

**Committee on Ways and Means Subcommittee on Oversight
Of the United States House of Representatives**

**Hearing on Protecting the Free Exchange of Ideas on College Campuses
March 2, 2016**

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Section 501(c)(3) of the Internal Revenue Code of 1986, as amended, provides that an organization will be exempt from federal taxation if it is organized and operated "exclusively" for certain enumerated exempt purposes, including "education" 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." Section 501(c)(3) focuses on the activities of the organization. Exemption from taxation applies to the university. Yet, an entity acts and speaks only through the individuals affiliated with it, whether as employees or students.

The issue before the Subcommittee today is whether the speech or actions of particular officials or employees or students or other persons affiliated with a university are properly treated as speech or action by the university as a tax-exempt entity. Under what circumstances, if any, will the actions of an individual or group be attributed to a university for purposes of determining whether the university is operating as an organization described in Section 501(c)(3)? When an individual or a group affiliated in some way with a university speaks, does that speech remain the speech of the individual or group or does it become the speech of the university for purposes of Section 501(c)(3)?

This issue implicates the concept of attribution. Part I of the testimony addresses the concept of attribution in tax law. Part II discusses the concept of attribution as it has been applied in guidance from the Internal Revenue Service (the "Service") on the question of attribution of political speech by individuals affiliated with an exempt organization to the organization itself.

I. Exemption and Attribution

Issues of attribution arise in complex structures of multiple entities. The core principle is that each entity maintains its separate identity for federal income tax purposes. Tax planning using complex structures rests on maintaining affiliation among entities while avoiding attribution of activities from one entity to one or more other entities. Exempt entities, including universities, now operate as complex structures of multiple types of exempt and taxable entities. These various entities will be controlled by the board of the core exempt entity through its

authority to appoint the boards of directors of the component exempt entities and ownership of a controlling equity interest in taxable entities. This kind of affiliation does not support attribution of the activities of the affiliated organizations to the core exempt entity. This separate identity principle was defined for federal income tax purposes in *Moline Properties v. Commissioner*, 319 U.S. 436 (1943).

An entity acting as the agent of the entity that controls it can provide an exception to the separate identity principle. This was the issue in *National Carbide Corp. v. Commissioner*, 336 U.S. 422 (1949). Although the Supreme Court held that the facts in *National Carbide* did not support a determination that the subsidiaries were agents of the parent corporation, it did identify “some of the relevant considerations in determining whether a true agency exists.” *National Carbide Corp. v. Commissioner*, 336 U.S. at 437. The six factors listed by the Court are: (1) whether the subsidiary operates in the name and for the account of the parent as principal; (2) whether the subsidiary has the ability to bind the principal by its actions; (3) whether the subsidiary transmits money received to the principal; (4) whether the subsidiary uses employees and assets of the parent; (5) whether the subsidiary’s relationship with the principal depends on its ownership by the principal; and (6) whether its business purpose is to conduct the normal duties of an agent. The Court emphasized that agency must be determined without reliance on factors of ownership and control. *National Carbide Corp. v. Commissioner*, 336 U.S. at 439. Mere affiliation or control does not establish agency. This principle was further consolidated in *Commissioner v. Bollinger*, 485 U.S. 340 (1988), which interpreted *National Carbide* as consistent with the separate identity principle of *Moline Properties*.

The separate identity principle applies in the case of exempt entities as well as the case of taxable entities. Formal control expressed in the authority to appoint another organization’s board of directors does not in itself support attribution of the controlled organization’s activities to the controlling exempt organization. Attribution arises from evidence of control of daily operations. Mere control over policy is distinguished from the requisite operational control. The overlap of officers provides evidence of the kind of operational control that results in attribution. Private Letter Ruling 8606056 (Nov. 14, 1985). Some overlap of officers will not support attribution if the majority of the board of directors consists of outside directors. Private Letter Ruling 8352091 (September 30, 1983). Sharing facilities and services rarely support attribution. The relationship between affiliation and attribution is discussed in greater detail in Frances R. Hill and Douglas M. Mancino, *Taxation of Exempt Organizations* at Chapter 27, “Complex Structures” (Thomson Reuters/Warren, Gorham & Lamont 2002 with cumulative supplements published twice each year).

The principles of attribution that have long applied in the context of the complex structures through which exempt entities, including most universities, operate are analytically similar to the principles that preclude attribution to an exempt entity of the speech and action of individuals affiliated with it. As discussed in the following section, individuals do not forego their rights to speak by mere affiliation with an exempt entity, including a university. By the same token, an exempt entity has no basis in Section 501(c)(3) for seeking to claim that any speech by any individual affiliated with it in any capacity will be attributed to the exempt entity

and could, in the case of certain political speech, jeopardize the exempt status of the exempt entity.

