199907021 MAY 20 1998

INTERNAL REVENUE SERVICE
TECHNICAL ADVICE MEMORANDUM

District Director 9999.9800

Taxpayer's Name:

Taxpayer's Address:

Taxpayer's EIN:

Tax Years Involved:

Date of Conference:

Legend:

B =
C =
D =
E =
F =
M =
X =
Y =
aa =
bb =

Issues:

(1) Whether some of X's communications constituted the publishing and distribution of statements that violated the prohibition against campaign intervention under section 501(c)(3) of the Internal Revenue Code.

(2) Whether X was an "action" organization under section 1.501(c)(3)-1(c)(3)(iv) of the Income Tax Regulations.

(3) Whether a substantial part of X's activities was devoted to carrying on propaganda or otherwise attempting to influence legislation under section 501(c)(3) or section 501(h) of the Code.

(4) Whether X participated or intervened in a political campaign, as defined in section 1.501(c)(3)-1(c)(3)(iii) of the regulations, on behalf of B.

135

(5) Whether X's communications concerning C or constituted a substantial non-exempt purpose or resulted in inurement or private benefit to B, within the meaning of sections 1.501(c)(3)-1(c)(1), -1(c)(2), and -1(d)(1)(ii) of the regulations.

(6) Whether X's distribution of B's book to its members resulted in inurement or private benefit to B, within the meaning of sections 1.501(c)(3)-1(c)(1), -1(c)(2), and -1(d)(1)(ii) of the regulations.

(7) Whether X's newsletters, radio commentaries, and other communications were educational, as defined in section 1.501(c)(3)-1(d)(3) of the regulations.

(8) Whether X's expenditures for certain communications made in the years aa and aa+1 constituted political expenditures under section 4955(d)(1) of the Code and, therefore, make X liable for the tax under section 4955(a)(1).

(9) Whether X made disqualifying lobbying expenditures under section 4912 of the Code.

Facts:

X was originally organized as Y in the year aa-3 under the laws of M. In the year aa-2, the Internal Revenue Service recognized the organization as exempt from federal income tax.

The following year, the organization's management was substantially restructured and its purposes were expanded. In October of the year aa-1, a new board of directors was elected and the organization changed its name to X. In March of the year aa, the Board elected new officers, In May of the year aa, X amended its articles of incorporation to broaden its purposes. In the year aa+1, X filed Form 5768, electing section 501(h) status, effective that year.

The Key District ("the District") conducted an examination of X that covered the years aa and aa+1. The District found that a major activity of X was the advocacy and dissemination of public policy positions whose goals could only be achieved by enacting legislation or by electing individuals to public office who favored its political philosophy. The District also found that X conducted certain activities that personally benefitted

136

its President, B.

Our review of the administrative file reveals that X has engaged in two distinct types of activities: research and dissemination of information ("educational activities"), primarily concerning public policy issues; and participation in various assistance programs ("charitable activities"). On its Form 990 for the year aa, X reported that approximately 38% of its exempt function expenses was devoted to public policy research, another 31% was used to maintain and disseminate public policy information, and the balance was used in connection with X's charitable activities. In the year aa+1, X allocated approximately 18% of its exempt function expenses to public policy research, 19% to maintain and disseminate public policy information,

X's educational activities consisted of publishing and distributing a periodic newsletter, producing radio commentaries, and providing information in mailings to both members and non-members.

X published five newsletters in the year aa. The newsletters contained two types of articles: discussions of policy issues of interest to X's members, and news of X and its charitable activities. Each newsletter contained approximately 8 pages. In addition, each newsletter package included a letter and a reply device. Each newsletter package, consisting of the newsletter, letter and reply device ranged from 8 to 11 pages. X's newsletters published in the year aa consisted of 47 total pages. A majority of these newsletters discussed national policy issues of concern to X's members.

In the year aa+1, X published six newsletters totalling 64 pages. The content of these newsletters was similar to the

137

content of those published the previous year with two notable differences. First, a greater percentage of the articles discussed a particular foreign policy issue,
Second, a significant number of articles concerned

X produced a series of daily radio commentaries aired on a radio network composed of a large number of stations. X states that it added the radio commentaries to its educational activities for two reasons: first, to expand X's educational activities beyond its members reached through the newsletters and other mailings; and second, to educate listeners on the facts behind current events as they occur.

During the year aa,
The broadcasts lasted for 90 seconds each and costed X about 3% of its total exempt function expenses reported on Form 990. The commentaries set forth positions on a range of foreign and domestic policy issues.

During the year aa+1,
These broadcasts, according to X, costed about 8% of X's total exempt function expenses reported on Form 990 for the year aa+1. The content of these broadcasts was similar to that of the broadcasts aired the previous year.

During the years aa and aa+1, X sent out a series of mailings that provided information on policy issues, X's charitable activities and requests for contributions. In the year aa, X sent out 15 letters to its "house file" (its members and supporters) and 7 "prospect" mailings (mailings to potential supporters). X claims that the total cost of the "house file" mailings and the "prospect" mailings was an amount that is 27% and 64%, respectively, of the figure reported on its Form 990 for exempt function expenses in the year aa.

In the year aa+1, X sent 18 letters to its "house file" and made 15 "prospect" mailings. The cost, according to X, of these mailings was an amount that is 42% and 42%, respectively, of the figure reported on its Form 990 for exempt function expenses in the year aa+1.

The District's request for technical advice and our subsequent examination of the administrative file revealed questions concerning whether some of X's educational activities and other transactions constituted substantial lobbying, political intervention, or serving a private interest more than

incidentally. We will now discuss these activities in more detail.

Alleged Political Campaign Intervention Communications

On October 30 of the year aa, X mass-mailed a letter concerning the Congressional elections in November. The letter stated the following:

> We need more citizens to vote -- not less. And we need to remind people that they have a reason to vote. That's why I'm sending you the enclosed bumper sticker. It says "I'm Fed Up With Congress!" I hope you will place this sticker on your car. Then let Congress know how you feel by voting -- and encouraging others to do so on . . . Election Day . . . . We have good reason to vote this Election Day . . . . Congress has absolutely no regard for American workers and families . . . . Congress is confident it can fool the voters again and return to Washington to conduct business as usual after November.

The letter also stated that the organization is "sending out 200,000 of these bumper stickers as part of our campaign to raise voter awareness. We are asking all . . . of our [members] to commit to get five friends to the polls this Election Day."

In addition, X and B made several communications over the radio concerning the same elections. X did not identify any specific candidate in any of these broadcasts. However, the general theme of these communications was that Congress was running the country poorly so the voters should make a change. Here is part of one radio commentary:

> The budget deal now being sold to the American people by the power brokers in Washington is a fraud . . . . I, for one, am fed up. I think it's high time for us voters to make some changes in Washington this November -- on Election Day.

In another commentary, B described Congress's justification for certain legislation as "INCREDIBLE. The mind boggles. This Election Day, it may well be time to remove your Congressman from that fantasy land on the Potomac." In a related commentary, B stated, "it's high time we cut Congress's allowance. I think a good many of them deserve to be thrown back into the private sector this Election Day."

In the year aa+1, X broadcast a radio commentary ("Candidate" commentary) at least three times in which B referred a certain Senator as being in the Presidential race, as being "full of angry rhetoric," as "promoting a . . . war," and as having a "failed" political and economic ideology.

