

Curbing Political Spending by Tax-Exempt Social Welfare Organizations

The Internal Revenue Service and Department of Treasury recently proposed new rules that would further curtail political activity by certain tax-exempt non-profit organizations.¹ Specifically, the new rules would affect any organization classified as a 501(c)(4), referred to as a “social welfare” organization. Currently, in order to qualify for tax-exemption as a social welfare organization, “an organization must operate primarily to further the common good and general welfare of the people of the community such as by bringing about civic betterment and social improvements.”² As part of furthering their exempt purpose in the promotion of social welfare, 501(c)(4) organizations currently may participate in an unlimited amount of lobbying without risking their tax-exempt status.³ Additionally, social welfare organizations may also engage in political campaigns on behalf of or in opposition of candidates for public office, as long as this does not constitute the organization’s primary activity.⁴

However, the new guidance proposed by the IRS and Treasury department “defines the term ‘candidate-related political activity’ and would amend current regulations by indicating that the promotion of social welfare does not include this type of activity.”⁵ In order to define candidate-related political activity, the IRS and Treasury Department relied on a variety of existing definitions of political activity in state and federal finance law, as well as other IRS provisions, and public comments.⁶ Thus, the types of expenditures that will no longer be allowed

¹Treasury, IRS Will Issue Proposed Guidance for Tax-Exempt Social Welfare Organizations, IRS.gov, <http://www.irs.gov/portal/site/irspup/menuitem.143f806b5568dcd501db6ba54251a0a0/?vgnextoid=42cef3b99f492410VgnVCM1000003b4d0a0aRCRD&vgnnextchannel=f9c31c39af0c6310VgnVCM10000024150a0aRCRD> (last visited Nov. 29, 2013).

² Social Welfare Organizations, IRS.gov, <http://www.irs.gov/Charities-&-Non-Profits/Other-Non-Profits/Social-Welfare-Organizations> (last visited Nov. 29, 2013).

³ *Id.*

⁴ Political Campaign and Lobbying Activities of IRC 501(c)(4) Organizations, IRS.gov, <http://www.irs.gov/pub/irs-tege/eotopicl03.pdf> (last visited Nov. 29, 2013)

⁵ Treasury, *supra* note 1.

⁶ *Id.*

cover a wide breadth of political activity, from television advertisements, to more grassroots political work, like voter registration drives and candidate forums.⁷ The proposal of new rules by the IRS seems to be a response to many years of regulatory shifts that have loosened the rules governing political spending.⁸ Political spending by tax-exempt groups has drastically increased in recent years, from less than \$5.2 million in 2006, to more than \$300 million in 2012.⁹ Because non-profit organizations are allowed to keep the names of donors confidential, non-profit social welfare groups have become an easy way for wealthy donors to secretly influence political campaigns.¹⁰ While there has not previously been a clearly delineated test for what constitutes an unlawful level of political activity by a 501(c)(4) organization, the general rule of thumb is if an organization spends more than 50 percent of its budget on political activity, then the promotion of social welfare is not its primary purpose and the organization could be at risk for losing its tax-exemption.¹¹

Currently, in order to determine whether a nonprofit is engaged "primarily" in its social purpose instead of politics, the IRS uses a "fact and circumstances" test.¹² The proposed rules would help streamline the process for the IRS by delineating clear guidelines that would eliminate the need for this type of test.¹³ These guidelines could have an enormous impact on some of the largest 501(c)(4) organizations. The new rules will force these groups to limit their

⁷ *Id.*

⁸ Nicholas Confessore, *New Rules Would Rein In Nonprofits' Political Role*, NYTimes.com, http://www.nytimes.com/2013/11/27/us/politics/new-campaign-rules-proposed-for-tax-exempt-nonprofits.html?emc=edit_tnt_20131126&r=0 (last visited Nov. 29, 2013)

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² Paul Blumenthal, *'Dark Money' Nonprofit Political Spending Restricted in Proposed IRS Rules*, HuffingtonPost.com, http://www.huffingtonpost.com/2013/11/26/dark-money-political-spending_n_4345057.html (last visited Nov. 29, 2013).

¹³ Treasury, *supra* note 1.

political spending, or register as openly political organizations that might no longer be eligible for tax-exemption.¹⁴

Due to the large impact the new rules may have on many large non-profit organizations, the proposal has been met with conflicting reviews and criticism. Some have praised the proposed rule change as an important step forward, while many others have expressed worry that the new rules may unfairly burden grassroots organizations. Additionally, it has also been claimed that these new rules primarily target conservative groups, while not applying the same rules to more liberal groups, such as labor unions.

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December 2, 2013

¹⁴ Confessore, *supra*, note 8.