



Office of the General Counsel

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Submitted Electronically

Office of the Chief Counsel
Internal Revenue Service
1111 Constitution Ave., N.W.
Washington, D.C., 200

**Re: Proposed Regulations for Tax-Exempt Social Welfare Organizations and
Candidate-Related Political Activity
File Code No. (REG-134417-13)**

Dear Sir or Madam:

On behalf of the United States Conference of Catholic Bishops, we respectfully submit the following comments to the Notice of Proposed Rulemaking ("NPRM") proposing to amend the regulations under section 501(c)(4) of the Internal Revenue Code concerning certain deemed "political" activities of tax-exempt social welfare organizations.

The United States Conference of Catholic Bishops ("USCCB") is an organization recognized by the IRS as exempt under section 501(a), and described in section 501(c)(3) as a church in section 170(b)(1)(A)(i). The USCCB holds a group exemption letter issued by the IRS in 1946. The USCCB group ruling consists of Catholic churches and ministries throughout the United States which are also described in section 501(c)(3).

I. Background

Organizations exempt from taxation under section 501(a) of the Internal Revenue Code and described in section 501(c)(4) include nonprofit organizations "operated exclusively for the promotion of social welfare." The regulations clarify that an "organization is operated exclusively for the promotion of social welfare if it is primarily engaged in promoting in some way the common good and general welfare of the people of the community."¹ However, the 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."²

Under the current regulations, a section 501(c)(4) organization may participate and intervene in political campaigns so long as that activity is not its primary activity, although amounts expended on such activity may be subject to tax under section 527(f).³ Identifying activity that constitutes participation or intervention in political campaigns is primarily a facts-and-circumstances inquiry.⁴

¹ Treas. Reg. § 1.501(c)(4)-1(a)(2)(i).

² Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii).

³ See Rev. Rul. 81-95, 1981-1 C.B. 332.

⁴ See Rev. Rul. 81-95 and Rev. Rul. 2007-41, 2007-25 I.R.B. 1421.

The proposed regulations would provide that for section 501(c)(4) organizations, “promotion of social welfare does not include direct or indirect candidate-related political activity... .”⁵ The term “candidate-related political activity” employs a bright-line test in lieu of the facts-and-circumstances analysis required for identifying political campaign intervention. By any measure, candidate-related political activity encompasses far more activity than political campaign intervention.

The proposed regulations expand the definition of a “candidate” (as compared to “candidate” for purposes of identifying political campaign intervention, although not with respect to section 527) to include appointees to any public office or political organization, as well as any officeholder subject to a recall election. Further, the proposed regulations create three general categories of candidate-related political activity: express advocacy and other public communications close in time to an election, contributions and gifts, and election-related activities. A section 501(c)(4) organization would be permitted to continue to conduct activities falling under one or more of these three categories without jeopardizing its tax-exempt status, unless such activities constituted the organization’s “primary” activity.

The first category, express advocacy and other public communications close in time to an election, includes any communications in which words expressly advocate for or against (“vote,” “oppose,” “support,” “elect,” “defeat,” or “reject”) a candidate, or, if within a certain amount of time prior to an election (60 days of a general election, or 30 days of a primary), simply refer to a clearly identified candidate or political party in the election, regardless of whether any express advocacy words are used. In addition, any expenditures for communications that are reported to the Federal Election Commission, including independent expenditures and electioneering communications, are included in this category.

The second category, contributions and gifts, comprises any gift, grant, subscription, loan, advance or deposit made to a section 527 political organization or any other person if the contribution is recognized under federal, state or local law as a reportable contribution to a candidate for elective office. In addition, any amounts given to another section 501(c) organization that engages in candidate-related political activity are included in this category. A section 501(c)(4) organization would be able to ensure that a contribution to another organization is not treated as candidate-related political activity under this category if the contribution is subject to a written restriction that it not be used for candidate-related political activity, and it receives, from an authorized officer of the recipient organization, a written representation that the organization does not engage in candidate-related political activity.

The third category, election-related activities, includes all voter registration drives, get-out-the-vote drives, preparation or distribution of a voter guide, distribution of any material prepared by or on behalf of a candidate or by a section 527 political organization, and hosting an event within 60 days of a general election or 30 days of a primary in which one or more candidates appear as part of the program.

Thus, the proposed rule would take the concept of “political campaign intervention,” which under current law is deemed to further neither a section 501(c)(3) organization’s charitable purpose nor a section 501(c)(4) organization’s promotion of social welfare, and subsume it within a new concept, “candidate-related political activity,” which will complicate relationships between section 501(c)(3) organizations and section 501(c)(4) organizations in

⁵ Prop. Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii).

ways that cannot yet be fully appreciated. In addition, the NPRM requests comments on whether any modifications or exceptions are needed in the context of section 501(c)(3) organizations and the definition of “political campaign intervention.” We therefore offer these comments.

