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Legislative and Political Advocacy for Health Centers: Allowable Scope of Public Policy Activities

Health centers, in addition to being providers of high-quality and culturally competent primary health care, often view themselves as advocates on behalf of their patients on health care and health care-related public policy issues. In addition, because of the expertise that health centers have developed on health care-related issues facing low-income and medically underserved populations, their views may be especially persuasive to policy makers and, in fact, often are sought out for that reason.

Health centers that are private nonprofit corporations exempt from Federal income tax under Section 501(c)(3) of the Internal Revenue Code ("IRC") may engage in legislative advocacy, subject to certain limitations – they are entirely prohibited from participating in any political campaign activity. Public health centers, that is, those operated by a unit of state or local government, are not subject to the IRC rules applicable to Section 501(c)(3) organizations, but may be subject to limitations imposed by state or local law. However, neither private tax-exempt centers nor public health centers may use Federal grant funds to support the costs of legislative advocacy or political campaign activities. Notwithstanding these limitations, health centers can legitimately engage in various types of public policy advocacy activities without violating Federal tax law or the terms of Federal grant awards.

As is the case with other health center policies, it is the center's board of directors that has the ultimate responsibility for establishing policy with regard to the health center's public policy advocacy and for the health center's compliance with laws and regulations that affect the center's advocacy activities. As such, it is important that board members be familiar with legitimate types of public policy advocacy activities, as well as limitations on those activities.

This information bulletin discusses the allowable scope of health center public policy activities under the IRC and Federal grant law. It does not attempt to address state or local requirements that may apply to public health centers.

In this information bulletin of the National Association of Community Health Centers (NACHC), the term "health center" refers to public or private nonprofit entities that: (1) receive grants under Section 330 of the Public Health Service Act (Section 330), including Sections 330(e), 330(f), 330(g) and 330(h) (collectively "Health Center Program Grantees"); and (2) entities that have been determined by the Department of Health and Human Services (DHHS) to meet the requirements to receive funding without actually receiving a grant ("health center look-alikes").

IMPORTANT DEFINITIONS AND CONCEPTS

Board members should understand certain key concepts with regard to their health center's public policy advocacy activities and expenditures. These concepts are:

- Legislative advocacy vs. political campaign activity
- Organizational activity vs. personal activity
- Use of Federal funds vs. non-Federal funds
- Federal cost principles
- Federal appropriations legislation
- The Byrd Amendment
- Section 330 of the Public Health Services Act

Legislative Advocacy vs. Political Campaign Activity

Although some view any and all public policy advocacy as "political" activity, in fact "legislative advocacy" and "political campaign activity" are treated very differently under Federal tax law.

Legislative advocacy – otherwise known as "lobbying," is defined for Federal tax purposes as: "carrying on propaganda, or otherwise attempting to influence legislation."

Charitable organizations (except for private foundations) *may engage* in lobbying activities without endangering their tax-exempt status, provided that the activities are not a "substantial part" of their overall activities. As will be discussed later, a health center may elect to be covered by special tax rules that permit it to measure its permissible lobbying by the amount of its lobbying expenditures, rather than by the amount of its lobbying activities.

Political campaign activity – on the other hand, is defined for income tax purposes as: "participating or intervening in any political campaign on behalf of, or in opposition to, any candidate for public office."

Charitable organizations, such as health centers, *may not participate* or intervene in any political campaign. Doing so can result in the imposition of a tax penalty and loss of tax-exempt status.

Organizational Activity vs. Personal Activity

Organizational activity – Restrictions on lobbying activity and political campaign activity apply to the health center as an organization.

Personal activity – Restrictions do not apply to a board member, a staff member, or a volunteer acting on his or her own behalf. However, board members, staff, and volunteers must be constantly vigilant to clearly distinguish their personal conduct from conduct that they undertake on behalf of the health center.

For example, while a health center board member can freely support a political candidate of his or her choice, a board member cannot indicate that the health center supports the candidate or use the center's resources (such as staff time, office space, telephone, stationery, e-mail, etc.) to support or oppose the candidate. As discussed below, particular caution is warranted if a board member or staff person is a candidate for public office. Similarly, board members, staff, and volunteers can lobby in their own right without it being treated as a health center lobbying activity, so long as they do not identify the health center with the lobbying effort or use center resources in connection with the activity.

