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Memo

To: Dave Oberting
From: Elizabeth Kingsley
Re: 501(c)(4) Political Activity
Date: December 3, 2013

The DC Economic Growth Action Fund, also known as Economic Growth DC, is a nonprofit organization incorporated under the DC Nonprofit Corporation Act. It is operated within the meaning of § 501(c)(4) of the Internal Revenue Code as a social welfare organization dedicated to promoting the common good and general welfare of the residents of the District of Columbia through a robust and dynamic economy. Economic Growth DC operates as a legislative, political, and economic advocacy organization.

A tax-exempt § 501(c)(4) social welfare organization is required to engage primarily in activities that further social welfare. Thus, to maintain its § 501(c)(4) tax-exempt status, and organization must be operated "primarily" for what is considered "social welfare" purposes. This includes § 501(c)(3)-permissible educational activities, lobbying for or against legislation, and other policy advocacy that is undertaken in order to further broad social well-being. "Political" activity does not count as social welfare. Political activities, including political advertising supporting or opposing a candidate for local office, are not prohibited by the tax law, but the organization must keep an eye on the limits: while the IRS has not given clear guidance on how to measure "primary," as a practical matter and based on existing rulings, in any given tax year, the qualifying social welfare work of a 501(c)(4) must exceed the amount of all non-social welfare activity, including anything the IRS classes as political. For most organizations, the amount of activity is a function of expenditures[1], so this comes down to making sure that 501(c)(4) social welfare exceeds political (and other non-qualified) spending in each tax year.

The Treasury Department has recently released proposed regulations that would dramatically revise the definition of "political" activity for 501(c)(4) organizations. However, those rules are not in effect and will not be for some time. Even if adopted as proposed, the rules would no doubt be subject to challenge in court. Until new rules are implemented, the activity that is considered to be "political" and therefore limited for a 501(c)(4) is the same thing that is too partisan to be permissible for a § 501(c)(3) charity. This includes anything that, under "all the facts and circumstances" the IRS concludes is intervention in a political campaign. Contributions to candidates, parties, or to PACs that support candidates are clearly political, as is any payment for a message that tells people to "vote for" or "vote against" a specific candidate. However, the scope of limited political activity is much broader. Under the facts and circumstances test, any public communication that indicates bias for or against a person who happens to be a candidate for office is potentially considered political advocacy, subject to the limits discussed above.

Advocacy that an organization can show is designed to influence a pending legislative or other official action is generally not considered political. In addition, nonpartisan voter education, voter registration, or get-out-the-vote efforts are not considered political.

[1] A more complicated analysis might be required for a group that relies heavily on volunteers, for instance.

It is important to remember that just because the federal tax law does not prohibit any specific political activity by a 501(c)(4) organization does not mean that anything goes. Political campaign advocacy must also comply with the applicable campaign finance laws. In campaigns for local office, DC campaign finance law governs. DC does not currently ban corporate contributions, but there are reporting and disclosure obligations that may apply to spending for certain kinds of advocacy.

Notice: Treasury Regulations require us to inform you that neither you nor any other recipient may use any tax advice in this communication to avoid any penalty that may be imposed under federal tax law. To obtain penalty protection, the Regulations require attorneys, accountants and other tax advisors to perform increased due diligence to verify all relevant facts and to format the written tax advice in a lengthy number of separately enumerated sections with numerous disclosures. If you would like us to prepare written tax advice designed to provide penalty protection, please contact us and we will be pleased to discuss the matter with you in more detail.