During another commentary ("Bonfire" commentary), B quoted three Senators of a particular political party who opposed a Here is part of B's commentary:

> And here's what Senator D had to say: "If we are wrong and the American people want I assume those people who feel my vote was wrong will vote against me." End Quote. I guess we won't be seeing much of Senator D A good title for the might be: "Bonfire of the [particular political party]."

B announced, over the radio ("Resolution" commentary), the names of several members of Congress of a particular political party that did not vote for
Here is part of the commentary: "[Nearly all] Democrats and Republicans embraced this seemingly uncontroversial resolution. But seven [members of a particular political party] and one independent voted against the resolution. They were . . . . Four more [members of a particular political party] simply voted "present" -- rather than go on record as opposing the resolution. They were . . . . If these House members can survive this vote in they can survive anything."

The Service asked X for the dates that it broadcast several commentaries, including the ones referenced in the preceding paragraphs. X replied that it has incomplete information as to when these commentaries were broadcast. X states that some stations aired the commentaries immediately after production, while other stations might have carried the commentaries, if at all, weeks after production. Evidence in the administrative file indicates that X produced the "Candidate," "Bonfire," and "Resolution" commentaries

In a newsletter in the , X ran an article which asked, "Did Your Congressman Vote Against The article listed the names of U.S. Representatives that voted against the resolution with a reminder that the elections were coming up again in the The overwhelming majority of the Members listed were members of a certain political party. Similarly, another newsletter issue

printed the Senate vote on whether to confirm
with a request to "post this record on your refrigerator door for future reference." This article was preceded and accompanied with articles that strongly supported the nominee's confirmation.

In its September newsletter of the year aa, X commented on the ethical behavior of two members of Congress. One of the members was running for reelection that November. In this article, X clearly focused in on the conduct of the members, which it claimed to be unethical, and the failure of Congress to impose adequate sanctions. The article did not contain any reference to the upcoming election or refer to either member as a candidate.

Alleged Legislative Communications in the year aa

In its June newsletter of the year aa, X published an article discussing the funding of a particular federal agency, stating a position on whether it should be funded in the future, and requesting that readers sign an attached note of support for delivery to a Senator with the same position on the issue.

In July of the year aa, X sent a "house file" letter that asked the readers to sign letters addressed, and to be delivered by X, to the President advocating action with respect to certain budget legislation. Also, in July of the year aa, X published a three-paragraph article that criticized proposed opposing legislation pending in Congress. Furthermore, at least three radio commentaries criticized the budget legislation.

In an August "house file" mailing of the year aa, X asked its readers to urge Senator D,

In its July newsletter of the year aa, X published an article in which B recommended limiting the terms of U.S. Senators and Representatives to 12 years in office. X states that it mailed thousands of house file letters in the fall of the year aa asking its members "to sign petitions directed to their respective Governors urging the Governors to support efforts to limit terms for Congress." Two other house file letters mailed that year similarly advocated term limits. X also produced at least five radio commentaries in support of term limits.

Alleged Political Campaign Activities on Behalf of B

this political action committee was not affiliated or related to X at any time.

Alleged Campaign Against C

Two months prior to month bb of the year aa+1, X's board of directors met and decided to study, and write about,
The board indicated that the examination would focus
would, therefore, provide a great service to them. X's minutes indicate that B did not participate in this decision.
X claims that it did, however, consider whether this activity would personally benefit B. The Board, without an explanation, ultimately concluded that any benefit to B would be incidental to the educational purpose served.

That same month (month bb-2 of the year aa+1), B and X sent the following letter requesting support. B wrote "I need your help on our urgent new project here at X -- we are fighting to
In the letter, X stated that it started a new project to stop tax-funding of "political persecution" and to eliminate the office. The letter also stated X's objective to send one million petitions from its grassroots supporters to the President and every U.S. Congressman and Senator demanding
X concluded the letter by informing its readers that it had hired an attorney specializing in constitutional law

199907021

to develop an effective legal and political strategy to abolish the office of C.

X attached to the letter a memorandum from its constitutional attorney to B regarding

The memorandum contains several recommendations to achieve repeal, including: preparing a brochure for circulation to Members of Congress and other opinion leaders in the private sector to create a favorable climate for repeal; petitioning Congress or that requires an indefinite appropriation to pay all necessary C expenses; and supporting a proposal

In at least two other mass mailings, one in month bb-2 and the other in month bb-1, B and X asked its members to sign and mail enclosed post cards to their representatives in the Senate and the House. The post cards ask the legislators to repeal the C law. With the letter, X included a petition, for the reader's signature, asking the President to lobby Congress to repeal the law. The letter, post cards, and petition all contain arguments but contain no arguments in support of the law.
Another X mass mailing tells the reader that momentum is building

with a tear-off postcard to the President urging him to
The letter also requests donations to launch a massive offensive against

B says financial help is needed, partially, to recruit 100,000 citizens to X's grass roots campaign

In the bb-2/bb-1 issue of its newsletter, X included a front page article decrying

and discussing X's efforts to stop the funding of such The article points out that most observers disagree with

In the same article,

(1) form a commission of sympathetic Congressmen, public policy leaders and legal experts to investigate how to repeal

199907021

(2) support efforts in Congress

and

(3) petition the Attorney General to reinstate a law making members of Congress

In addition, X announced that it contracted with a prominent attorney to put together a comprehensive strategy to implement the plan. The newsletter also contains a two-page article by the attorney calling for the end One page of the newsletter highlighted statements by the trial judge suggesting that A letter from B, attached to the newsletter, was continuing even though continued prosecution against and urged X's readers to support In doing so, B spelled out X's plan to repeal the law and

The first article of the newsletter of the month bb in the year aa+1 informs the reader that several prominent members of Congress have joined X's project to dismantle the According to the article, a Member of Congress was a co-chair of the project and was instrumental in organizing a drive to deliver a multitude of petitions to the President asking him to push Congress In addition, the issue contained a two-page article On page five of the newsletter, X states that it is continuing B, in a letter attached to the newsletter, asks for tax-deductible gifts to support, in part, X's campaign

In the newsletter of the month bb+1, X announced that The newsletter also announced that thousands of Americans had sent petitions to X addressed to the President urging him to

X purchased the books directly from the publisher at the author's discount rate. No royalty was included in the price of the

144

books, B received no compensation as a result of the purchases, and the sale of books purchased by X did not count X says that it distributed the books because the contributors would find the book a persuasive inducement to contribute. According to X, the mailings that made use of the book as a premium generated substantial net income for X. X also favorably reviewed the book in the lead article of a newsletter.

Issue 1. Alleged political campaign intervention

Applicable Law:

Section 501(c)(3) of the Code provides, in part, that an organization is exempt from federal income tax if it is organized and operated for charitable and educational purposes, provided that it 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 1.501(c)(3)-1(c)(3)(iii) of the Income Tax Regulations provides that if an organization participates or intervenes, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office it is an "action" organization. An "action" organization is not operated exclusively for one or more exempt purposes, and therefore, cannot be exempt under section 501(c)(3) of the Code. The term "candidate for public office" means an individual who offers himself, or is proposed by others, as a contestant for an elective public office, whether such office be national, State, or local. 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 candidate.

