Election year do's and don'ts

The 2016 general election is fast approaching. While the field is still wide, some tax-exempt organizations will begin to ramp up their activities as the election date looms on the horizon.

Under the Internal Revenue Code, all section 501(c)(3) organizations are absolutely prohibited from directly or indirectly participating in, or intervening in, any political campaign on behalf of (or in opposition to) any candidate for elective public office. Contributions to political campaign funds and public statements of position (verbal or written) made on behalf of the organization in favor of or in opposition to any candidate for public office clearly violate the prohibition against political campaign activity. Violating this prohibition may result in denial or revocation of tax-exempt status and the imposition of certain excise taxes.

However, certain activities or expenditures may not be prohibited, depending on the facts and circumstances. For example, certain voter education activities (including presenting public forums and publishing voter education guides) conducted in a nonpartisan manner do not constitute prohibited political campaign activity. In addition, other activities intended to encourage people to participate in the electoral process, such as voter registration and get-out-the-vote drives, are not prohibited political campaign activity if conducted in a nonpartisan manner.

On the other hand, voter education or registration activities with evidence of bias that:
- Would favor one candidate over another
- Oppose a candidate in some manner, or
- Have the effect of favoring a candidate or group of candidates, will constitute prohibited participation or intervention.

For section 501(c)(4), (5) and (6) organizations, certain political campaign activities may result in an excise tax being assessed against these organizations.

This white paper will analyze and discuss activities that will result in a section 501(c)(3) organization being accused of entering into political campaign activity and activities that will not result in such an accusation. The paper then looks at six factual situations where section 501(c)(4), (5) or (6) organizations have entered into political activities and discusses and analyzes those situations where these types of organizations may be subject to an excise tax under section 527(f).
Background

Section 501(c)(3) provides for the exemption from federal income tax of an organization organized and operated exclusively for charitable or educational purposes, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation (except as otherwise provided in section 501(h)), and which does not 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.

Reg. section 1.501(c)(3)–1(c)(3)(i) states that an organization is not operated exclusively for one or more exempt purposes if it is an action organization.

Reg. section 1.501(c)(3)–1(c)(3)(iii) defines an action organization as an organization that participates or intervenes, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office. The term candidate for public office is defined as an individual who offers himself or herself, or is proposed by others, as a contestant for an elective public office, whether such office is national, state, or local. The regulations further provide that activities that constitute participation or intervention in a political campaign on behalf of or in opposition to a candidate include, but are not limited to, the publication or distribution of written statements or the making of oral statements on behalf of or in opposition to such a candidate.

Whether an organization is participating or intervening, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office depends upon all of the facts and circumstances of each case. For example, certain voter education activities, including preparation and distribution of certain voter guides, conducted in a nonpartisan manner may not constitute prohibited political activities under section 501(c)(3). Other so-called voter education activities may be proscribed by the statute. Revenue Ruling (Rev. Rul.) 78–248, 1978–1 C.B. 154, contrasts several situations illustrating when an organization that publishes a compilation of candidate positions or voting records has or has not engaged in prohibited political activities based on whether the questionnaire used to solicit candidate positions or the voter's guide itself shows a bias or preference in content or structure with respect to the views of a particular candidate. Rev. Rul. 80–282, 1980–2 C.B. 178, amplifies Rev. Rul. 78–248 regarding the timing and distribution of voter education materials.

The presentation of public forums or debates is a recognized method of educating the public. Rev. Rul. 66–256, 1966–2 C.B. 210 addresses the situation where a tax-exempt organization formed to conduct public forums at which lectures and debates on social, political and international matters were presented qualified for exemption from federal income tax under section 501(c)(3). Therefore, providing a forum for candidates is not, in and of itself, prohibited political activity. Rev. Rul. 74–574, 1974–2 C.B. 160, held that an organization operating a broadcast station was not participating in political campaigns on behalf of public candidates by providing reasonable amounts of air time equally available to all legally qualified candidates for election to public office in compliance with the reasonable access provisions of the Communications Act of 1934.

However, a forum for candidates could be operated in a manner that would show a bias or preference for or against a particular candidate. This could be done, for example, through biased questioning procedures. On the other hand, a forum held for the purpose of educating and informing voters, which provides fair and impartial treatment of candidates and does not promote or advance one candidate over another, would not constitute participation or intervention in any political campaign on behalf of or in opposition to any candidate for public office. Rev. Rul. 86–95, 1986–2 C.B. 73, addresses an organization that proposed to educate voters by conducting a series of public forums in congressional districts during congressional election campaigns and held that the organization was not participating in a political campaign on behalf of any candidate due to the neutral form and content of its proposed forums.