II. Analysis

A. Deductibility of contributions to section 501(c)(3) organizations, and treatment of contributions from section 501(c)(3) organizations to section 501(c)(4) organizations

A section 501(c)(3) organization may make a contribution to a section 501(c)(4) organization because the latter is better equipped or situated to further a particular charitable purpose, or to engage in permissible issue advocacy (including legislative advocacy) at a local, state or federal level that is of critical importance to the section 501(c)(3) organization’s mission. Notwithstanding that a donor who makes a gift to a section 501(c)(3) organization is not permitted a charitable contribution deduction under section 170 if the gift is earmarked for use in influencing specific legislation, or that the contribution by the section 501(c)(3) organization to the section 501(c)(4) organization may not be used for political campaign intervention, the proposed regulations do not directly address the following two questions: (i) is a donor to the section 501(c)(3) organization permitted a charitable contribution deduction under section 170 if the donor’s contribution is designated for a charitable purpose, even if that charitable purpose might constitute candidate-related political activity (but not political campaign intervention or influencing specific legislation), whether conducted by the section 501(c)(3) organization or a section 501(c)(4) organization; and (ii) if a section 501(c)(3) organization makes a contribution to a section 501(c)(4) organization, does the contribution violate the prohibition against political campaign intervention by the section 501(c)(3) organization merely because the section 501(c)(4) organization uses the contribution to engage in candidate-related political activity (but not political campaign intervention)?

Regarding the charitable contribution deduction, it would seem that nothing in the proposed regulation should disturb the rationale in Rev. Rul. 80-275 (1980-42 I.R.B. 6), or otherwise expand it to proscribe a charitable contribution deduction for a charitable purpose simply because it falls within the definition of candidate-related political activity. No guidance has been issued that would suggest that properly conducted nonpartisan voter guides,⁶ voter registration drives⁷ or candidate forums⁸ are no longer charitable activities if conducted by section 501(c)(3) organizations, even though these activities may constitute candidate-related political activity. Similarly, regarding the question of a distribution from a section 501(c)(3) organization to a section 501(c)(4) organization, there should be no consequence to the section 501(c)(3) organization unless that contribution is earmarked for or given with the understanding that it be used for political campaign intervention.

Thus, we believe that the answers to these two open questions continue to be “no.” Contrary answers would not only run afoul of current guidance on these questions, but also complicate administrative issues for many section 501(c)(3) organizations. While some section 501(c)(3) organizations have relationships with affiliated section 501(c)(4) organizations, and

⁶ Rev. Rul. 78-248, 1978-1 C.B. 154

⁷ Rev. Rul. 2007-41, 2007-25 I.R.B. 1421

⁸ Rev. Rul. 86-95, 1986-32 I.R.B. 4

therefore also have knowledge of the distinct federal tax rules applicable to each, many do not, and yet still make contributions to these organizations. It would be a burden for section 501(c)(3) organizations that make such contributions to have to learn and comply with an entirely different regulatory framework concerning restrictions on contributions.

If Treasury and the IRS issue any further guidance on the subject of the NPRM, such guidance should confirm that a contribution by a section 501(c)(3) organization to a section 501(c)(4) organization that either engages in candidate-related political activity, or uses any part or all of the contribution for candidate-related political activity (but not political campaign intervention), will not be treated as an expenditure for political campaign intervention by the section 501(c)(3) organization. In addition, we request confirmation that a contribution by a donor to a section 501(c)(3) organization will continue to be eligible for a charitable contribution deduction under section 170 if the donor's contribution is designated for a charitable purpose, even if that charitable purpose constitutes candidate-related political activity, as long as it is not designated for the purpose of political campaign intervention or influencing specific legislation.

B. Contributions from section 501(c)(4) organizations to section 501(c)(3) organizations

A section 501(c)(4) organization may make a contribution to a section 501(c)(3) organization as part of its program for promoting social welfare, which is a charitable activity.⁹ As explained above, the proposed regulation would permit such a contribution, and indeed would not treat it as an expenditure for candidate-related political activity by the section 501(c)(4) organization, if certain conditions are met. One of those conditions is that an authorized officer of the donee section 501(c)(3) organization would have to make a written representation that the organization does not engage in candidate-related political activity.

It is unfortunate that a section 501(c)(3) organization, as a condition to receiving funds from another organization, would be prohibited from engaging in activity that is charitable, *even if it uses its own funds to do so*. The intent of this condition appears designed to prevent abuse so that section 501(c)(4) organizations cannot transfer funds to other organizations in order to circumvent the limitations imposed by the proposed regulations, but the scope of this condition is unnecessarily broad. Because candidate-related political activity encompasses activity that a section 501(c)(3) organization is permitted to engage in, it should be sufficient that the donee section 501(c)(3) organization, as a condition to receiving a contribution, makes a written representation that the organization will not use the funds for candidate-related political activity. If the purpose of the provision is to prevent a section 501(c)(4) organization from distributing funds to another organization to do what it cannot, then the rule is not subverted by permitting a section 501(c)(3) organization to use the contribution for restricted purposes, without limiting the scope of activities it may conduct using its own funds.

