MEMORANDUM

May 28, 2004

Members of Board of Regents
President Evan S. Dobelle
Senior Management Team
Chancellors

FROM:
Walter S. Kirimitsu
Vice President for Legal Affairs
and University General Counsel

IRS Warning Regarding Political Activities

The attached are transmitted for your information and files. Please review carefully and disseminate to your appropriate departments.

Attachment
TRANSMITTAL LETTER

[ ] HAND DELIVERED/PICK UP
[ ] STATE MESSENGER
[x] MAIL

Walter Kirimitsu, Esq.
Vice President
Legal Affairs and University General Counsel

FROM: Holly T. Shikada
Deputy Attorney General

DATE: May 25, 2004

IRS warning regarding political activities

ORIG. COPIES DATED DESCRIPTION

May 20, 2004 Memorandum from Robert H. Kapp and Adam S. Feuerstein to General Counsel of University Clients

TRANSMITTED FOR:

[x] For your information & files          [x] Your approval
[ ] For your signature & return         [ ] Your review & comments
[ ] For signature and forwarding as indicated below [ ] Per your request
                                           [ ] See remarks below

REMARKS:
IRS warning regarding political activities

On April 28, 2004, the Internal Revenue Service (IRS) issued a news release entitled "Charities May Not Engage in Political Campaign Activities." The news release reminds charities that involvement in political activities is prohibited.

As the release states, whether a university has engaged in prohibited political activity depends on all of the facts and circumstances. While a university can sponsor a forum of candidates to educate voters, it may not do so if the forum shows a preference for or against a particular candidate. For example, inviting the candidates from the Republican and Democratic parties without inviting the candidates from the other parties could constitute prohibited intervention in a political campaign.

The release also briefly discusses the ramifications of engaging in prohibited political activity. These include the imposition of excise taxes and the loss of tax-exempt status.

For university counsel, the release underscores the importance of understanding and monitoring the political activities that are conducted on campus. For your information, a copy of the IRS release is attached. In addition, we have attached a copy of a memorandum that we prepared for the American Council on Education in 2003 regarding campaign-related activities.

We would be happy to respond to questions.
MEMORANDUM

November 11, 2003

To: American Council on Education

From: Hogan & Hartson, LLP

Re: Political campaign-related activities of and at colleges and universities

We summarize here "do's" and "don'ts" on potential entanglements of the institutions and their personnel in campaigns for public office. The summary is not exhaustive and omits legal citations. It is based on judicial and IRS rulings under Section 501(c)(3) of the Internal Revenue Code; and the Federal Election Campaign Act of 1971, as amended, as well as Federal Election Commission regulations that apply to colleges and universities.

Additional state law requirements that govern campaigns for state and local office vary from state to state and are not addressed here. Also not specified here are the penalties for improper political activity by and at a college or university. They can include loss of the institution's tax-exempt status, imposition of taxes on the institution and its responsible managers, and other risks, including federal or state government lawsuits, audits, and investigations.

We recommend that the institution's counsel be consulted before proposed actions are taken in this area. This memorandum states general propositions, is not legal advice, and does not address the advisability as a matter of institutional policy of engaging in the activities identified below.
I. POTENTIAL ACTIVITIES OF OR ATTRIBUTABLE TO THE INSTITUTION

A. Illustrative permitted activities

Genuine curricular activities aimed at educating students with respect to the political process. (For example, the IRS approved a political science program in which, as part of a for-credit course, university students participated in several weeks of classroom work to learn about political campaign methods, and then were excused from classes for two weeks to participate in campaigns of their choice, without the university influencing which campaigns were chosen.)

Partisan editorial activities of a student newspaper that is supported by a college or university. (For example, the IRS approved, on the ground that a university's educational purpose was advanced, making professors available as advisors to a student newspaper that published editorial opinions on political and legislative matters. The university also provided the newspaper financial support and office space.)

Providing on an equal basis to all legally qualified candidates for a public office, and consistently within the limits imposed by Federal Communications Commission standards, access to air time on a university-owned radio station.

Conducting institution-sponsored public forums to which all legally qualified candidates (or, if impractical, at least all candidates who meet certain objective criteria) for a public office (or for the nomination of a particular party) are invited and given equal access and opportunity to speak, if the format and content of the forum are presented in a neutral manner. If the institution chooses to invite candidates to speak individually, it must take steps to ensure that all such legally qualified candidates are invited,
and that none are favored in relation to the activity. Ordinarily it is prudent to make an explicit statement as part of the introduction of the speaker that the institution does not support or oppose the candidate. Political fundraising at the event should be prohibited. The institution must make reasonable efforts to ensure that the appearances constitute speeches, question-and-answer sessions, or similar communications in an academic setting and are not conducted as campaign rallies or events.

Certain "voter education" activities if related to the institution's educational purpose. For example, annually preparing and making publicly available a compilation of voting records on major legislative issues that involve a wide range of topics, without political skew and without editorial opinion, is likely to be held permissible, particularly if the information is not widely distributed and is not geared to coincide with the election period.