The remainder of this paper will be presented in two parts. Part I will look at section 501(c)(3) organizations, consider various election–year activities and give specific examples related to each type of activity that likely will be considered political campaign intervention, as well as those activities that likely will not be considered political campaign intervention. Part II will discuss and analyze six situations for sections 501(c)(4), (5) and (6) organizations and determine if the factual patterns discussed likely will result in the organization owing an excise tax on political expenditures.

PART I

Voter education, voter registration and get–out–the–vote drives

Section 501(c)(3) organizations are permitted to conduct certain voter education activities, including the presentation of public forums and the publication of voter education guides, if the activities are carried out in a nonpartisan manner. In addition, section 501(c)(3) organizations may encourage people to participate in the electoral process through voter registration and get–out–the–vote drives conducted in a nonpartisan manner. On the other hand, voter education or registration activities conducted in a biased manner that favor (or oppose) one or more candidates are prohibited.

So, what kind of activity could be considered political campaign intervention? An example of an IRS–approved activity is one involving a section 501(c)(3) organization that promotes community involvement and sets up a state fair booth where citizens can register to vote. The signs and banners in and around the booth give only the name of the organization, the date of the next upcoming statewide election, and notice of the opportunity to register. No reference to any candidate or political party is made by the volunteers staffing the booth or in the materials available at the booth, other than the official voter registration forms that allow registrants to select
a party affiliation. According to the IRS, the section 501(c)(3) organization will not be considered engaged in political campaign intervention when it operates a voter registration booth of this kind.

However, consider a situation where a section 501(c)(3) organization is formed to educate the public on environmental issues and, shortly before an election, sets up a telephone bank to call registered voters in the district in which a candidate’s platform is to challenge the current incumbent’s environmental stance. In the phone conversations, the section 501(c)(3)’s representative tells the voter about the importance of environmental issues and asks questions about the voter’s views on these issues. If the voter appears to agree with the incumbent’s position, the section 501(c)(3)’s representative thanks the voter and ends the call. If the voter appears to agree with the candidate that plans on opposing the incumbent’s environmental stand, the section 501(c)(3) organization’s representative reminds the voter about the upcoming election, stresses the importance of voting in the election and offers to provide transportation to the polls. In this activity, the section 501(c)(3) organization likely is engaged in political campaign intervention when it conducts this get–out–the–vote drive.

**Individual activity by organization leaders**

The political campaign intervention prohibition is not intended to restrict free expression on political matters by leaders of organizations speaking for themselves, as individuals. Nor are leaders prohibited from speaking about important issues of public policy. However, for their organizations to remain tax-exempt under section 501(c)(3), leaders cannot make partisan comments in official organization publications or at official functions of the organization.

One type of allowed activity which would not be considered political campaign intervention may be when a CEO of a section 501(c)(3) is listed, along with four other local leaders in the area, in a local newspaper campaign ad published by a candidate for public office. The ad may contain language that identifies the CEO and the organization to which he or she is affiliated and also contains a statement that states, “Titles and affiliations of each individual in the ad are provided for identification purposes only.” Because the ad was paid for by the political candidate rather than the CEO’s section 501(c)(3) organization and was not contained in an official publication of the section 501(c)(3) organization, notwithstanding that the CEO endorses the candidate for public office in a personal capacity, the organization likely will not be considered to have entered into political campaign intervention.

However, consider a fact pattern where a section 501(c)(3) organization has a monthly newsletter that highlights its executive in each issue with a column written by the executive called “My Views,” and a month before the election the executive writes, “It is my personal opinion that Candidate X should be re–elected.” Notwithstanding that the executive may pay for that particular month’s newsletter costs from personal funds, since the statement was made in an official publication of the section 501(c)(3) organization, such an activity likely will be considered political campaign intervention.

In the religious organization context, sometimes a situation arises where a minister of a church at some point close to an election attends a press conference at a political candidate’s headquarters and expressly states at that press conference that the candidate should be re–elected. Notwithstanding that his statements make the front page of a local newspaper and he and the church are identified in the article, this endorsement likely will not be considered prohibited political campaign intervention since his endorsement did not occur at an official church function or in a church publication, nor were church assets used in the activity. This will be the case only if the minister did not state he was speaking as a representative of the church.

However, if during an official function of a section 501(c)(3) organization, a board member speaks at that function on issues of importance to the accomplishment of the organization’s tax-exempt purpose and the importance of voting in the upcoming election, but near the end of the speech states, “It is important that you all do your duty in the election and vote for Candidate W,” the organization likely will be considered to have partaken in political campaign intervention.

**Candidate appearances**

Depending on the facts and circumstances, an organization may invite political candidates to speak at its events without jeopardizing its tax-exempt status. Political candidates may be invited in their capacities as candidates, or in their individual capacities (not as candidates). Candidates may also appear without an invitation at organization events that are open to the public.