Rev. Rul. 78-248, 1978-1 C.B. 154, describes four different organizations involved in voter education activities by publishing a voter guide. The revenue ruling holds that an organization annually preparing and making generally available to the public a compilation of voting records of all Members of Congress on major legislative issues involving a wide range of subjects, containing no editorial opinion, and structuring the publication so as not to imply approval or disapproval of any Members or their voting records, is not engaged in political activity within the meaning of section 501(c)(3) of

the Code. An organization sending a questionnaire to all candidates for governor in a certain State, soliciting a brief statement of candidate's position on a wide variety of issues, and publishing the responses in a voters guide generally available to the public that does not evidence a bias or preference with respect to the views of any candidate or group of candidates is not engaged in political activity within the meaning of section 501(c)(3). However, when a voters guide is distributed during an election campaign, with some questions evidencing a bias on certain issues, the revenue ruling holds that the organization is participating in a political campaign in contravention of the provisions of section 501(c)(3) and is disqualified from exemption under that section. In the fourth situation, where an organization publishes a voter guide which is a compilation of incumbents' voting records on a particular issue (land conservation in this case) and is widely distributed among the electorate during an election campaign, the organization is participating in a political campaign in contravention of the provisions of section 501(c)(3) and is disqualified from exemption under section 501(c)(3) even though the voting guide contains no express statements in support of or in opposition to any candidate.

Rev. Rul. 80-282, 1980-2 C.B. 178, amplifies the holding of Rev. Rul. 78-248 with regard to the situations determined to be in contravention of the provisions of section 501(c)(3) of the Code. The revenue ruling describes an organization that is concerned with a broad range of issues of important social interest and publishes voting records with an indication of which position is the position of the organization. The revenue ruling states that when the voting records of all incumbents are presented, candidates for reelection are not identified, no comment is made on an individual's overall qualifications for public office, no statement expressly or impliedly endorsing or rejecting any incumbent as a candidate for public office is offered, no comparison to potential political opponents is made, and the organization points out the inherent limitations of judging the qualifications of any incumbent on the basis of certain selected votes by stating the need to consider such unrecorded matters as performance on subcommittees and constituent service, other factors must be examined to determine whether in the final analysis the organization is participating or intervening in a political campaign. The revenue ruling holds pertinent the additional facts that the organization does not widely distribute its compilation of incumbents' voting records, but rather distributes to its normal readership who number only a few thousand nationwide (resulting in a very small distribution in any particular state or congressional district), and no

141

attempt is made to target the publication toward particular areas in which elections are occurring nor to time the date of publication to coincide with an election campaign, distinguishes the organization from the organizations described adversely in Rev. Rul. 78-248, and concluded it is not considered to be engaging in prohibited political campaign activity.

Rev. Rul. 86-95, 1986-2 C.B. 73, describes an organization engaged in the conduct of public forums involving qualified Congressional candidates. The revenue ruling states that the presentation of public forums or debates is a recognized method of educating the public. Providing a forum for candidates is not in and of itself, prohibited political activity. However, a forum for candidates could be operated in a manner that would show a bias or preference for or against a particular candidate. This could be done, for example, through biased questioning procedures. On the other hand, a forum held for the purpose of educating and informing the voters, which provides fair and impartial treatment of candidates, and which does not promote or advance one candidate over another, would not constitute participation or intervention in any political campaign on behalf of or in opposition to any candidate for public office.

Rev. Rul. 86-95 additionally provides that the facts and circumstances of the revenue ruling establish that both the format and content of the proposed forums will be presented in a neutral manner. All legally qualified congressional candidates will be invited to participate in the forum. The questions will be prepared and presented by a non-partisan, independent panel. The topics discussed will cover a broad range of issues of interest to the public, notwithstanding that the issues discussed may include issues of particular importance to the organization's members. Each candidate will receive an equal opportunity to present his or her views on each of the issues discussed. Finally, the moderator selected by the organization will not comment on the questions or otherwise make comments that imply approval or disapproval of any of the candidates. In view of these facts, the organization was not considered to be engaged in prohibited political activity.

In Christian Echoes Nat. Ministry, Inc. v. U.S., 470 F.2d 849 (10th Cir. 1972), the court held that an organization intervened in political campaigns even though it did not formally endorse specific candidates. The organization, generally, used its publications and broadcasts to attack candidates and incumbents who it considered too liberal. The court concluded by stating that "these attempts to elect or defeat certain political

leaders reflected Christian Echoes' objective to change the composition of the federal government."

In United States v. Dykema, 666 F.2d 1096 (7th Cir. 1981) cert. denied, 456 U.S. 983 (1982), the court stated that exemption is lost by participation in any political campaign on behalf of any candidate for public office. It need not form a substantial part of the organization's activities.

In Association of the Bar of the City of New York v. Commissioner, 858 F.2d 876 (2d Cir. 1988), cert. denied, 490 U.S. 1030 (1989), the Court found that the organization's practice of rating candidates for elective judicial offices constituted participation or intervention in a political campaign. The Court stated that "representation that a candidate is a lawyer or a judge is a readily provable statement of objective fact. A representation that a candidate is able and has proper character and temperament is simply a subjective expression of opinion." The Court also stated that "the Tax Court recognized quite correctly that "ratings, by their very nature, necessarily will reflect the philosophy of the organization conducting such activities, and they are simply expressions of professional opinion concerning the candidates' qualifications." The Court further stated that "[p]ublished expressions of such opinion, made with an eye toward imminent elections, are a far cry from the revenue rulings upon which the Association relies." The Court, citing Rev. Rul. 80-282, observed that the ratings of candidates were "published with the hope that they will have an impact on the voter." The effort, and not the effect, constituted intervention in a political campaign. Finally, the court emphasized that section 501(c)(3) prohibits any "degree of support for an individual's candidacy for public office" and that "exemption is lost by participation in any political campaign on behalf of any candidate for public office."

Rationale:

The prohibition against participation or intervention in a political campaign is absolute. Therefore, it is not material that the intervention is an insubstantial part of an organization's activities or that other activities would, by themselves, support exemption under section 501(c)(3) of the Code. See United States v. Dykema, supra and Association of the Bar of the City of New York v. Commissioner, supra.

X claims that none of its newsletters, radio commentaries, "house file" mailings and its "prospective" mailings contained any material which supported or opposed any candidacy for public

office. Additionally, X asserts that it has never rated candidates for public office, nor ever expressed opinions as to the qualifications of any candidates for political office. X acknowledges that B referred to a candidate for President in the "Candidate" commentary in the year aa+1. However, X maintains that the commentary was not on behalf of or in opposition to his candidacy and that the candidacy was merely incidental to the issue that was being discussed.

For purposes of section 501(c)(3), intervention in a political campaign may be direct or indirect. A section 501(c)(3) organization cannot, explicitly or implicitly, endorse or oppose a candidate for public office. However, prohibited intervention may occur even if an organization does not explicitly endorse or oppose a candidate.

X made several communications that referred to an upcoming election or a candidate for public office. Although X did not expressly campaign for candidates, and even though it often did not name specific candidates, we must examine each communication individually to determine whether the communication constituted political campaign intervention within the meaning of section 501(c)(3).

A few days before the Congressional elections of the year aa, X distributed its "I'm Fed Up with Congress" communication. The communication criticized Congress, stating that the legislative body had "no regard for American workers." In addition, X urged its members to let Congress know how they feel by voting and encouraging others to vote.

