months away), was politically motivated.

The IRS referred the allegation that it was operating in a politically motivated fashion to the Treasury Inspector General for Tax Administration. On February 2005 the Inspector General issued a report declaring that it had not found any indications that inappropriate action had been taken regarding the audit and review process by the Exempt Organizations office of the IRS.

On February 23, the IRS responded to the attorneys for the NAACP that it in fact had the authority to proceed and enforce such a summons and set a March 2 date for a meeting of the parties regarding the delivery of the requested information. That date was later moved to March
By letter dated March 10, attorneys for the NAACP sent a letter to the IRS declining to attend the March 11 meeting and further requested that the IRS close the case and issue a letter confirming its exempt status.

On March 29, 2006 the NAACP issued a press release announcing the steps it would take to force the case to court. The NAACP sent the IRS a payment of $17.65 and requested a refund. Typically, organizations that indulge in this type of prohibited behavior have to pay an excise tax equivalent to 10% of the amount of the political expenditure. The NAACP calculated that it had spent approximately $176.50 to disseminate the “prohibited speech,” and therefore sent the IRS a check for 10% of that amount along with a request for a refund. Under statute, the IRS now had six months to respond to the request for a refund. Under statute, the IRS now had six months to respond to the request for a refund i.e. to either agree that the speech was not electioneering and return the $17.65 or deny the refund thereby determining that the speech was a prohibited communication. Presumably, if the IRS denied the refund, the NAACP would promptly sue. The constitutionality of the IRS' ability to request this type of information prior to the filing of a 990 has yet to be tested.

On May 17, 2006, the NAACP released the IRS documents it obtained under the Freedom of Information Act. Prior requests for information from the IRS about whose complaints initiated the investigation were refused, citing confidentiality concerns. The IRS would only say that it had received complaints from the “general public.” These newly acquired documents show that the IRS received complaints about the July 2004 speech of Julian Bond from several Republican members of Congress including Lamar Alexander (R-TN), Susan Collins (R-ME), Strom Thurmond (R-SC), Reps. JoAnn Davis (R-VA), Larry Combest (R-TX), Robert Ehrlich (R-MD) and Joe Scarborough (R-FL).

Not until August 9, 2006 did the NAACP receive a letter from the IRS determining that it had not intervened in a political campaign and that it remained a tax exempt organization. On August 31, the NAACP announced to the public that the IRS had determined after nearly two years that it did not violate the ban on electioneering.

“The good news is that we are vindicated" said Bond. “The bad news for us and other freedom loving Americans is that it was initiated for partisan purposes to threaten our right to free speech. We'll continue to speak truth to power.”

Whether or not you believe that the IRS was politically motivated, it shows no sign of stopping the audit process for nonprofits, particular in high profile situations.

**IRS v. United Church of Christ** *(Jeremiah Wright controversy)*

In 2007 the Church invited then Senator Obama to speak, before he had announced his candidacy for president. 8 months later the IRS launched an investigation because “a reasonable belief existed that the United Church of Christ (UCC) had engaged in political activities that
could jeopardize its tax exempt status as a church...” This investigation was launched immediately after one of the national media television stations called attention to some of the remarks made by the pastor of the church, Rev. Jeremiah Wright.

Some of those controversial statements included:

“I heard Ambassador Peck [former U.S. Ambassador to Iraq under President Reagan and deputy director of President Reagan's terrorism force] on an interview yesterday did anybody else see or hear him? He was on FOX News, this is a white man, and he was upsetting the FOX News commentators to no end, he pointed out, a white man, an ambassador, he pointed out that what Malcolm X said when he was silenced by Elijah Mohammad was in fact true, he said America's chickens, are coming home to roost.”

Reverend Wright then went on to list what he thought were some of America's previous wrong doings from the killing of native Americans to the bombing of civilians in foreign nations. He concluded by saying “We have supported state terrorism against the Palestinians and black South Africans, and now we are indignant because the stuff that we have done overseas is now brought right back into our own front yards. America's chickens are coming home to roost.”

Reverend Wright delivered this speech on Sept 16, 2001; shortly after the Sept 11 attack on the United States.

Parts of the speech were given wide publicity during the Presidential campaign of 2008 and could likely have caused Obama to lose the election had he not neutralized the frenzy with the “Race speech” he made in Philadelphia in April 2008.

Again, whether or not you agree with Reverend Wright's pronouncements, at no time did he try, in that speech, to intervene in a political campaign. He damned the actions of America as a whole; he made no political divisions. Obama's appearance at UCC seemed a thinly veiled cover to initiate an investigation of a church that had spawned such a “radical” preacher.

On approximately, July 2008, the IRS concluded no political intervention had taken place during Obama's appearance at UCC.