When a candidate is invited to speak at an organization event in his or her capacity as a political candidate, factors in determining whether the organization participated or intervened in a political campaign include the following:

- Whether the organization provides an equal opportunity to participate to political candidates seeking the same office
- Whether the organization indicates any support for or opposition to the candidate (including candidate introductions and communications concerning the candidate’s attendance)
- Whether any political fundraising occurs at the event or in close proximity to it

In determining whether candidates are given an equal opportunity to participate, the nature of the event to which each candidate is invited will be considered, in addition to the manner of presentation. For example, an organization that invites one candidate to speak at its well–attended annual banquet, but invites the opposing candidate to speak at a sparsely attended general meeting, will likely have violated the political campaign prohibition, even if the manner of presentation for both speakers is otherwise neutral.
When an organization invites several candidates for the same office to speak at a public forum, factors in determining whether the forum results in political campaign intervention include the following:

- Whether questions for the candidates are prepared and presented by an independent, nonpartisan panel
- Whether the topics discussed by the candidates cover a broad range of issues that the candidates would address if elected to the office sought and are of interest to the public
- Whether each candidate is given an equal opportunity to present his or her view on each of the issues discussed
- Whether the candidates are asked to agree or disagree with positions, agendas, platforms or statements of the organization
- Whether a moderator comments on the questions or otherwise implies approval or disapproval of the candidates

If an organization’s president, a month prior to an election, invited the three Congressional candidates for district office to address the organization’s members, one each at a regular meeting held during three successive weeks, and each candidate was given an equal opportunity to address and field questions on a wide variety of topics, this likely will not constitute political campaign intervention if the organization’s publicity announcing the dates for each of the candidate’s speeches and the president’s introduction of each candidate included no comments on their qualifications or provided any indication of a preference for any candidate.

The above result likely would remain the same if there were four candidates invited to the event and one of them declined to attend as long as any publicity surrounding the event announced the dates of the meetings and that the fourth candidate was invited but declined to attend. As an additional requirement, when the candidates were introduced by the organization’s president, he could not have commented on their qualifications or provided any indication of a preference for any candidate.

Many times, a political candidate may be invited to preach to a minister’s congregation close to an election date. Assume no other candidate is invited to preach to the same congregation, and the candidate states, “I am asking not only for your votes, but for your enthusiasm and dedication, for your willingness to go the extra mile to get a very large turnout on election day.” Because this all occurred at an official church service, the activity is attributed to the church, and as such, the church likely would be intervening in a political campaign. This is the case because the provision of church facilities was selective, and the candidate states, “I am asking not only for your votes, but for your enthusiasm and dedication, for your willingness to go the extra mile to get a very large turnout on election day.”

Candidate appearances where speaking or participating as a noncandidate

A candidate may also appear or speak at organization events in a noncandidate capacity. For instance, a political candidate may be a public figure who is invited to speak because he or she:

- Currently holds, or formerly held, public office
- Is considered an expert in a nonpolitical field
- Is a celebrity or has led a distinguished military, legal or public service career

A candidate may choose to attend an event that is open to the public, such as a lecture, concert or worship service. The candidate’s presence at an organization-sponsored event does not, by itself, cause the organization to be engaged in political campaign intervention. However, if the candidate is publicly recognized by the organization, or if the candidate is invited to speak, factors in determining whether the candidate’s appearance results in political campaign intervention include the following:

- Whether the individual is chosen to speak solely for reasons other than the candidacy for public office
- Whether the individual speaks only in a noncandidate capacity
- Whether either the individual or any representative of the organization makes any mention of his or her candidacy or the election
- Whether any campaign activity occurs in connection with the candidate’s attendance
- Whether the organization maintains a nonpartisan atmosphere on the premises or at the event where the candidate is present
- Whether the organization clearly indicates the capacity in which the candidate is appearing and does not mention the individual’s political candidacy or the upcoming election in the communications announcing the candidate’s attendance at the event

Therefore, if a section 501(c)(3) organization located in the national capital or state capital frequently holds meetings in accomplishment of its tax-exempt purpose and its president, as a matter of regularity, acknowledges the presence at those meetings of any public officials and makes no reference to any candidacy or upcoming election, the event likely will not be considered engaging in a political campaign.

Many times, new facility groundbreaking events for a section 501(c)(3) organization may have present at the ceremony an elected official who was invited to attend by a leader of the organization. If that elected official or candidate for public office is introduced generically, with no reference to his or her candidacy or the election forthcoming, the public official makes no reference to his or her candidacy or the election and does not do any political fundraising at the event, the organization likely will not be considered to have intervened in a political campaign.

