

tax-exempt organizations lawflash

February 20, 2014

IRS Proposes New Definition of “Political Activity” for Social Welfare Organizations

The initial comment period for the proposed regulations is drawing to a close on February 27, 2014.

On November 29, 2013, the Internal Revenue Service (IRS) and the U.S. Department of the Treasury issued a Notice of Proposed Rulemaking (NPRM)¹ that would create new rules for “candidate-related political activity” (CRPA), which would be excluded from being an activity that promotes social welfare for 501(c)(4) organizations. The NPRM would replace existing regulations issued in 1959 that use a concept of “political campaign intervention” and its related facts and circumstances test. The following is a summary of answers to common questions about the NPRM, together with our observations about the proposed guidance.

The NPRM requests comments from the public regarding the proposed CRPA rules, including the standard for being “primarily” engaged in social welfare activities and how this standard should be measured, whether this standard should be changed, the advisability of applying the CRPA rules to other 501(c) organizations, and the advisability of using the CRPA rules to define “political activities” for purposes of section 527 of the Internal Revenue Code. The due date for comments is February 27, 2014.

What are the proposed key changes to the current law?

The NPRM would replace the current facts and circumstances test used to define “political campaign intervention” for purposes of section 501(c)(4) with a generally broader definition of “CRPA,” which is excluded from being an activity that promotes social welfare.

What activities would constitute CRPA and therefore not be promoting social welfare?

CRPA would include the following:

- Communications that express a view on, whether for or against, the selection, nomination, election, or appointment of one or more clearly identified candidates (i.e., express advocacy communications)
- Public communications (as defined) within 30 days of a primary election or 60 days of a general election that refer to one or more clearly identified candidates or, in the case of a general election, one or more political parties
- Communications whose expenditures are reported to the Federal Election Commission
- Contributions (including gifts, grants, subscriptions, loans, advances, or deposits) of money or anything of value to, or the solicitation of contributions on behalf of, a candidate, a section 527 political organization, or a section 501(c) organization that engages in CRPA
- Conduct of a voter registration drive or “get out the vote” drive

1. Notice of Proposed Rulemaking, Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities REG-134417-13, 78 Fed. Reg. 71,535 (Nov. 29, 2013), available at <https://www.federalregister.gov/articles/2013/11/29/2013-28492/guidance-for-tax-exempt-social-welfare-organizations-on-candidate-related-political-activities>.

- Distribution of any material prepared by or on behalf of a candidate or by a section 527 political organization
- Preparation or distribution of a voter guide that refers to one or more clearly identified candidates or, in the case of a general election, to one or more political parties
- Hosting or conducting a forum for candidates within 30 days of a primary election or 60 days of a general election²

Who counts as a “candidate” under CRPA?

A candidate is any individual who publicly offers himself or herself, or is proposed by another individual, for selection, nomination, election (including recall), or appointment to any federal, state, or local public office or office in a political organization or to be a presidential or vice-presidential elector. This includes certain judicial and executive branch appointments.³

How much political activity can section 501(c)(4) organizations currently conduct?

A section 501(c)(4) organization may conduct political activities so long as the organization is primarily engaged in activities that promote social welfare.⁴ This has been interpreted in informal IRS training guide materials to mean that an organization can make expenditures for political activities so long as such activities, in conjunction with any other nonqualifying activities, do not constitute “the organization’s primary activity (51%).”⁵ The IRS notes that there is no established method to determine the 51% standard—it may be calculated based purely on monetary expenditures or an analysis of staff and volunteer hours.

Additionally, the IRS has recently developed a safe harbor test for an expedited review of a section 501(c)(4) organization, which can represent that the organization will spend 60% or more of both its total expenditures and its total time (measured by employee and volunteer hours) on activities that promote social welfare and 40% or less of both its total expenditures and its total time on political campaign intervention.⁶

The NPRM specifically requests comments on what portion of an organization’s activities must promote social welfare in order to qualify under section 501(c)(4) and whether additional limits should be imposed on any or all activities that do not further social welfare. The NPRM also requests comments on how such a standard should be measured.

What are the potential issues with the expanded definition of “CRPA” replacing the current definition of “political campaign intervention”?

The new definition would include nonpartisan activities that many 501(c)(3) organizations engage in, such as nonpartisan voter education on issues, nonpartisan voter education on candidates and voter guides, and get-out-the-vote efforts.

If the NPRM rules are finalized in their current form, does that mean that 501(c)(4) organizations cannot engage in CRPA?

No. The NPRM only broadens the definition of “political activities” that are deemed not to promote social welfare. A 501(c)(4) organization may conduct CRPA activities so long as it still primarily conducts other non-CRPA activities that promote social welfare.

2. Prop. Treas. Reg. § 1.501(c)(4)-1(a)(2)(iii)(A).

3. Prop. Treas. Reg. § 1.501(c)(4)-1(a)(2)(iii)(B)(1).

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

5. EO Tax Journal 2013-211 (Nov. 15, 2013).

6. IRS Letter 5228, pg. 3 (Sept. 2013).

How does the NPRM affect other 501(c) organizations?

The NPRM only applies to section 501(c)(4) organizations and does not change the political campaign intervention rules that apply to other 501(c) organizations. However, the NPRM requests comments on whether the CRPA rules should be extended to other section 501(c) organizations. The NPRM states that any proposed changes to the rules for other organizations would be issued as proposed regulations with the required notice and comment period.

Even if the proposed regulations only apply to section 501(c)(4) organizations, the NPRM, if adopted, could potentially create confusion and a chilling effect on other section 501(c) organizations that wish to engage in CRPA activities.

What is the status of the proposed regulations, and when would any revised final regulations be effective?

The NPRM proposes that the final regulations will be effective on the date they are published in the *Federal Register* as final regulations. In view of the number and nature of the comments received to date (more than 49,000), it is likely that substantial changes will be made to the initial proposed regulations before they are finalized.

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