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IRS Proposes New Rule on Political Activities of 501(c)(4) Social Welfare Organizations

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Major changes are being proposed for tax-exempt 501(c)(4) social welfare organizations, particularly those that engage in a significant amount of political activity. Just after Thanksgiving, the IRS proposed to expand the types of political activities that would not count as promoting social welfare, and therefore would have to be limited in order for an organization to obtain and maintain its 501(c)(4) tax-exempt status. Rather than focusing on just activities that seek to influence the outcome of elections -- so-called "electioneering" activity -- as is now the rule, the IRS would look at a much broader array of activities, such as nonpartisan neutral voter registration drives, activities in connection with appointed public officials, and certain communications referring to candidates or political parties made close in time to an election or primary. The IRS is seeking comments on the proposed regulations, as well as other related issues, by February 27, 2014.

What is the current rule?

Although the Internal Revenue Code requires 501(c)(4) organizations to operate *exclusively* for the promotion of social welfare, longstanding IRS regulations interpret "exclusively" as "primarily" and therefore permit those organizations to engage in a fair amount of non-social welfare activities. The current regulations also provide that promotion of social welfare does not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office. There is no definition of "primarily" in the regulations, although some have interpreted it to mean more than half of the activities of the organization. Therefore, the rule was commonly thought to mean that the organization's exempt status would be safe so long as the electioneering activity did not exceed half of the organization's overall activity or expenditures.

Why is the IRS proposing this change now?

The IRS proposal follows several years of increased involvement of 501(c)(4) corporations in political activity as a result of the Supreme Court's decision in Citizens United, which lifted the federal election law ban on corporations spending their own money to pay for communications to expressly advocate for the election or defeat of a candidate, so long as they did not coordinate expenditures with candidates. The decision did not lift the federal election

law ban on corporations making direct contributions to candidates or their committees or the Internal Revenue Code ban on 501(c)(3) organizations intervening in political campaigns.

Section 501(c)(4) organizations are particularly favored as vehicles to influence elections because the identities of their donors need not be publicly disclosed. As a result, some have called for the IRS to amend the regulations in order to limit, or at least more clearly define, political activity for 501(c)(4) groups. The IRS has also said that the lack of a clear definition of “political campaign intervention” and the absence of a clear rule for measurement of how much social welfare activity is sufficient has led to confusion both for the public and for the IRS as it makes appropriate 501(c)(4) exemption determinations.

What is the proposed change?

In response, the IRS has proposed replacing the current regulatory definition of political activity for 501(c)(4)s. The proposed definition of political activity, which would now be called “candidate-related political activity,” draws from current tax law (including that applicable to tax-exempt Section 527 political groups) and federal election law.

The proposed definition of “candidate-related political activity” covers the following:

- Express Advocacy: Any communication expressing a view on the selection, nomination, election, or appointment of a clearly identified candidate or candidates of a political party that contains words that expressly advocate, such as “vote,” “oppose,” “support,” “elect,” “defeat,” or “reject,” or is susceptible of no reasonable interpretation other than a call to support or oppose a candidate;
 - “Candidates” include individuals seeking elected or appointed federal, state, or local office or office in a political organization.
- Communications During Election Period: Any public communication within 30 days of a primary election or 60 days of a general election that refers to a candidate in that election or, for general elections, the political party represented in that election;
 - “Public communication” includes communications by broadcast, cable, satellite; on a website; in a newspaper, magazine or other periodical; by paid advertising; or that otherwise reaches or is intended to reach at least 500 people.
- Campaign Contributions: A contribution of money or anything of value to, or the solicitation of a contribution on behalf of, a candidate for elective office, a political committee, or a PAC or other entity described in Section 527 of the Internal Revenue Code;

- Transfers to 501(c) Organization: Contributions to any 501(c) organization that engages in candidate-related political activity;
- Independent Expenditures: Expenditures for communications reported to the Federal Election Commission, including independent expenditures and electioneering communications;
- Civic Engagement (including neutral non-partisan activities):
 - Voter registration
 - Get-out-the vote drives; and
 - Voter guides that refer to candidates, or in the case of general elections, political parties.
- Political Materials: Distribution of material prepared by or on behalf of a candidate or by a 527 organization; and
- Candidate Appearances: Hosting or conducting an event within 30 days of a primary election or 60 days of a general election at which candidates appear as part of the program.
 - Includes a neutral nonpartisan candidate debate.

A transfer of funds to another 501(c) organization would not be considered to be candidate-related political activity if the recipient certifies that it does not engage in such activity, the (c)(4) contributor does not know or have reason to know that the representation is inaccurate or unreliable, and the contribution is subject to a written restriction that it not be used for candidate-related political activity.

How would the proposed change impact 501(c)(4)s?

The potential impact on 501(c)(4)s of the proposed regulation depends on the extent and type of political activity in which the organization engages. The biggest potential impact may be on organizations that now engage in what is often termed neutral or nonpartisan activities such as voter registration, get-out-the vote drives, candidate debates, and other voter education and engagement activities. Although these activities could still be carried on, they would have to be limited; they could not be the “primary” activity of the organization. Nor could they be so extensive that, even if not the “primary” activity, when combined with other non-social welfare activities, resulted in the social welfare activities not being considered the “primary activity.” In addition, if the 501(c)(4) now engages in activities that seek to influence the appointment of public officials, such as judges, that too would be considered candidate-related political activity that would not count as social welfare activity.

Will the change actually happen?

The proposed changes probably won't happen exactly as proposed, or possibly even at all. There has been a fair amount of criticism of the regulations so far, from both those who say they go too far and those who say they don't go far enough. One major issue they don't address so far is the interpretation of "exclusively" as "primarily," although the IRS is seeking comment on that issue. How much political activity, however it is defined, may (c)(4)s engage in? Any changes proposed now will not be effective until final regulations are issued, and implementation of any additional changes proposed after comments will await final rules issued on those proposals. All in all, it is likely to be quite some time, at least many months, before any changes are effective.

What can we do now?

The IRS and the Treasury Department are accepting comments on the proposed rules. They are particularly interested in which specific activities should be included in, or excepted from, the definition of candidate-related political activity and how the proposed addition or exception is consistent with the IRS's goal of providing more definitive rules and reducing the need for fact-intensive analysis of the activity. In addition, comments are requested on the following topics:

- Should a similar approach to defining political activity be extended to the following categories of tax-exempt entities?:
 - 501(c)(3) - charitable and educational organizations;
 - 527 --political organizations;
 - 501(c)(5) – labor and agricultural organizations; and
 - 501(c)(6) – business leagues, chambers of commerce, and trade associations.

- Should the current regulation that defines "exclusively" as "primarily" be retained or changed?
 - What proportion of an organization's activities must promote social welfare to qualify it as a (c)(4)?
 - Should additional limits be placed on activities that do not further social welfare?
 - How should the activities be measured, i.e. by percentage of expenditures, or otherwise?

Comments will be accepted through February 27, 2014. They can be submitted online at regulations.gov (IRSREG-134417-13) or in paper form to the address listed in the Federal Register Notice of Proposed Rulemaking (78 Federal Register 71535-01), which contains the



complete proposed rule and a preamble describing the rationale for the proposal:
<http://www.gpo.gov/fdsys/granule/FR-2013-11-29/2013-28492/content-detail.html>. A public hearing will be scheduled if any person who submits timely comments requests one.



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If you need legal assistance in preparing comments or in understanding how these changes may impact your organization, please contact one of the attorneys in the nonprofit practice group, listed below:

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