Consider a case where a section 501(c)(3) organization publishes an alumni newsletter on a regular basis and asks alumni to send in updates about themselves, which will be printed in each edition of the newsletter, and an alumnus sends in an update that states, “Alumnus X is running for mayor of Metropolis.” If this entry is printed in an edition of the alumni newsletter and does not contain any reference to any
upcoming election for mayor, the organization likely will not be considered to have intervened in a political campaign.

Many times, a local symphony will give free public concerts sponsored by the locality in which it resides. Assume that at such a free event, the local mayor is present and the symphony organization’s chairman of the board addresses the crowd in attendance at the event and states, “I am pleased that Mayor Y is in attendance tonight, without his support these free concerts would not be possible. So please, we need his help if we want these concerts to continue next year, so please support Mayor Y in November as he has supported us.” This likely will be considered engaging in a political campaign by the symphony organization.

**Issue advocacy versus political campaign intervention**

Section 501(c)(3) organizations may take positions on public policy issues, including issues that divide candidates in an election for public office. However, section 501(c)(3) organizations must avoid any issue advocacy that functions as political campaign intervention. Even if a statement does not expressly tell an audience to vote for or against a specific candidate, an organization delivering the statement is at risk of violating the political campaign intervention prohibition if there is any message favoring or opposing a candidate. A statement can identify a candidate not only by stating the candidate’s name, but also by other means such as showing a picture of the candidate or referring to political party affiliations or other distinctive features of a candidate’s platform or biography. All the facts and circumstances need to be considered to determine if the advocacy is political campaign intervention.

Key factors in determining whether a communication results in political campaign intervention include the following:

- Whether the statement identifies one or more candidates for a given public office
- Whether the statement expresses approval or disapproval for one or more candidates’ positions or actions
- Whether the statement is delivered close in time to the election
- Whether the statement makes reference to voting or an election
- Whether the issue addressed in the communication has been raised as an issue distinguishing candidates for a given office
- Whether the communication is part of an ongoing series of communications by the organization on the same issue that are made independent of the timing of any election
- Whether the timing of the communication and identification of the candidate are related to a non-electoral event such as a scheduled vote on specific legislation by an officeholder who also happens to be a candidate for public office

A communication is particularly at risk of being deemed political campaign intervention when it makes reference to candidates or voting in a specific upcoming election. Nevertheless, the communication must still be considered in context before arriving at any conclusions.

Consider a situation where shortly before an election a section 501(c)(3) organization prepares and finances a full-page newspaper advertisement published in several large-circulation newspapers in a state and the ad identifies by number a pending bill, which if passed would allow for that state’s residents to attend college. The ad also highlights that a certain incumbent candidate for political office has opposed similar measures in his or her past record, and the ad asks voters “to call or write the candidate to tell him or her to vote for the legislation.” If educational issues are not a distinguishing factor raised between candidates for a certain public office, although a pending bill may be voted on just before an election, the advertisement specifically states that the incumbent candidate’s views are contrary to that of the exempt organization’s views, and the incumbent candidate is in a position to vote for the legislation, such an activity likely will not be considered intervention in a political campaign.

However, assume that close to an election an organization formed to create public awareness of an issue enters into a public communication via a radio ad that is not a part of an ongoing series of substantially similar advocacy communications by the organization and asks that listeners contact a certain politician running for office to increase his or her focus in a particular area. If the radio ad addresses a hotly contested issue between the candidates for that public office, and there is no pending legislation related to the issue, then the organization likely will be deemed to have intervened in a political campaign activity.

One thing is for certain, if a section 501(c)(3) sanctioned event results in any communication related to an election between candidates who requests those in attendance to vote for one candidate or the other, or vote on a topic that is highly contested between candidates and widely known, such commentary likely will result in the organization being accused of intervening in a political campaign, especially if such an event or occurrence takes place shortly before an election.

**Business activity**

The question of whether an activity constitutes participation or intervention in a political campaign may also arise in the context of a business activity of the organization, such as the selling or renting of mailing lists, the leasing of office space, or the acceptance of paid political advertising. In this context, some of the factors to be considered in determining whether the organization has engaged in political campaign intervention include the following:

- Whether the good, service or facility is available to candidates in the same election on an equal basis
- Whether the good, service or facility is available only to candidates and not to the general public
Consider, for example, a section 501(c)(3) organization that maintains a website and posts an unbiased, nonpartisan voter guide prepared consistent with the principles discussed in Rev. Rul. 78–248 and, for each candidate covered in the voter guide, includes a link to that candidate’s official campaign website. As long as the links to the candidates’ websites are presented on a consistently neutral basis for each candidate and any text included is neutral as well, the exempt organization likely will not be considered to have intervened in a political campaign because the links are provided for the exempt purpose of educating voters and are presented in a neutral, unbiased manner that includes all candidates for a particular office.