IRS v. All Saints Episcopal10
On Oct 31, 2004 a guest preacher gave a sermon entitled “If Jesus Debated Senator John Kerry and President Bush.” In 2005 the IRS launched an investigation to determine if the sermon had breached the rules against political intervention. On September 10, 2007 the IRS closed the investigation but determined that the speech was political intervention. The IRS gave no explanation for its conclusion and did not impose any excise tax.

III. How Did We Get Here?

A. Lobbying prohibition
The US government has long expressed its preference that it likes its charitable nonprofits seen but not heard. Lobbying by charitable organizations was first limited by a 1919 Treasury
regulation providing that “associations formed to disseminate controversial or partisan propaganda are not educational within the meaning of the statute.

The government has advanced this position with varying degrees of success: Slee v. Commissioner, 42 F.2d 184 (2d Cir. 1930) In Slee the Second Circuit denied the American Birth Control League federal tax exemption because it distributed literature to legislators and the public supporting the repeal of laws against birth control. Judge Learned Hand notes that where there is “political agitation” an organization cannot be operated exclusively for charitable or educational purposes. Apparently lobbying to shape policy was viewed as a substantial noncharitable purpose. Slee v. Commissioner of Internal Revenue, 42 F.2d 184

Taxpayer, Slee, wanted his deductions to the American Birth Control League to be deductible. The Court said because the charter of the League contained language that included as its purpose "enlist the support...of...legislators to effect the lawful repeal of existing laws" this prevented the League from being organized exclusively for charitable purposes. The organization suffered this harsh result, even though the League asserted that it only did a small bit of that type of activity.

This notion that lobbying is not an appropriate charitable purpose is antithetical to a system that claims to value freedom of speech and the power and role of advocacy in its democracy. This is especially true when the legislative history surrounding federal tax exemption would indicate this was never the intent.

Prior to the 1960's the lobbying limitations were seldom enforced. The Service became more aggressive in the early days of the Kennedy administration when an “ideological organizations” project was initiated for the purpose of scrutinizing the political activities of primarily right-wing exempt organizations. The Christian Echoes case was an outgrowth of that project. This case is addressed at length later in this article.

Legislative history suggests that Congress only intended to limit lobbying that served the selfish private interests of an organization's donors and not to affect “worthy institutions." In 1987 Congressional hearings, a Treasury official conceded that the legislative history was "inconclusive" and that the rationale that no substantial part of a nonprofit's activities should include lobbying had "never been clearly articulated.”

In 1987 Congress continued to pass legislation addressing the limitation on lobbying: creating further financial penalties in some situations and providing a means of "correction" and avoidance of a tax where there may have been an inadvertent political expenditure.

No substantial part test
Regs 1.501 (c)(3)-I(c)(3) interpret 501(c)(3) “no substantial part of the activities” as the carrying on of propaganda or otherwise attempting to influence legislation. This inevitably leads to the question: what constitutes “influencing legislation” (i.e. lobbying)? and when does “
lobbying" amount to a “substantial" part of the organizations' activities?

If the subject is lobbying and nonprofits, whether it's good, bad or indifferent does not matter if the tax exempt nonprofit is trying to influence legislation. Courts have generally arrived at the conclusion that the motive is irrelevant. Nonprofits should always examine, when engaged in a particular activity, whether it's contacting a politician, giving a speech, or handing out literature if it is for the ultimate purpose of trying to influence legislation. The limitation applies not only to the enactment of legislation currently in bill form but also the proposing of future legislation.

Organizations defined by the IRS as “action organizations" (organizations that have as its primary object to get a piece of legislation passed or defeated to meet its stated goal); are automatically presumed to be engaged in substantial political activity. Governing Bodies and Referendums are similarly equated with substantial political activity. Nonprofits are permitted to encourage executive action of elected officials without running afoul of the IRS. This would include for example, lobbying for the pardon of a person that was unfairly convicted; but not to influence legislation on all pardons.

While it's clear that any substantial activities that attempt to influence legislation will be considered lobbying, to avoid trouble nonprofits must engage in lobbying activities that do not amount to “substantial."

Case law has provided three means of determining whether lobbying is substantial:

1. The Seasongoods wanted their contributions to the Hamilton County Good Government League to be allowed as deductible contributions to a charity. The articles of incorporation of the League specified its objective to "provide an opportunity for discussion of matters of civic importance and to advance good government." In furtherance of its objective, the League held public forums, investigated proposed legislation, distributed literature about the importance of voting and registration, and conducted study on the need for future legislation. The League termed its activities educational but the IRS claimed they were political. Seasongood testified that less than 5% of the time and effort of the League was devoted to the activities that the Tax Court found to be “political." As such the Court of Appeals reasoned that the "so-called political activities" of the League were not substantial in relation to all of its other activities.