Non-partisan voter registration activities of certain charitable organizations have been approved, even when aimed at groups (such as urban voters, young people or minorities) likely to favor a certain political candidate or party; provided that the activities are not intended to target voters of a particular party or to help particular candidates; and provided further that particular geographic areas are not selected to favor any party or candidates.

Circulating unbiased questionnaires to all candidates for an office, and tabulating and disseminating the results; provided that the questionnaires cover a broad range of subjects, and neither reflect political skew nor contain editorial opinion. As in other areas, counsel should be consulted on whether the proposed
activity is consistent with the institution's tax-exempt mission.

Y8. Continuing usual and permissible lobbying and public policy education activities, within the constraints ordinarily applicable to such activities conducted by a college or university. This is a complex topic warranting fuller analysis and advice. Special caution is indicated with respect to heightened, different or targeted lobbying and public policy education activities conducted during a campaign season.

Rearranging the academic calendar to permit students, faculty, and administrators to participate in the election process, if the rearrangement is made without reference to particular campaigns or political issues; provided that the recess is in substitution for another period that would have been free of curricular activity.

Use of institutional facilities by established student groups for partisan political purposes, provided that such groups pay the usual and normal charge, if any, for use of institutional facilities by student groups. Fees usually are not required for traditional, on-campus student political clubs. (Generally, groups other than student groups should be charged.) Administrators and faculty should take special care in relation to any such proposed student activities, to avoid the appearance of institutional endorsement and to observe the other principles this memorandum describes. Independent institutions may as a matter of their own general policy decline to permit their facilities to be used for such purposes.

Y11. Conducting training programs designed to increase public understanding of the electoral process or to encourage citizens to become involved in the
process, provided such training is nonpartisan in nature and open to those traditionally interested in such activities regardless of party affiliation or candidate preference.

Conducting public opinion polls with respect to issues (rather than candidates), provided that the questions are framed to be fair and neutral, accepted polling techniques are used, and the questions do not directly or indirectly concern records or positions of particular candidates or parties. With respect to such activities of faculty, the limitations should be addressed with due regard for academic freedom.

Providing a hyperlink to the webpages, or other space on a university’s website, for all legally qualified candidates for a public office as long as it is done in a manner that does not favor one candidate over another.

Establishing a voluntary payroll deduction plan that would allow individual employees to direct a portion of their wages to the political action committees ("PACs") for their respective unions, provided that the university’s activities with respect to the PAC are ministerial and simply involve transferring the funds earmarked by the employees to the PAC chosen by the employee, the university has absolutely no role in the management or governance of the PAC or any influence over the selection of candidates or political parties to be supported by the PAC, the university’s name is not used or otherwise acknowledged in connection with any contributions made by the PAC to any candidates for public office, the university is reimbursed for costs associated with the plan, the university takes steps to ensure that no employees associate the PAC with the university, and the university does not allow employees to participate in PAC activities during work hours other than in the
performance of the ministerial activities
described above.

B. Illustrative prohibited (or in some instances,
questionable) activities if undertaken by the
institution or by an individual whose actions are
attributable to the institution:

Categorically: "Participating" or "intervening"
in any campaign of any candidate for public office
(including candidates for local, state, and
federal office).

N2. Endorsing, expressly or impliedly, a candidate for
public office. Examples of implied endorsement
are public statements at a college or university
event by an official of the institution, praising
a particular candidate in relation to the holding
of public office, and a pattern of institutional
activities in relation to or support of a
particular candidate.

N3. Providing mailing lists, use of office space,
telephones, photocopying or other institutional
facilities or support to a candidate, campaign,
political party, political action committee (PAC)
or the like free of charge. If mailing lists or
facilities are sold or rented to a candidate or
campaign, the items must be made available to all
other viable candidates on the same terms and at
fair market prices. Additionally, the institution
should be prepared to show that it did not take
the initiative in making the items available and
that the sales or rentals are part of an ongoing
pattern in which similar items are provided to
unrelated, nonpolitical entities. Counsel should
be consulted on the potential for taxation of
revenues generated by such sales or rentals.

Coordinating institutional fund-raising with fund-
raising of a candidate for public office,
political party, PAC or the like.
Sponsoring events to advance the candidacy of particular candidates.

"Voter education" activities, such as those involving questionnaires, if confined to a narrow range of issues or skewed in favor of certain candidates or a political party. For example, the IRS has disapproved such activities that involved selected voting records of certain incumbents on a narrow range of issues (in that case, "land conservation").

Voter registration activities that are similarly skewed. (See Y6, above.)

Reimbursing university officials for campaign contributions.

Publishing ratings of the candidates, particularly in situations where the ratings could be viewed as reflecting the views of the institution or institutional resources are used in connection with the preparation or publication of such ratings without reimbursement at the usual and normal charge.

