wiley

NEWSLETTER

IRS Proposes Strict Political Rules for Nonprofits: Comments Due February 27

January 2014

On November 29, 2013, the U.S. Internal Revenue Service (IRS) published a Notice of Proposed Rulemaking (NPRM) with respect to regulating the political activity of social welfare organizations exempt from taxation under section 501(c)(4) of the Internal Revenue Code and, essentially, other non-charity 501(c) organizations. The initial response from across the political spectrum has been largely negative. According to the IRS, the proposed regulations are an attempt to clarify the rules about political activity and a move away from the contextual facts and circumstances test that is currently employed. Although analysis is often easier and clearer with clear, bright-line rules, once bright lines are drawn, there are winners and losers. With the proposed regulations, the ability of nonprofits to engage in political activity would be diminished, with the outside possibility that it would be eliminated.

As with all rulemakings, the only method to ensure that one's views are known is to submit comments to the agency, which are due to the IRS in this instance by February 27, 2014. Politically active nonprofits of all types should take notice of this rulemaking and be prepared to engage the IRS and other commenters in this process. Wiley Rein is available to assist in crafting effective and coherent comments on behalf of nonprofits and others, putting to work its extensive campaign finance and nonprofit tax law experience.

Below is a brief summary of some of the main issues raised in the NPRM and a few remarks about the potential impact on nonprofits of all types:

Authors

D. Mark Renaud
Partner
202.719.7405
mrenaud@wiley.law

The regulations are proposed only. As stated above, the regulations have not been finalized, and the proposal is subject to comments from the public, which are due by February 27, 2014. Once the comment period draws to a close, there will be a public hearing. Afterward, it may take the IRS many months to sift through the comments and promulgate the final regulations and corresponding explanation and justification.

Initial focus is on 501(c)(4) organizations. By their terms, the proposed regulations would be applicable only to 501(c)(4) social welfare organizations with respect to the types of candidate-related political activity (see list below) that may cause the organization to lose its 501(c)(4) status and, as a result, face disclosure of its donors as a 527 political organization.

Initial focus is on the primary purpose test. Undertaking any or all of the proposed candidate-related political activities would not cause a 501(c)(4) organization to lose its donor-protected nonprofit status. Instead, it is ultimately the relative level of such activities and its relationship to the organization's "primary purpose" that jeopardize this status. In the rulemaking, the IRS calls for comment on the level of candidate-related political activity that should cause the loss of 501(c)(4) status, although the IRS does not state this level as a percentage of an organization's overall activity. From documents issued recently in light of the IRS scandal, however, there appears to be internal IRS support for the threshold being set at 40% of overall activities. This level of political activity ultimately may be the real focus of this rulemaking.

Implications for other 501(c) organizations. Any regulations adopted for 501(c)(4) organizations also likely would be used with respect to the maximum candidate-related political activity permitted by other, non-charity 501(c) organizations. Use of the new regulations in evaluating non-501(c)(4) entities, under facts and circumstances tests, would not necessarily require a separate rulemaking, although the IRS discusses possible future rulemakings.

Possible future tax implications. Any regulations adopted for 501(c)(4) organizations defining candidate-related political activity also might, after a separate rulemaking, be used under section 527 of the Internal Revenue Code to define the types of expenditures by 501(c) organizations that generate 527(f) tax liability.

Specific Proposed "Candidate-Related Political Activity"

The following activities by a 501(c)(4) social welfare organization would be treated as per se candidate-related political activity if the U.S. Department of the Treasury were to adopt the regulations as proposed.

Less Contentious Categories

- Communications that expressly advocate the election or defeat of a clearly identified candidate;
- Communications that are the functional equivalent of express advocacy;
- Federally defined independent expenditures and electioneering communications;
- Payments to 527 political organizations; and
- Distribution of materials prepared by a candidate or 527 political organization.

More Contentious Categories

- Any communication via essentially any medium, including communications to more than 500 persons, disseminated within 30 days of a primary or 60 days of a general election if the communication mentions or depicts a clearly identified candidate (or political party) in that election. The rule would include, for example, bona fide grassroots advertising about a bill that is up for a vote within a 30/60-day window;
- A payment to any person if federal, state, or local campaign finance law mandates that the transaction is a reportable contribution, which would make the operation of the tax law subject to state or local campaign finance rules;
- The conduct of a voter registration or get-out-the-vote drive, including nonpartisan drives;
- The preparation of a voter guide that refers to a clearly identified candidate or political party, including nonpartisan voter guides;
- The conduct of an event within 30 days of a primary or 60 days of a general election at which one or more candidates appear as part of the program; and
- Donations to another 501(c) organization that engages in any of the above-described candidate-related political activities, whether or not the donation carries restrictions on its use and without allocating between donee's other expenditures.