Politics and Vigilance: Election-Year Risks and Your Nonprofit

By Glenn Mott

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(download The Political Risk issue of *Risk Management Essentials*, here.)

NRMC is grateful to attorney Cindy Lewin, Partner and co-chair of the Nonprofit Organizations practice at Venable, for speaking with us about some of the risks that nonprofit organizations face during an election cycle. Prior to joining Venable, Cindy served as executive vice president and general counsel for AARP, where she led the organization's legal, ethics and compliance, and ERM teams.

At their core, most nonprofits have a mission that enacts and advocates for social change—whether it's supporting access to healthcare and human services, ending hunger in their community, or serving underrepresented populations. To be effective, organizations need to directly address important issues of the day and respond to public policy debates, while balancing concern for possible negative consequences to their organization. It's a tall order. The 2020 elections offer an ideal environment in which to take a closer look at the intersection of nonprofit advocacy, accountability, and mission.

To get some perspective on this topic, NRMC asked Cindy Lewin to weigh in on a few framing questions:

NRMC: It's fair to say that nonprofits and the communities they serve are feeling the direct impact of the current political climate of division. Why should nonprofits be hypervigilant during this election year?

Cindy Lewin: For two important reasons. First, with any 501(c)(3) organization, the risk of losing your tax-exempt status is always a concern. It's relatively easy to make a mistake given the complex rules around dealing with elections. However, keep in mind that the IRS is unlikely to revoke a nonprofit's tax-exempt status simply because one field staff member made a misstep, such as praising a candidate's position on an issue at a local meeting.

Second, in our super polarized political environment, an organization's leaders must focus on the mission and understanding the entity's supporters; know who you are at your very core and be able to articulate your mission clearly without politicizing it. Keep in mind that it's very easy to alienate stakeholders if you take sides or are perceived as biased. There's also a significant risk of missing opportunities to build and sustain support for a charitable mission if your organization oversteps by getting involved in one-sided political activity. Instead of building stronger support, the opposite can happen; once-happy stakeholders might turn away, or worse, turn

against you.

NRMC: What are some of the biggest mistakes that nonprofits make during a big election year?

CL: They may cross the line in the way they engage in politics. The organization's website and governing documents may indicate that it's a *nonpartisan* organization, but the nature of an activity in which it's involved creates a perception that it is supporting a candidate or political party. For example, a nonprofit might invite a political candidate to a meeting but fail to provide the same opportunity to the candidate's opponent(s). We hear from nonprofit leaders that "the rules aren't clear." While I agree that there are a lot of rules, in some cases they are clear but ignored!

NRMC: Yet, nonprofits that treat social issues must be part of the solution through action and advocacy. How do nonprofits protect their status, while shaping the public debate, and public policy, on important causes?

CL: You've stated precisely the dilemma; another common mistake is that nonprofits are sometimes *too* tentative or risk-averse. They worry that any lobbying or issue advocacy puts their tax-exempt status at risk. It's important to remember that advocating on issues as part of your mission on an ongoing basis is permitted and should not be viewed as supporting specific candidates, even if those candidates have also taken a position on some of the same issues.

NRMC: What are some things organizations should be doing *right now* to prepare for or avoid risks that emerge in the wake of a Presidential election?

CL: I'd like to broaden that to include local and state as well as federal elections. There are lots of things nonprofits can and should do around issues that are important to their mission. Reaching out to campaign staff to share educational information about your mission, stakeholders, and key issues is a great idea. That outreach should extend far beyond the contenders for the office of President; share educational materials with candidates for congressional and statewide offices, too. By providing educational resources and materials during the campaign season, you're helping candidates "hit the ground running" when they take office.

Another approach is to reach out after the elections wrap to request an opportunity to meet with staff of newly elected officials to let them know about the issues that are important to your organization. Keep in mind that relationships take time to build, and care and nurturing to sustain.

NRMC: We hear a lot about loopholes that allow corporate sponsors to direct funds to nonprofits for political gains. Are there specific risk concerns or risk management strategies that you would recommend to nonprofits that have close associations or ties to legislators?

CL: Recognize that there are a lot of rules, understand what the rules mean, follow the rules! It's not exciting, but that's where you can get into trouble. This is a highly regulated, highly political, and highly technical area of expertise.

As most of your readers will know, *Citizens United vs. FEC* struck down a federal law prohibiting corporations and unions from making expenditures in connection with federal elections. *Citizens United* unleashed a wave of 501(c)(4) organizations to make independent expenditures and run ads for candidates (as long as the 501(c)(4) isn't coordinating with their campaign, etc.). The IRS initially said that these organizations must disclose their donors, then last summer, said a 501(c)(4) organization didn't need to disclose donors to the public, just to the IRS so that it could look for patterns . . . but now they're not even requiring that. The message? The rules are constantly evolving, so stay up to date on policy changes.

501(c)(3)s can't make political contributions, of course, but 501(c)(4)s are direct advocacy organizations, raising a lot of money and making independent expenditures for political gains.

NRMC: What do you wish nonprofit leaders knew, or what issues do nonprofits overlook during an election year?

CL: Sophisticated nonprofits generally know about the rules, but new or smaller ones may be less informed or may have fewer resources. I want all nonprofits to know that it's important to continue to engage in the world, including advocating and lobbying on issues related to their mission if they have continually done that.

Unfortunately, many nonprofits miss important opportunities to make an impact and educate legislators because they believe they aren't allowed to reach out during an election year. When in fact, their mission often depends upon holding elected officials accountable.

NRMC: Any resources that you would point our readers to?

CL: Yes. I would highly recommend the Alliance for Justice for materials on their Bolder Advocacy website (the Alliance is a 501(c)(3) organization). You can download the useful book *The Connection: Strategies for Creating and Operating 501(c)(3)s, 501(c)(4)s and Political Organizations*, by Holly Schadler. The website also has useful fact sheets on all kinds of topics. *www.bolderadvocacy.org/resource/the-connection-strategies-for-creating-and-operating-501c3s-501c4s-and-political-organizations/*

And here are the FEC's own instructions on setting up a federal PAC: www.fec.gov/help-candidates-and-committees/registering-pac/

If you lead a 501(c)(3) nonprofit and you need to do political activity, you can set up an affiliated 501(c)(4) organization. There are tons of (c)(3)s with companion (c)(4)s. Tax laws are there to help you color inside the lines and help you carry out your mission via related organizations. Your affiliated (c)(4) can even set up a PAC.

NRMC: Where does advocacy for accountability, and lobbying activity cross the line? Can you give us an example of the risk involved for a 501(c)(3) nonprofit?

CL: One of the things that people often do, or try to do, is offer to take Congressional staff members or elected officials out to lunch, or offer other benefits that could be impermissible benefits under a certain rule, like the House Gift Rule. Rules related to gifts are in place at the federal and state levels. Although it's understandable that you want to give a legislator a token gift to thank them for helping out with an issue, if that gift has a monetary value you could wind up afoul of the rules. Even a private statement of thanks could be a derailment if it violates gift rules. Your organization's attorney or accountant should be consulted for guidance.

For those who are interested, Alliance for Justice has staff attorneys who conduct workshops and offer one-on-one technical assistance. Coaching is available to individuals and organizations that want to make their voices heard, but also informs them where the lines are drawn.

NRMC: Thank you, Cindy.

Glenn Mott is a Senior Consultant for the Nonprofit Risk Management Center, and a partner at New Narrative North America, a media and communications firm with offices in New York and Hong Kong.

For further reading on this subject from NRMC, see "How to Lose Your 501c3 Tax-Exempt Status Without Really Trying," here.