If Treasury and the IRS issue any further guidance on the subject of the NPRM, such guidance should provide that a contribution by a section 501(c)(4) organization to a section 501(c)(3) organization will not be treated as candidate-related political activity by the section 501(c)(4) organization if the contribution is subject to a written agreement between the organizations that the contribution will not be used for candidate-related political activity, or alternatively, specified election-related activities.

⁹ Treas. Reg. § 1.501(c)(3)-1(d)(2).

C. Confusion and chilling impact on section 501(c)(3) organizations

The term "charitable," as applied to section 501(c)(3) organizations, refers to its generally accepted legal sense, and includes the "promotion of social welfare."¹⁰ Because the proposed regulations state that "promotion of social welfare" does not include direct or indirect candidate-related political activity, it is not unreasonable for a section 501(c)(3) organization to conclude that if it conducts candidate-related political activity, the IRS might treat such activity as not furthering a charitable purpose. Unless we accept the premise that promotion of social welfare is somehow mutually exclusive from that other charitable concept, "educational," then the proposed regulation seemingly upends decades of guidance concerning permissible, and in fact, charitable, activity by section 501(c)(3) organizations that might otherwise constitute candidate-related political activity.¹¹

We presume that it is not the intent of the NPRM to indirectly narrow the definition of "charitable," and that the proposed regulations are exclusively addressing promotion of social welfare by section 501(c)(4) organizations. Nevertheless, it is confusing. Officers and employees of charitable organizations and their attorneys are hearing that a section 501(c)(4) organization can't do this or that (perhaps a misunderstanding that candidate-related political activity is not *per se* prohibited), and are assuming that such activity is now prohibited for section 501(c)(3) organizations. This assumption is a natural one, considering that section 501(c)(4) organizations have generally been treated more permissively under the tax code because their donors are not permitted charitable contribution deductions.¹² This inhibition is causing a chilling effect on many section 501(c)(3) organizations.

We request that Treasury and the IRS, in any subsequent rule-making, provide that candidate-related political activity (but not political campaign intervention) is not prohibited by section 501(c)(3) organizations, and the fact that any activity by a section 501(c)(3) organization constitutes candidate-related political activity does not, alone, create an inference that such activity does not further a charitable purpose. An explicit provision might reduce confusion, but not eliminate it. The very fact that an activity is defined as candidate-related political activity in one set of regulatory guidance will create a stigma for section 501(c)(3) organizations that conduct such activity, even though it is done in a nonpartisan and educational manner intended to promote civic involvement in the political process.

Before issuing any further guidance on the subject of the NPRM, Treasury and the IRS should carefully consider the direct and indirect effects that such guidance will have on section 501(c)(3) organizations, even if, as with the NPRM, the changes apply exclusively to section 501(c)(4) organizations. One way to mitigate such effects on section 501(c)(3) organizations would be to provide reasonable safe harbors that recognize the inherently charitable and educational nature of nonpartisan election-related activities conducted by section 501(c)(4) organizations. For example, with respect to the preparation and distribution of a voter guide, one or more of the following could create a safe harbor, or at least a rebuttable presumption that it is not candidate-related political activity, if: (i) it contains a disclaimer that the organization

¹⁰ Treas. Reg. § 1.501(c)(3)-1(d)(2).

¹¹ See Rev. Rul. 78-248, Rev. Rul. 2007-41 and Rev. Rul. 86-95, cited above; see also Rev. Rul. 80-282, 1980-41 I.R.B. 7 (publication of voting records) and Rev. Proc. 86-43, 1986-2 C.B. 729 (criteria for determining whether advocacy by an organization is educational).

¹² See *Regan v. Taxation with Representation*, 461 U.S. 540 (1983).

does not endorse for political office any candidate named or not named in the voter guide;¹³ (ii) it is made available to members or the public a certain period of time prior to a general or primary election, and the guide is not altered, nor its distribution changed or expanded in any way during that period of time up until the election; or (iii) it does not contain the advocacy words in Prop. Treas. Reg. § 1.501(c)(4)-1(a)(2)(A)(1)(i) (“vote,” “oppose,” “support,” “elect,” “defeat,” or “reject”) (or if it does, they are limited to past-tense usage) or would otherwise not be described in Prop. Treas. Reg. § 1.501(c)(4)-1(a)(2)(A)(1)(ii) (“susceptible of no reasonable interpretation other than a call for or against the selection, nomination, election, or appointment of one or more candidates or of candidates of a political party”).

