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Congress Missed a Valuable Opportunity: Greg Colvin and Others Discuss Congress' Refusal to Fund Regulations on Section 501(c)(4)

On February 8, Tax Analysts published an article titled ***Confusion Over Judging Political Activity Still Reigns at IRS***. In the article, Paul C. Barton describes the prohibition that appeared in the **2016 Consolidated Appropriations Act** against using any fiscal year federal funds "to issue, revise, or finalize any regulation, revenue ruling, or other guidance ... relating to the standard which is used to determine whether an organization is operated exclusively for the promotion of social welfare for purposes of section 501(c)(4)...."

According to Barton, as a result of the Republican-backed Congress' restriction on IRS rulemaking, "many practitioners and other observers say [that] the future appears as clouded as ever when it comes to how to regulate the political activities of section 501(c) organizations and especially groups exempt under section 501(c)(4)...." Among the practitioners interviewed is **Greg Colvin**, who describes the rulemaking process as having become a "punching bag for those who would rather continue to operate in an environment of unclear rules and toothless enforcement for as long as possible, using tax-exempt 501(c)(4) and (c)(6) organizations to bend American politics in their direction."

Authors on this blog have previously applauded the IRS' effort to promulgate new regulations on political activity and Section 501(c) organizations. The Treasury issued a first set of such proposed regulations in 2014, and after unprecedented feedback from the public, the IRS had announced it would further revise and reissue proposed regulations by early 2016. The fact that these efforts are being forced to a halt – so that the second draft from the IRS won't be seen and discussed at public hearings for many more months – is disconcerting to many practitioners and nonprofit organizations alike.

For additional insightful comments by both Colvin and other practitioners, the whole article is reprinted here with the permission of Tax Analysts.

> ***Confusion Over Judging Political Activity Still Reigns at IRS***
>
> by Paul C. Barton
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> When the IRS announced in late 2013 that it was developing new rules to govern the involvement of nonprofit groups in political campaigns, the hope on all sides was that the long-used and much-derided facts and circumstances test was finally coming to an end.
>
> But 26 months later, a Republican-controlled Congress has brought development of new rules to a halt, prohibiting the agency from any work on

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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.

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them in fiscal 2016, as conservatives continue to regard the IRS as biased against them when it comes to political speech. The prohibition was included in the omnibus spending bill passed in December.

As a result, many practitioners and other observers say, the future appears as clouded as ever when it comes to how to regulate the political activities of section 501(c) organizations and especially groups exempt under section 501(c)(4), the preferred means for gathering "dark money" that can be used to influence political campaigns without disclosing the names of donors.

Much will depend on the outcome of the 2016 elections, but legal action could also play a role, some stakeholders say.

For now, the facts and circumstances test still rules, even though a 2014 Senate Homeland Security and Governmental Affairs Permanent Subcommittee on Investigations report described it as a "time-consuming, case-by-case, non-transparent, subjective, and unpredictable method of evaluation that not only confused and delayed IRS processing of individual applications, but also invited public suspicion that IRS decisionmaking may have been influenced by politics."

Rude Awakening?

As a result of the work stoppage on the new rules, John Pomeranz of Harmon, Curran, Spielberg + Eisenberg LLP issued a warning.

"I think that many nonprofits involved in activities related to the 2016 elections should be terrified," Pomeranz told Tax Analysts. "They're facing an agency that has been left with no alternative than to try to enforce the current vague rules governing exempt organization election-related activities." He added that he hopes politically active 501(c)(4)s start having to back up their claims to being primarily engaged in social welfare activities.

"I think there are some organizations — particularly those who have been advised by lawyers not familiar with IRS regulation of tax-exempt organizations — who will be in for a rude awakening," said Pomeranz. "Perhaps then people will beg Congress to allow the IRS to complete the stalled rulemaking."

An Intimidated IRS?

Others fear the IRS now stands too intimidated by the Republicans in Congress to attempt much enforcement in 2016 — or even later. Craig Holman, a reform advocate at Public Citizen, said that when Congress shut down work on the new rules, it made it "clear to any electioneering group that they are free to abuse the tax code and hide behind the veil of nonprofit status to wage secretly funded political campaigns, which is what the Republican congressional sponsors intended." He added that "even in the most abusive cases, the IRS is likely to avoid the partisan politics and turn a blind eye."

Similarly, Robert Maguire, lead nonprofit investigator at the Center for Responsive Politics, said Congress's decision to freeze work on new rules "sent a pretty clear signal to wealthy individuals and corporations hoping to influence the 2016 elections anonymously. Not only will the lax oversight and confusion continue through the elections, but long after."