An organization participates or intervenes in a political campaign if it publishes or distributes a statement on behalf of or in opposition to any candidate. Some voter education is a permitted activity, however, if it is conducted in a nonpartisan manner. See Rev. Rul 78-248, supra. Although the communication refers to no specific candidate, this question presents a close call. A communication may attempt to influence a political campaign without naming a specific candidate. Such communication, however, should contain some relatively clear directive that enables the recipient to know the organization's position on a specific candidate or a specific slate of candidates. The "I'm Fed Up With Congress" communication does not clearly indicate whether X supports or opposes a specific candidate or slate of candidates. While it expresses a general dissatisfaction with Congress, it does not rise to the level of expressing a position on any individual candidate or candidates. This communication could be viewed as focusing attention on the

perceived abuses of the Congress or as a way to send a message of disgust to members of Congress. The fact that no statement was made on an individual's qualifications, or lack thereof, for public office supports this view. Moreover, not all members of Congress were candidates for office in the elections of the year aa. This communication does not clearly support or oppose any single candidate or identifiable group of candidates (such as by party or a geographic location). Additionally, there is no indication in the file that the letter was sent only to specific states or congressional districts in which congressional elections targeted by the organization were occurring. Our determination with respect to this communication might be different if evidence in the file indicated that the communication was aimed at a specific candidate, specific candidates, or a specific ticket of candidates. However, the file lacks such evidence and there is no other evidence in the file that any other facts and circumstances existed indicating the letter was an intervention in a political campaign. Consequently, there is insufficient evidence to conclude that this communication constituted campaign intervention.

In the June issue of its newsletter in the year aa+1, X published a list of The list was accompanied by a brief statement which provided, in part: "If your Congressman is on this list, you might want to give him (or her) a call to express your views on the subject . . . . And don't forget . . . Articles, in previous issues and this issue, Another column in that June publication, entitled contained quotations from several Senators who opposed the resolution.

By listing only the members who voted against the resolution, the communication implies disapproval of their vote. Furthermore, this disapproval is aggravated by reminding the readers of the the statements of certain Senators during the debates, and other articles that show X's position on the resolution. However, the publication occurred in June of the year in relatively close proximity to the legislative vote. The Congressional elections were not scheduled until November of the There is no evidence in the administrative file that any member referenced on the list or the accompanying article was a candidate for public office on the date of distribution. If this communication had been published during the congressional campaign rather than almost a year and a half before the next election, it is more likely that we would consider it an intervention. Although, even in those

circumstances, some consideration of whether non-candidates were included and the type of distribution, as well as the exact language connecting it to the election would be important in making a final determination. However, because there is no evidence in the file that indicates that the distribution occurred in the midst of a political campaign, or that any member was a candidate for public office at that time, the June publication of the year aa+1 does not constitute prohibited campaign intervention.

In another issue of the year X's newsletter published

X stated that the readers should post the list on their "refrigerator door for future reference." On the same page of the newsletter, X included a letter from the Chairman of the Judiciary Committee thanking B for forwarding petitions in support of the nominee. Again, this communication does not constitute campaign intervention. At the time of publication, there is no evidence in the file that any Senator on the voting list was a candidate for reelection. Consequently, the same analysis that applies to the "resolution" voting list communication in June of the year aa+1 applies here as well. Also, as with the resolution voting list communication, there are no other facts and circumstances in the file indicating the communication is an intervention in a political campaign.

Similarly, the radio commentary that names several House members, who failed to vote for a resolution and suggesting they be voted out of office in the elections of the year aa+2, does not constitute political intervention. At the time of the communication, which was produced in the year aa+1 in close proximity of the legislative vote discussed in the communication, there is no evidence in the file that any of the members were candidates for reelection. In this case as well no other facts and circumstances in the file indicate that the communication is an intervention in a political campaign.

In autumn of the year aa+1, B narrated a radio commentary as spokesman for X criticizing an announced candidate for the Presidential nomination of a particular political party. During this broadcast, B notes that the person is "now in the Presidential race" and proclaims that the candidate Moreover, B claims the candidate's political/economic ideology is a failed ideology.

Campaign intervention includes the making of oral statements in opposition to a candidate for public office. Section 1.501(c)(3)-1(c)(3) of the regulations. The radio commentary

began by announcing that the individual had entered the race for the Presidential nomination. The individual held himself out "as a contestant for elective public office." Id. In Association of the Bar of the City of New York, supra, the court stated, "a campaign for public office in a public election merely and simply means running for office, or candidate for office, as the word is used in common parlance and as it is understood by the man in the street." Id. at 880. The presidential contender announced his candidacy no more than five months before State primary elections were to be held. In this case, the radio commentary referred to an announced candidate for public office within reasonably close proximity to major events in the Presidential campaign.

Intervention in a political campaign is to be determined from all the facts and circumstances of a case. See Rev. Rul 78-248, supra. In Christian Echoes Nat. Ministry, Inc., supra, an organization was found to be engaging in prohibited campaign activity, even though it did not formally endorse specific candidates but used its publications and broadcasts to attack some candidates and support others. Clearly, an organization may not consistently criticize or evaluate the qualifications of candidates in an upcoming election. See Association of the Bar of the City of New York, supra, and Rev. Rul 67-71, supra.

X acknowledges that the commentary discussed an issue raised by a presidential candidate. However, X maintains that the individual's candidacy was incidental to the commentary's message. The commentary, according to X, was an educational criticism of an economic issue raised by the candidate.

We do not question the educational content of the broadcast. While the commentary may have been a response to the candidate's attack on national economic policies, it was also a prohibited campaign intervention. The phrase "on behalf of or in opposition to" refers not to the motive of the participant but the reasonable consequences of his or her activities. In this case, it appears that the broadcast occurred within months of the first scheduled primary of the Presidential campaign during a time in which extensive campaigning was already occurring. In addition, comments on the views of a Presidential candidate which name the candidate, mention his or her candidacy for the Presidency, and explicitly favor or oppose the candidate's views violate the proscription against political campaign intervention as set forth in section 1.501(c)(3)-1(c)(3)(iii) of the regulations. Therefore, we conclude that this radio commentary consisted of an intervention in opposition to a candidate for public office.

Issue 2. Action organization

15

Applicable Law:

Section 1.501(c)(3)-1(c)(3)(iv) of the regulations provides that an organization is an action organization if it has the following two characteristics: (a) its main or primary objective or objectives (as distinguished from its incidental or secondary objectives) may be attained only by legislation or a defeat of proposed legislation; and (b) it advocates or, or campaigns for, the attainment of such main or primary objective or objectives as distinguished from engaging in non-partisan analysis, study or research and making the results thereof available to the public. In determining whether an organization has such characteristics, all the surrounding facts and circumstances, including the articles and all the activities of the organization, are to be considered.

Rationale:

An organization is considered an "action" organization if its "main or primary objective or objectives (as distinguished from its incidental or secondary objectives) may be attained only by legislation or a defeat of proposed legislation and it advocates and campaigns for, the attainment of such main or primary objective or objectives as distinguished from engaging in nonpartisan analysis, study or research and making the results thereof available to the public." Section 1.501(c)(3)-1(c)(3)(iv) of the regulations. None of X's stated purposes in its articles of incorporation require the attainment of legislation to be accomplished. X's primary objective is to educate the public on a wide variety of public policy issues from a perspective not widely available from other sources. Many of X's topics did not concern legislation,

In our opinion, the primary objective of X was the education of the public on a wide range of issues, a number of which did not concern legislation. Consequently, we cannot say that X's objectives may only be attained by legislation or the defeat of proposed legislation.

