IRS ISSUES PROPOSED REGULATIONS DEFINING POLITICAL ACTIVITY BY §501(c)(4) ORGANIZATIONS

On November 29, 2013, the Internal Revenue Service issued proposed regulations addressing certain political – or politically tinged – activities by §501(c)(4) organizations. The stated intent is twofold: (1) to make determinations of what activities are "political" more black-and-white; and (2) to broaden the scope of what is considered to be "political activity" by §501(c)(4) organizations. Many §501(c)(4) organizations all along the political spectrum have criticized the proposed regulations as an attempt to stifle participation in the political process.

The proposed regulations are published at http://www.gpo.gov/fdsys/pkg/FR-2013-11-29/pdf/2013-28492.pdf. Anyone wishing to submit written or electronic comments to the IRS about the proposed regulations must do so no later than **February 27, 2014**.

WHAT THE PROPOSED REGULATIONS DO NOT PROPOSE TO DO

The proposed regulations, if adopted, would not prohibit §501(c)(4) organizations from engaging in any particular political activity. That is, the IRS is not seeking to impose new prohibitions or to declare that an activity permissible under current law should be off-limits in the future.

Instead, if adopted, the proposed regulations would characterize more activities (including some that are plainly non-partisan) as "political." This is particularly true of non-partisan events and communications that mention a candidate (even if she is an incumbent who may act on legislation) in the context of attempts to influence legislation, as well as other non-partisan activities such as voter registration and voter education.

For some §501(c)(4) organizations, particularly those highly active in the public policy arena, the proposed regulations could effectively disqualify them from exemption, and perhaps cause them to be treated as political organizations described in §527.

BACKGROUND ON §501(c)(4) POLITICAL ADVOCACY

Under current law, legislative activity, i.e., lobbying, is recognized as being consistent with §501(c)(4) tax-exempt status.[1] It is a permissible means of attaining social welfare goals,[2] and in fact may even be the organization's sole function.[3]

[1] Rev. Rul. 68-656, 1968-2 C.B. 216.
[2] Id.
[3] Rev. Rul. 71-530, 1971-2 C.B. 237.

The same is not the case for political activity. The IRS regulations state that "[t]he 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."[4]

Political activities are not prohibited; they are only restricted. Promoting social welfare, i.e., "promoting in some way the common good and general welfare of the people of the community,"[5] need only be the "primary" focus of a §501(c)(4) organization.[6] As stated in the IRS regulations, a Section 501(c) (4) organization must be "primarily engaged" in social welfare. As a result, involvement in political campaigns is entirely permissible, as long as the organization is primarily focused on social welfare.[7]

THE "PRIMARILY ENGAGED" STANDARD REMAINS

The IRS is not proposing at this point to change the rule that a §501(c)(4) organization need only be "primarily," and not "exclusively," engaged in promoting social welfare.

Nor is the IRS proposing to further define what "primarily" means.[8] At present, the IRS uses a facts-and-circumstances analysis,[9] and any number of factors may be relevant, such as how much money is spent on particular activities, the sources of revenue of the organization, and the allocation of time devoted by employees or volunteers.

However, the IRS is leaving the door open to changing this standard and/or its interpretation. To this end, the IRS is seeking public comment on whether the "primarily engaged" standard should remain and, if so, whether it should be defined by a specific amount or revised to mirror the "insubstantial" language in the §501(c)(3) regulations. The IRS is also seeking public comment on how to measure the activities of organizations for purposes of qualification under §501(c)(4).

THE BASIC DEFINITION OF "POLITICAL ACTIVITY" IS BROADENED

As stated, the regulations currently describe political activity under §501(c)(4) as "participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office." To date, in analyzing whether an activity is intervention in a

[4] 26 CFR §1.501(c) (4)-1(a)(2)(ii).
[5] 26 CFR §1.501(c) (4)-1(a)(2).
[6] Id. See also, Rev. Rul. 81-95, 1981-1 C.B. 332.
[7] Rev. Rul. 81-95, 1981-1 C.B. 332. This is in contrast to a §501(c) (3) organization, which may not participate in politics to any degree.
[8] Some practitioners and commentators have said that "primarily" means more than 50% of its activity (however measured). Although the IRS has not formally adopted that definition, it has been cited informally by several IRS TE/GE employees.
[9] Rev. Rul. 68-45, 1968-1 C.B. 259.

political campaign for purposes of §501(c)(3), (4), (5), and (6) organizations (and an "exempt function" for purposes of §527), the IRS has used the same facts and circumstances for all organizations.[10] In addition, the current analyses do not treat non-partisan voter education, registration, and get-out-the-vote drives, or candidate appearances in an official capacity, as intervention in a political campaign.

The proposed regulations would change this approach, by establishing, *for §501(c)(4) organizations only*, a new category called "candidate-related political activity." This is a broader group of activities, because it is tied to a candidate or political party, rather than intervention in a campaign. This broad definition is particularly troublesome for many §501(c)(4) organizations because it includes activity that is not normally considered to be political activity. This new definition also sets the stage for other changes intended to make the question of what is political or not political for §501(c)(4) purposes more clear-cut.

THE FOLLOWING KEY ACTIVITIES WOULD BE DEEMED TO BE POLITICAL FOR A §501(c)(4) ORGANIZATION:

1. Voter Guides

Production and distribution of a voter guide would be considered *per se* political activity if it merely "refers" to a candidate or, in the case of a general election, refers to a political party.[11] At present, voter guides can be deemed educational, and therefore non-political, based on certain considerations, such as the range of topics covered and the absence of editorial opinion or any indications of approval or disapproval of candidates.[12]

Although this characterization of voter guides as political does not extend to legislative scorecards, and the latter would continue to be analyzed under a facts-and-circumstances test, scorecards are also likely to be considered regulated "communications" (see section 4, below).