Use of Federal Funds vs. Non-Federal Funds

Federal grant-related laws and regulations prohibit using Federal grant funds to pay the costs of lobbying activities, except under very limited circumstances.

Federal Cost Principles

The Federal Cost Principles, codified at 2 C.F.R., Part 200, Subpart E-Cost Principles contain the Federal government's rules for determining allowable costs under Federal grants. If a grantee spends Federal grant funds in a manner not permitted under the Cost Principles, the cost will be disallowed, and the grantee may be required to repay the misspent funds.

Prohibited activities – Under the Federal Cost Principles, health centers and other nonprofit organizations *may not use Federal grant, cooperative agreement, or cost reimbursement contract funds* to attempt to influence:

- The introduction of Federal or state legislation;
- The enactment or modification of any pending Federal or state legislation through communication with any member or employee of Congress or a state legislature, including efforts to influence state or local officials to engage in similar lobbying activity by preparing, distributing or using publicity or propaganda, or urging members of the general public (or any segment of the general public) to contribute to, or to participate in, any mass demonstration, march, rally, fundraising drive, lobbying campaign or letter-writing or telephone campaign; or
- Any government official or employee in connection with a decision to sign or veto enrolled legislation.

Further, unallowable under the Cost Principles are costs associated with legislative liaison activities including attendance at legislative sessions or committee hearings, gathering information regarding legislation, and analyzing the effect of legislation when such activities are carried on in support of, or in knowing preparation for, an effort to engage in a lobbying activity.

Permitted activities – The following kinds of legislation-related activities permitted under the Cost Principles are:

- Technical and factual presentations on topics directly related to the *performance* of a grant, contract, or other agreement (through hearing testimony, statements, or letters to Congress or a state legislature or subdivision, member, or legislative staff of the body), but only in response to a *documented* request (including a *Congressional Record* notice requesting testimony or statements for the record at a regularly scheduled hearing) from the health center's member of Congress, legislative body or subdivision, or a staff member of the body **and** provided that such information is readily obtainable and can readily be put in deliverable form; (Costs for travel, meals and lodging are nevertheless not allowable, unless incurred in the course of providing testimony at a regularly scheduled Congressional hearing pursuant to a written request for such presentation by the chairman or ranking minority member of the committee or subcommittee conducting the hearing.)
- Direct lobbying to influence state legislation in order to directly reduce the cost of, or to avoid material impairment of the organization's authority to perform, a Federal grant, contract, or other agreement;

- Any activity specifically authorized by statute to be undertaken with grant funds; and

- Any activity excepted from the definitions of "lobbying" or "influencing legislation" for organizations exempt under Section 501(c)(3) of the Internal Revenue Code. (See discussion below under "Legislative Advocacy.")

The Cost Principles also prohibit the use of Federal grant funds to influence the outcome of any Federal, state, or local election, referendum, initiative, or similar procedure through in-kind or cash contributions, endorsements, publicity, or similar activity, or to establish, administer, or pay the expenses of a political party, campaign, political action committee, or other organization established for the purpose of influencing the outcome of elections. However, as a practical matter, the prohibition on the use of Federal funds in the context of political campaign activity is secondary to the IRC's sweeping prohibition on charitable organization political campaign activity.

Federal Appropriations Legislation

Prohibited activities – Legislation appropriating funds for Federal agencies may contain provisions limiting the use of Federal funds for lobbying activities. The Departments of Labor, Health and Human Services, Education and Related Agencies Appropriations Act (which appropriates funds for Section 330 and numerous other health-related grant programs) has for many years contained language stating that no funds appropriated under the Act may be used for:

- Publicity or propaganda purposes;

- Preparation, distribution, or use of any kit, pamphlet, booklet, publication radio, television, or film presentation designed to support or defeat legislation pending before the U.S. Congress or any state legislature, except in presentation to the Congress or any state legislature;

- Payment of salary or expenses of any grant or contract recipient, or agent acting for such recipient, related to any activity designed to influence legislation or appropriations pending before the Congress or any state legislature.