Issue 3. Alleged attempts to influence legislation

Applicable Law:

Section 501(c)(3) of the Code provides, in part, for the exemption from federal income tax for corporations organized and operated exclusively for charitable, scientific or educational purposes, provided no part of the corporation's net earnings inures to the benefit of any private shareholder or individual and no substantial part of its activities is carrying on

propaganda or otherwise attempting to influence legislation, except as provided in subsection (h).

Section 501(h) of the Code provides that certain organizations exempt from federal income tax as organizations described in section 501(c) may elect to have a percentage of expenditures test apply for determining whether a substantial part of the organization's activities is attempting to influence legislation. In addition, nothing in this subsection or section 4911 shall be construed to affect the interpretation of the phrase, "no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation," under subsection (c)(3).

Section 4911(a) of the Code imposes a tax on the excess lobbying expenditures of organizations which make an election under section 501(h).

Section 4911(d)(1) of the Code provides that "influencing legislation" means (1) any attempt to influence legislation through an attempt to affect the opinions of the general public or any segment thereof (grassroots lobbying), and (2) any attempt to influence legislation through communication with any member or employee of a legislative body, or with any government official or employee who may participate in the formulation of the legislation (direct lobbying).

Section 4911(d)(2)(D) of the Code provides that, with certain exceptions, the term "influencing legislation" does not include communications between the organization and its bona fide members with respect to legislation or proposed legislation of direct interest to the organization and such members.

Section 4911(d)(3)(A) of the Code provides that communications between the organization and its bona fide members that directly encourage such member to engage in direct lobbying within the meaning section 4911(d)(1) shall be considered to be direct lobbying by the organization.

Section 4911(d)(3)(B) of the Code provides that communications between the organization and its bona fide members that directly encourage such member to encourage persons other than members to engage in direct or grassroots lobbying within the meaning section 4911(d)(1) shall be considered to be grassroots lobbying by the organization.

Section 1.501(c)(3)-1(c)(3)(ii) of the regulations provides that an organization is an "action" organization if a substantial

15

part of its activities is attempting to influence legislation by propaganda or otherwise. For this purpose, an organization will be regarded as attempting to influence legislation if the organization: (a) contacts, or urges the public to contact, members of a legislative body for the purpose of proposing, supporting, or opposing legislation; or (b) advocates the adoption or rejection of legislation.

Section 1.501(c)(3)-1(c)(3)(ii) of the regulations further provides that the term "legislation", as used in this section, includes action by the Congress, by any State legislature, by any local council or similar governing body, or by the public in referendum, initiative, constitutional amendment, or similar procedure. An organization will not fail to meet the operational test merely because it advocates, as an insubstantial part of it activities, the adoption or rejection of legislation. An organization for which the expenditure test election of section 501(h) is in effect for a taxable year will not be considered an "action" organization by reason of this paragraph (c)(3)(ii) for that year if it is not denied exemption from taxation under section 501(a) by reason of section 501(h).

Section 56.4911-2(b)(1)(i) of the regulations provides that a direct lobbying communication is any attempt to influence legislation through communication with: (1) any member or employee of a legislative body; or (2) any other government official or employee who may participate in the formulation of legislation, but only if the principal purpose of the communication is to influence legislation. A communication with a legislator or government official will be treated as a direct lobbying communication only if the communication refers to "specific legislation," and reflects a view on the legislation.

Section 56.4911-2(b)(2) of the regulations defines a "grass roots lobbying communication" as any communication that (1) refers to specific legislation, (2) reflects a view on such legislation, and (3) encourages the recipient of the communication to take action with respect to such legislation.

Section 56.4911-2(b)(2)(iii) of the regulations provides that a communication encourages a recipient to take action if it:

(A) states that the recipient should contact a legislator, or an employee of a legislative body, or should contact any other government official or employee who may participate in the formulation of legislation (but only if the principal purpose of

199907021

urging contact with the government official or employee is to influence legislation); or

(B) states the address, telephone number or similar information of a legislator or an employee of a legislative body; or

(C) provides a petition, tear-off postcard or similar material for the recipient to communicate his or her views to a legislator or to any other government official or employee who may participate in the formulation of legislation (but only if the principal purpose of so facilitating contact with the government official or employee is to influence legislation); or

(D) specifically identifies one or more legislators who will vote on the legislation as: opposing the communication's views with respect to the legislation; being undecided with respect to the legislation; being the recipient's representative in the legislature; or being a member of the legislative committee that will consider the legislation. (Encouraging the recipient to take action under this fourth category does not include naming the main sponsor(s) of the legislation for purposes of identifying the legislation.)

Section 56.4911-2(b)(2)(iv) of the regulations treats communications that provide any one of the items described in the paragraphs (b)(2)(iii) (A) through (C) as communications that "directly encourage" action with respect to legislation. A communication which merely identifies legislators that will vote on legislation or that are members of the committee considering legislation does not directly encourage action. Such communication is be treated as grass roots lobbying only if it is not nonpartisan analysis, study or research.

Section 56.4911-2(d)(i) of the regulations states that "legislation" includes any act, bill, resolution, or similar action of Congress, a state legislature or a local governing body. An action by the public in a referendum, constitutional amendment, initiative or similar procedure, under the regulation, is also "legislation." "Legislation" encompasses a proposed treaty required to be submitted by the President to the Senate for its advice and consent as soon as the President's representative begins to negotiate the terms of the treaty.

Section 56.4911-2(d)(ii) of the regulations states that "specific legislation" includes both legislation that has already

been introduced in a legislative body and a specific legislative proposal that the organization either supports or opposes.

Notice 88-76, 1988-2 C.B. 392, provides that attempting to influence the Senate confirmation of a federal judicial nominee constitutes attempting to influence legislation but not political intervention for purposes of section 501(c)(3) of the Code.

Seasongood v. Commissioner, 227 F.2d 907 (6th Cir. 1955) held organization that devoted less than 5 percent of its time and effort to political activities did not violate the substantial part test (the court did not appear to distinguish between the organization's legislative and political campaign activities). In that case the organization endorsed candidates for political office and supported and in some cases opposed legislation. The legislative efforts primarily consisted of the organization's members contacting legislators. Most of these efforts did not require the use of organization funds. The organization put forth uncontested testimony that its so called political activities were less than 5 percent of its total activities.

In Kuper v. Commissioner, 332 F.2d 565 (2d Cir. 1964) the court held that formulating, discussing, and agreeing upon positions was part of a program to influence legislation, including those activities that ultimately did not lead to direct legislative action in the end. In the case, an insignificant amount of "women hours" of the organization consisted of writing, telegraphing or telephoning representatives in Congress and the state legislature, testifying before legislative committees and similar direct efforts to influence legislation. However, a substantial portion of those hours were devoted to formulating, discussing and agreeing upon positions, if any, to be taken with respect to advocating or opposing legislative matters.

Christian Echoes Nat. Ministry, Inc., supra, upheld the Service's revocation of a ministry organization's tax exemption because, in part, it found that the organization engaged in substantial lobbying activities. The court decided that an attempt to influence legislation need not be directed to specific legislation pending before Congress. On the contrary, any indirect campaign to mold public opinion, according to the court, could constitute an attempt to influence legislation. The court listed over twenty examples of the organization's lobbying efforts. The court, however, refused to apply a pure percentage test to determine whether an organization's lobbying activities were substantial. Instead, the court opted to balance "the organization's activities in relation to its objectives and

circumstances and found promoting through legislation desirable governmental policies to be an essential part of the organization's program. The court found that the organization devoted a substantial part of its activities to lobbying. The court supported this conclusion by citing hundreds of exhibits evidencing attempts to influence legislation.