Marcus S. Owens, former head of the IRS Exempt Organizations Division and now with Loeb & Loeb LLP, also doubts anything will come of the November 2013 initiative.

"I suspect that the draft regulations, and any administrative clarification of political activity, [are] unlikely to happen," he told Tax Analysts. "Congress has not given any guidance to Treasury and the IRS on which a different standard could be based; thus, any regulations setting forth a new definition would be subject to challenge as having no basis in law by any organization adversely impacted."

In any event, said Owens, "the IRS has successfully defended the facts and circumstances approach to political activity in court, and one or more of the groups like Crossroads GPS, if they still exist, may eventually challenge an adverse finding by the IRS. As a result, the IRS may let the courts decide." Crossroads GPS is the politically oriented 501(c)(4) founded by Republican operative Karl Rove.

David Keating, president of the conservative Center for Competitive Politics, said the targeting scandal involving former IRS exempt organizations director Lois Lerner still looms large.

"The IRS is a tax collection agency with little understanding of First Amendment rights and should not be tasked with policing speech," Keating said. "Previous efforts by the Service to act as the speech police resulted in the IRS targeting scandal — in which the agency systematically harassed and subjected to delay many groups applying for tax-exempt status so that they could more effectively participate in political and issue debates."

"Ideally, the IRS should be taken off the speech police beat permanently," said Keating, adding that "if that is not possible, however, then new regulations that respect First Amendment rights are needed to improve the current vague rules that helped create the scandal."

According to Keating, the Obama administration has unfortunately demonstrated that "it is incapable of writing reasonable regulations on this topic," so the best available alternative would be to freeze the regulations and "prevent additional damage to free speech rights."

Similarly, Cleta Mitchell of Foley & Lardner LLP, who represents conservative 501(c)(4)s, said in an email, "I am very glad that Congress blocked the development and issuance of more speech suppression regulations for citizens' groups, and my only wish is that they had made it permanent and had said the IRS can NEVER promulgate or issue regulations governing citizen political activity and speech. It is an outrageous overreach by the IRS to even contemplate such regulations."

Beth Kingsley, also of Harmon, Curran, Spielberg + Eisenberg, said conservatives want a ruling articulating that express advocacy — arguing unmistakably for a candidate's election or defeat — is acceptable for a 501(c)(4), "which I think goes way too far in a tax context." In the meantime, she said, "I would think conservative groups should be as troubled by facts and circumstances as I am."

According to the Center for Responsive Politics, most of the dark money channeled through nonprofit groups over the past six years has favored conservative over liberal 501(c)s — $382.9 million to $84.47 million.

New Rules Still Possible?

One of those not giving up is Gregory L. Colvin of Adler & Colvin, who also serves on Public Citizen's Bright Lines Project, a nationwide coalition of interest groups that want clarified political rules for nonprofits. The rulemaking "is most certainly not derailed, although there are some who wish for that and are trying to characterize the congressional action that way," Colvin said, adding that the freeze on new regulations lasts only through September 2016 and that the IRS can then proceed with seeking public comments again.

Colvin said, however, that by shutting the process down for fiscal 2016, Congress missed a valuable opportunity to have the rules debated during "an election cycle, when these issues are at the top of mind for everybody." He also wondered why Congress was so concerned about stopping all work this year when IRS Commissioner John Koskinen had made clear that no new rules would be made effective before the 2016 elections. "The commissioner was emphatic about that," Colvin added.

Instead, Colvin said, the IRS rulemaking has become a "punching bag for those who would rather continue to operate in an environment of unclear rules and toothless enforcement for as long as possible, using tax-exempt 501(c)(4) and (c)(6) organizations to bend American politics in their direction." He added that "partisan political activity is not entitled to tax-deductible treatment under the Internal Revenue Code, and bright-line rules were supposed to be a remedy for the IRS Cincinnati review headache of 2013."

So could it be facts and circumstances forever? "No," Colvin said. "The vague facts and circumstances approach has run its course. The IRS cannot do its congressionally mandated job to distinguish taxable from tax-deductible spending, by businesses or by nonprofits, without fair and serviceable rules defining political intervention."

As for getting political backing for the effort, Colvin said, "Campaign finance disclosure, at historical moments when the fundraising abuses are obvious and leading legislators are fed up with them, can find bipartisan support." However, disclosure isn't really the main issue with the current IRS rulemaking, he said, adding it is more about political intervention and how much of it should be allowed under each subsection of 501(c).

Colvin added, "Conservatives tend to want the line drawn at express advocacy, which would allow much more nonprofit speech tilted for or against candidates and parties than liberals would prefer. But both sides would be better off with a clear IRS interpretation, whatever that might be."