Note that, while the appropriations provision only bans the use of appropriated funds to lobby Congress and state legislatures, the Cost Principles extend the ban on use of Federal grant funds to lobbying local legislative bodies (subject to the limited exceptions noted above).

The Byrd Amendment

The so-called Byrd Amendment:[1]

- **Prohibits** – a recipient of a Federal grant, contract, cooperative agreement, or loan from using Federal funds to pay any person for influencing or attempting to influence the award or extension, continuation, renewal or amendment of any Federal grant, contract, cooperative agreement, or loan.

- **Does not prohibit** – the paying of reasonable compensation to a person if the payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for a Federal grant, contract, loan, or cooperative agreement or for meeting requirements imposed by law as a condition for receiving a particular award.

1 31 U.S.C. § 1352

Any organization that receives (directly or as a sub-recipient) Federal grants, contracts, or cooperative agreements exceeding $100,000, or loans exceeding $150,000, must certify that it will not use Federal funds to lobby the legislative or executive branch of the Federal government in connection with a specific grant, cooperative agreement, contract, or loan, and the extension, continuation, renewal, amendment or modification of such agreements. In addition, those organizations must file a disclosure form if they make any payment to a person (other than as reasonable compensation to officers or employees of the organization) using non-Federal funds for activities that would be prohibited if paid for with Federal funds.

The **disclosure form** includes:

- Name and address of the individual or entity performing the lobbying services
- Federal agency contacted
- Federal program involved
- Type of action involved (e.g., initial award, modification, etc.), and
- Award amount if known

The disclosure form must be updated if there is a material change in the information previously provided.

Section 330

Section 330 of the Public Health Service Act does not explicitly prohibit health centers from using Federal grant funds for legislative advocacy and political campaign activity. Of course, such expenditure would be prohibited by the Cost Principles and applicable appropriations legislation discussed above.

Section 330:

Authorizes – health centers to use non-grant funds, specifically state, local, and other operational funding provided to the center and fees, premiums, and third-party reimbursements (including any such funds in excess of those originally expected) for purposes not prohibited by Section 330,

Contains a proviso – that the use must further the objectives of the [health center] project.[2]

Thus, while health centers can use non-Federal funds to engage in lobbying activities (subject to the constraints on organizations that are tax exempt under IRC Section 501(c)(3) discussed below), it is important that the center's advocacy activities promote the mission of the health center generally and grant-funded operations in particular. Accordingly, it may be advisable to document the purpose and objective of any legislative advocacy activity through a board of directors' resolution. Also keep in mind that state and local funding sources, and, in particular, private foundations, may well impose their own restrictions on the use of grant funds for legislative and political advocacy.[3]

2 Section 330(e)(5)(D) of the Public Health Service Act. See also BPHC Policy Information Notice 2013-01, Health Center Budgeting and Accounting Requirements (March 18, 2014).

3 Note that the costs of legislative and political advocacy activities may be unallowable under cost principles applicable to Medicaid and Medicare cost-based reimbursement.

LEGISLATIVE ADVOCACY

Other than the Federal rules regarding the use of grant funds discussed above, the Federal tax rules applicable to Section 501(c)(3) organizations constitute the main body of "law" with which private tax-exempt health centers must comply when engaging in lobbying activities.

Lobbying: How Much Is Allowed?

There are two tests for determining the extent of allowable lobbying by health centers under the IRC:

- *"Substantial Part" Test*
- *"Expenditure" Test*

The Substantial Part Test – provides that a charitable organization, such as a health center, can lose its Federal tax exemption if, in any given year, a "substantial part" of its activities consists of carrying on propaganda or otherwise attempting to influence legislation. However, there is no precise definition under the Substantial Part Test of exactly what kinds of activities are considered lobbying, nor does the test define the amount of such activities that can be conducted without endangering an organization's tax exemption. A 1955 U.S. Circuit Court of Appeals case suggested that legislative activities amounting to five percent of an organization's total activities were insubstantial. Nevertheless, the Substantial Part Test remains largely subjective.