Haswell v. United States, 500 F.2d 1133 (Ct.Cl. 1974) held that where an organization applied approximately 16 to 20 percent of its total expenditures toward political activities during the years 1967 and 1968, its political activities were more than an insubstantial part of its overall activities, and therefore the organization did not qualify for tax exemption under section 501(c)(3).

Rationale:

An organization that has substantial activities which constitute the carrying on of propaganda, or otherwise attempting, to influence legislation is barred from qualifying as an organization described in section 501(c)(3).

X made an election under section 501(h) for its tax year of aa+1. Consequently, during that year it was subject to the expenditure test of section 501(h) and section 4911 for the purpose of determining whether a substantial part of its activities consisted of attempting to influence legislation. X claims that it carefully monitored its compliance with sections 501(h) and 4911, and reported the cost of all lobbying communications. There is no substantial evidence in the file that challenges X's contention. Based on the information in the file, we conclude that X appropriately reported its lobbying expenditures for its tax year of aa+1 and a substantial part of its activities did not consist of carrying on propaganda, or otherwise attempting, to influence legislation under section 501(h).

During the year aa, X did not made an election under section 501(h). The information contained in the file indicates that X made several communications in the year aa that constitute attempts to influence legislation. However, these communications, when compared to X's other charitable and educational activities, do not appear to be substantial. Moreover, the file lacks conclusive evidence as to the amount of such expenditures or of other measures, such as man-hours, to conclude that X's legislative efforts were substantial. Accordingly, we conclude that these communications were an insubstantial part of X's overall activities in the year aa.

15

Issues 4 through 6: Political intervention, substantial nonexempt purpose and private benefit

Applicable Law:

Section 501(c)(3) of the Code provides that an organization must operate exclusively for exempt purposes, and must not participate or intervene in (including the publishing or distribution of statements) any political campaign on behalf of (or in opposition to) any candidate for public office.

Section 1.501(c)(3)-1(c)(1) of the regulations provides that an organization will be regarded as operated exclusively for one or more exempt purposes only if it engages primarily in activities which accomplish one or more such exempt purposes specified in section 501(c)(3). An organization will not be so regarded if more than an insubstantial part of its activities is not in furtherance of an exempt purpose.

Section 1.501(c)(3)-1(c)(3)(iii) of the regulations provides that the term candidate for public office means an individual who offers himself, or is proposed by others, as a contestant for elective public office.

Section 1.501(c)(3)-1(d)(1)(ii) of the regulations provides that an organization is not organized or operated exclusively for exempt purposes under section 501(c)(3) of the Code unless it serves a public rather than a private interest. This, an organization must establish that it is not organized or operated for the benefit of private interests, such as designated individuals, the creator or his family, shareholders of the organization, or persons controlled by such private interests.

Rev. Rul. 80-302, 1980-2 C.B. 182, held that a genealogical society whose primary activity is the compilation of data for members of a particular family does not qualify for exemption from federal income tax under section 501(c)(3) of the Code.

Better Business Bureau v. United States, 326 U.S. 279 (1945), held that the presence of a single substantial nonexempt purpose precludes exempt status for an organization, regardless of the number or importance of the exempt purposes.

The Calloway Family Association, Inc. v. Commissioner, 71 T.C. 340 (1978) held that a family association formed as a nonprofit organization to study immigration to and migration within the United States by focussing on its own family history and genealogy does not qualify for exemption under section

501(c)(3) of the Code. The association's activities included researching the genealogy of its members for the ultimate purpose of publishing a family history. The court stated that the association's family genealogical activities were not insubstantial and were not in furtherance of an exempt purpose. Rather, they served the private interests of the members. Thus, the association was not operated exclusively for exempt purposes.

Benjamine Price Genealogical Association v. Internal Revenue Service, 79 U.S.T.C. ¶9361 (D.D.C. 1979), held that private purposes are served by an organization doing genealogical research concerning ancestors and descendants of one person and disseminating the results primarily to supporters.

American Campaign Academy v. Commissioner, 92 T.C. 1053 (1989) provided that actual purposes are not necessarily limited to those stated in the organizing documents.

In Save the Free Enterprise System, Inc. v. Commissioner, T.C.M. 1981-388, the court upheld denial of exemption to an organization that had a substantial purpose to advance its founder's attack on various institutions which he claimed interfered with free enterprise, reasoning that the organization served the founder's private interest.

Rationale:

Issue 4. Alleged political campaign activities of behalf of B

The key District asserts that X engaged in a political campaign on behalf of B. In support of its position the key District points to

In addition, the key District provided evidence of three political committees that supposedly supported B's candidacy.

X also cites Federal Election Campaign law to support its position. Under such law, a political committee cannot accept contributions or make expenditures on behalf of a candidate before it receives written authorization that it is either the candidate's principal campaign committee or an authorized committee. 11 C.F.R. §§ 101.1(a), (b), 101.12(a), 101.13(a)(1).

The information in the file supports X's position. There is not sufficient information in the file

or by others to a

substantial extent, during the years under examination. Individuals, apparently unconnected to B, formed committees to in the year aa-2. There is no record in the file that indicates that B approved, or even had any knowledge of, these committees. In fact, there was considerable doubt could legally run for public office.

There is no evidence in the file that any close associates of B were involved in these committees or any other organization that may have suggested Additionally, there is no evidence in the file

Finally, the evidence in the file is insufficient to conclude that X in the years aa or aa+1 engaged in any effort Therefore, we conclude that X did not engage in a political campaign

Issue 5.

An organization fails to be operated exclusively for exempt purposes if it has a single nonexempt purpose that is substantial in nature. See Better Business Bureau v. United States, supra. This is true regardless of the number or importance of the organization's charitable purposes. See Id. An organization is not operated exclusively for an exempt purpose if it more than incidently serves a private interest. See section 1.501(c)(3)-1(d)(1)(ii) of the regulations. It is the burden of the organization to establish that it is not operated in a manner that benefits designated individuals, its creator, shareholders, or other persons similarly connected to the organization.

Therefore, an organization that serves a public purpose but also serves a private interest other than incidentally does not qualify for exempt status under section 501(c)(3). Incidental, in this context, has both qualitative and quantitative connotations. The qualitative component requires the private benefit to be a necessary concomitant of the activity which benefits the public at large. The private benefit is incidental in the qualitative sense if the benefit to the public cannot be achieved without necessarily benefitting certain private individuals.

Thus, an activity may provide an indirect benefit to private interests and be treated as incidental from a qualitative

16

standpoint. However, if the activity provides a substantial benefit to private interests, quantitatively, the organization transgresses the limitations of section 501(c)(3). The substantiality of the private benefit is measured in the context of the overall public benefit conferred by the activities. On the other hand, if the activity provides a direct benefit to private interests, it does not matter that the benefit may be quantitatively insubstantial; the direct private benefit is deemed inappropriate to an exclusively public charitable purpose and the organization cannot be exempt under section 501(c)(3).

Despite X's claim, we believe that one goal of X's activities in this regard was to During the time that X disseminated most of its communications concerning C, there was a reasonable likelihood that other individuals would continue. In fact, in one letter asking the public to contact their legislators

In a letter attached to the bb+1 newsletter of the year aa+1, . The same gang that went after me is now out to destroy F. Your help is <u>again</u> needed!" The timing of the communications and B's private, personal purposes predominate.