II. Attribution of Speech or Actions of Individuals or Groups Affiliated with an Exempt Entity

In nonprecedential but widely relied upon guidance, the Service has stated unambiguously that “[t]he prohibition on political campaign activity applies only to IRC 501(c)(3) organizations, not to the activities of individuals in their private capacity.”¹ At the same time, the Service noted that “since an IRC 501(c)(3) organization acts through individuals, sometimes the political activity of an individual may be attributed to the organization.” 2002 CPE Text at 364. In general, students are more likely to be acting in their private, personal capacity, while senior officials of a university will be acting in their official capacities or at least appear to be doing so. Issues involving students are likely to center on their access to university resources, while issues involving university officials are likely to center on the greater scope of their official role and thus relatively smaller role for actions taken in their private capacities.

As in the case of the complex structures discussed in Part I, affiliation does not itself trigger attribution of the speech by an individual or a group to the exempt entity. The Service has developed practical principles that can be applied in a number of situations involving political speech by individuals or groups affiliated with exempt organizations, including universities.

A. Political Speech by Students or Student Organizations

The Service has taken the position that “[t]he actions of students generally are not attributed to an educational institution unless they are undertaken at the direction of and with authorization of a school official.” 2002 CPE Text at 365.

The two revenue rulings issued by the Service dealing with political speech by students or student organizations both find that attribution does not arise simply from their affiliation with the university as students even if they use some university resources in connection with their political speech. Revenue Rule 72-512, 1972-2 C.B. 246 deals with a political science course that requires students to participate in the campaigns of a candidate of their own choosing. The course is open to any student. It is offered for academic credit and is graded. It consists of several weeks of work in the classroom followed by two weeks of participation in a political campaign of a candidate of the student’s choice. Revenue Ruling 72-512 states that “[t]he university does not influence the student in his choice of a candidate or control his campaign work.” Revenue Ruling 72-512 concluded that “this university is not participating in political campaigns on behalf of candidate for public office within the meaning of section 501(c)(3) of the Code.” Revenue Ruling 72-512 explained the result in the following terms:

The course described above is exclusively educational in nature since it is provided as part of the university’s political science program solely for the purpose of improving or developing his capabilities.

The student activities in question represent a bona fide course of conduct in fulfillment of a formal course of instruction conducted by the university. Where the extent and manner student participation in the actual political process in such cases is reasonably germane to the course of instruction, the fact that such course is a part of the university's curriculum and that university personnel and facilities are employed in its conduct does not make the university a party to the expression or dissemination of political views of the individual students in the course of their actual campaign activities within the intendment of section 501(c)(3).

In subsequent nonprecedential guidance, the Service commented that the conclusion in Revenue Ruling 72-512 would have been different if the students had not chosen the campaigns that they worked for in the course. The Service observed that “[h]ad the faculty members specified the candidates on whose behalf the students should campaign, the actions of the students would be attributable to the university since the faculty members act with the authorization of the university in teaching classes.” 2002 CPE Text at 365.

Revenue Ruling 72-513, 1972-2 C.B. 246 deals with a student newspaper that endorses candidates for public office. The university provides office space and financial support for the publication costs. Several professors at the university serve as advisers to the student editors. Revenue Rule 72-513 states that

Editorial policy is determined by a majority vote of the student editors. Neither the university administration nor the advisors exercise any control or direction over the newspaper's editorial policy. A statement on the editorial pages makes it clear the views expressed are those of the student editors and not of the university. In customary journalistic manner, from time to time there are editorials taking a position on pending or proposed legislation and candidates for public office.

In this ruling, too, the Service determined that the university was not attempting to influence legislation or participate in political campaigns on behalf of candidates for public office. The Service reasoned as follows:

The publication and dissemination of the editorial statements in question are acts and expressions of opinion by students occurring in the course of bona fide participation in academic programs and academic-related functions of the educational institution. In such circumstances, the fact that the university furnishes physical facilities and faculty advisors in connection with the operation of the student newspaper does not make the expression of political views by the students in the publishing of the newspaper the acts of the university within the intendment of section 501(c)(3) of the Code.