The Court's bright line percentage test in Seasongood confidently proclaimed that devoting less than 5% of an organization's time and effort to lobbying was insubstantial with little guidance as to what maximum percentage of such activity would be insubstantial. It provides little guidance if the organization devotes less than 5 ½ % of its efforts toward lobbying. Or if an organization that devotes less than 6% or 7% of its efforts is still insubstantial. Now the bright line doesn't look so bright anymore.

2. In 1972 Christian Echoes Ministry, Inc. v. U.S., 470 F.2d 849 (19th Cir. 1972), was decided. The Court didn't use a percentage test as in Seasongood; but rather a balancing test; the “essence" of the political activities of the organization have to be balanced in the context of the organization's objectives and circumstances.
In *Christian Echoes* the taxpayer sued for a refund of taxes paid to a nonprofit religious organization. According to its articles of incorporation the purpose of the organization was “to establish and maintain weekly religious, radio and television broadcasts, to establish and maintain a national religious magazine and other religious publications, to establish and maintain religious educational institutions.”

The organization encouraged its followers to: 1) write to their congressmen to influence political decisions, 2) to work in politics at lower levels, 3) to inform Congress that the House Committee on Unamerican Activities must be retained and 4) to oppose efforts to disarm the United States.

The Court found that even though the organization never lobbied Washington or supported a particular bill or candidate, the “essence” of what the organization was doing amounted to substantial lobbying.

The “smell test” of *Christian Echoes* gives nonprofits little guidance how it can influence legislation as part of fulfilling its mission without risking its tax exempt status.

This can be a particularly disturbing atmosphere when the reason for starting nonprofit is that the mission is unpopular, misunderstood, or unknown to the general public or neglected by the government. The work of many of our nations’ most impactful nonprofits is not popular: the short line starts here for everyone who wants to dedicate their professional life to work with the uninsured elderly, poor, HIV positive populations, safe birth control, unconventional religions or mentally deficient persons. The work of nonprofits in our society is vital, deeply rewarding to some but not always a likely survivor of the “smell test” of *Christian Echoes*; particularly when the people doing the “smelling” have very little in common with the mission of the organization or the community served by the nonprofit.

3. In 1974, the Haswell decision gave us the “all the facts and circumstances” test. 26 Taxpayer, Haswell, wanted a refund of monies donated to the National Association of Railroad Passengers (NARP). Haswell formed and was primary funder of the group himself; met with legislators, staff and other members of congressional committees to advocate the interests of consumer railroad passengers and entered into an agreement with a lobbying firm, National Counsel Associates (NCA) prior to incorporation.

The Court noted that distribution of expenditures is one measure of the substantiality of activities and that 20.5 percent of NARP budget spent on political activities. The agreement with NCA before incorporation was another indicator of the importance of legislative activities. Statements in the brochures of NARP described the organization's “work for the preparation of constructive legislation.”

After applying an “all the facts and circumstances test” the Court concluded that a substantial part of its activities involved attempts to influence legislation. Taken together with Seasongood, 27 a taxpayer might conclude that if an organization's alleged political activities amounted to somewhere between 5%-19.99% of its total activities and efforts then those political activities would be insubstantial. Except the Court in Haswell noted that it was not the percentage of the activities alone to be considered when trying to determine if they are insubstantial. Back to square one.
Each test really fails to provide nonprofits the certainty they need; instead placing them in a legal twilight zone. The last thing a nonprofit wants to do is deal with a judge who may or may not share its view of the world, trying to determine the “essence” of what it does or judging the “facts and circumstances” through a lens that doesn’t fully appreciate the mission of the nonprofit especially when the consequences are so severe:

If found to have substantially engaged in lobbying a nonprofit could suffer any of the following penalties or consequences:

1. Loss of its federal tax exemption
2. Loss of state and local exemptions which are often dependent on federal tax exemption
3. Subject to an excise tax
4. Donors may lose their deduction if organization loses its tax exempt status
5. Future income from donors or grants limited and organization's reputation damaged
6. Organization may not be able to continue to operate without donor support or grant funding
7. Organization prohibited from restructuring itself as a 501(c)(4) and permitted to lobby

**B. Limitation on Political Campaign Intervention**

Even more obscure in origin is the limitation on Political Campaign Intervention. Tax exempts are strictly prohibited from intervening in political campaigns. This ban originated as a Senate floor amendment to the Internal Revenue Code of 1954. Apart from sponsor Sen. Lyndon B. Johnson saying that rule was intended to "extend" the limitation of section 501(c)(3), no other comment on the bill was recorded in the Congressional Record. The conventional wisdom is that Sen. Johnson wanted to curb the activities of a Texas foundation which had provided indirect financial support to his opponent in a senatorial primary election 30

Although an absolute ban according to statute, the IRS has been known to ignore de minimus violations of the prohibition of involvement in political campaigns. The inconsistent application of the ban has raised several questions; some that have been resolved through litigation or regulation, others that have not:

(1) what constitutes intervention in a campaign?
(2) who is a candidate for public office?
(3) Under what circumstances are the political campaign activities of leaders attributable to the tax exempt nonprofit organization?
(4) does the IRS discriminate through its selective enforcement of the political campaign limitations?
(5) does the application of the political campaign limitations violate their First Amendment Rights to free speech and in the case of churches, free exercise of religion?

