May 31, 2008

Internal Revenue Service
Attn: CC:PA:LPD:PR (Notice 2008-47)
Room 5203
P.O. Box 7604
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Washington, DC 20044

Comments on Priorities for IRS 2008-2009 Guidance Priority List

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

In February 2006 the Congressional Research Service released a report that said, "neither tax law nor the regulations offer much insight as to what activities are banned for 501(c)(3) organizations prohibited from intervening in political campaigns."[1] A clear definition of what is and is not allowed for issue advocacy and voter education efforts by 501(c)(3) organizations is critically needed to guarantee basic constitutional rights of free speech and association. It is also 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.

This issue does not involve a large number of individual taxpayers or large amounts of money. However, it is fundamental to something of greatest importance: the healthy functioning of our democratic system. 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 policies issues is informed by the expertise and public interest perspective of 501(c)(3) organizations.

[1] CONGRESIONAL RESEARCH SERVICE 110TH CONG. REPORT ON TAX EXEMPT ORGANIZATION: POLITICAL ACTIVITY RESTRCTIONS AND DISCLOSURE REQUIREMENTS 12-13 (Updated Jan 25, 2007 (prepared by Erika Lunder)

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The IRS can also encourage more nonprofits to help make our electoral system fair and functional. Our August 2007 report *How Nonprofits Help America Vote 2006*[2] describes how nonpartisan organizations defend voters' rights, help protect the integrity of our elections and work to expand and educate the electorate. For example, a coalition of nonprofits in Arizona has challenged overly restrictive voter identifications laws, the League of Women Voters in Florida successfully challenged laws that restricted nonprofit voter registration drives and many nonprofits participated in the Election Protection project, which help respond to voting rights violations on Election Day. Even more of these kinds of activities could go forward in the future if 501(c)(3)s could plan their activities based on clear rules that remove the threat of IRS investigation.

The need for a bright line rule is the result of systemic flaws in the facts and circumstances test, and the problems it causes cannot be solved by more efficient administration of the current system. In fact, the IRS has made great strides toward providing better guidance on political intervention in the past several years, with Fact Sheet 2006-17 and Rev. Rul. 2007-41. In its April 17 letter. 2008 PACI letter the IRS noted that it "has encountered a number of cases with varied fact patterns not directly covered by those examples." The IRS also needs greater clarity to improve its enforcement. Now is the time to take the logical next step and develop a bright line rule and more accountable enforcement process.

The facts and circumstances test and lack of clear definitions threaten First Amendment rights of charities and religious organizations. For instance, it fails to adequately inform 501(c)(3) organizations of what is and is not permissible. Enforcement of such a vague standard may constitute an unconstitutional prior restraint on speech, as the IRS has said its goal is to deter activity before elections through its fast track process. However, this can result in restraint of speech where there is no finding of wrongdoing, since investigations are initiated quickly, but generally concluded well after the election. In *Anderson v. Celebreeze*[3] 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 path to a bright line, while not easy, is not impossible to find. The Supreme Court has provided overarching standards in *FEC v. Wisconsin Right to Life*[4] that the IRS can draw on. These are communications that:

- focus is 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.

[2] Available online at http://www.ombwatch.org/npadv/PDF/nphelpedamericavote2006.pdf
[3] 460 U.S. 780 (1983)
[4] 127 S. Ct. 2652 (2007)

In addition, attorney Gregory Colvin of Adler and Colvin in San Francisco put forward a draft bright line approach in a discussion draft circulated at the American Bar Association's Tax Section meeting in May. It lays out a framework for distinguishing genuine issue advocacy from partisan political intervention that can be used as the basis for drafting bright line guidance. A copy of this document is attached to these comments as Appendix I.

We recommend that the IRS draft bright line guidance and release it for public comment and discussion, with the goal of finalizing the project before the 2010 elections.

In addition to Mr. Colvin's memo, we have attached a copy of an article I wrote for the University of North Carolina's *First Amendment Law Review*, Fall 2007 issue, that lays out our argument for a bright line definition in detail.

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

Yours truly,

Kay Guinane
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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.