Assume that Hospital N, a section 501(c)(3) organization, maintains a website that includes such information as medical staff listings, directions to Hospital N, and descriptions of its specialty health programs, major research projects, and other community outreach programs. On one page of the website, Hospital N describes its treatment program for a particular disease. At the end of the page, it includes a section of links to other websites titled “More Information.” These links include links to other hospitals that have treatment programs for this disease, research organizations seeking cures for that disease, and articles about treatment programs. This section includes a link to an article on the website of O, a major national newspaper, praising Hospital N’s treatment program for the disease. The page containing the article on O’s website contains no reference to any candidate or election and has no direct links to candidate or election information. Elsewhere on O’s website, there is a page displaying editorials that O has published. Several of the editorials endorse candidates in an election that has not yet occurred. Hospital N likely has not intervened in a political campaign by maintaining the link to the article on O’s website because the link is provided for the exempt purpose of educating the public about Hospital N’s programs and neither the context for the link, nor the relationship between Hospital N and O, nor the arrangement of the links going from Hospital N’s website to the endorsement on O’s website, indicates that Hospital N was favoring or opposing any candidate.

Sometimes, parishioners of a church run for political office. Usually a church maintains a website that includes such information as biographies of its ministers, times of services, details of community outreach programs, and activities of members of its congregation. In this example, B, a member of the congregation of the church, is running for a seat on the town council. Shortly before the election, the church posts a message on its website stating, “Lend your support to B, your fellow parishioner, in Tuesday’s election for town council.” The church likely has intervened in a political campaign on behalf of B.

PART II

IRC sections 501(c)(4), (5) and (6) organizations political campaign activity consequences

Organizations exempt from federal income tax under section 501(a) as organizations described in sections 501(c)(4), 501(c)(5), or 501(c)(6) may, consistent with their exempt purpose, publicly advocate positions on public policy issues. This advocacy may include lobbying for legislation consistent with these positions. Because public policy advocacy may involve discussion of the positions of public officials who are
also candidates for public office, a public policy advocacy communication may constitute an exempt function within the meaning of section 527(e)(2) and if so, subject the organization to tax under section 527(f). This paper concludes by looking at six example situations where these types of exempt organizations likely have or have not entered into an exempt political function as defined under section 527.

Section 501(c)(4) provides exemption from taxation for civic leagues or organizations not organized for profit and operated exclusively for the promotion of social welfare. Reg. section 1.501(c)(4)‐1 requires that labor, agricultural or horticultural organizations have as their objects the betterment of the conditions of those engaged in such pursuits, the improvement of the grade of their products, and the development of a higher degree of efficiency in their respective occupations.

Section 501(c)(5) provides exemption from taxation for labor, agricultural or horticultural organizations. Reg. section 1.501(c)(5)‐1 requires that labor, agricultural or horticultural organizations have as their objects the betterment of the conditions of those engaged in such pursuits, the improvement of the grade of their products, and the development of a higher degree of efficiency in their respective occupations.

Section 501(c)(6) provides exemption from taxation for business leagues, not organized for profit and no part of the net earnings of which inure to the benefit of any private shareholder or individual. Reg. section 1.501(c)(6)‐1 requires that a business league is an association of persons having some common business interest, the purpose of which is to promote such common interest and not to engage in a regular business of a kind ordinarily carried on for profit. A business league’s activities should be directed to the improvement of business conditions of one or more lines of business, as distinguished from the performance of particular services for individual persons.

Section 527 generally provides that political organizations that collect and expend monies for exempt function purposes as described in section 527(e)(2) are exempt from federal income tax, except on their investment income.

Section 527(e)(1) defines a political organization as a party, committee, association fund or other organization (whether or not incorporated) organized and operated primarily for the purpose of accepting contributions or making expenditures, or both, for an exempt function. Section 527(e)(2) provides that the term exempt function for purposes of section 527 means the function of influencing or attempting to influence the selection, nomination, election or appointment of any individual to any federal, state or local public office or office in a political organization, or the election of presidential or vice‐presidential electors, whether or not such individual or electors are selected, nominated, elected or appointed. By its terms, section 527(e)(2) includes all attempts to influence the selection, nomination, election or appointment of the described officials.

Section 527(i) provides that, in order to be tax‐exempt, a political organization is required to give notice that it is a political organization described in section 527, unless excepted. An organization described in section 501(c) that does not set up a separate segregated fund, but makes exempt function (political) expenditures subject to tax under section 527(f), is not subject to this requirement, as provided for in section 527(i)(5)(A).