X claims that it decided to examine the C issue in month bb-2 of the year aa+1. However, it immediately began its campaign to mold public interest against the office and the law. In the bb-2/bb-1 newsletter of that year, the lead article and another article were devoted to the campaign. The newsletter also contained a two-page statement from This newsletter was followed by the edition of

162

month bb which contained four articles, editorials or other items that opposed the C law and mentioned
Likewise, the bb+1 issue contained three items and the bb+3 issue contained another concerning In summation, the newsletters of the year aa+1 consisted of 63 total pages. Articles and other items voicing opposition to the accounted for 18 pages, or over 28% of the total newsletter pages published that year.

In addition, X sent out 15 "house file" mailings to its members during the year aa+1. X's charitable activities were the subject of 7 of these mailings. The remaining 8 were devoted to public policy issues. Of these 8 mailings, 2 letters were devoted entirely to abolishing
and 2 other letters, while devoted to another topic, voiced X's position and reported on its progress Based on these numbers, we conclude that 20% of X's "house file" mailings put forth its opinion concerning This percentage increases to over 37% if only the mailings requiring public policy research is taken into account. Also in the year aa+1, X distributed 8 "prospect" mailings. These mailings required public policy research on 4 topics. Based on these assumptions, 25% of X's public policy research in connection with the prospect file mailings concerned
Approximately 12.5% of X's expenses incurred in disseminating its "prospect file" mailings were in connection

Although making such communications might have served an educational purpose in part, it was not an exempt activity, because the activity directly served the private interest of X's President, B. See The Calloway Family Association, Inc., supra. The primary reason for this activity appears to be that C was involved in an investigation of B for activities occurring long before Consequently, we think the advocacy communications against although they may have benefitted the public, provided more than incidental private benefit to B in the qualitative sense. Consequently, we believe, even if the activity is not more than incidental in the quantitative sense, that this activity disqualifies X for exempt status under section 501(c)(3).

However, we believe this activity was more than incidental in the quantitative sense as well. Based on our review of the newsletters, the "house file" and "prospect file" mailings and the radio commentaries, we estimate that approximately 30% of X's public policy research expenditures in the year aa+1, 20% of X's public information expenditures, and 9% of X's total program

service expenditures for its aa+1 year were in connection with the C issue.

Issue 6. Mailing list and book agreements

An organization described in section 501(c)(3) may provide services or assets to other parties including its officers without violating either the inurement or private benefit tests. However, the organization must receive fair market/rental value for the assets transferred and arm's-length compensation for services provided.

There is no information in the file that suggests that X paid more than fair market value Moreover, there is no information that shows that B received more than insubstantial benefits on account of the transaction. Of particular importance with respect to the book distribution is the fact that

Accordingly, based on the facts currently in the administrative file in this specific case, we are unable to conclude that the book arrangement produced inurement or private benefit to B, within the meaning of sections 1.501(c)(3)-1(c)(1), -1(c)(2), and -1(d)(1)(ii) of the regulations.

Issue 7. Whether X's communications were educational

Applicable Law:

Section 1.501(c)(3)-1(d)(3)(i) of the regulations provides that the term "educational" relates to--

(a) The instruction or training of the individual for the purpose of improving or developing his capabilities; or
(b) The instruction of the public on subjects useful to the individual and beneficial to the community.

An organization may be educational even though it advocates a particular position or viewpoint so long as it presents a sufficiently full and fair exposition of the pertinent facts as to permit an individual or the public to form an independent opinion or conclusion. On the other hand, an organization is not educational if its principal function is the mere presentation of unsupported opinion.

Rev. Proc. 86-43, 1986-2 C.B. 729, stated the criteria used to determine whether an organization's advocacy of a particular viewpoint or position is educational under sections 501(c)(3) of

the Code and 1.501(c)(3)-1(d)(3) of the regulations. Although the Service renders no judgment as to the viewpoint, the Service will look to the method used by the organization to develop and present its views. The method is not educational if it fails to provide a factual foundation for the viewpoint being advocated, or a development from the relevant facts that would materially aid a listener or reader in a learning process. The presence of any of the following factors in the presentations made by an organization is indicative that the method used by the organization to advocate its viewpoints is not educational:

1. The presentation of viewpoints unsupported by facts is a significant portion of the organization's communications.

2. The facts that purport to support the viewpoints are distorted.

3. The organization's presentations make substantial use of inflammatory and disparaging terms and express conclusions more on the basis of strong emotional feelings than of objective evaluations.

4. The approach used in the organization's presentations is not aimed at developing an understanding on the part of the intended audience or readership because it does not consider their background or training in the subject matter.

There may be exceptional circumstances, however, where an organization's advocacy may be educational even if one or more of the listed factors are present. The Service will look to all the facts and circumstances to determine whether an organization may be considered educational despite the presence of one or more of such factors. Even if the organization's advocacy is educational, the organization must still meet all other requirements for exemption under section 501(c)(3), including the restrictions on influencing legislation and political campaigning.

In Big Mama Rag, Inc. v. United States, 631 F.2d 1030 (D.C. Cir. 1980), the court ruled that the "full and fair exposition" requirement of the section 1.501(c)(3)-1(d)(3) educational regulation was unconstitutional because the standard was vague. The organization in that case published material intended to advance the cause of the women's movement. The Service determined that the organization did not meet the educational criteria under section 501(c)(3) because it refused to publish

any items it considered damaging to its cause. Id. (emphasis added). Therefore, the Service determined, and the District Court agreed, that the organization did not present a sufficiently full and fair exposition of the pertinent facts as to permit an individual or the public to form an independent opinion or conclusion as set forth in the regulation. In overturning the Service's determination, the D.C. Circuit stated that "[a]pplications for tax exemption must be evaluated, however, on the basis of criteria capable of neutral application. The standards may not be so imprecise that they afford latitude to the individual IRS officials to pass judgment on the content and quality of an applicants views and goals and therefore to discriminate against those engaged in protected first Amendment activities."

In National Alliance v. United States, 710 F.2d 868 (D.C. Cir. 1983), the court upheld the Service's denial of an organization's exemption under section 501(c)(3) of the Code as educational. The organization published a monthly newsletter and membership bulletin, organized lectures and meetings, issued occasional leaflets, and distributed books, all for the stated purpose of arousing in white Americans of European ancestry "an understanding of and a pride in their racial and cultural heritage and an awareness of the present dangers to that heritage." The newsletter's general theme was that "non-whites" are inferior to white Americans of European ancestry and that Jews control the media and thus cause government policy to be harmful to the interests of white Americans of European ancestry. The Service cited the "methodology" test (later published in Rev. Proc. 86-43) as its test to determine whether the organization's activities were educational. The court reasoned that although the organization cited certain purported facts in support of its views (e.g., crimes committed by blacks), there was no reasoned link between the facts cited and the conclusions asserted by the organization. The court distinguished Big Mama Rag on the ground that the vague test set forth in the regulations posed a real risk of arbitrary enforcement, and the organization's activities in Big Mama Rag could have been found educational within some reasonable interpretation of the term. Although the court did not reach the question of constitutionality of the methodology test, it did note that the test "tend[s] toward ensuring that the educational exemption be restricted to material which substantially helps a reader or listener in a learning process." The court also noted that the application of this test reduced the vagueness found in Big Mama Rag.

