

TO: MHA Members

DATE: September 10, 2008

FROM: Amy Barkholz, general counsel

RE: **Election Activities and 510 (c)(3) Hospitals**

Executive Summary

Set forth below are the answers to the five questions posed in your recent e-mail concerning political campaign activities by hospitals exempt from federal taxation under Section 501(c)(3) of the Internal Revenue Code.¹ In considering the answers below, it is important to also note the following two core principles:

- A hospital will not qualify for tax exemption under Section 501(c)(3) if it participates in, or intervenes in, any political campaign on behalf of (or in opposition to) any candidate for public office. A determination whether a hospital has participated or intervened in a campaign is based upon all of the relevant facts and circumstances.
- The prohibition under Section 501(c)(3) against participating or intervening in a political campaign is absolute. In other words, a tax exempt hospital's participation or intervention in a campaign is prohibited even if such activity is not a substantial part of the hospital's overall activities. There is no exception for *de minimis* amounts of political participation or intervention by an exempt hospital. A hospital's motivation is irrelevant for purposes of determining whether it engaged in prohibited campaign activity.

Given these core principles, the answers to your five questions are as follows:

1. May a 501(c)(3) Hospital Endorse a Candidate?

No. Section 501(c)(3) organizations, including hospitals, are absolutely prohibited from endorsing candidates for public office. In its FY 2002 Exempt Organizations Technical Instruction Program (hereinafter the "2002 Program"), the IRS warned that "a written or oral endorsement of a candidate is strictly forbidden."² In this regard, it is also important to note that Treasury Regulation 1.501(c)(3)-1(c)(3)(iii) states the following:

¹ Please note that this analysis is limited to Michigan hospitals that are organized and operated under section 501(c)(3) of the Internal Revenue Code.

² Page 344 of the FY 2002 Exempt Organizations Technical Instruction Program regarding "Election year Issues".

"Activities which 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 or printed statements or the making of oral statements on behalf of or in opposition to such a candidate."

The prohibition against political campaign activity applies to organizations, not individuals. Accordingly, the political campaign activity prohibition applies to hospitals as organizations, not to the organization's management and employees *acting in their individual capacities* (see the discussion below).

2. May a CEO of a 501(c)(3) Hospital Send Communications to Hospital Employees Asking Them To Vote for a Particular Candidate?

No – unless the CEO's request is *clearly and unambiguously* made in his/her individual capacity and no hospital resources of any kind are involved with the CEO's request. Even then, this can be a risky proposition. Prudence dictates that CEOs refrain from this activity.

The prohibition against political campaign activity does not preclude management and employees of 501(c)(3) hospitals from involving themselves in political campaign activities, *so long as they do so in their individual capacities*. However, it is vitally important that these individuals not engage in political campaign activities under circumstances that might reasonably be viewed as involving the hospital itself, including any communications or functions of the hospital. Per the IRS:

"[An exempt organization's management or employees may] not in any way utilize the [organization's] financial resources, facilities or personnel [in the course of engaging in individual political activity, and must] clearly and unambiguously indicate that the actions taken or statements made are ... not [those] of the [organization]." ³

The following excerpt from the IRS's 2002 Program provides valuable guidance for all tax exempt hospitals:

"The prohibition against political campaign activity does not prevent an organization's officials from being involved in a political campaign, so long as those officials do not in any way utilize the organization's financial resources, facilities, or personnel, and clearly and unambiguously indicate that the actions taken or the statements made are those of the individuals and not of the organization.

On the other hand, since an IRC 501(c)(3) organization acts through individuals, sometimes the political activity of an individual may be attributed to the organization. As in other situations where the political campaign prohibition is concerned, the determination of

³ Excerpt from the 1991 IRS-approved press release by "Jimmy Swaggart Ministries", which announced the Ministries' settlement with the IRS regarding the Ministries' political activity conducted during the 1986 presidential campaign.

whether the act of an individual will be attributed to an IRC 501(c)(3) organization is based on the relevant facts and circumstances. In particular, when officials of an IRC 501(c)(3) organization engage in political activity at official functions of the organization or through the organization's official publications, the actions of the officials are attributed to the IRC 501(c)(3) organization. Use of the IRC 501(c)(3) organization's financial resources, facilities, or personnel is also indicative that the actions of the individual should be attributed to the organization."

Given a CEO's position of authority and status as leader of the hospital, asking the hospital's employees to support a particular candidate is potentially perilous. Although I found no authorities directly on point, such a request, if determined by the IRS to have been made within the context of the employees' employment relationship with the hospital, would surely be attributed to the hospital and, therefore, would constitute a prohibited endorsement of the candidate by the hospital. In this same vein, a CEO's use of hospital publications, meetings, etc., to ask for the employees' support would, obviously, also be prohibited.

These kinds of issues are extremely fact sensitive. A CEO must use great care, and might have to go to extreme lengths⁴, in order to clearly and unambiguously establish that he/she was acting in his/her individual capacity when asking the hospital's employees to support a particular candidate. In order to lessen the risk (but certainly not eliminate it), a CEO should approach employees on an individual basis outside of the hospital environment. In doing so, the CEO should plainly state that he/she is making the request in his/her individual capacity. In addition, each employee should be advised that he/she is being approached in his/her individual capacity, not as an employee of the hospital.

3. May the CEO of a 501(c)(3) Hospital Encourage Hospital Employees to Place Yard Signs, Etc.?

No – if the request is made for a particular candidate or political party. As noted above, the use of a 501(c)(3) hospital's financial resources, facilities, or personnel in a political campaign is prohibited. However, as also noted above, the CEO may engage in such activity if performed in his/her individual capacity and the employees are approached by the CEO in their individual capacities.

Parenthetically, it is not inappropriate for a CEO, acting as the CEO, to generally encourage hospital employees to be good citizens, to participate in America's political process, and to exercise their right to vote (so long as the encouragement does not identify, or suggest support for, any particular candidate or party).

4. May a 501(c)(3) Hospital's Resources Be Used to Support a Candidate?

⁴ Communicating with all the hospital's employees without using any hospital resources, alone, would be quite an undertaking (among other things, the CEO could not use hospital records to obtain any employee's home address or telephone number).

No. Section 501(c)(3)'s prohibition against political campaign activity includes, among other things, a prohibition against the use the exempt organization's financial resources, facilities and personnel. See the answer to Question No. 2 above.

5. May an Employee of a 501(c)(3) Hospital Use "Hospital Time" to Support a Candidate?

No. As indicated above, the prohibition against the use of an exempt organization's personnel or other resources for a political campaign is well established.

Should you have any questions regarding election activities and 501 (c)(3) hospitals, please contact your local counsel or Amy Barkholz, general counsel, MHA, at abarkholz@mha.org or (517) 886-8224.