the BRIGHT LINES project

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The Bright Lines Project: Clarifying the IRS Rules for Political Intervention

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Under current law, the IRS considers all the relevant "facts and circumstances" when determining whether a nonprofit organization has engaged in restricted political activity. Over time, the uncertainty created by this vague approach has had a tremendous chilling effect on free speech by charities and other 501(c) organizations and a sense of uneven enforcement.

Even before the *Citizens United* decision, there was widespread agreement that it was time to replace the ambiguity of the "facts and circumstances" test with predictability, simplicity, and ease of understanding. In the aftermath of that decision, it became imperative that the IRS establish clear and comprehensive rules on political activity. To address this problem, a group of tax law experts, legal practitioners, and nonprofit leaders met for two days in June 2009 to discuss IRS political activity rules and assess what changes were needed.

Since that retreat, a team of nine experts on nonprofit tax law, led by Greg Colvin of Adler & Colvin and Beth Kingsley of Harmon, Curran, Spielberg & Eisenberg, has developed a set of proposed rules for the purpose of discussion and feedback. These proposed rules seek to establish a new definition of political intervention that uses bright lines and safe harbors. If the organization's speech is not clearly covered by that definition, it can fall back on the current "facts and circumstances" approach in its defense. But never again would a nonprofit that spoke out on an issue, without relating it to a choice of candidate, face the jeopardy of IRS prosecution solely for entering the vague terrain of "facts and circumstances."

This project has taken on new urgency in the wake of recent revelations about the IRS's use of improper criteria to screen some exemption applications for further scrutiny. It has become apparent that a major factor in this systematic breakdown of the review process was the lack of clear, neutral, objective standards by which IRS employees and managers could determine whether applicants were engaged in political intervention. In other words, the difficulty experienced in the nonprofit world, with many organizations very unsure of how to comply with the IRS' vague "facts and circumstances" approach to cases of political intervention, was mirrored inside the IRS, with line staff concocting their own selection criteria and managers unable to communicate useful guidance to them.

Charities already have clear and predictable lobbying rules they can follow. They can elect to be subject to the 1990 lobbying rules developed by the IRS, often called the expenditure test or 501(h)

rules. The Colvin Committee's proposed test of whether a charity is engaging in permissible nonpartisan speech activity is modeled on these successful 1990 lobbying rules.

This document briefly describes the Colvin Committee's proposal. We look forward to your comments on the proposal. For further information, please contact Lisa Gilbert at Public Citizen: LGilbert@citizen.org or 202-454-5188.

"Political intervention" is defined throughout the Internal Revenue Code (IRC) as participation or intervention in a campaign in support of or opposition to any candidate for public office. That definition should be improved by adoption of the following six new bright line rules, to be fully developed in the form of Treasury Regulations.

1. Scope: Federal, state, local, and foreign election campaigns are included. "Candidate" is defined as a person who offers himself or herself for election to public office or whose election the organization expressly proposes, supports, or opposes.

2. Application: The definition applies consistently to (a) the prohibition on IRC 501(c)(3) organizations and the tax penalties under 4955 and 4945, (b) political intervention that is not within exempt purposes for other 501(c) groups, (c) the proxy tax paid by some 501(c) entities under 6033(e), and (d) the denial of a business expense deduction under 162(e)(1)B).[i]

3. *Per Se* Intervention: It is political intervention to expressly advocate:

(a) the election, defeat, nomination, or recall of a clearly-identified candidate;

(b) the election or defeat of candidates affiliated with a specific political party;

(c) that voters select candidates for support or opposition based on one or more criteria that clearly distinguish certain candidates from other candidates;

(d) the making of contributions to a candidate, party, or any organization that has the primary purpose of engaging in political intervention.

4. Candidate Advocacy: If an organization's action is a form of communication, other than *per* se intervention described above, the threshold definition of political intervention is: any communication to any part of the electorate that meets a two-part test--

(a) it refers to a clearly-identified candidate and

(b) it reflects a view[ii] on that candidate.