Section 527(j) provides that, unless excepted, a tax‐exempt political organization that has given notice under section 527(i) and does not timely make periodic reports of contributions and expenditures, or that fails to include the information required, must pay an amount calculated by multiplying the amount of contributions and expenditures that are not disclosed by the highest corporate tax rate. An organization described in section 501(c) that does not set up a separate segregated fund, but makes exempt function (political) expenditures subject to tax under section 527(f), is not subject to the reporting requirements under section 527(j).

Reg. section 1.527‐2(c)(1) provides that the term exempt function includes all activities that are directly related to and support the process of influencing or attempting to influence the selection, nomination, election or appointment of any individual to public office or to an office in a political organization. Whether an expenditure is for an exempt function depends on all the facts and circumstances.

Reg. section 1.527‐6(f) provides that an organization described in section 501(c) that is exempt under section 501(a) may, if it is consistent with its exempt status, establish and maintain a separate segregated fund to receive contributions and make expenditures in a political campaign.

Rev. Rul. 2003–49, 2003–1 C. B. 903, discusses the reporting and disclosure requirements for political organizations in question and answer format. In Q&A–6, the ruling holds that while a section 501(c) organization that makes an expenditure for an exempt function under section 527(e)(2) is not required to file the notice required under section 527(i), if the section 501(c) organization establishes a separate segregated fund under section 527(f)(3), that fund is required to file the notice in order to be tax–exempt unless it meets one of the other
exceptions to filing.

Certain broadcast, cable or satellite communications that meet the definition of electioneering communications are regulated by the Bipartisan Campaign Reform Act of 2002 (BCRA), P.L. 107–155. An exempt organization that violates the regulatory requirements of BCRA may well jeopardize its exemption or be subject to other tax consequences.

In summary, an organization exempt from federal income tax under section 501(a) as an organization described in section 501(c) that, consistent with its tax-exempt status, wishes to engage in an exempt function (political) within the meaning of section 527(e)(2) may do so with its own funds or by setting up a separate segregated fund under section 527(f)(3). If the organization chooses to establish a separate segregated fund, that fund, unless excepted, must give notice under section 527(i) in order to be tax-exempt. A separate segregated fund that has given notice under section 527(i) is then subject to the reporting requirements under section 527(j). If the organization chooses to use its own funds, the organization is not subject to the notice requirements under section 527(i) and the reporting requirements under section 527(j), but is subject to tax under section 527(f)(1) on the lesser of its investment income or the amount of the exempt function expenditure.

Analysis of six factual situations

All of the facts and circumstances must be considered to determine whether an expenditure for an advocacy communication relating to a public policy issue is for an exempt function (political) under section 527(e)(2). When an advocacy communication explicitly advocates the election or defeat of an individual up for election to public office, the expenditure clearly is for an exempt function (political) under section 527(e)(2). However, when an advocacy communication relating to a public policy issue does not explicitly advocate the election or defeat of a candidate, all of the facts and circumstances need to be considered to determine whether the expenditure is for an exempt function (political) under section 527(e)(2).

Factors that tend to show that an advocacy communication on a public policy issue is for an exempt function (political) under section 527(e)(2) include, but are not limited to, the following:

- The absence of one or more of the factors listed above
- The communication identifies specific legislation, or a specific event outside the control of the organization, that the organization hopes to influence.
- The timing of the communication coincides with a specific event outside the control of the organization that the organization hopes to influence, such as a legislative vote or other major legislative action (for example, a hearing before a legislative committee on the issue that is the subject of the communication).
- The communication identifies the candidate solely as a government official who is in a position to act on the public policy issue in connection with the specific event (such as a legislator who is eligible to vote on the legislation).
- The communication identifies the candidate solely in the list of key or principal sponsors of the legislation that is the subject of the communication.

Following are six fact patterns wherein the advocacy communication identifies a candidate in an election, appears shortly before that election, and targets the voters in that election. Even though these factors are present, the remaining facts and circumstances must be analyzed in each situation to determine whether the advocacy communication is for an exempt function under section 527(e)(2).

In addition to the above mentioned factors, each of the situations assumes that:

- All payments for the described activity are from the general treasury of the organization rather than from a separate segregated fund under section 527(f)(3).
- The organization would continue to be exempt under section 501(a), even if the described activity is not a section 501(c) exempt activity, because the organization’s primary activities are described in the appropriate subparagraph of section 501(c).
- All advocacy communications described also include a solicitation of contributions to the organization.