The Expenditure Test – was added to the IRC in 1976 in an attempt to add some certainty to the lobbying rules. Section 501(h) of the IRC allows most charitable organizations to elect to have their lobbying measured by the amount of funds they expend for lobbying purposes, as opposed to the amount of their activities (as is the case under the Substantial Part Test).

A charitable organization that elects the Section 501(h) Expenditure Test may spend funds on lobbying (as defined by the IRS regulations) within the following limits:

Up to:

- 20% of the first $500,000 of its exempt-purpose expenditures[4]
- 15% of the next $500,000 of its exempt-purpose expenditures
- 10% of the next $500,000 of its exempt-purpose expenditures
- 5% of its exempt-purpose expenditures over $1,500,000, up to a maximum of $1,000,000 per year

However, no more than 25% of the organization's total lobbying expenditures may be for grass-roots lobbying, as defined below. Thus, if an organization spends $20,000 per year on lobbying, it may not spend more than $5,000 on grass-roots lobbying.

What is Lobbying?

The IRS has published detailed regulations that define the kinds of activities that it considers to be lobbying under the Expenditure Test. These rules are discussed below. It is important to remember, however, that the definitions and concepts contained in the IRS regulations apply only to charitable organizations that have elected the Section 501 (h) Expenditure Test. Non-electing charities continue to be covered under the Substantial Part Test.

4 In general, exempt-purpose expenditures constitute funds expended in furtherance of the organization's charitable purposes, including lobbying expenses. The IRS regulations contain specific rules as to what kinds of expenditures do not count as exempt purpose expenditures.

DIRECT VS. GRASSROOTS LOBBYING

It is important to understand the distinction between "direct lobbying" and "grassroots lobbying" as defined in the IRS regulations.

Direct lobbying – means directly communicating with a member or employee of a local, state, or Federal legislative body (or with any government official or employee who may participate in the formulation of legislation) for the principal purpose of influencing specific legislation. Specific legislation includes both legislation that has already been introduced and a legislative proposal that the organization supports or opposes. Legislation also includes a referendum, ballot initiative, constitutional amendment, or similar procedure. In addition, the IRS considers Senate confirmation votes on Presidential nominees (such as heads of agencies and judges) to be "legislation" under the regulations. A communication must have all three of the following elements in order to constitute direct lobbying:

1. It must refer to specific legislation, **and**
2. It must reflect a view on such legislation, **and**
3. It must be addressed to a legislator (or an official participating in the formulation of legislation).

For example, a health center sends a letter to Senator X noting a substantial increase in the number of uninsured persons in its community. The letter does not reflect a view on any specific pending legislation or legislative proposal that the health center supports (or opposes). The letter is not a direct lobbying communication under the IRS regulations. If, however, the letter included a request to support a *particular* appropriations bill that would increase health center funding, the letter would be a direct lobbying communication.

Grassroots lobbying – means communicating with members of the general public, or any segment of the public, in an effort to influence the vote of a legislative body. In order to be considered grassroots lobbying, a communication must have all of the following elements:

1. It must refer to specific legislation, **and**
2. It must reflect a view on such legislation, **and**
3. It must contain a call to action, in one of the following ways:
   - Urge recipients of the communication to contact legislators, or
   - Include a legislator's address, phone number, etc., or
   - Identify a legislator as being:
     - Opposed to a communication's view
     - Undecided about the legislation
     - The recipient's representative
     - A member of the legislative committee that will consider the legislation

For example, a health center sends a letter to its patients that says:

> *"H.R. 549, if passed, will be a disaster for the uninsured. Write your representative and tell him to vote against this bill."*

This letter constitutes grassroots lobbying because it encourages people to contact their representative.

In contrast, a letter says:

> "*H.R. 549 will be a disaster for uninsured persons. This bill simply must be defeated!*"

This is not grassroots lobbying under the IRS regulations because there is no "call to action," i.e., the letter does not ask a patient to contact his or her representatives nor otherwise suggest (as defined in the regulation) that the patient take some action.

