



Exempt Organizations Alert

February 27, 2009

IRS Articulates New Standards for Nonprofit Websites

In a Nutshell

On February 20, 2009, the Internal Revenue Service (the "IRS" or "Service") released a [Technical Advice Memorandum](#)¹ with serious implications for affiliated nonprofit organizations that engage in political advocacy online. Specifically, the Service found that a section 501(c)(3) charitable organization violated the prohibition against campaign intervention when it included content sponsored by its section 501(c)(4) affiliate on its website even though that content was contained in a discrete set of web pages identified as the affiliate's speech and the affiliate paid all associated costs. Given the lack of guidance from the Service concerning campaign intervention on the web, the release of the memorandum is significant—especially since we understand that it was reviewed by senior personnel in both the Exempt Organizations Division and the Office of the TE/GE Commissioner.

In the memorandum, the Service reasoned that, because the charity's "banner, logo, site links, and disclaimer and copyright notices" appeared on every page of the website, including those containing the affiliate's political content, the charity itself was "considered to have distributed those candidate questionnaires and endorsements." In reaching this conclusion, the Service noted that "the banner and visual presentation of those [affiliate] pages is virtually indistinguishable from the other pages of the [charity's] website." In the Service's view, the fact that the affiliate funded the political content pursuant to a cost-sharing agreement (a longstanding and common practice among charities and their section 501(c)(4) affiliates) did not change the result that the charity should be treated as having distributed the material.

At a minimum, this new memorandum indicates that, as far as the IRS is concerned, observance of corporate formalities, separately identifying content and careful cost allocations are not enough to protect a charitable organization from attribution of an affiliate's activities on the web. Consequently, this guidance may raise more questions than it answers.

Facts

The charity at issue (apparently a local chapter of a national organization) was a public charity described in section 509(a)(2) that controlled its section 501(c)(4) affiliate through "common board membership and...a

1. T.A.M. 200908050 (Feb. 20, 2009).

close working relationship.” The two organizations shared office space and employees pursuant to a cost-sharing arrangement.

Initially, the affiliate maintained its own separate website. However, after experiencing several years of technical difficulties, the organizations’ web providers advised transferring the affiliate’s content to the charity’s website. In deciding to combine the sites, management relied in part on the fact that numerous other organizations in similar circumstances share a website. The organizations also obtained legal advice regarding how to operate and maintain a shared website.

On the shared site, the affiliate’s content was designed as a “separate subset” of pages. Some of those pages contained candidate questionnaires and endorsements of candidates for public office. Although the affiliate’s distinct logo and address appeared on the pages where its content was presented, every page on the site, including those with the affiliate’s political content, contained a banner with the charity’s logo and other identifying information. Also, the charity’s copyright and electronic links appeared on every page. For instance, a click on the “About Us” link led to a description of the charity, not the affiliate. The charity explained to the IRS that its website operator (presumably an independent third party) required the charity’s banner to appear on all of the site’s pages, including those containing the affiliate’s content. Thus, removing the charity’s information from the affiliate’s content may have presented undue administrative burdens and costs.

Although the organizations did not provide any written documentation concerning the operation of the shared website, the affiliate did reimburse the charity for its proportional share of the costs of the website pursuant to a cost-sharing agreement.

On these facts, the IRS concluded that by allowing its logo and other identifying marks to appear on pages containing the affiliate’s content, the charity was “considered to have distributed those candidate questionnaires and endorsements.” The IRS was not persuaded by the fact that the affiliate paid for the costs associated with its own content.

Our Perspective

The IRS’s analysis and conclusion in this ruling are troubling. At least since the Supreme Court’s decision in [*Regan v. Taxation with Representation of Washington*](#),² it has been well accepted that the bar for preventing attribution of a section 501(c)(4) organization’s political speech to an affiliated charity is generally quite low. In defending the constitutionality of the lobbying limits of section 501(c)(3), the Court endorsed the same kind of “dual structure” at issue in the memorandum, noting that a section 501(c)(3) organization must ensure that it does not subsidize an affiliated section 501(c)(4) organization. In explaining this requirement, however, the Court observed that

2. 461 U.S. 540 (1983).

[t]he IRS apparently requires only that the two groups be separately incorporated and keep records adequate to show that tax deductible contributions are not used to pay for lobbying. This is not unduly burdensome.³

Consequently, as Justice Blackmun noted in the concurring opinion, the absence of any significant administrative burden associated with maintaining charitable and noncharitable affiliates is recognized as a necessary part of the IRS's regulatory regime in this area:

A §501(c)(3) organization's right to speak is not infringed, because it is free to make known its views on legislation through its §501(c)(4) affiliate without losing tax benefits for its nonlobbying activities.

Any significant restriction on this channel of communication, however, would negate the saving effect of §501(c)(4).⁴

The D.C. Circuit subsequently applied these principles in the political activity context.⁵

Is the standard different on the web? As described in the memorandum, these organizations made efforts to separately identify the affiliate's political speech and to ensure that this speech was not subsidized by the charity. Moreover, the organizations tried to maintain separate websites and, when that proved not to be feasible, consulted a lawyer about the legality of constructing a combined site.

A straightforward application of the standards enunciated in *Taxation with Representation* should have compelled the Service to respect the cost-sharing arrangement and not attribute the affiliate's speech to the charity. However, rather than focusing on whether the charity was subsidizing another organization's political speech, in accordance with the Supreme Court's opinion, the IRS apparently applied a subjective "look and feel" test to measure attribution. The agency cited is own [Revenue Ruling 2007-41](#) to support its conclusion that the charity was responsible for all speech that appeared on the same web page as its marks. That ruling states: first, as a general principle, that a charity is responsible for the content that appears on its website and, second, that a charity cannot cure an act of campaign intervention merely by charging offending activities to nondeductible funds.⁶ Those guidelines may be appropriate in certain contexts. Regrettably, though, applying them to affiliated organizations as the Service has done in this memorandum may create more, rather than less, uncertainty.

3. Id. at 544 n.6.

4. Id. at 553 (Blackmun, J., concurring).

5. *Branch Ministries v. Commissioner*, 211 F.3d 137 (D.C. Cir. 2000).

6. In Revenue Ruling 2007-41, 2007-25 I.R.B. 1421 (June 18, 2007), the IRS analyzed 21 situations to illustrate the application of its "facts and circumstances" approach to determine whether a charity has engaged in prohibited campaign intervention. In this memorandum, the Service quoted the ruling's general caution that "[i]f an organization posts something on its website that favors or opposes a candidate for public office, the organization will be treated the same as if it distributed printed material, oral statements or broadcasts that favored or opposed a candidate." The Service also relied on Situation 4 of the ruling, in which the IRS determined that a charity violated section 501(c)(3) when its president endorsed a political candidate in an official publication of the organization, despite the fact that the president reimbursed the charity for the expenses associated with publishing the political content.



If you have any questions regarding the memorandum, or how it might apply to your organizations, please feel free to call any of the following attorneys:

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