2. Voter Registration and Get-Out-The-Vote Initiatives

Like voter guides, under current law, non-partisan voter registration and get-out-the-vote efforts are not treated as intervention in a political campaign.[13] However, under the proposed regulations, even non-partisan voter registration and get-out-the-vote activities would be treated as candidate-related political activity that is not a "social welfare" activity.[14]

[10] Rev. Rul. 2007-41, 2007-25 I.R.B. (June 18, 2007; Rev. Rul. 2004-6, 2004-1 C.B. 328.
[11] Prop. Reg. §1.501(c) (4)-1(a) (2)(iii)(A)(7).
[12] Rev. Rul. 78-248, 1978-1 C.B. 154.
[13] 26 CFR §1.527-6(b) (5).
[14] Prop. Reg. §1.501(c) (4)-1(a)(2)(iii)(A)(5).

3. Candidate Appearances and Forums Prior To an Election

Hosting or conducting any event within 30 days before a primary election or 60 days before a general election at which one or more candidates in such election appear as part of the program would be considered "candidate-related political activity" under the proposed regulations.[15] This would cause non-partisan candidate forums or debates,[16] and nonpolitical events at which a candidate appears, i.e., in his capacity as an incumbent officeholder, to give meeting attendees an update on legislative activities, to be treated as political activity by a §501(c)(4) organization.

4. Public Communications Prior to an Election.

Under the most controversial of the proposals, *any* public communication, including postings on a public website, will be conclusively deemed a political activity if published within 30 days before a primary election or 60 days before a general election - if the communication refers to one or more clearly identified candidates in that election or, in the case of a general election, refers to one or more political parties represented in that election.[17]

This rule appears to apply to *any* mention of a candidate, including mention in their official capacity. This could include, for example, grassroots lobbying, or mentioning a bill with a candidate's name. It is even conceivable that the websites of some organizations would be deemed wholly political unless shut down prior to every federal primary or general election.

The breadth of this rule can be seen in its application to a President running for re-election. Because of staggered primary elections, it will be considered candidate-related political activity to mention or discuss a President's actions, policies, or judicial nominees at nearly any time during the election year.

In contrast, under the current rules, communications that refer to specific candidates in close proximity to an election may be considered to be political in nature by the IRS, but under the current facts and circumstances analysis, other factors—i.e., legislative advocacy that is ongoing throughout the year, or an impending vote on legislation of importance to the organization—may demonstrate that the communication is an attempt to influence legislation, not intervention in a political campaign.[18] As described above, the proposed regulations would eliminate any room for argument with respect to such issue or legislative advocacy prior to an election if any candidate or even party is mentioned.

[15] Prop. Reg. §1.501(c)(4)-1(a (2)(iii)(A)(8).
[16] *See* Rev. Rul. 86-95, 1986-2 C.B. 73.
[17] Prop. Reg. §1.501(c) (4)-1(a)(2)(iii)(A)(2).
[18] Rev. Rul. 2004-6, 2004-1 C.B. 328.

This proposed regulation is drawn from a similar Federal Election Commission (FEC) regulation, but omits certain exemptions recognized by the FEC, such as communications via the Internet and candidate debates.[19]

5. Other Activities That Would Be Considered *Per Se* "Political"

- Public communication expressing a view - whether for or against - on the selection, nomination, election, or appointment of one or more clearly identified candidates or of candidates of a political party;[20]
- Communications reportable to the FEC under federal election law;[21]
- Contributions, whether of funds or in-kind, to political campaigns, §527 organizations, or other tax-exempt organizations that engage in candidate-related political activity;[22] and
- Distribution of materials prepared by or on behalf of a candidate or by a §527 organization.[23]

EXPANSION OF NEW §501(c)(4) REGULATIONS TO OTHER EXEMPT ORGANIZATIONS

As proposed, the regulations would apply only to §501(c)(4) organizations. Indeed, one of the principal criticisms is that they upend 50 years of jurisprudence regarding "intervention in a campaign for public office," and subject §501(c)(4) organizations to a wholly new and different standard that applies only to them, and not to §501(c)(5) (labor unions) or §501(c)(6) (trade and professional associations) organizations that may engage in similar activities. However, recognizing this issue, the IRS has asked for comments on whether any of the proposed regulations should be extended to other exempt organizations, including §501(c)(3) organizations, which are the biggest potential target. The new proposed rules regarding voter guides, voter registration and get-out-the-vote drives, and issue advocacy are the most likely to be applied to §501(c)(3) organizations.

CONCLUSION

By classifying more activity, including non-partisan activity, as political activity, the proposed regulations are an attempt by the IRS to reduce the extent to which §501(c)(4) organizations may participate in political campaigns. With no intervening change in the law since the existing regulations became effective in 1959, it is questionable whether the IRS has

[19] 11 CFR §100.29(c).
[20] Prop. Reg. §1.501(c)(4)-1(a)(2)(iii)(A)(1).
[21] Prop. Reg. §1.501(c)(4)-1(a)(2)(iii)(A)(3).
[22] Prop. Reg. §1.501(c)(4)-1(a)(2)(iii)(A)(4).
[23] Prop. Reg. §1.501(c)(4)-1(a)(2)(iii)(A)(6).

the authority to change the definition of "intervention in a campaign for public office." Finally, given the initial reaction of both tax lawyers and §501(c)(4) organizations all along the political spectrum, it seems unlikely that the proposed regulations will become effective exactly as written. Nevertheless, active monitoring of this issue and submission of comments to the IRS are vital.

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