**IV. Strategies for circumventing the ban on political intervention and limitation on lobbying**

A. Can section 501(h) offer relief?
Nonprofits grew sick and tired of this continued threat to their existence through this prohibition and ironically lobbied their government for more certainty. Many nonprofits have substantial budgets, employ thousands of persons and therefore have considerable influence. And they began to lobby for change.

In 1976 Congress enacted a law to expand the rights of nonprofits to lobby. Under this new law “substantial” would be expressed as a fractional relationship between the total expenditures of the nonprofit and the expenditures related to lobbying activities. It wasn't until 1990 that IRS and the treasury department promulgated regulations to implement the laws. That 14 year period between 1976 and 1990 was largely spent with Congress and the nonprofits battling over the definition of the key term “substantial” since 501(c)(3) nonprofits can't carry on “substantial” lobbying activities.

501(h) didn't do away with the three tests derived from case law for determining whether or not an organization was engaged in “substantial” lobbying activities. Now, however, some organizations (but not most religious affiliated organizations) have a safe harbor; they can elect to have subsection (h) apply. This section applies a ceiling amount to lobbying expenditures and grass roots expenditures. This removes tax exempt nonprofits from the “smell test” of Christian Echoes, if it makes the election. Otherwise if you are a nonprofit that does not make the 501(h) election those other case law derived tests will apply.

The I.R.S. regulations permit nonprofits, on a sliding scale, to spend up to 20% of their first $500,000 in expenditures and up to 5% of expenditures over 1.5 million on political lobbying activities. There is a 1 million dollar annual ceiling every year on total political expenses. Of those expenses only a quarter may be spent on grassroots lobbying.

1. Grassroots Lobbying v. Direct Lobbying
Because 501(h) makes a distinction between “grassroots lobbying” and “direct lobbying”
it's important that organizations understand the difference. Grass roots lobbying are communications to the general public that attempt to influence legislation through changing public opinion.39

Direct lobbying is any attempt to influence any legislation through communication with any member or employee of a legislative body or any other government official or employee who may participate in the formulation of the legislation but only of the principal purpose of the communication is to influence legislation.40

501(h) favors direct lobbying over grass roots lobbying as it places a restriction on how much of your permitted lobbying can be grassroots. There is a mass media exception that prohibits any grassroots lobbying 2 weeks before a vote by a legislative body or committee on a highly publicized piece of legislation. (Television, radio, newspapers, magazines, internet)41

In order to determine if you meet guidelines under the test in 501(h) you have to total your political expenditures and determine the ratio to your total expenditures. Examples of political expenditures include:

1. Candidate travel expenses
2. Cash paid for speeches
3. Cost of polls, surveys, position papers, publicity
4. Any other money paid to a candidate
5. Fundraising expenses, advertising

3. Penalties
For 501(c)(3) and 501(c)(4) nonprofits, once you make the 501(h) election you need to be mindful of the consequences.

Once you obtain the figure that is permissible for lobbying expenses, the tax exempt nonprofit must be careful not to exceed it; if it goes over that amount then:

1. It may be subject to a tax equal to 25% of the amount of the excess lobbying expenditures for
the taxable year. That tax is referred to as an excise tax. 42

2. The excise tax can be applied to that organization and to each of the managers of the organization that knew that a political expenditure was being made. Note, this provision may be individually applicable to some staff, not just boardmembers.

3. If a tax exempt nonprofit spends in excess of 150% of the allowed amounts over a 4 year period it could lose its tax exemption.

For most organizations these are very generous amounts that should allow the organization to lobby without restriction.

B. Consider a Change of Structure

501(c)(4)

Many nonprofits think that making the 501(h) election makes them a more likely audit target. There is some evidence to believe that at least at one point those taking the election did make an attractive audit target. 43 The IRS says it no longer engages in a practice of specifically selecting those that make the 501(h) as targets for audit. 44

The 501(h) election requires extra record keeping that a nonprofit may be unwilling or unable to do. For whatever reason, if the 501(h) election is not appropriate, 501(c)(4) organization may be better answer.

