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IRS Commissioner Hints at Timing for New Political Regulations, Summarizes Thousands of Public Comments

We looked at IRS Commissioner John Koskinen's written statement to the Senate Finance Committee, with attached documents, submitted with his testimony on Tuesday, October 27, at **http://www.finance.senate.gov/imo/media/doc/27OCT2015Koskinen.pdf**.

Here's what's newsworthy:

First, from the Commissioner's oral testimony and from his prepared statement, the IRS and Treasury have not been intimidated by Republican calls to discontinue the rulemaking process. He emphasized that the IRS aims to "clarify" the political activity rules, not change them to deprive organizations of their free speech rights. The Commissioner said there was no timetable for the release of the second version of the proposed regulations, but that there would be "ample, additional opportunity" for public commentary and public hearings.

He did say in his oral testimony that the next version might come out in early 2016, and be finalized "before the election," but his previously-stated position has always been that the new rules would not be "effective" (legally binding) on organizations or activities until after the 2016 elections.

What's new is the IRS effort to summarize public comments received (160,000) since the first version was released in November 2013, almost two years ago. No precise prediction can be gleaned from its rendition of the comments on three key issues: how much political activity should be permitted under 501(c)(4), the scope of the definition of political campaign activity, and the potential use of a uniform definition for all 501(c) groups. However, the summary does perhaps reveal a bit about the thought process of the lawyers drafting the new rules—what they take from the public comments and what legal arguments might be used to support certain outcomes.

From what we've seen, a common theme is apparent. Social welfare 501(c)(4) organizations cannot be viewed in isolation; both the range of public comments and the fabric of the law itself require considering the interplay between section 501(c)(4) and section 527 (political organizations), as well as among the other main categories–501(c)(3) (charities), (c)(5) (labor unions), and (c)(6) (business and professional associations)—that may be active in election periods.

Highlights:

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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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- The IRS and Treasury appear to remain open to various arguments on "how much"political activity is too much for 501(c)(4) exempt status, considering the existing"primarily" standard, an "exclusively" standard, or a "no substantial part" standard, as well as a percentage-of-expenditures limit. Over 3,000 commenters expressed opinions on this topic, and many "generally supported" retention of the "primarily" standard. The IRS concludes by citing comments arguing that Congress, by adopting section 527 in 1975, recognized that 501(c) groups may engage in "some" political activity taxable under 527(f). In that view, Congress essentially ratified the IRS position rather than "amending the existing 'primarily' standard under the 1959 regulations."
- The IRS goes into some detail on the definition of "candidate" that it proposed in 2013, sweeping in appointees for public office as well as those running for election. From the strong objections it received containing rather persuasive legal analysis, it appears the IRS may be convinced to drop that suggestion and focus only on electoral campaigns for public office.
- On issue advocacy, the IRS notes the arbitrariness of timeframes, such as 30 or 60 days before an election, used to capture any public communication that mentions the name of a candidate. As commentary (from the **Bright Lines Project**, actually) pointed out, the result could be under-inclusive, failing to capture "politically motivated" messages outside of the timeframe, yet be over-inclusive, limiting "legitimate policy advocacy inside it."
- 20,000 comments, the largest segment reported by the IRS, complained that classifying all forms of voter education and outreach as political campaign activity would have an adverse impact on nonpartisan social welfare activities that encourage civic participation and engage the public.
- Finally, the IRS addresses comments related to the "potential application of a uniform definition of political campaign intervention across section 501(c)." Seven thousand commenters saw the 2013 first draft of regulations as inequitable because it did not apply to other tax-exempt organizations. Some argued that (c)(4), (5) and (6) entities "are often prominent and competing players in the same advocacy space," so that singling out the (c)(4)s for regulation "would create an uneven political playing field." Further, commenters noted, if the same definitions did not apply to 501(c)(3) charitable organizations (for which political intervention is completely prohibited), the result could be a system of burdensome, multiple standards with a chilling effect on nonpartisan activities historically permitted under section 501(c)(3). Again, the IRS recognizes the interaction of sections 501(c) and 527, noting comments suggesting a single definition of political intervention for all categories.

I chair the Drafting Committee of the Bright Lines Project, which has been pressing for clearer IRS definitions of political intervention for over five years. We are heartened to see the IRS and Treasury continuing their work to pursue better political activity rules, building on the wealth of public input and the harmonization of existing tax code distinctions. As I said in testimony to a Senate Judiciary subcommittee in July, "we don't want bad political rules that apply only to (c)(4)s, but good rules for everybody."