

MAY 20, 2013

A Bad Week for the IRS: Improper Scrutiny of Organizations Applying for Tax-Exempt Recognition

Five of our attorneys, Rob Wexler, Ingrid Mittermaier, Susan Dawson, and the two of us, were in the audience at the American Bar Association Exempt Organizations Committee meeting in Washington, D.C., on May 10.

We heard the remarks from Lois Lerner, head of Exempt Organizations at the IRS, apologizing for how the exemption applications of some conservative groups had been targeted for extra scrutiny through word searches using “Tea Party,” “Patriot,” and other inappropriate terms.

Since then, the controversy has erupted in many directions. Given our firm’s practice area, we’ve had many requests to join the national conversation about what went wrong and what it means, and we hope our expertise can be helpful for what should happen next.

It is now apparent that the improper selection process was not limited to 501(c)(4) applications (social welfare organizations). According to the report of the Inspector General (TIGTA), the search terms were also used to select applications across the 501(c)(3), 501(c)(5), and 501(c)(6) categories (charities, unions, and trade associations). On May 15, the IRS posted answers to questions [here](#) and also released a list of 175 “advocacy” organizations that had been approved in the recent period [here](#). The range of ideologies represented on the list stretches from conservative to liberal, and includes a good number of 501(c)(3) charities. There are hundreds of organizations that were selected for special review still in process at the IRS, and we don’t know their tax section or their viewpoints. We hope these cases will be resolved soon and the IRS will provide updated information on them, to the extent their obligation to keep individual taxpayers’ information confidential permits it.

What was the IRS looking for? **Evidence of political intervention in the campaigns of candidates for public office**, especially in the 2010 and 2012 elections. That’s a job the IRS must perform, because Congress has set prohibitions and limits in the Internal Revenue Code on the extent to which political campaign activities can be conducted by 501(c) organizations that receive tax-deductible and tax-exempt money.

The problem is that the IRS has no clear standards for determining what is and is not permitted election activity for exempt organizations, and how much is too much for the non-charitable 501(c) groups. The two of us have been working for several years with other tax-exempt attorneys on a “Bright Lines Project” to replace the vague, unpredictable “facts and circumstances” approach currently used by the IRS to judge political activity. We want to see a set of clear definitions and safe harbor exceptions that would apply across the board under the Internal Revenue Code. You will be hearing more about that in the coming months.

RELATED CATEGORIES

- Formation & Tax Exempt Status
- Tax Treatment of Lobbying & Political Activities
- Unions, Associations, Clubs & Other Tax-Exempt Organizations

AUTHORS



Gregory L. Colvin
Emeritus



Rosemary E. Fei
Principal

ABOUT OUR BLOG

Nonprofit Law Matters looks at legal issues in the nonprofit and tax-exempt organizations world. Written by the attorneys and paralegals of Adler & Colvin, it provides updates and analysis regarding philanthropy, charity, and other exempt organization issues.

EDITORS



Eric K. Gorovitz
Principal

Meanwhile, here are some news items to which we have contributed:

[“Room for Debate” Opinion Pages of the New York Times](#), describing the valuable purposes served by 501(c)(4) social welfare organizations

[Chronicle of Philanthropy](#)

[Fortune](#)

[PRWatch](#)

[Atlantic/ProPublica](#)

For our clients with exemption applications pending at the IRS: not to worry. We have had a few cases that experienced extra scrutiny for advocacy activities, but we received the IRS exemption letter in the end. Most of our IRS applications, we believe, will be unaffected by this controversy.

This is not over yet. Stay tuned.