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Less is More: A Proposal for Tax Simplification for Exempt Organizations' Political and Lobbying Activities

Recent press coverage of the IRS's review of exemption applications, and Washington's reactions to it, has shone a spotlight on a problem that tax-exempt practitioners have been talking about for years: the need to clarify standards surrounding political and lobbying activity by exempt organizations, and to make compliance with the law easier, for the IRS and exempt organizations, regardless of their politics. The document below, and available here, written by Beth Kingsley and me, sets out some proposals aimed at satisfying this need through tax simplification. We hope this sparks discussion!

Summary of

Proposals for Federal Tax Law Simplification

Relating to the Political and Lobbying Activities of

Tax Exempt Organizations

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These proposals were originally developed during the first half of 2011, with valuable assistance from many colleagues, by the authors, who are (and were at the time) the co-chairs of the Political and Lobbying Activities Subcommittee of the Exempt Organizations Committee of the Tax Section of the American Bar Association, in anticipation of an Administration request to the Tax Section of the American Bar Association for tax simplification proposals. However, these proposals have not been reviewed by, or incorporated into any document sanctioned by the ABA, and represent only our views as individual practitioners. We gratefully acknowledge those practitioners who provided input (including Ellen Aprill, Greg Colvin, Betsy Grossman, James Joseph, Ofer Lion, John Pomeranz, Ezra Reese, Emily Robertson, Kevin Shortill, Donald Tobin, and Jean Tom), but none of them has had an opportunity to review this work product, and all responsibility for these proposals rests with the authors.

Due to the circumstances under which these proposals were developed, they are limited to those that either simplify the Internal Revenue Code, or simplify federal tax law compliance for exempt organizations engaged in political or lobbying activities. Both authors support additional proposals that go beyond simplification that are not included here. This document is only a list of the proposals, and a much more detailed

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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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explanation, including specific edits to the Internal Revenue Code and analysis and rationale for each proposed change, will be available.

The complexity of the Code dictates that even simplifying it is a technical and complicated exercise, as will be evident to anyone reading the list below. However, we note that if all the changes proposed below were made, the Code would be as much as approximately 2500 words shorter than current law; the regulations would be shortened by several times that amount.

The following proposals (including some alternatives) are intended to be considered together. While the authors would support adoption of some of these proposals alone, others would have serious unintended impacts on some exempt organizations, and we could not support their adoption in isolation without modification. These interactions are addressed in the forthcoming detailed explanation.

Our purpose in releasing these proposals now is to spark discussion, and to make them available in the context of much-needed legislative changes being considered that would affect the political and lobbying activities of exempt organizations.

Proposed changes

*Relating to legislative lobbying by organizations exempt under Section 501(c)(3)**[1]**:*

1. Expand the application of the expenditure test that governs lobbying by Section 501(c)(3) organizations under Section 501(h), by either:

    a. Changing it from an opt-in arrangement to being the lobbying limit for all charities, other than churches, their conventions or associations, and their integrated auxiliaries, who would be allowed to opt in, and governmental units. To avoid substantial harm to charities that have chosen not to be governed by Section 501(h) in the past, this proposal also requires adoption of items 2, 3, and 4 below, and a change to the Regulations under Section 4911 to permit land conservation charities to count the costs of acquiring conservation properties toward their exempt purpose expenditures. Alternatively, Section 501(h) could become the default rule, with charities permitted to opt out, back to the "no substantial part" test.

    or b. Allowing all Section 501(c)(3) organizations other than governmental units to opt into the Section 501(h) test, making it available to churches, private foundations, and all supporting organizations.

2. Eliminate the separate limit on grass roots lobbying within Section 501(h).

3. Eliminate the $1 million annual cap on lobbying under Section 501(h).

4. Eliminate Section 4911(f), which contains rules regarding lobbying limits imposed on affiliated organizations.

5. Repeal Section 501(h)(7), which prohibits charities that have not elected to be governed by Section 501(h) from relying on any of the definitions or rules under Sections 501(h) and 4911.

6. Equalize treatment of local lobbying by charities and businesses by eliminating the reference to local governing bodies from Section 4911(e)(2), and eliminating Section 162(e)(2).

7. Eliminate the prohibition on lobbying that is applicable only to private foundations by deleting Section 4945(d)(1) and 4945(e), and subject private foundations the same tax consequences as public charities for excessive lobbying, by deleting Section 4912(c)(2)(C). This proposal is implicit in item 1 above, but could be implemented even without item 1.

Relating to candidate campaign intervention by organizations exempt under Section 501(c)(3):

8. Eliminate Section 4955(d)(2) which defines specific political expenditures for only a subset of Section 501(c)(3) organizations, and revise Section 4955(d) to align the wording describing taxable political expenditures for 501(c)(3) organizations with the Section 501(c)(3) prohibition.

Relating to political organizations exempt under Section 527:

9. Align the scope of income that is subject to tax for a Section 527 organization, with the requirements regarding activities consistent with qualification for exemption under Section 527, by changing the word "only" in Section 527(c)(3) to "primarily," which is the word used in Section 527(e)(1).

10. Increase the threshold in Section 527(j)(4) describing which organizations must report in detail on their contributions and expenditures from gross receipts of $25,000, to $100,000; and increase the thresholds in Section 527(j) for disclosing single expenditures from $500 to $10,000, and for disclosing single contributions from $200 to $1000, to be consistent with Federal Election Campaign Act reporting requirements for electioneering communications.

11. Repeal Section 527(g), which provides special rules for newsletter funds of candidates and officeholders.

12. Repeal Section 527(h), which gives principal campaign committees special tax advantages over other Section 527 organizations, making all taxable income of all Section 527 organizations taxable at the same rate.

Relating to organizations exempt under Section 501(c)(4), (5), or (6):

13. Align the definition of political activities that do not satisfy the primary purpose test for Section 501(c)(4), (5), or (6) organizations, with the definition of political activities that subject such organizations to tax on their political activities, and with the definition of political activities that are prohibited under Section 501(c)(3), by revising Sections 527(e)(2) and 527(f)(1) to track the formulation in Section 501(c)(3).

14. Amend Section 2501(a) to provide that gifts to Section 501(c)(4) organizations for their use are excluded from gift tax, ***or*** amend Section 2522(a) to allow citizens or residents to deduct gifts to or for the use of a Section 501(c)(4) organization from the computation of their taxable gifts.

[1] All Section references are to the Internal Revenue Code.