501(c)(4) permits civic leagues or other organizations “operated exclusively for the promotion of social welfare ..”45 to receive tax exemption even if a substantial part of their activities includes lobbying. The political activities and lobbying must be closely related to the stated mission of the organization. 501(c)(4) organizations can endorse candidates, hold targeted voter registration drives, and distribute voter guides as long as political campaigning is not the organization's primary activity46

Either qualifying your nonprofit as a 501(c)(4) or creating an affiliated 501(c)(4) organization may be the answer for some organizations. A 501(c)(3) organization can even exercise
control over a 501(4) organization through the power to appoint all or a majority of its board of directors. While each organization should maintain separate books and accounts they are permitted to share office expense with the appropriate reimbursement of costs to the 501(c)(3) 47

By limiting its electioneering to less than 50% of an organization's total activities a 501(c)(4) can safely create a Political Action Committees (PAC) using separately segregated funds to raise monies from its members for campaign activities. Those monies may be subject to a tax on its investment income 48

Note that while 501®(4) organizations can affirmatively attempt to influence legislation, they may not participate in political campaigns. The most significant drawback of 501(c)(4) is that donations to the organization are not deductible.

C. Organizations other than 501(c)(3)

Like section 501(c)(4), other sections of the tax code permit tax exemption but not deductible donations. Sections 501 (c) 5 through 501( c) 16 are not subject to the restriction on political activities and nonprofits organized under these sections can therefore participate in political activities and still maintain their tax-exempt status. These sections cover very specific types of nonprofit organizations and must be examined to see if their definition would include the type of organization contemplated.

D. Other Strategies for 501(c)(3) nonprofits

If section 501(h) election or 501(c)(4) are impractical or not desirable perhaps because the organization cannot survive without tax deductible donations or if the mission of the organization does not fit within the other sections providing tax exemption, there are other strategies. These options are particularly useful for a one time attempt to influence legislation.

The Internal Revenue Code offers exceptions to activities that would otherwise be considered influencing legislation. You do not need to make a 501(h) election to undertake these
1. Make available the results of nonpartisan analysis, study or research. The analysis should be available to people on both sides of the issue. This cannot include a “call to action” asking the recipient of the analysis, study or research to take action.50

2. Provide technical advice or assistance (where such advice would otherwise constitute the influencing of legislation) to a governmental body or to a committee or other subdivision thereof in response to a written request by such body or subdivision.51 Organizations would do well to establish themselves as the “go to” nonprofit for certain types of issues. Testifying at public hearings before non-legislative bodies (e.g. utility commission) or writing an article can help to elevate an organization's profile.

3. Appearances before, or communications to, any legislative body with respect to a possible decision of such body which might affect the existence of the organization, its powers and duties, tax-exempt status, or the deduction of contributions to the organizations.52

4. Communications between the organization and its bona fide members with respect to legislation or proposed legislation of direct interest to the organization and such members, other than communications (which encourage members or others to directly or indirectly influence legislation) [How can you determine if someone is a bonafide member? Nonprofits need to determine eligibility for membership and keep a maintain list of members]53

5. Any communication with a government official that is not for the purpose for influencing legislation54

**Quasi-political Activities**

6. Activities designed to influence Ballot questions are permissible since the restriction is for or against a candidate for public office.

7. Get Out the Vote Campaigns that contain no bias toward a candidate or party are acceptable
even if the voter registration campaign targets certain groups (e.g. minorities, homeless, ) that are likely to favor a certain party. These campaigns may be viewed as partisan if they target a group with a viewpoint on a particular issue (e.g. pro choice, anti-abortion).

8. A public forum with an impartial moderator is a permissible activity. All candidates should be invited and the hosting organization should not provide any editorial comments. 55

9. Mailing lists that an organization sells or rents to those that want to communicate to its members is permissible as long as it is available to all candidates. Note that the income from selling mailing lists may be characterized as unrelated business income. 56

10. Awards may be given to those persons in business or government that share the organization's viewpoint but these types of ceremonies are best held not during an election period. 57

11. Organizations may advocate for social change generally.

12. Organizations may comment on broad public policy

13. Questionnaires are permissible as long as there is no bias in the questions and no editorial comment. Groups that have a very narrow focus (e.g. anti-abortion) need to be very careful to ask a breadth of questions. 58

14. Publishing legislators voting records would not be considered lobbying if it involved a wide range of subjects; listed all relevant officials (not just those up for reelection); and did not imply organizational approval or disapproval of the public officials named. It should not be disseminated beyond the membership or mailing list of the organization. This underscores the importance of keeping up to date membership lists and mailing lists for supporters of your organization. Voting Records should not be released only before an election.