In Nationalist Movement v. Commissioner, 102 T.C. 558 (1994), affd. 37 F.3d 216 (5th Cir. 1994), cert. denied, 513 U.S.

16.

1192 (1995), the Tax Court upheld the Service's denial of section 501(c)(3) status to an organization on the grounds of failure to operate exclusively for charitable or educational purposes. The organization advocated a "pro-majority" philosophy, which generally favored those Americans who are white, Christian, English-speaking, and of northern European descent. The organization's membership application stated as follows:

> I apply for membership in The Nationalist Movement vowing freedom as the highest virtue, America as the superlative nation, Christianity as the consummate religion, social justice as the noblest pursuit, English as the premier language, the White race as the supreme civilizer, work as the foremost standard and communism as the paramount foe.

With respect to charitable purposes, the court held that the organization failed to prove that its social service counseling and legal activities furthered charitable purposes. With respect to educational purposes, the court held that Rev. Proc. 86-43 was not unconstitutionally vague or overbroad, on its face or as applied; that the organization's newsletter met three of the four criteria of the Methodology Test of Rev. Proc. 86-43 and therefore was not educational; and that the organization failed to show that its treatment was different from that of similarly situated organizations in violation of its due process and equal protection rights. However, the court held that the organization's operations did not privately benefit the founder by providing him a forum to express his personal agenda and promote his career in politics, reasoning that the founder did not engage much in retaliatory personal attacks, financially benefit from the organization, or appear to have current ambitions for public office (although he had campaigned for office a decade ago).

Rationale:

While nearly all of X's articles discuss various public policy issues from a particular ideological perspective, the articles to some extent set forth the opposition's positions. Despite the perception that X's articles present facts that shed an unfavorable light on opposing ideological perspectives, we cannot say that newsletter articles or X's other informational communications are based upon unsupported opinion. X, on a regular basis, has cited independent sources that support the facts contained in the articles. The communications of an organization such as X are educational, even though they maintain clear and definite positions on public policy issues that are

discussed and addressed in the legislative and political realms, because they use an educational methodology. Therefore, we conclude that X's communications are educational, within the meaning of section 1.501(c)(3)-1(d)(3)(i) of the regulations.

Issue 8. Political expenditures

Applicable Law:

Section 4955 of the Code generally imposes a tax on each political expenditure by a section 501(c)(3) organization (payable by the organization), and a tax on the agreement of any organization manager to the making of any expenditure, knowing that it is a political expenditure, unless such agreement is not willful and is due to reasonable cause (payable by the organization manager).

Section 4955(d)(1) of the Code defines a "political expenditure" generally as any amount paid or incurred by a section 501(c)(3) organization in any participation in, or intervention in (including the publication or distribution of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

Section 4955(d)(2) of the Code provides that in the case of an organization which is effectively controlled by a prospective candidate for public office and which is availed of primarily for purposes of promoting the prospective candidacy, the term "political expenditure" includes any of the following amounts paid or incurred by the organization:

(A) Amounts paid or incurred to such individual for speeches or other services.

(B) Travel expenses of such individual.

(C) Expenses of conducting polls, surveys, or other studies, or preparing papers or other materials, for use by such individual.

(D) Expenses of advertising, publicity, and fundraising for such individual.

(E) Any other expense which has the primary effect of promoting public recognition, or otherwise primarily accruing to the benefit, of such individual.

Section 4955(f)(1) of the Code defines a "section 501(c)(3)

organization" as any organization which (without regard to any political expenditure) would be described in section 501(c)(3) and exempt from taxation under section 501(a).

Section 4955(f)(2)(A) of the Code defines an "organization manager" as including any officer, director, or trustee of the organization (or individual having powers or responsibilities similar to those of officers, directors, or trustees of the organization).

Sections 4962 and 4963 of the Code provide generally that if it is established to the Secretary's satisfaction that a taxable expenditure under section 4955 was not willful and flagrant and was corrected within a certain time, then the 4955 tax shall be abated.

Section 53.4955-1(c)(2)(iii) of the regulations provides that expenditures for voter registration, voter turnout, or voter education constitute other expenses, treated as political expenditures by reason of section 4955(d)(2)(E) of the Code, only if the expenditures violate the prohibition on political activity provided in section 501(c)(3).

Rationale:

Inasmuch as the analysis concerning Issue 1 indicates that one communication made by X was an intervention in a political campaign, a tax under section 4955(a)(1) becomes applicable with respect to that expenditure.

Issue 9. <u>Disqualifying lobbying expenditures</u>

Applicable Law:

Section 4912(a) of the Code imposes a tax on the lobbying expenditures of an organization which is not described in section 501(c)(3) for any taxable year by reason of making lobbying expenditures. The tax is 5 percent of the amount of such expenditures and shall be paid by the organization.

Section 4912(b) of the Code imposes a tax on the agreement of any organization manager to the making of lobbying expenditures described in section 4912(a), knowing that such expenditures are likely to result in the organization not being described in section 501(c)(3), unless such agreement is not willful and is due to reasonable cause. The tax is 5 percent of the amount of such expenditures and shall be paid by any manager who agreed to the making of the expenditures.

16

Section 4912(c) of the Code provides that section 4912 applies to any organization determined by the Secretary to be exempt under section 501(c)(3) that is not a private foundation and to which a 501(h) election does not apply.

Section 4912(d) of the Code defines a "lobbying expenditure" as any amount paid or incurred by the organization in carrying on propaganda, or otherwise attempting to influence legislation, and an "organization manager" as defined in section 4955(f)(2).

Rationale:

The analysis concerning Issue 3 indicates that while certain communications made by X in the year aa were attempts to influence legislation, they were not substantial, and thus section 4912 is not applicable.

Conclusion:

(1) constituted a violation of the prohibition against campaign intervention under section 501(c)(3) of the Internal Revenue Code.

(2) X was not an "action" organization under section 1.501(c)(3)-1(c)(3)(iv) of the Income Tax Regulations.

(3) A substantial part of X's activities in the years aa and aa+1 was not devoted to carrying on propaganda or otherwise attempting to influence legislation under section 501(c)(3) or section 501(h) of the Code.

(4) X did not participate or intervene in a political campaign, as defined in section 1.501(c)(3)-1(c)(3)(iii) of the regulations,

(5) X's communications in the year aa+1 more than incidentally served a private interest within the meaning of section 1.501(c)(3)-1(d)(1)(ii) of the regulations.

(6) its members did not result in inurement or private benefit to B, within the meaning of sections 1.501(c)(3)-1(c)(1), -1(c)(2), and -1(d)(1)(ii) of the regulations.

(7) X's newsletters, radio commentaries, and other communications were educational, as defined in section 1.501(c)(3)-1(d)(3) of the regulations.

12

(8) X's expenditures for one communication made in the year aa+1 constituted a political expenditure under section 4955(d)(1) of the Code and, therefore, X is liable for the tax under section 4955(a)(1).

(9) X did not make disqualifying lobbying expenditures under section 4912 of the Code.

The Assistant Commissioner (EP/EO) has declined to grant retroactive relief to X under section 7805(b)(8) of the Code, because the facts during the years under examination were materially different from the facts on which the exemption ruling was based, and because X has failed to demonstrate that it relied in good faith on the exemption ruling.

A copy of this technical advice memorandum is to be given to X. Section 6110(j)(3) of the Internal Revenue Code provides that it may not be used or cited as precedent.

-END-