May 29, 2009

Internal Revenue Service
Attn: CC:PA:LPD:PR (Notice 2009-43)
Room 5203
P.O. Box 7604
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Washington, DC 20044

Comments on Priorities for IRS 2009-2010 Guidance Priority List

OMB Watch appreciates the opportunity to comment on priorities for Internal Revenue Service (IRS) guidance. As an organization dedicated to government accountability and civic participation, we believe the top priority for guidance should be the creation of a bright line definition of prohibited political intervention for charities and religious organizations exempt under Internal Revenue Code (IRC) Sec. 501(c)(3).

A clear definition of what is and is not allowed for issue advocacy and voter education efforts by 501(c)(3) organizations is needed to guarantee basic constitutional rights of free speech and association. By protecting the ability of the only nonpartisan sector to speak out on the issues of the day, on any day, on any issue, no matter how controversial, the IRS can ensure debate on public policy issues is informed by the expertise and public interest perspective of 501(c)(3) organizations.

On May 12, 2009, the Treasury Inspector General for Tax Administration (TIGTA) issued an audit report on the IRS Political Activities Compliance Initiative (PACI) for the 2004 election season. TIGTA reviewed 99 cases and found that 14 cases were incorrectly classified as a violation of the prohibition, even though no intervention occurred in those cases. In addition, 15 of the closing letters TIGTA reviewed, "did not specifically state whether the IRS determined that the prohibition against political intervention had been violated, which can be confusing for tax-exempt organizations that spend resources on a lengthy examination. Closing letters were sometimes silent on whether the prohibition had been violated because of a lack of guidance to ensure that closing letters clearly state whether prohibited political activities occurred."

The need for a bright line rule is the result of systemic flaws in the facts and circumstances test, and the problems they cause cannot be solved by more efficient administration of the current system. For example, the IRS has issued contradicting information regarding 501(c)(3) organizations' use of web links for issue advocacy. On July 28, 2008 the IRS sent a memo to

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revenue agents that indicate that web links may be considered prohibited intervention in elections, depending on their context, the number of clicks between a site and a partisan message on the linked site, and whether an organization has a position on an issue and links to candidates' positions. However, Rev. Rul. 2007-41 and Rev. Rul. 2004-6 imply the opposite, that an organization's track record of ongoing advocacy on an issue is a factor that demonstrates genuine issue advocacy.

TIGTA released an audit report on June 18, 2008 that found IRS employees have an inconsistent understanding of prohibited political intervention. Without any additional clarity from the IRS, some groups are willing to deliberately violate the law, while the IRS maintains a passive response that lacks a clear statement whether inappropriate political activities even occurred. Unfortunately, other groups feel more comfortable vacating their issue advocacy prior to an election rather than inadvertently violating the law. It is necessary to remove the chilling effect of the current vague facts and circumstances test so that 501(c)(3) organizations can become fully engaged in activities that support election reform and the goals of the Help America Vote Act. If IRS employees do not understand the difference between permissible and impermissible activities, nonprofit organizations certainly can not be expected to understand the overly vague standard of when partisan activity has occurred. The IRS should develop a bright line rule to encourage an improved and accountable enforcement process. A bright line will both reduce controversy and help to clarify an ambiguous area of tax law.

The facts and circumstances test and lack of clear definitions threaten First Amendment rights of 501(c)(3) organizations. Enforcement of such a vague standard may constitute an unconstitutional prior restraint on speech. In *Anderson v. Celebreeze,*[1] the Supreme Court said restraints on speech and association that are based on a legitimate government interest must be the least burdensome approach available. Bright line guidance defining prohibited intervention is the least burdensome approach, since the facts and circumstances test inevitably forces charities and religious organizations to make their best guess on how the IRS may view their activities.

The Supreme Court has provided overarching standards in *FEC v. Wisconsin Right to Life*[2] that the IRS can draw on. These are communications that:

- focus on a legislative issue, take a position on it and urge an officeholder to support the position.
- call on the public to support a legislative position and contact an officeholder to urge them to do so
- make no reference to "election, candidacy, political party, or challenger" and
- do not take a position on a candidate's character, qualifications or fitness for office.

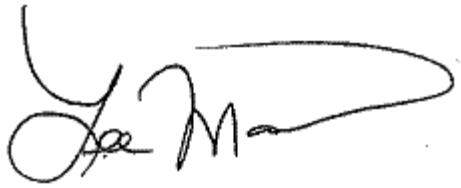
We offer suggestions developed by attorney Gregory Colvin of Adler and Colvin in San Francisco. It lays out a framework for distinguishing genuine issue advocacy from partisan political intervention that should be adopted as the basis for drafting bright line guidance. A copy of those suggestions is attached as Appendix I.