V. FORESHADOWING OF THE FUTURE

Project 302 - Political Activities Compliance Initiative 2004 (PACI)
In 2004 the IRS initiated a pilot program, the Political Activities Compliance Initiative. This is a
program that “fast tracks” complaints to the IRS concerning tax exempt nonprofits that are allegedly involved in improper political activity. It is this program that initiated the complaint in the case of Branch Ministries. The IRS has said on many occasions that the purpose of the program was to educate and encourage compliance. The IRS assigned 3 employees to review each referral of alleged political impropriety. A recommendation would be made for an ‘in office’ or field examination. Only the Director of Exempt Organizations performed examinations on any church that was referred for alleged improper political activity. The project operated from June 2004 to November 2004 with a focus on the November elections. A total of 166 referrals involving 127 organizations were received. The IRS concluded that 72% of the referral items were found to be intervening in political activities. Of the offenders 43% were churches and 57% were nonchurch organizations. Some of the common infractions that the IRS found were instances where political candidates spoke at the exempt organization’s function; exempt organizations posting signs endorsing a political candidate; a verbal endorsement by an exempt organization official of a political candidate; an exempt organization making a political contribution to a candidate, a church official making a statement supporting a political candidate at a religious service; and improper voter guides.

Specifically the project determined that:

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<th>REASON FOR REFERRAL</th>
<th>NUMBER OF REFERRALS</th>
<th>NUMBER OF REFERRALS FOUND TO BE IN VIOLATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>improper printed documents</td>
<td>24</td>
<td>9</td>
</tr>
<tr>
<td>church official made statement supporting candidate during services</td>
<td>19</td>
<td>12</td>
</tr>
<tr>
<td>candidate spoke at an exempt organization function</td>
<td>11</td>
<td>9</td>
</tr>
<tr>
<td>distribution of improper voter guides or candidate ratings</td>
<td>14</td>
<td>4</td>
</tr>
<tr>
<td>exempt organization posted a sign on its property endorsing the candidate</td>
<td>12</td>
<td>9</td>
</tr>
</tbody>
</table>
exempt organization website endorsed the candidate | 15 | 7
exempt organization made a political contribution to candidate | 7 | 5
noncandidate endorsed a candidate at an exempt organization function | 4 | 4
verbal endorsement of candidate by exempt organization | 8 | 6 [all churches during services]

As a result of the program the IRS proposed 7 revocations of the exempt organizations involved.
After the 2004 PACI, the IRS issued Rev. Rule 2007-41 in June 2007 holding nonprofits responsible for the web content posted on its website

**Political Activities Compliance Initiative 2006 (PACI)**

Using the 2004 PACI as a model the IRS resumed the project again in 2006. At that time the in 2006, the IRS received 237 referrals and selected 100 cases selected for examination. It closed 92 cases. 65 of the exempt organizations were given written advisories because of improper political intervention; 21 were found to have no improper intervention.

The 2006 project concluded that exempt organizations have problems interpreting statutory language. The Project also recommended that PACI become an annual program. It noted that virtually all of the exempt organizations examined by the project were received by referral.

Thereafter the IRS converted the project into a permanent program with varying results.

The PACI program presents some troubling Constitutional concerns. If an exempt organization posts a sign today that says “don't vote for President Obama. It has engaged in improper political activity. Yet, during a non-election year the IRS does not aggressively fast track those cases and in fact may not follow up on it at all. But if the same statement is made on November 10, in an
election year. That statement could generate a referral that would result in an expedited examination of that nonprofit organization. The examination would then generate publicity and the nonprofit would experience the harmful effects thereof. Donations would be negatively impacted; resulting in a chilling of speech.

This inconsistent application of the law by the IRS is problematic. One of the tenets of fairness in law is that it be applied to all taxpayers in a consistent manner. The format of the PACI program where aggressive application of the law occurs only in an election year makes consistent application impossible. Even more disturbing is that the timing of the examination could affect the outcome of the election as was seen in the Rev. Wright/UCC case. So the irony is that the expressed goal of insuring that nonprofits don't improperly effect elections is being supplanted by IRS timing its investigations during election periods investigations thereby inevitably impacting election outcomes. If its true goal is to educate nonprofits in an effort to achieve compliance wouldn't this be better achieved through a more aggressive IRS effort in nonelection years where impact on the election would be minimized and actions of tax exempts scrutinized before they intervene in campaigns?

At the time of its decision in 2000 in the Branch Ministries case the court dismissed the assertion of the taxpayer that it was being selectively prosecuted; finding that it hadn't shown that similarly situated taxpayers had not been prosecuted. Now some 9 years later it could conceivably be easier to substantiate that allegation by showing that other nonprofits that are politically active in nonelection years are not prosecuted by the IRS or by pointing to cases such as the IRS v. All Saints Episcopal where, the IRS declined to impose any penalty on a church that it determined after its examination was indeed involved in political activity. How can the IRS justify such a result when the law clearly states that the lobbying expenditures of a nonprofit that intervenes in a political campaign is subject to an excise tax. The IRS made a decision to selectively exclude All Saints from imposition of the tax. Rev. J. Edward Bacon, Jr., rector of All
Saints aptly remarked after the IRS closed the case without further explanation that “Synagogues, mosques and churches across America have no more guidance about the IRS rules now than when we started this process over two years ago.”