Activities That Do Not Constitute Lobbying under the Expenditure Test

The Expenditure Test focuses on the amount of funds a charitable organization (such as a health center) expends for direct and grassroots lobbying as defined in the IRS regulations. It is important to note that, under the regulations, many activities related to legislation or public policy advocacy are not considered to be lobbying, and accordingly, funds expended for those purposes do not count toward the Expenditure Test limits. Some activities that specifically are not considered lobbying under the regulations are:

- Making available the results of nonpartisan research, study, or analysis;
- Providing technical advice or assistance to a governmental body or committee in response to a written request from such body;
- Discussing broad social, economic, and similar issues is not lobbying even if the problems are of the type with which government would ultimately be expected to deal, so long as the discussion does not directly encourage recipients of the communication to contact a legislator or discuss the merits of a specific proposal;
- A communication directed only to members of an organization (such as members of national, state, and local health care associations) that refers to and reflects a view on specific legislation is not considered lobbying if the specific legislation is of direct interest to the organization and its members, and if the communication does not encourage the members to lobby directly or to engage in grassroots lobbying;
- Self-defense lobbying, that is, a communication concerning a decision that could affect the existence, powers, or duties of an organization, its tax-exempt status, or the deductibility of contributions to the organization is not considered lobbying under the expenditure test.

To Elect or Not to Elect?

Most health centers devote less than five percent of their activities to lobbying, and far less to grass roots lobbying and are not likely to jeopardize their tax exemption under the Substantial Part Test. However, as previously noted, electing the Expenditure Test allows a health center to rely on detailed rules defining what is lobbying and delineating how much lobbying (direct vs. grass-roots) is permissible. In contrast, the Substantial Part Test is vague, subjective, and sometimes difficult to apply. Thus, a health center desiring a good measure of certainty as to which of its activities is considered lobbying and how much it can spend on those activities, without endangering its tax exemption, may consider electing the Expenditure Test.

Although most health centers that engage in any significant amount of lobbying activities may want to consider electing the Expenditure Test, there are advantages and disadvantages that merit some consideration.

- **Nature of the Health Center's Lobbying Activities** — The Substantial Part Test measures lobbying activities, while the Expenditure Test focuses on the funds actually expended for lobbying (as defined in the regulations). As a result, the lobbying of uncompensated volunteers connected with a health center, most notably board members, does not count toward the Expenditure Test but could very well count toward the Substantial Part Test.

For example, a health center could launch an extensive lobbying campaign at very little cost using volunteers to contact legislators. Under the Expenditure Test, only the funds actually expended for the lobbying effort (such as travel, printing of materials, and other out-of-pocket costs incurred) would be considered (in relation to the health center's total exempt-purpose expenditures). Under the Substantial Part Test, the IRS would determine if the extent of the lobbying campaign constituted more than an insubstantial part of the center's total activities. In this example, a center might well benefit from electing the Expenditure Test because there would be very little expense involved and, therefore, little impact on the center's lobbying limit.

On the other hand, if a lobbying campaign consisted entirely of grassroots lobbying urging the public to contact their legislators, the center might be better off under the Substantial Part Test because an electing organization may spend only 25% of its total allowable lobbying expenditures on grass-roots lobbying assuming, of course, that the overall lobbying activity was not substantial in relation to the center's total activities.

As with any decision that can have significant legal consequences, a health center should consult with qualified counsel regarding its particular circumstances.

♦ Electing the Expenditure Test

Health centers may elect to be covered under the Expenditure Test simply by filing IRS Form 5768. The election can be filed up until the last day of any tax year for which it applies. Once an organization files Form 5768, it is covered by the Expenditure Test until it revokes the election. An organization may revoke an election at any time (again by using Form 5768), but the revocation must be filed before the first day of the first tax year to which it applies. The IRS will automatically apply the Substantial Part Test for any year for which an election is not on file.

Penalties for Excessive Lobbying

Under the Substantial Part Test, there is only one penalty that the IRS may impose on a charitable organization that engages in excessive lobbying in a given year – revocation of the income tax exemption. Moreover, the same penalty applies whether or not there was a gross or only a marginal violation.