N10. Commenting on specific actions, statements or positions taken by candidates, including incumbents, in the course of their campaigns. The institution is not forbidden to comment on specific issues pertinent to its tax-exempt purposes, particularly if it has a track record of commenting on such issues in non-election years.

Promoting action (voting) with respect to issues that have become highly identified as dividing lines between the candidates. This does not bar the institution from commenting on issues critical to its tax-exempt purposes, if it has a track record of commenting on such issues in non-election years, but does bar encouragement of voting on one side of such issues.
N12. Coordinating voter education activities with campaign events.

Providing a candidate a forum to promote his or her campaign, even if the forum is not intended to assist the candidate. (For example, the IRS has published a memorandum concluding that a charitable organization violated the prohibition on campaign intervention when the candidate solicited funds on the organization's behalf, because the content of the solicitation included campaign rhetoric).

II. POTENTIAL ACTIVITIES OF FACULTY, ADMINISTRATORS, AND OTHER EMPLOYEES OF THE INSTITUTION

A. Illustrative permitted activities:

Members of the college or university community are entitled to participate or not, off-hours, as they see fit, in the election process; provided that speaking or acting in the name of the institution is prohibited except as described in this memorandum, provided they are not acting at the direction of an institutional official and provided that if the institution is mentioned as a means of introduction, it should be communicated that the opinions that are expressed are not the opinions of the college or university. (See also Y16 and N14, below.)

Y16. A faculty member, administrator or other employee may, if permitted by institutional policies and procedures, engage in federal campaign-related activity that is (a) outside normal work hours; or (b) within ordinary work hours, if the time is made up within a reasonable period by devoting a comparable number of extra hours to work for the institution; (c) charged to vacation time to which the person is then entitled or occurs during a regular sabbatical leave; or (d) during a leave of
absence without pay taken with the institution's approval. The institution should consult applicable state law concerning permitted volunteer activities by employees relating to campaigns for state or local office. Senior institutional officials (such as the president and the vice-president for governmental affairs) should ordinarily refrain from or otherwise limit such activity, as there is risk that such activity would be perceived as support or endorsement by the institution. (See also N15).

B. **Illustrative prohibited (or questionable) activities:**

- Use of institutional letterhead in support of a candidate, political party, PAC or the like.

- Public statements, oral or written, by institutional officials (such as the president and deans) in support of a candidate, political party, PAC or the like, where there is risk that the statements would be perceived as support or endorsement by the institution.

N16. Use of message boards and forums affiliated with the institution's website to support particular candidates if the statements of the provider of the information can be reasonably attributed to the institution. A disclaimer that states that the opinions are neither the opinion of the institution nor sanctioned by the institution is recommended in those public discussion areas where the information could reasonably be attributed to the institution.

The foregoing is not exhaustive, and considerable judgment in the application of these principles is likely to be required.

Martin Michaelson, Robert Kapp, and Adam Feuerstein prepared this memorandum.
WASHINGTON - Charities should be careful that their efforts to educate voters comply with the Internal Revenue Code requirements concerning political campaign activities, the tax agency said Monday in a presidential election-year advisory.

Organizations described in section 501(c)(3) of the Code that are exempt from federal income tax are prohibited from participating or intervening in any political campaign on behalf of, or in opposition to, any candidate for public office. Charities, educational institutions and religious organizations, including churches, are among those that are tax-exempt under this code section.

These organizations cannot endorse any candidates, make donations to their campaigns, engage in fund raising, distribute statements, or become involved in any other activities that may be beneficial or detrimental to any candidate. Even activities that encourage people to vote for or against a particular candidate on the basis of nonpartisan criteria violate the political campaign prohibition of section 501(c)(3).

Whether an organization is engaging in prohibited political campaign activity depends upon all the facts and circumstances in each case. For example, organizations may sponsor debates or forums to educate voters. If the debate or forum shows a preference for or against a certain candidate, however, it becomes a prohibited activity.

The federal courts have upheld this prohibition on political campaign activity, most recently in Branch Ministries v. Rosotti, 211 F.3d 137 (D.C. Cir. 2000). The courts have held that it is not unconstitutional for the tax law to impose conditions, such as the political campaign prohibition, upon exemption from federal income tax.

If the IRS finds a section 501(c)(3) organization engaged in prohibited campaign activity, the organization could lose its tax-exempt status and it could be subject to an excise tax on the amount of money spent on that activity.

In cases of flagrant violation of the law, the IRS has specific statutory authority to make an immediate determination and assessment of tax. Also, the IRS can ask a federal district court to enjoin the organization from making further political expenditures.

In addition, contributions to organizations that lose their section 501(c)(3) status because of political activities are not deductible by the donors for federal income tax purposes.

The political campaign prohibition as it applies to churches is discussed in Publication 1828, Tax Guide for Churches and Religious Organizations. This publication, along with other information about the political campaign prohibition, is available on IRS.gov at www.irs.gov/eo.

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