Adding to the uncertainty is the IRS reaction to “Pulpit Freedom Sunday” coordinated by the Alliance Defense Fund (ADF), a Arizona based legal association of the religious right. Approximately 33 pastors in 22 states all made pointed political recommendations from their pulpits on a single Sunday in September 2008. The church participants urged their members not to vote for Barack Obama and Hillary Clinton and several churches openly endorsed John McCain during the Presidential election campaign.

The IRS was aware of the group's intention at least since June 11, 2008 when the Americans United for Separation of Church and State filed a formal complaint. ADF publicized its participants' intention and later forwarded the IRS copies of the sermons containing the prohibited political speech in an effort to force a legal battle. Complaints were also filed with the IRS on September 29, 2008 by three former IRS executives and 40 other religious institutions.

To date the IRS will neither confirm nor deny that an investigation is taking place only issuing a statement that it “will monitor the situation and take action as appropriate.” While the ADF and others wonder why the IRS has taken no action others have suggested that the IRS is ignoring the protest because it has “little incentive to pursue the issue. It would be expensive for them to fight and would give people all sorts of reasons to say the IRS is evil and irreligious. It's not like their going to recoup a lot of money.” But this is the election cycle where the IRS launched an investigation of the United Church of Christ because it received a complaint about the appearance there of candidate Barack Obama.

Notwithstanding that the IRS has taken two or more years in the past to conduct similar investigations if, for lack of motive or deficient resources the IRS chooses not to prosecute the protestors, it buttresses the argument of selective prosecution of this statute and further draws into question the constitutionality of the IRS’ approach to enforcement.
Speculation continues that the IRS has intentionally stopped short of taking the kinds of action that would generate litigation that would challenge the constitutionality of the PACI program; satisfied with intimidating tax exempt organizations. A lot of this IRS aggression occurred under the last eight years of the Bush administration. The Obama administration has given no indication as to whether or not it will change course.

It would seem that the perfect time to educate the tax exempts would before they engaged in harmful and illegal behavior. And if the secondary goal of the IRS is to encourage compliance then the IRS apply the excise tax to all those nonprofits that violate the political intervention prohibition.

**CONCLUSION**

The statutory language prohibiting lobbying and intervention in political campaigns is a problem; it is a real limitation on the freedom of speech enjoyed by nonprofit organizations in exchange for its exempt status. IRS has decided that issue this warrants implementing an annual permanent program each Presidential election cycle to ensure that nonprofits don't violate this prohibition on political activities. However, the IRS enforcement of the ban has been uneven and selective.

Practitioners should expect tax exempts to continue to be at the mercy of federal administrations, when they espouse unfavorable positions. The outcome of the NAACP case is encouraging; nonprofits can take a stand, as long as they take proper steps to insure that they are on right side of the prohibitions, and resist the urge to let IRS investigations into their tax exemption chill their freedom to speak out. The NAACP and the United Church of Christ cases are also a warning that the swiftest action will be taken as you get closer to political campaigns.

In the meantime review your actions for compliance with the statute; familiarize yourself with those types of actions that generate the greatest scrutiny from the IRS. Decide whether
501(h)
election is necessary or appropriate for a tax exempt organization that engages in lobbying.
Explore use of section 501(c)(4) for the establishment of a separate nonprofit that may freely engage in lobbying. Have your written materials, the structure of nonprofit public forums reviewed by a knowledgeable attorney or consultant. Tax exempt organizations could also benefit from writing and instituting policies that will assist in it not violating these political restrictions (e.g. that the nonprofit is prohibited from donating to a political campaign or that no candidates for office are invited to speak during the election campaign).
Be particularly mindful that churches and other religious institutions violate the restrictions against political intervention at a higher rate than other tax exempt organizations according to the IRS PACI program. Plan your political expenditures and keep good records.

Properly prepared and aware of the relevant challenges, nonprofits can still go about the business of changing the world undeterred.

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1 I.R.C. sects. 501(b); 501(c)(3)
2I.R.C. section 501
3IRS commenced investigation of NAACP on October 8, 2004
5NAACP took the position that section 6852 of the I.R.C. gives the IRS the right to initiate an examination prior to filing form 990 only if the organization had engaged in flagrant violations of electioneering. And its attorneys wrote in its March 10 letter that “While criticism of an administration's policies might constitute intervention under some set of circumstances, it hardly rises to the level of a 'gross violation' or a ‘flagrant' expenditure."
7IRS investigation of UCC commenced February 2008
9Id.
IRS investigation of All Saints Episcopal commenced
Treas. Reg. Section 45, art (1919 ed)

The often quoted language of Justice Learned Hand: “Political agitation as such is outside the statute, however innocent the aim, though it adds nothing to dub it propaganda, a polemical word used to decry the publicity of the other side. Controversies of that sort must be conducted without public subvention; the Treasury stands aside from them.” 42F.2d at 185 fn

