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Top 25 Comments on IRS Proposed Political Activity Rules: #1 — American Bar Association Section of Taxation

“Promulgating regulations with clear rules regarding political intervention or candidate-related political activity could help the government to avoid constitutional attacks on the grounds of vagueness. . . . Such regulations are not unconstitutional. Quite the contrary, they help remove doubts as to the constitutionality of Service guidance in this important area.”

Our countdown closes with comments by the nation’s most prominent and longstanding association of lawyers and law students: the American Bar Association.

Posting the [ABA Section of Taxation’s commentary](#) today is significant. The Tax Section’s Exempt Organizations (EO) Committee is meeting today in Washington, D.C. This is the same meeting that, one year ago, featured the admission of internal review bias by Lois Lerner, then EO Director at the IRS, that began the upheaval resulting in this long-overdue rulemaking process.

On April 2, IRS Commissioner John Koskinen [described the uniquely overwhelming response to this particular rulemaking](#):

During the comment period, which ended in February, we received more than 150,000 comments. That’s a record for an IRS rulemaking comment period. In fact, if you take all the comments on all Treasury and IRS draft proposals over the last seven years and double that number, you come close to the number of comments we are now beginning to review and analyze.

In this context, it is no wonder we struggled over the selection and order of our list. In the interest of full disclosure, you should know that the drafting group for the ABA Tax Section’s comments was headed by a member of our firm — [Rosemary Fei](#), as Co-Chair of the Subcommittee on Political & Lobbying Activities & Organizations of the EO Committee. The Section’s comments are so incisive and technically rigorous that we believe they justify the #1 spot if for no other reason than the thoroughness of the 57-page response. They combine succinct summaries of recommendations with detailed legal arguments evidencing the expertise and collaboration that went into the submission.

We highlight a few of the many points raised:

- The comments note that if 501(c)(4)s are only permitted to engage in an insubstantial amount of candidate activity, then many social welfare organizations would be stuck in non-exempt limbo between section 501(c)(4) and section 527, which requires that political organizations engage primarily in political intervention: “ . . . we recommend

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the minimum level of political intervention required for section 527 exemption be adjusted to approach or mirror the maximum under section 501(c)(4): we see no public policy justification for withholding tax-exempt status from nonprofit organizations that fall in the gap.” (The [Bright Lines Project](#) also raised this point.)

- The comments examine the role that section 501(c)(4) organizations play in multiple-exempt-entity structures, and the impact that the rules would have on tandem nonprofits: “Section 501(c)(4) social welfare organizations form the critical link and the essential buffer between section 501(c)(3) charitable organizations and section 527 political organizations. They allow the unique voice and perspectives of a charity to be heard in public debates, including the most important debate, about who will lead our country, while preserving the charity’s section 501(c)(3) status. These families of organizations of various tax-exempt classifications sharing a common nonprofit mission are vital to our society and our democracy, and provide an important counterweight to private profit-seeking interests. Operating them requires close attention to boundaries, and the boundaries can be difficult and expensive to administer properly. In practice, structuring these families so they can function requires one standard for political intervention to apply across the family.”
- The comments delve into myriad problems with the 60/30-day election blackout period. Examples of specific dilemmas are provided with respect to internet archives, and the proliferation of online posting and re-posting: “. . . once deleted it will be impractical and burdensome to restore such references after the pre-election window has passed. As a result, interesting and thoughtful conversations provoked by a months-old or even years-old post may be entirely lost through an organization’s need to avoid or minimize its ‘candidate-related political activity.’”

We urge our readers to read the Tax Section’s comments in their entirety for a comprehensive survey of the proposed regulations and their impact. Like the comments from the [AICPA](#), the Tax Section’s comments represent neither the views of an affected organization nor the agenda of a particular constituency; the Section submits comments on nearly every IRS Notice of Proposed Rulemaking.

We urge Treasury/IRS to use these comments as a starting point for revised rules that will be informed by the experiences of thousands of nonprofit groups, attorneys, accountants, academics, politicians, and members of the general public, to arrive at political tax rules under the Internal Revenue Code that provide consistency, clarity, and functionality.