

New Guidance Issued for Tax-Exempt Social Welfare Organizations Regarding Candidate-Related Political Activities

December 11, 2013

On November 26, 2013, the Treasury Department and Internal Revenue Service ("IRS") issued proposed regulations that seek to provide guidance to social welfare organizations described in section 501(c)(4) of the Internal Revenue Code (the "Code") regarding what types of activities constitute political candidate activities. The political candidate activities of social welfare organizations have been the subject of much controversy and confusion in recent years following the Supreme Court's ruling in *Citizens United*, which removed limits on the amount of political independent expenditures that could be made by corporations and the recent accusations that the IRS was targeting the tax-exempt applications of tea-party and other conservative groups. The proposed regulations represent the IRS's and Treasury's attempt to provide more definite rules with respect to what constitutes such activities and, if finalized, would replace the current imprecise and fact-intensive analysis.

Current Regulations

In order to qualify for exemption, a social welfare organization must be operated exclusively for the promotion of social welfare. The current regulations provide that an organization will be considered to be operated exclusively for the promotion of social welfare "if it is primarily engaged in promoting in some way the common good and the general welfare of the people of the community." With respect to political candidate activities, the current regulations merely provide that "[t]he promotion of social welfare does not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office." Neither section 501(c)(4) of the Code nor the current regulations provide a definition for what constitutes participation or intervention in a political campaign. Instead, the IRS generally applies a facts and circumstances test to determine whether an organization's actions constitute participation or intervention in a political campaign.

Proposed Regulations

The primary effect of the proposed regulations would be to create a new concept entitled "candidate-related political activity." Activities falling within this definition would explicitly be deemed to not constitute the promotion of social welfare. Under the proposed regulations, the following activities would fall within the

definition of candidate-related political activity:

- any communication expressing a view on, whether for or against, the selection, nomination, election, or appointment of one or more clearly identified candidates;
- any public communication within 30 days of a primary election or 60 days of a general election that refers to one or more clearly identified candidates in that election or, in the case of a general election, refers to one or more political parties represented in that election;
- any communication the expenditures of which are reported to the Federal Election Commission, including independent expenditures and electioneering communications;
- conduct of a voter registration drive or "get-out-the-vote" drive;
- distribution of any material prepared by or on behalf of a candidate or by a section 527 organization including, without limitation, written materials, and audio and video recordings;
- preparation or distribution of a voter guide that refers to one or more clearly identified candidates or, in the case of a general election, to one or more political parties (including material accompanying the voter guide);
- hosting or conducting an event within 30 days of a primary election or 60 days of a general election at which one or more candidates in such election appears as part of the program; or
- a contribution of money or anything of value to or the solicitation of contributions on behalf of: (i) any person, if the transfer is recognized under applicable federal, state, or local campaign finance law as a reportable contribution to a candidate for elective office; (ii) any section 527 organization; or (iii) any section 501(c) organization that engages in candidate-related political activity.

A contribution to a section 501(c) organization will not be treated as a contribution to an organization engaged in candidate-related political activity if the contributor organization obtains a written representation from an officer of the recipient stating that it does not engage in such activity (and the contributor does not know or have reason to know that such representation is inaccurate or unreliable), and the contribution is subject to a written restriction that it not be used for candidate-related political activity.

Another change contemplated by the proposed regulations would be to expand the types of candidates explicitly subject to the prohibition on political campaign intervention to include candidates for appointed judgeships and executive branch positions, as well as current office-holders that were the subject of a recall election.

One issue the proposed regulations do not address is the use of the "primarily" standard for section 501(c) (4) organizations (i.e., that a social welfare organization will be considered to be operating exclusively for the promotion of social welfare so long as it is "primarily" engaged in activities that promote the common good or general welfare of the people of a community). The Treasury Department and the IRS are considering whether the "primarily" standard should be more precisely defined or mirror the standard for section 501(c) (3) organizations (i.e., that no more than an insubstantial amount of the organization's activities may be



dedicated to non-social welfare activities). Section 501(c)(4) organizations that currently conduct a substantial amount of candidate-related political activity should closely monitor this situation and consider providing comments or suggestions on what proportion of an organization's activities must promote social welfare in order for the organization to qualify as a section 501(c)(4) organization. Comments regarding the "primarily" standard and other comments concerning the proposed regulations must be received by the IRS by February 27, 2014.

If you have any questions about the information presented in this alert, please contact your Lathrop Gage attorney or one of the attorneys listed above.