A communication (not described in Rule 3 above) that lacks either element is not intervention. Four safe harbor exceptions are available, but only if the communication does not consist of paid mass media advertising:[iii]

(i) **Influencing Official Action**: Commentary on a public official that has a direct, limited, and reasonable relationship to specific actions the official may yet perform within his or her current term of office without mention of any election or voting, or the person's candidacy or opponent.[iv]

(ii) **Comparing Candidates**: Voter education[v] that compares two or more candidates for an office, and may include the organization's views on such issues, if the communication consists solely of content in which the time, text, and/or space is offered in equal shares to each of the participating candidates, and the organization's share of content[vi] is no greater than the share available to any of the participating candidates. The opportunity to participate must be given, including a full description of the opportunity and a copy of the organization's content, to all current candidates (or to those meeting an objective threshold of viability) for election (or nomination) to the office a reasonable time in advance of the final preparation of the communication (which in no case may be less than 72 hours).[vii]

(iii) **Self-Defense**: A response, as limited below, by an organization to a public or publicly-reported statement by a candidate that either (a) attacks the organization itself, or (b) comments upon a specific public policy position that the organization has taken publicly in furtherance of its exempt purpose within the prior year, or (c) results in press inquiries to the organization that were not solicited by the organization in the wake of the candidate's statement. The response by the organization must be educational,[viii] limited topically to addressing the candidate's statement, and as to (a) or (b), disseminated in a manner commensurate in medium and scale, and proximate in time, to the publicity of the candidate's statement, and as to (c), limited to dissemination to the requesting press organization.[ix]

(iv) **Personal, Oral Remarks at Official Meetings:** Oral remarks made by anyone (other than a candidate) who is present in person at an official meeting of an organization held in a single room or location, so long as no announcement of the meeting refers to any candidate, party, election, or voting. This exception covers only oral remarks about candidates made by and to persons in attendance, not any other form of communication of those remarks, whether written, electronic, recorded, broadcast, or otherwise transmitted. A prominent disclaimer must be made to those attending, stating that such remarks are the speaker's personal opinion and are not made on behalf of the organization, and that the speaker is not advocating any of the actions set forth in Rule 3.

Evidence of intent in relation to the speech is irrelevant. A communication that refers to and reflects a view on a candidate, if not within an exception or specifically allowed under an existing Revenue Ruling or other federal tax authority,[x] is subject to further analysis under Rule 6 below in which the organization bears the burden of proof to show why the speech is not political intervention.[xi]

Speech covered by Rule 4 includes "voter engagement," defined as communications directed to potential voters, offering to assist or explicitly encouraging them to register or vote in an election for public office. Voter engagement is political intervention if it is covered by Rule 3, it refers to and reflects a view on a candidate or political party, or it is targeted based on the voter's expressed candidate or party preference. Voter engagement is not political intervention if it meets both a targeting and a content test. It must be untargeted, targeted to the organization's natural

constituency,[xii] or targeted to voters under-represented in prior elections. As to content, any references to specific contests for a public office or to public policy issues must be neutral, that is, not indicate any preference for a candidate or party, and, if any view is reflected on a candidate, it is within the safe harbor for comparing candidates in (ii) above. All other voter engagement is subject to further analysis under Rule 6 below to determine if it is or is not political intervention.

5. Use of Resources: This rule covers only transactions and activities that contain no significant element of speech. It is political intervention to provide any of the organization's resources, whether monetary or in-kind, goods, services, or facilities, tangible or intangible, by gift, loan, sale, rental, or any other method of transfer to another person or entity,[xiii] if the transferee uses such resources to support or oppose any candidate's election to public office, if such use is reasonably foreseeable, and if the transferor has not taken reasonable steps to prevent such use.

Such transfers are not intervention, however, if the transfer is (a) made at no less than fair market value, (b) similar to other transactions conducted by the organization and (c) without preference for or against any candidate. Any other transfer recognized under applicable campaign finance law as a reportable contribution to a candidate for elective public office, or to an organization that has the primary purpose of engaging in political intervention, is political intervention.[xiv]

Other uses of an organization's resources (transferred or not) in support of or in opposition to a candidate, if not specifically allowed under an existing Revenue Ruling or other federal tax authority,[xv] are subject to further analysis under Rule 6 below in which the organization bears the burden of proof to show why the use of resources is not political intervention.

6. Facts and Circumstances: Communications that reflect a view on a candidate, do not come within an exception, and are targeted to voters in states, districts, or other locations, where close election contests are occurring, are conclusively political intervention.[xvi] In other cases, evidence of other facts or circumstances, such as timing, the range of issues discussed, disclaimers and disclosures, the organization's history, the impartiality of its methods, or corrective steps taken, shall be considered only in the organization's defense:

(a) to meet its burden of proof[xvii] that intervention did not arise from its communications or use of resources, by showing that the conduct furthered a proper exempt or business purpose and was unrelated to intervening in the campaign of any candidate for public office or

(b) as mitigating factors affecting the penalty or remedy to be imposed upon violations.