Situation 1

N, a labor organization recognized as tax-exempt under section 501(c)(5), advocates for the betterment of conditions of law enforcement personnel. Senators A and B represent State U in the U.S. Senate. In year 20xx, N prepares and finances full-page newspaper advertisements supporting increased spending on law enforcement, which would require a legislative appropriation. These advertisements are published in several large circulation newspapers in State U on a regular basis during year 20xx. One of these full-page advertisements is published shortly before an election in which Senator A (but not Senator B) is a candidate for re-election. The advertisement
published shortly before the election stresses the importance of increased federal funding of local law enforcement and refers to numerous statistics indicating the high crime rate in State U. The advertisement does not mention Senator A’s or Senator B’s position on law enforcement issues. The advertisement ends with the statement “Call or write Senator A and Senator B to ask them to support increased federal funding for local law enforcement.” Law enforcement has not been raised as an issue distinguishing Senator A from any opponent. Therefore, based on these facts and circumstances, the amount expended by N on the advertisement likely is not an exempt function (political) expenditure under section 527(e)(2) and, therefore, is not subject to tax under section 527(f)(1).

Situation 2

O, a trade association recognized as tax-exempt under section 501(c)(6), advocates for increased international trade. Senator C represents State V in the U.S. Senate. O prepares and finances a full-page newspaper advertisement that is published in several large circulation newspapers in State V shortly before an election in which Senator C is a candidate for re-election. The advertisement states that increased international trade is important to a major industry in State V. The advertisement states that S. 24, a pending bill in the U.S. Senate, would provide manufacturing subsidies to certain industries to encourage export of their products. The advertisement also states that several manufacturers in State V would benefit from the subsidies, but Senator C has opposed similar measures supporting increased international trade in the past. The advertisement ends with the statement “Call or write Senator C to tell him to vote for S. 24.” International trade concerns have not been raised as an issue distinguishing Senator C from any opponent. S. 24 is scheduled for a vote in the U.S. Senate before the election, soon after the date that the advertisement is published in the newspapers.

Under the facts and circumstances in situation 2, the advertisement likely is not for an exempt function (political) under section 527(e)(2). Although N’s advertisement identifies Senator A, appears shortly before an election in which Senator A is a candidate, and targets voters in that election, it is part of an ongoing series of substantially similar advocacy communications by N on the same issue during year 20xx. The advertisement identifies both Senator A and Senator B, who is not a candidate for re-election, as the representatives who would vote on this issue. Furthermore, N’s advertisement does not identify Senator A’s position on the issue, and law enforcement has not been raised as an issue distinguishing Senator A from any opponent. Therefore, there is nothing to indicate that Senator A’s candidacy should be supported or opposed based on this issue. Based on these facts and circumstances, the amount expended by N on the advertisement likely is not an exempt function (political) expenditure under section 527(e)(2) and, therefore, likely is not subject to tax under section 527(f)(1).

Situation 3

P, an entity recognized as tax-exempt under section 501(c)(4), advocates for better health care. Senator D represents State W in the U.S. Senate. P prepares and finances a full-page newspaper advertisement that is published repeatedly in several large circulation newspapers in State W beginning shortly before an election in which Senator D is a candidate for re-election. The advertisement is not part of an ongoing series of substantially similar advocacy communications by P on the same issue. The advertisement states that a public hospital is needed in a major city in State W but that the public hospital cannot be built without federal assistance. The advertisement further states that Senator D has voted, in the past year, for two bills that would have provided the federal funding necessary for the hospital. The advertisement then ends with the statement “Let Senator D know you agree about the need for federal funding for hospitals.” Federal funding for hospitals has not been raised as an issue distinguishing Senator D from any opponent. At the time the advertisement is published, a bill providing federal funding for hospitals has been introduced in the U.S. Senate, but no legislative vote or other major legislative activity on that bill is scheduled in the U.S. Senate.

Under the facts and circumstances in situation 3, the advertisement likely is for an exempt (political) function under section 527(e)(2). P’s advertisement identifies Senator D, appears shortly before an election in which Senator D is a candidate, and targets voters in that election. Although federal funding of hospitals has not been raised as an issue distinguishing Senator D from any opponent, the advertisement identifies Senator D’s position on the hospital funding issue as agreeing with P’s position and is not part of an ongoing series of substantially similar advocacy communications by P on the same issue. Moreover, the advertisement does not identify any specific legislation and is not timed to coincide with a legislative vote or other major legislative action on the hospital funding issue. Therefore, based on these facts and circumstances, the amount expended by P on the advertisement likely is an exempt function (political) expenditure under section 527(e)(2) and subject to tax under section 527(f)(1).
Situation 4

R, an entity recognized as tax-exempt under section 501(c)(4), advocates for improved public education. Governor E is the governor of State X. R prepares and finances a radio advertisement urging an increase in state funding for public education in State X, which requires a legislative appropriation. The radio advertisement is first broadcast on several radio stations in State X beginning shortly before an election in which Governor E is a candidate for re-election. The advertisement is not part of an ongoing series of substantially similar advocacy communications by R on the same issue. The advertisement cites numerous statistics indicating that public education in State X is under-funded. While the advertisement does not say anything about Governor E’s position on funding for public education, it ends with “Tell Governor E what you think about our under-funded schools.” In public appearances and campaign literature, Governor E’s opponent has made funding of public education an issue in the campaign by focusing on Governor E’s veto of an income tax increase the previous year to increase funding of public education. At the time the advertisement is broadcasted, no legislative vote or other major legislative activity is scheduled in the State X legislature on state funding of public education.