Under the Expenditure Test, there is a two-tiered penalty structure. An electing charity that exceeds its permissible amount of lobbying expenditures in a given year is subject to a 25% excise tax on the excessive expenditures. The charity will not lose its exemption unless it exceeds its permitted amount of lobbying expenditures by 150% over a four-year period. Thus, there is some opportunity for a charity to bring its lobbying activities into line before the IRS is constrained to revoke the organization's tax exemption.

Recordkeeping and Reporting

Health centers should keep detailed records of any lobbying expenditures and activities. Organizations that have elected the Section 501(h) Expenditure Test must report the amount of expenditures for direct and grass-roots lobbying and the amount of their total exempt purpose expenditures on Part II-A, Schedule C to their annual information return, Form 990. Organizations that have not elected under Section 501(h) must report their lobbying activities on Part II-B of Schedule C. This includes a statement of funds expended for lobbying and a detailed description of their lobbying activities.

POLITICAL CAMPAIGN ACTIVITY

In contrast to lobbying, which is permitted within certain limits, health centers and other charitable organizations may not engage in any political campaign activity whatsoever without jeopardizing their Federal tax exemption.

Political campaign activity is defined for income tax purposes as participating or intervening, including publishing or distributing statements, in any political campaign on behalf of, or in opposition to, any candidate for public office. Unlike the lobbying rules, there is not a comprehensive body of regulations explaining the IRS's interpretation of the statutory prohibition on political campaign activity. However, the IRS has issued a number of Revenue Rulings and other informal guidance that state its views on political activity, although they technically apply only to the organizations to which the rulings are addressed.

The Prohibition is Absolute

The IRS's position is that the proscription on political campaign activity is absolute. Thus, unlike legislative advocacy, any intervention in a political campaign can jeopardize a charitable organization's tax exemption and expose its officers and directors personally to substantial tax penalties. In order to understand the full import of this rule, some definition of terms is warranted.

CANDIDATES FOR PUBLIC OFFICE

The proscription applies to any elective public office at any level of government – local, state, or Federal. It does not matter if the election is not a partisan one, which is not contested by a political party. Nor does it matter if the candidate is unopposed in the election. Whether or not a particular office is a public office and whether or not there is an election or appointment to that office is a matter of local election law.

It should be noted that public policy issues sometimes are contested through a referendum, ballot initiative, or other similar procedure where the matter is decided by voters, sometimes in conjunction with a regularly scheduled election of public officials. The IRS does not consider referenda, ballot initiatives and the like to be political campaign activity even though the issue is decided by voters in an "election." Rather, the IRS treats advocacy on such measures as a lobbying activity, the voters being the legislative body. Accordingly, health center activities related to referenda, ballot initiatives and similar measures should be viewed in light of the lobbying rules discussed above.

WHAT IS A POLITICAL CAMPAIGN?

A campaign for a given office is generally deemed to begin when someone announces his or her candidacy or is proposed by others for an elective public office. The timing can be important because the IRS is concerned with a charitable organization's activities during a campaign, not before or after it, unless the activity is deliberately timed to circumvent the law.

PARTICIPATION OR INTERVENTION IN A CAMPAIGN

It is quite clear that a health center cannot, as a charitable organization, take part in a political campaign. Prohibited activities include:

- Endorsing or opposing a candidate
- Directly contributing funds to a candidate
- Indirectly supporting a candidate by making the health center's facilities or property (e.g., telephones, photocopying services, mailing lists, etc.) available to a candidate.[5]

5 Under the Federal Election Campaign Act, corporations are prohibited from making contributions to candidates in Federal elections. Thus, providing support to a candidate for Federal office, directly or indirectly, can have repercussions in addition to the income tax consequences which are the primary focus of this issue brief.

