

August 24, 2012

Ms. Lois G. Lerner, Director
Exempt Organizations Division
Internal Revenue Service
1111 Constitution Ave., N.W.
Washington, DC 20224

**Re: Two Revenue Rulings Defining Political Activity and Issue Advocacy;
General Information Letter**

Dear Ms. Lerner:

On May 7th of this year, I wrote your office expressing concerns about two Rulings issued three years apart by the Internal Revenue Service addressing the same topic—issue advocacy communications by tax-exempt organizations—but phrased in significantly different ways.

Revenue Ruling 2004-6 dealt with a non-charitable section 501(c) organization using its own funds to engage in political (“exempt function”) activity described in section 527(e)(2), which could result in 35% tax liability under section 527(f) on the annual amount of such expenditures.

Revenue Ruling 2007-41 covered a number of fact patterns where a section 501(c)(3) charity might cross the line into prohibited political activity, which could result in a 10% tax liability on the expenditures under section 4955 and/or revocation of tax-exempt status.

Both Rulings (excerpted below) presented multiple-factor tests that the organization could use to determine whether its communications (such as TV or radio advertising) consisted of public policy issue advocacy, with no tax consequence, or whether the communications were political in character causing adverse tax treatment.

I suggested that the IRS issue a single Revenue Ruling on this topic that would apply to all tax-exempt organizations, clearing up any differences in interpretation that might arise from the variations in wording between the two Rulings.

You indicated that my suggestion had been shared with the Department of the Treasury and with IRS Chief Counsel, but after three months without a substantive response, I remain concerned that many tax-exempt 501(c) organizations are raising and spending millions of dollars on public communications during this 2012 election season without a clear understanding of how the Rulings apply to their activities.

Therefore, in order to educate the general public--ranging from consultants who prepare advertisements to the working press to the average citizen who views these messages--I respectfully request that the Service answer four questions, using the format of a general information letter.

1. Would application of the 2004-6 Ruling or the 2007-41 Ruling ever result in different judgments for the same communication, as to whether it was issue advocacy or political campaign intervention?

Proposed answer: No.

2. The 2004-6 Ruling includes, as a negative factor "target[ing] voters in a particular election." While not specifically mentioned in the 2007-41 Ruling, is the presence of geographical targeting still a relevant factor?

Proposed answer: Yes.

3. Which Ruling applies to the primary purpose test for qualification as a tax-exempt non-charitable section 501(c) organization, such as social welfare 501(c)(4) organization?

Proposed answer: Activities that do not promote the exempt purpose of a 501(c) organization, including political campaign activity, must be less than primary in order for the organization to qualify for exemption. The definition of political campaign activity in this context is the same as it would be for a section 501(c)(3) charitable organization that is prohibited from engaging in such activity, and so Revenue Ruling 2007-41 applies. However, because no difference in outcome is intended between the 2007 and 2004 Rulings, use of either Ruling would reach the same result.

4. Why are the 2004 and 2007 Rulings worded differently?

Proposed answer: Both Rulings were intended to provide a multi-factor, open-ended analysis of an organization's communications, especially during election periods. All factors relevant to a determination under one Ruling would be relevant under the other Ruling. The 2007 Ruling is more succinct than the 2004 Ruling.

These are recurring questions that, if answered by the IRS in the form of a general information letter, would assist in correcting misconceptions in this area.

Very truly yours,



Gregory L. Colvin

Revenue Ruling 2004-6 (excerpted)

Organizations that are exempt from federal income tax under § 501(a) as organizations described in § 501(c)(4), § 501(c)(5), or § 501(c)(6) may, consistent with their exempt purpose, publicly advocate positions on public policy issues. This advocacy may include lobbying for legislation consistent with these positions. Because public policy advocacy may involve discussion of the positions of public officials who are also candidates for public office, a public policy advocacy communication may constitute an exempt function within the meaning of § 527(e)(2). If so, the organization would be subject to tax under § 527(f).

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All the facts and circumstances must be considered to determine whether an expenditure for an advocacy communication relating to a public policy issue is for an exempt function under § 527(e)(2). When an advocacy communication explicitly advocates the election or defeat of an individual to public office, the expenditure clearly is for an exempt function under § 527(e)(2). However, when an advocacy communication relating to a public policy issue does not explicitly advocate the election or defeat of a candidate, all the facts and circumstances need to be considered to determine whether the expenditure is for an exempt function under § 527(e)(2). In facts and circumstances such as those described..., factors that tend to show that an advocacy communication on a public policy issue is for an exempt function under § 527(e)(2) include, but are not limited to, the following:

- a) The communication identifies a candidate for public office;
- b) The timing of the communication coincides with an electoral campaign;
- c) The communication targets voters in a particular election;
- d) The communication identifies that candidate's position on the public policy issue that is the subject of the communication;
- e) The position of the candidate on the public policy issue has been raised as distinguishing the candidate from others in the campaign, either in the communication itself or in other public communications; and
- f) The communication is not part of an ongoing series of substantially similar advocacy communications by the organization on the same issue.

In facts and circumstances such as those described ..., factors that tend to show that an advocacy communication on a public policy issue is not for an exempt function under § 527(e)(2) include, but are not limited to, the following:

- a) The absence of any one or more of the factors listed in a) through f) above;
- b) The communication identifies specific legislation, or a specific event outside the control of the organization, that the organization hopes to influence;
- c) The timing of the communication coincides with a specific event outside the control of the organization that the organization hopes to influence, such as a legislative vote or other major legislative action (for example, a hearing before a legislative committee on the issue that is the subject of the communication);

- d) The communication identifies the candidate solely as a government official who is in a position to act on the public policy issue in connection with the specific event (such as a legislator who is eligible to vote on the legislation); and
- e) The communication identifies the candidate solely in the list of key or principal sponsors of the legislation that is the subject of the communication.

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Revenue Ruling 2007-41 (excerpted)

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Issue Advocacy vs. Political Campaign Intervention

Section 501(c)(3) organizations may take positions on public policy issues, including issues that divide candidates in an election for public office. However, section 501(c)(3) organizations must avoid any issue advocacy that functions as political campaign intervention. Even if a statement does not expressly tell an audience to vote for or against a specific candidate, an organization delivering the statement is at risk of violating the political campaign intervention prohibition if there is any message favoring or opposing a candidate. A statement can identify a candidate not only by stating the candidate's name but also by other means such as showing a picture of the candidate, referring to political party affiliations, or other distinctive features of a candidate's platform or biography. All the facts and circumstances need to be considered to determine if the advocacy is political campaign intervention.

Key factors in determining whether a communication results in political campaign intervention include the following:

- 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.

A communication is particularly at risk of political campaign intervention when it makes reference to candidates or voting in a specific upcoming election. Nevertheless, the communication must still be considered in context before arriving at any conclusions.

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