Under the facts and circumstances in situation 4, the advertisement likely is for an exempt (political) function under section 527(e)(2). R’s advertisement identifies Governor E, appears shortly before an election in which Governor E is a candidate, and targets voters in that election. Although the advertisement does not explicitly identify Governor E’s position on the issue of funding public schools, that issue has been raised as an issue in the campaign by Governor E’s opponent. The advertisement does not identify any specific legislation, is not part of an ongoing series of substantially similar advocacy communications by R on the same issue, and is not timed to coincide with a legislative vote or other major legislative action on that issue. Therefore, based on these facts and circumstances, the amount expended by R on the advertisement likely is an exempt function (political) expenditure under section 527(e)(2) and subject to tax under section 527(f)(1).

Situation 5

S, an entity recognized as tax-exempt under section 501(c)(4), advocates to abolish the death penalty in State Y. Governor F is the governor of State Y. S regularly prepares and finances television advertisements opposing the death penalty. These advertisements appear on several television stations in State Y shortly before each scheduled execution in State Y. One such advertisement opposing the death penalty appears on State Y television stations shortly before the scheduled execution of G and shortly before an election in which Governor F is a candidate for re-election. The advertisement broadcast shortly before the election provides statistics regarding developed countries that have abolished the death penalty and refers to studies indicating inequities related to the types of persons executed in the U.S. Like the advertisements appearing shortly before other scheduled executions in State Y, the advertisement notes that Governor F has supported the death penalty in the past and ends with the statement “Call or write Governor F to demand that he stop the upcoming execution of G.”

Under the facts and circumstances in situation 5, the advertisement likely is not for an exempt (political) function under section 527(e)(2). S’s advertisement identifies Governor F, appears shortly before an election in which Governor F is a candidate, targets voters in that election, and identifies Governor F’s position as contrary to S’s position. However, the advertisement is part of an ongoing series of substantially similar advocacy communications by S on the same issue, and the advertisement identifies an event outside the control of the organization (the scheduled execution) that the organization hopes to influence. Further, the timing of the advertisement coincides with this specific event that the organization hopes to influence. The candidate identified is a government official who is in a position to take action on the public policy issue in connection with the specific event. Therefore, based on these facts and circumstances, the amount expended by S on the advertisements likely is not an exempt function (political) expenditure under section 527(e)(2) or subject to tax under section 527(f)(1).

Situation 6

T, an entity recognized as tax-exempt under section 501(c)(4), advocates to abolish the death penalty in State Z. Governor H is the governor of State Z. Beginning shortly before an election in which Governor H is a candidate for re-election, T prepares and finances a television advertisement broadcast on several television stations in State Z. The advertisement is not part of an ongoing series of substantially similar advocacy communications by T on the same issue. The advertisement provides statistics regarding developed countries that have abolished the death penalty and refers to studies indicating inequities related to the types of persons executed in the U.S. The advertisement calls for the abolishment of the death penalty. The advertisement notes that Governor H has supported the death penalty in the past. The advertisement identifies several individuals previously executed in State Z, stating that Governor H could have saved their lives by stopping their executions. No executions are scheduled in State Z in the near future. The advertisement concludes with the statement, “Call or write Governor H to demand a moratorium on the death penalty in State Z.”

Under the facts and circumstances in situation 6, the advertisement likely is for an exempt (political) function under section 527(e)(2). T’s advertisement identifies Governor H, appears shortly before an election in which Governor H is a candidate, targets the voters in that election, and identifies Governor H’s position as contrary to T’s position. The advertisement is not part of an ongoing series of substantially similar advocacy communications by T on the same issue. In addition, the advertisement does not identify and is not timed to coincide with a specific event outside the control of the organization that it hopes to influence. Based on
these facts and circumstances, the amount expended by T on the advertisement likely is an exempt function (political) expenditure under section 527(e)(2) and, therefore, subject to tax under section 527(f)(1).

Conclusion

All tax-exempt organizations that wish to be involved in the political process must enter into that process understanding where the line is drawn in the sand. Section 501(c)(3) organizations need to recognize what prohibited activities risk tax-exempt status, and section 501(c)(4), (5) or (6) organizations must realize what activities can cause their organizations to be subject to a 35 percent excise tax. Before your organization jumps into the process, please ensure that proper analysis and planning have occurred and that all volunteers assisting with your efforts are made aware of the do’s and don’ts in an election year.