Revision by Greg Colvin 12/16/13 with input from the Drafting Committee

[i] The taxable (under IRC 6033(e)) and non-deductible (under IRC 162(e)) activity includes both political intervention and lobbying (which is well-defined under existing regulations). Note that Section 527 is not included, because it uses a somewhat different definition and covers anything with a "nexus" to the candidate selection process. Section 527 is the least advantageous tax-exempt status, and so more borderline activities are embraced.

[ii] To avoid reflecting a view, the communication must be completely neutral, meaning that a reasonable reader/listener/viewer knowing the contemporary context could not discern the speaker's candidate preference from the content of the communication. Even a statement of undisputed fact could reflect a view if a reasonable person would infer a preference on the part of the speaker for or against the candidate from it, e.g. "is a Muslim," "served in the Army in Iraq," or "has binders full of women" If a candidate preference appears to be discernible from the content, the speech may still be found not to be intervention if the communication meets one of the safe harbors (i) through (iv) or the organization meets its burden of proof, described in Rule 6, showing other surrounding facts and circumstances, such as the anticipated attitudes of the audience receiving the message or similar speech by the candidate or his/her opponent, etc., indicating that no preference was likely to be conveyed.

[iii] A proposed definition of paid mass media advertising is the following: "A communication to the general public, placed for a fee on one of the following media, operated by another person: a broadcast, cable, or satellite facility, newspaper, magazine, outdoor advertising facility, mass mailing service, telephone bank, or another person's web site or internet communications service. As of January 1 of even-numbered years, the Internal Revenue Service shall issue a public notice modifying the list as needed to include substantially similar media as changes in communications technology occur."

[iv] This safe harbor is intended to cover *bona fide* grassroots lobbying, as well as non-legislative official actions.

[v] This could be a candidate debate, a request for a 30 second video statement from each candidate on a topic, responses to a questionnaire, voter guides based on material from each candidate's website, or the results of asking candidates to take a pledge on an issue.

[vi] This means the organization itself could take a position on the matters presented to the candidates, even though it may indicate the organization's preferred view, because each candidate has an opportunity equal to that of the organization to counteract its view.

[vii] A reasonable time could be much longer than 72 hours, e.g. for a live, broadcast candidate debate, for videotaped commentaries, or for lengthy articles in a print magazine.

[viii] The methodology test for educational communications would apply, as set forth in Revenue Procedure 86-43.

[ix] For this safe harbor to be used, the candidate has to attack the organization so that the organization's response is made in its self-defense or something the candidate says either refers to a specific public policy position taken by the organization or causes press inquiries to the organization for some reason, e.g. the organization has a known, contrary view, it has relevant expertise or experience, or it is a stakeholder in some important public policy issue.

[x] An example would be Revenue Ruling 80-282 on legislative scorecards. Our intent is to preserve permission for activities <u>expressly</u> allowed under prior guidance existing at the time regulations are adopted, but not to expose organizations to the risk of the open-ended multi-factor analysis that the IRS applies to other cases.

[xi] The standard for meeting this burden of proof is stated in Rule 6.

[xii] Defined as members (using IRC 4911 definition), employees, students, patients, clients, visitors, subscribers, event attendees, customers, donors, shareholders, and others who have provided contact info to the organization in the ordinary course of its tax-exempt program, trade, or business, apart from any political intervention activity.

[xiii] Transfers to 501(c)(3)s would not be intervention unless it was reasonably foreseeable that the transferee planned to use the resources for political intervention.

[xiv] So, if the organization did report or should have reported the contribution under applicable campaign finance laws that pertain to candidate elections, it is an intervention.

[xv] For instance, if a charity rents out space to the public, including candidates, on the same terms, as set forth in Revenue Ruling 2007-41 for business activities, Situation 17, it is not intervention.

[xvi] This will require IRS regulations to objectively define "close" contests and what distinguishes "targeted" from untargeted communications. It is our intent that "targeted" should mean that an attempt is made to limit the reach of the communication on the basis of a given factor. A message broadcast on national television is not targeted except to the entire nation, or the known demographic of the show's audience.

[xvii] To be clear, the burden of proof to be met under Rule 6 is the same burden that the organization bears as to any aspect of federal tax law: to establish that, more probably than not, it is in compliance with the Internal Revenue Code. Matters considered under Rule 6 are not presumed to be political intervention. Rather, the conduct of the organization has crossed a threshold beyond the protection of the bright line definitions and exceptions but the conduct is not deemed *per se* or conclusively intervention. In such cases, a determination of whether or not political intervention has occurred would need to be made following the method of analyzing facts and circumstances that we describe in Rule 6.