Stats on # of cases/re: IRS & lobbying
Detail on ideological organizations project

I.R.C. section 4912
I.R.C. section 4955
Treas. Reg sect. 1.501(c)(3)-1(c)(3)

The education of public spirited women so that they may, by their agreed opinion deliberately and intelligently arrived at, influence legislators or influence others to influence legislators to reach right decisions, is education of the most useful and laudable kind. But a gift to such an educational institution cannot qualify for a tax deduction under section 812”

Treas. Reg 1.501(c)(3)-1(c)(3)(i)(a)
Treas. Reg sect. 1.501(c)(3)-1(c)(3)(ii)
Treas.Reg sect 1.501(c)(3)-1(c)(3)(ii)(a)
Treas. Reg sect 1.501(c)(3)-1(c)(3)(ii)(b)
I.R.C. 4911(d)(2)(E); Treas. Reg sect. 56.4911-2(d)(2)-(4)
Seasongood v. Commissioner, 227 F.2d 907 (6th Cir. 1955)
Haswell v. United States 205 Ct.Cl.421, 500 F.2d 1133
Infra
I.R.C. sec. 4955
100 Cong. Rec. 9604 (1954)


Anyone who offers themselves for office at local state or natl elective office, Treas Reg. sec 1.501( c)(3)-1( c)(3)(iii) , election need not be contested or even involve political parties, Rev. Rul. 67-71, 1967-1C.B. 125, incumbents who have not announced their intention but are likely to do so Christian Echoes, judges even if election is nonpartisan Assn of the Bar of the City of New York v. Commissioner, 858 F.2d 876 (2d Cir. 1988),

Actions taken by leaders of an organization may be attributable to the organization
unless it timely disavows those actions and takes steps to make sure that type of unauthorized action does not occur again. See Kindell & Reilly, “Election Year Issues,” Internal Revenue Service Exempt Organizations Continuing Professional Education Technical Instruction Program for FY1993.

33 No definitive answer yet but IRS treatment of All Saints Episcopal Church gives ammunition to the argument that it is indeed practicing selective enforcement; discussed further later in this article.

34 Case law has definitively held that the prohibitions placed on organizations for the privilege of tax exemption is not violative of the first amendment right to free speech or the free exercise of religion. See Christian Echoes, Branch Ministries, infra.

35 I.R.C section 501(h)

36 I.R.C. sect 501(h)

37 Id.

38 Treas. Reg sect. 1.501(h)-2(a) thru 1.501(h)-3(e)

39 Treas. Reg sect. 56.4911-2(b)(2)(i)

40 I.R.C. 4911(d)(1)(B); Treas. Reg. sect. 56-4911-2(b)(1)(i)

41 Treas. Reg. sect. 56.4911-2(b)(i)(iii)

42 I.R.C. 4911(a)

43 Look at summary info

44 In 2003 IRS as a result of the “Non-Compliance Indicator” project several nonprofits that selected 501(h) were targeted for audit. After an organized outcry the then IRS Exempt Organizations Director, Steve Miller, agreed to halt the program. See www.ombwatch.org/article/articleview/1706/1/41?TopicID=3

45 I.R.C. 501(c)(4)

46 I.R.S. Rev. Rul 81-95, 1981-1 C.B. 332


48 501©(4) could become subject to IRS sec 527 tax if make expenditures for an “exempt function” influencing or attempting to influence the selection, nomination, election or appointment of any individual to any Fed, state or local public office or office in a political organization, or the election of Presidential or Vice-Presidential electors, whether [the] individual electors are selected, nominated, elected or appointed.” IRC 527(e)(2). The amount taxed is the lesser of the organizations net investment income or the aggregate amount spent for exempt functions For more details see Treas. Reg 1.527-2 ©

49 I.R.C. sec. 4911(d)(2)

50 IRC Treas. Reg section 56.4911-2(b)(2) , 56.4911-2(b)(2)iii, 56.4911-2(b)(5) [Example (5)(ii)]

51 I.R.C. sec 4911(d)(2)(B)

52 I.R.C. sect. 4911(d)(2)(C)

53 I.R.C. sect. 4911(d)(2)(D)

54 I.R.C. sect. 4911(d)(2)(E)

55 I. R.S. Rev. Rul. 86-95 1986-2 CB 73
Kindell & Reilly, “Election Year Issues,” 2002 CPE Text at 383
IRS regs/case/anecdotes
I.R.S. Rev. Ruling 78-248
2008 PACI stats: NOTE I.R.S. was expected to release by March 31, 2009 but the report is currently “in abeyance” according to Judith Kindell, IRS exempt organizations technical advisor as quoted in OMB Watch, April 2009, http://www.ombwatch.org/node/9864
I.R.C. section 4912
MPR news Q, minnesota.publicradio.org/display/web/2008/09/pulpit/