As noted above, there is no prohibition on a health center's board members, officers, or individual employees participating in a political campaign. However, they must not identify the health center in any way with a candidate. If, for some reason, they reveal their connection with the health center, they should make it clear that they are speaking for themselves and not on behalf of the health center. Moreover, they must not use health center resources on behalf of a candidate. For example, it would not be permissible for a staff person to use the center's phones to make calls on behalf of a candidate, even if this were done after hours on the staff person's own time unless the staff person reimbursed the center for all costs associated with using the phones.

Special caution is warranted when a board member, employee, or volunteer closely associated with a health center is a candidate for elective office. Clearly, the health center may not actively promote the person's candidacy. On the other hand, a candidate can continue to be employed by the center or to serve on the board while running for office. For example, the candidate could appear at the center's functions covered by the media, as long as the appearances follow the customary pattern and practice of the center, including media coverage. Furthermore, the center can continue to reimburse the employee or board member-candidate for expenses incurred on behalf of the center, again as long as the reimbursement is consistent with its usual reimbursement policies. However, the center should avoid the implication that it is subsidizing the candidate's campaign travel expenses.[6]

6 The Federal Hatch Act limits the partisan political activities of employees of state and local government entities and organizations that receive Federal grant awards under grant programs that incorporate the Hatch Act provisions. Recipients of Section 330 funds are not subject to the Hatch Act solely by virtue of receiving those funds. However, they may indeed be subject to the Act if the center receives funding under one of the federally funded grant programs that incorporates the Hatch Act, principally Head Start, or if the center is a public center that is a unit of local government.

How Can a Health Center Participate Legally in the Electoral Process?

Despite the strict prohibition on intervening in political campaigns, health centers can still play a significant role in the electoral process. Some of the traditional roles, and some important caveats, are discussed below.

VOTER EDUCATION

It is permissible to undertake certain voter education activities as long as they are conducted in a totally nonpartisan manner. Many charitable organizations routinely report to their constituents how legislators voted on issues of particular concern to the organization. That is acceptable as long as the information is published in the same manner during an election campaign as other times and the organization's position on a particular issue is not included.

It is not a good idea, however, to begin to publish voting records for the first time during a political campaign. They should be published during an election campaign only if it is a regular part of the organization's service to its constituency. Similarly, centers should not distribute voting records or similar material to the general public. Distribution should be confined to persons who regularly receive informational materials produced by the center.

Publishing voter guides or the results of candidate questionnaires should be avoided because it is problematic for the vast majority of charitable organizations, like health centers, whose focus is on a relatively narrow set of issues, such as health care. In general, the IRS position is that questionnaires or guides that evidence a bias for or against candidates, either through the questions asked or by their coverage of a narrow range of issues, violate the proscription on political activity. Voter guides that set forth the position of candidates on a wide variety of

issues without any indication of preference, direct or indirect, are acceptable. However, it is very difficult to frame questions to a candidate without emphasizing a special interest. Moreover, the IRS takes the position that the very narrowness of focus of questions implies an endorsement of the candidate whose reply is most favorable. There are similar considerations where candidates are asked to respond to a position paper drafted by the organization since this, in effect, is simply a more elaborate form of questionnaire. At a minimum, the results of a questionnaire should not be published.

PUBLIC FORUMS INVOLVING CANDIDATES

A charitable organization can invite candidates for public office to attend a public forum sponsored by the organization to state their views on matters of interest to the organization. Evenhandedness is the key to conducting public forums; that is, all candidates for a particular office should be invited and allowed to participate on equal terms. For example, if there is a question and answer period, each candidate should be given the opportunity to answer questions. Importantly, no person associated with the organization (staff, volunteers, board members) should comment on a candidate's answers or state the organization's position on particular issues.

In short, health centers should proceed with extreme caution in sponsoring a public candidate forum. Particular sensitivity is required with regard to candidates for Federal office (President, Senator, member of the House of Representatives). Elected representatives clearly have an interest in seeing how Federal programs, like health centers, operate in their district, and health centers clearly have a right to bring matters affecting their programs (both their successes and problem areas) to the attention of their elected representatives. However, in the context of an election campaign, centers should take pains to assure that otherwise legitimate contacts with candidates do not taken on an aura of a campaign event (and, equally important, are not perceived by other candidates or the public to be electioneering on the part of the center). Similar caution should be exercised with regard to contacts with state and local candidates.