These two situations do not specifically address the case at the center of this Hearing, but they do provide relevant guidance. The facts in this matter provide no basis for attribution of the student's political campaign activity to the university. The student did not claim any authority to

speak for the university. There was thus no basis for concern that the student's political campaign activity could reasonably be attributed to the university, which is the only way that political campaign activity undertaken by an individual affiliated with a university could jeopardize the university's exempt status. None of the principles identified in *National Carbide* as creating an agency exception to the separate identity principle of *Moline Properties* apply to the student distributing leaflets at his university. The requirements of Section 501(c)(3) provide no basis for prohibiting political speech by a student under these facts. Although the student had applied for use of a table reserved for student activities, that alone would not have supported attribution of his political campaign activities to the university. He never claimed any status at the university other than the status of a student. This status does not create the kind of implied authority that would support attribution of the student's political activities to the university. If a student newspaper operated by students but using significant university resources, including the name of the university in its masthead, can endorse candidates for public office in its editorials based on a vote of the student editorial board without having this action attributed to the university as was the case in Revenue Ruling 72-513, then certainly one student distributing leaflets urging the election of a clearly identified candidate for public office will not be attributed to the university and thereby jeopardize the university's exempt status.

B. Political Speech by Faculty Members

Faculty members can certainly engage in political speech in their private capacities, but the scope and nature of their private capacity when fulfilling their teaching roles and when using the array of university resources routinely available to them raises issues. Faculty members cannot under the ordinary scope of their authority bind the university to a course of action. If faculty members also occupy roles in academic administration, such as roles as department chairs or deans, then they have sufficient authority to speak for the component of the university for which they have administrative responsibility.

Issues raised by faculty status involve the scope of their authority as teachers. This does not give faculty members authority to use their classrooms to support or oppose clearly identified candidates for public office. Faculty may not use their classrooms to endorse or urge the election of particular candidates. Faculty members should not signal their support by displaying indicia of their personal political choices in their classrooms. Time spent with students in a classroom should focus on the material that students enrolled in the course to learn. Using a classroom for political campaigning when the faculty member is acting within the scope of his or her authority in the university could well be attributed to the university. A greater problem is that using class time for political campaigning means that class time is diverted from the exempt educational purpose of the university to the private, personal preferences of the faculty member.

A faculty member has access to a range of university resources including business cards and stationery bearing the university's name and logo, a well-equipped office, and staff assistance. All of these assets are provided to a faculty member to enhance performance of the teaching and research that define the scope of their faculty authority consistent with the educational purpose of the university. Diverting any of these resources to personal uses not only

diverts such resources from their use in exempt educational activities but also raises issues of attribution of these non-educational activities to the university.

The university should have administrable policies in place that advise faculty members of these issues. Such policies should also serve as a disavowal of routine, perhaps unintentional, misuse of university resources by faculty members. In more extreme cases, a university needs to disavow the specific behavior of the particular faculty member to avoid attribution.

C. University Administrators

University administrators retain their personal right to become involved in political campaigns in their personal capacity. Delineating the personal capacity of a university president or the dean of a college requires specific action. If a senior administrator wishes to sign an endorsement of a specific candidate, the senior administrator should take care that the use of the university affiliation is accompanied by the disclaimer that the university's name is used solely for purposes of identifying the individual. *See* Revenue Ruling 2007-41, Situation 3. If a senior administrator writes an editorial in an official university publication urging that a particular candidate should be elected, that statement will be attributed to the university even if the president pays for that portion of the cost of producing the publication. *See* Revenue Ruling 2007-41, Situation 4. This example should be interpreted as requiring that a private action such as paying for the portion of the cost of the publication is an insufficient disavowal of a public endorsement. The university's disavowal should be as public as the endorsement.

The positions of senior administrators are particularly sensitive because these senior administrators have the type of broad authority over the operation of a university that is discussed in Part I of this Statement. This authority is similar to the elements of the agency exception to the separate identity principle set forth in the *National Carbide* case discussed in Part I.

Senior administrators are entrusted with the operation of a tax-exempt university in a manner consistent with its exempt educational purpose. It is reasonable but not sufficient to assume that senior administrators understand the potential issues arising from their own behavior. The actions of a senior administrator in endorsing a candidate for public office or the candidates of a particular political party will be attributed to the university and thus require an appropriately public disavowal by the university. Senior administrators are in a position to make significant contributions to the organizations that they lead. They are also in the position of potentially doing significant harm to their universities or other tax-exempt organizations. Tax law offers practical, useful guidance on how to avoid such harm.

D. Boards of Directors and Major Contributors

Other persons who occupy positions of responsibility or who are in a position to influence the actions of a university or other tax-exempt entity should consider carefully the steps required to ensure that they do not invoke their roles or relationships with the university to

support or oppose one or more candidates for public office.

In addition, the board of directors should ensure that senior administrators have developed appropriate policies that ensure that political campaign participation by persons affiliated with the university but acting in their personal capacities are not limited by university policies or actions and should not invoke Section 501(c)(3) inappropriately to do so.

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