D. Potential changes to definition of political campaign intervention for section 501(c)(3) organizations

The prohibition against political campaign intervention by section 501(c)(3) organizations is absolute, and the consequences of revocation, including losing exemption from federal income tax, recognition of that exemption by the IRS, and advance assurance of deductibility, are grave.¹⁴ In addition, most section 501(c)(3) organizations cannot self-declare their tax exemption as section 501(c)(4) organizations after revocation for engaging in political campaign intervention.¹⁵

As the NPRM notes, regarding a definition of political campaign intervention, a “more nuanced consideration of the totality of the facts and circumstances may be appropriate.” A bright-line test for defining political campaign intervention, or candidate-related political activity, is likely to encompass far more activity than is necessary, which is particularly true if the purpose is to ensure that no more than an “insubstantial” part of an organization’s activities are not in furtherance of its tax-exempt purpose.¹⁶ A bright-line test may bear lower risks of this kind in cases where the proscription is not *absolute*, because the organization’s activities need only be “primarily” in furtherance of its tax-exempt purpose.¹⁷

As an example of how a bright-line rule regarding political campaign intervention might place a severe burden on a section 501(c)(3) organization, consider the NPRM’s 60/30 rule for identifying a candidate or political party: the proposed regulations would treat as candidate-related political activity any public communication (including an internet page) within 60 days of a general election that refers to a political party or a candidate in that election, or within 30 days of a primary that refers to a candidate in that primary. A section 501(c)(3) organization with no interest in engaging in political campaign intervention should not have to bear the burden of scouring its website 61 days prior to a general election to ensure there are no references to a candidate or political party in such an election, *in any capacity*. Moreover, the same section 501(c)(3) organization should not have to endure the risk that an individual or organization that resents or disagrees with the mission of the section 501(c)(3) organization will scour its website for incidental or lingering references and report the organization to the IRS’ exempt organizations examinations classification unit.

¹³ See Rev. Rul. 86-95 (“At both the beginning and end of each forum, the moderator will state that the views expressed are those of the candidates and not those of the organization and that the sponsorship of the forum is not intended as an endorsement of any candidate”).

¹⁴ See *Branch Ministries v. Rossotti*, 211 F.3d 137 (D.C. Cir. 2000).

¹⁵ Section 504(a). Although this rule does not apply to churches and their integrated auxiliaries. Section 504(c).

¹⁶ Treas. Reg. § 1.501(c)(3)-1(b)(1)(iii).

¹⁷ Treas. Reg. § 1.501(c)(4)-1(a)(2).

The potential for abuse inherent in a bright-line test for political campaign intervention is especially acute for churches. Congress enacted section 7611 to insulate churches from unmitigated interference by the IRS regarding their tax-exempt status, while still allowing the IRS to pursue spurious claims of tax exemption. Imposing a bright-line test as over-inclusive as now proposed for “candidate-related political activity” would effectively vitiate the protection that Congress afforded churches from governmental interference. To continue the example from the preceding paragraph, imagine a section 501(c)(3) church’s website contained a lingering reference to an individual that, although created 90 days before the election, and the content of the communication was unrelated to the individual’s candidacy, nonetheless violated a bright-line “60/30” rule. The government would be able to make a prima facie case for beginning a church tax inquiry (and ultimately revoke the church’s recognition of tax-exempt status) without being required to first establish a reasonable belief under section 7611 regarding the church’s intent or a consideration of any facts and circumstances.

We request that Treasury and the IRS, in any subsequent rule-making, not follow the approach proposed here for “candidate-related political activity” in defining “political campaign intervention” for section 501(c)(3) organizations. If an approach similar to what is proposed in the NPRM is advanced, then we request, in order to preserve the statutory protection of section 7611, that organizations described in section 501(h)(5) (including churches, conventions or associations of churches and their integrated auxiliaries) either not be subject to the new definition, or be permitted to be subject to such a rule only by making an affirmative election.¹⁸

III. Conclusion

USCCB appreciates the concerns that Treasury and IRS have set forth as prompting the NPRM. However, we believe the NPRM creates more problems than it solves and unnecessarily inhibits section 501(c)(3) organizations from engaging in permitted activity and restricts their ability to give to and receive contributions from section 501(c)(4) organizations. More importantly, any application of similar rules to a definition of political campaign intervention will likely limit the ability of section 501(c)(3) organizations to engage in educational and otherwise charitable activity. In the case of churches and conventions or associations of churches, this kind of change would strip away the protection from governmental interference afforded by section 7611 as it relates to the most severe administrative action that the IRS can take against such organizations: revocation of their recognition of exemption from federal income taxes and advance assurance of deductibility with respect to their donors.

¹⁸ See section 410(d).

The United States Conference of Catholic Bishops therefore respectfully requests that Treasury and IRS consider these comments in the rule-making process.

Respectfully Submitted,



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