Unfortunately, not everyone is familiar with the permissible scope of activities during an election campaign, and some may have a partisan motive for complaining about legitimate activity. A health center should consider the possibility that voter education activities will attract unwarranted attention and possibly negative publicity.

CANDIDATE STATEMENTS

The IRS rules concerning statements by a candidate in support of a charitable organization present a bit of a paradox. On the one hand, it is perfectly acceptable for a charitable organization to inform candidates of its position on issues, to urge them to support the organization's position if elected, and to ask them to go on record to that effect. Indeed, generating public awareness and debate during an election campaign can be a highly effective means of laying the groundwork for later legislative initiatives.

However, while the candidate is free to respond to the inquiring organization and to distribute that response to the general public, the IRS position is that a charitable organization may not publish the candidate's response, even to its own constituency. The IRS position is based on language in Section 501(c)(3) of the IRC that specifically prohibits "the publishing or distribution of statements." The prohibition also applies to a statement volunteered by a candidate. On the other hand, nothing prevents a charitable organization from using a statement

made by a victorious candidate after the election as a reminder of promises made during the campaign.[7]

GET-OUT-THE-VOTE CAMPAIGNS

A health center may legitimately engage in voter registration or other get-out-the-vote activities provided that they are conducted in a completely nonpartisan matter. Voter registration is considered to be non-partisan as long as it does not favor one candidate or party over another. For example, it is not advisable to do voter registration only in neighborhoods that are likely to support a particular candidate or party. A health center with multiple sites, if it conducts or permits voter registration activities on site, should do so at all of its sites. However, health centers that are part of a multi-service organization should keep in mind that some Federal programs, e.g., Head Start, prohibit voter registration activities entirely.

Health centers can make voter registration materials available for patients in waiting rooms and allow local voter registration officials or private nonpartisan organizations, such as the League of Women Voters, to do voter registration on site. Health centers also can encourage patients to register to vote, help patients to complete registration forms, and send completed forms to the election authorities, as long as they do not suggest how patients should vote or that patients should register as members of a particular political party. Again, caution is warranted if patients are likely to overwhelmingly favor a particular candidate or party even without outside encouragement.

Health centers should be very careful not to imply that their health services are dependent in any way upon a patient's decision to register health center employees with delegated authority) may be required to do voter registration under the National Voter Registration Act, also known as "Motor Voter." The Bureau of Primary Health Care (BPHC) has determined that voter registration services provided at FQHC Medicaid outstations are consistent with the Federally-approved scope of project and indicated that program income and other non-grant funds can be used for costs not covered by Medicaid, provided that there are no restrictions on those funds. See BPHC Program Assistance Letter (PAL) 2000-18 (September 13, 2000) reaffirming PAL 96-17. While it is reasonable to conclude that the public service provided by a health center supporting a nonpartisan voter registration effort generally furthers the objectives of the Section 330-supported project, the BPHC PALs specifically address voter registration only in the context of Motor Voter requirements and Medicaid eligibility outstations. Therefore, in all other circumstances, a health center would have the burden of showing that the expenditure of program income and other grant-related funds furthers the objective of the Section 330-funded project. Finally, Medicaid reimbursement should be available for voter registration services provided by health center-employed Medicaid outstation workers. See PAL 2000-18. Health centers should confirm the availability of reimbursement with their state's Medicaid agency.

7 IRS Rev. Rul. 2007-41 is a useful guide as to how the IRS views various types of political campaign-related activity, including 21 examples illustrating the applicable principles.

Penalties for Intervening in a Political Campaign

The ban on political campaign activities is contained in the IRC section that provides for tax exemption for charitable organizations. Thus, conducting political activity is considered to be evidence that the organization is not engaged in charitable activities and grounds for revoking the exemption. Furthermore, the IRS can impose an excise tax on the organization and any of its managers who knowingly agree to political campaign expenditures.

CONCLUSION

Although there is a substantial degree of latitude for health centers that want to engage in potential problem areas, it is advisable to seek the assistance of knowledgeable legal counsel.

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