

Treasury and IRS Provide Thanksgiving Surprise: Proposed 501(c)(4) Political Activity Rules

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As most of America travelled over the river and through the woods to Grandma's house before the Thanksgiving holiday, the Treasury Department and the IRS delivered their own holiday gift. On Tuesday, November 26, they released proposed guidance aimed at clarifying which conduct by **tax-exempt social welfare organizations – 501(c)(4) entities – qualifies as political campaign activity.**

Under existing IRS regulations, the promotion of social welfare does not include direct or indirect participation in political campaigns on behalf of or in opposition to any candidate. Over the years, the IRS has used a wide-ranging facts and circumstances test to determine whether an organization is engaged in an impermissible level of political campaign activity. In the aftermath of the recent IRS scandal regarding the review of 501(c)(4) applications, Treasury and the IRS believe that more definitive political activity rules would reduce the need to conduct fact-intensive inquiries when applying the rules for qualification as a social welfare organization.

To accomplish this objective, Treasury and the IRS have coined a new term, “**candidate-related political activity.**” This term encompasses existing definitions of political campaign activity from federal tax and campaign finance laws, and includes the following:

- Express advocacy communications;
- Public communications made within 60 days before a general election or 30 days before a primary election that clearly identify a candidate for public office, as well as any other communications that have to be reported to the FEC (including independent expenditures and electioneering communications);
- Monetary and in-kind contributions to or the solicitation of contributions on behalf of campaign, party and other political committees, and other tax-exempt organizations that engage in political activity; and
- Other election related activities such as voter registration and get-out-the-vote drives, distribution of candidate or political committee materials, and the preparation and distribution of voter guides.

The proposed rules raise many serious concerns. For example, candidate-related political activity could include conducting nonpartisan voter registration drives and distributing nonpartisan voter guides. Moreover, the proposed rules attribute to 501(c)(4) organizations, among other things, political activities conducted by their officers, directors or employees acting in that capacity.

Unfortunately, the draft rules do not elaborate on the possible differences between conduct taken in an official capacity and personal political conduct by an officer, director or employee. Finally, many contributions from a 501(c)(4) to another tax-exempt organization would appear to qualify as candidate-related activity unless the contributor receives a written confirmation that the recipient does not engage in such activity and the contributor restricts the use of the contribution.

The proposed political activity rules also leave many important issues unaddressed. Under existing rules, 501(c)(4) entities must be “primarily” engaged in activities that promote the common good or social welfare. The proposed rules provide no guidance on what proportion of an organization’s activities must be dedicated to this purpose to qualify under section 501(c)(4). The proposed regulations also do not apply to entities that qualify under Section 501(c)(3) (charitable organizations), Section 501(c)(5) (labor unions), Section 501(c)(6) (trade associations), or Section 527 (political organizations). Treasury and the IRS are, however, accepting comments on the advisability of making changes in each of these areas. Interested persons may submit comments to the IRS by February 27, 2014.

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