[1] 460 U.S. 780 (1983)
[2] 127 S. Ct. 2652 (2007)

We recommend that the IRS draft bright line guidance and release it for public comment and discussion.

Please let us know if you have any questions or would like any additional information.

Yours truly,



Lee Mason
Director, Nonprofit Speech Rights

PROPOSAL TO COORDINATE IRS GUIDANCE ON ISSUE ADVOCACY WITH FEC REGULATIONS *for discussion, comments welcome*

Greg Colvin colvin@adlercolvin.com May 7, 2008

The Internal Revenue Service, as part of Revenue Ruling 2007-41, issued guidance for organizations exempt from tax under Section 501(c)(3) of the Internal Revenue Code that may wish to take positions on public policy issues during election periods without violating the prohibition on political campaign intervention. Among the "facts and circumstances" that the IRS considers in determining whether issue advocacy constitutes political intervention are seven "key" factors cited in the ruling:

- Whether the statement identifies one or more candidates for a given public office;
- Whether the statement expresses approval or disapproval for one or more candidates' positions and/or actions;
- Whether the statement is delivered close in time to the election;
- Whether the statement makes reference to voting or an election;
- Whether the issue addressed in the communication has been raised as an issue distinguishing candidates for a given office;
- Whether the communication is part of an ongoing series of communications by the organization on the same issue that are made independent of the timing of any election; and
- Whether the timing of the communication and identification of the candidate are related to a non-electoral event such as a scheduled vote on specific legislation by an officeholder who also happens to be a candidate for public office.

The Federal Election Commission, later in 2007, issued Regulation 114.15 to provide guidance defining "electioneering communications" under the Bipartisan Campaign Reform Act of 2002 (BCRA) so as to permit issue advocacy broadcast advertising referring to candidates during periods prior to elections, unless the communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a candidate. The centerpiece of that guidance is a "safe harbor" stating what must and must not be said in the advertisement for a corporation or labor union to be certain that it is not prohibited from publishing the ad under BCRA.

Unfortunately, the elements of the IRS ruling and the FEC rule are presented using language that is almost entirely different. This has caused great confusion. A nonprofit corporation that can be certain it is within the FEC safe harbor may be quite uncertain of the federal tax consequences of publishing the ad under the IRS multiple-factor test. True, the statutes authorizing the IRS and the FEC to regulate speech derive from different legislative policies, but the conceptual problem both agencies are trying to solve is the same: *short of express advocacy to vote for or against a candidate, what speech constitutes an attempt to influence the outcome of an election?*

The IRS could, without too much difficulty, harmonize the two standards. Here's how:

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Expand and refine the IRS list of factors from seven to ten, incorporating useful terms from the FEC rule (underlined below). Then, organize them so that organizations will know which factors they must satisfy to fit within the safe harbor, like this:

1. Whether the statement identifies one or more candidates for a given public office.

2. Whether the statement is delivered close in time to the election, defined, as under BCRA, as within 30 days before a primary, caucus, or convention, and within 60 days before a general election.

3. Whether the statement makes no reference to voting by the general public or any election, candidacy, political party, or opposing candidate.

4. Whether the statement takes no position on any candidate's or officeholder's character, qualifications, or fitness for office.

5. Whether the statement focuses on a legislative, executive, or judicial matter or issue.

6. Whether the statement urges a candidate to take a particular position or action with respect to the matter or issue, or urges the public to adopt a particular position and to contact the candidate with respect to the matter or issue (a "call to action").

7. Whether the statement expresses no approval or disapproval for one or more candidates' positions and/or actions.

8. Whether the issue addressed in the communication has not been raised as an issue distinguishing candidates for a given office.

9. Whether the communication is part of an ongoing series of communications by the organization on the same issue that are made independent of the timing of any election.

10. Whether the timing of the communication and identification of the candidate are related to a non-electoral event such as a scheduled vote on specific legislation by an officeholder who also happens to be a candidate for public office.

The IRS safe harbor I propose would be this: IF the communication is within factors 1 and 2, then it MUST satisfy factors 3, 4, 5, and 6 (which bring it within the FEC safe harbor). Further, to meet the IRS safe harbor it must also satisfy at least TWO of the remaining four factors, 7, 8, 9, and 10.

That's it. Simple.

If the communication does not meet the safe harbor, then all ten factors, and any others that may arise, may be relevant to the IRS facts and circumstances determination.