



Stop the Delay on IRS Political Activity Rules May 2016

Nonprofits hoping for clearer IRS rules on civic engagement will need to wait because Congress has blocked the agency from moving forward for fiscal year 2016. The IRS and the U.S. Treasury Department had been working on political activity rules that would have helped all of us better understand what counts as nonpartisan civic engagement activities.

New rules would help curtail the sort of IRS overreach that led to the targeting of Tea Party groups that surfaced in 2013. Congress needs to be told to stop squandering the opportunity to provide the clarity nonprofits have needed for decades and allow Treasury to finish a process aimed at resolving the problem of uneven IRS enforcement.

On December 18, 2015, Congress passed a spending bill with an unfortunate rider preventing the IRS and the Treasury department from using any funds during the current federal fiscal year to “issue, revise, or finalize any ...guidance...relating to the standard which is used to determine whether an organization is operated exclusively for the promotion of social welfare” and freezing the definitions and guidance used to make that determination to what was available in 2010. The rider stops all forward motion to define tax-exempt political activity for 501(c)(4) organizations until October 1, 2016.

Over the last two years, Treasury and the IRS had been working on a rulemaking that could have clarified where the lines are between partisan campaigning and nonpartisan civic engagement. The vague “facts and circumstances” approach currently in place intimidates careful nonprofits when they want to speak out on civic issues during elections, while at the same time enabling groups willing to flout the law to pour millions of dollars of undisclosed money into the election system. Revising this confusing standard would have made it easier for all nonprofits and private foundations to know what they can and cannot do to further their missions during campaign seasons. It would limit the discretion of the IRS to interfere with the free speech of tax-exempt citizen groups.

It appears the IRS was ready to release an improved second draft of proposed regulations, and schedule public hearings, when the Congressional rider suddenly halted the process. While technically the IRS could shift gears and draft new, better rules for charities and tax-exempt organizations *other than* 501(c)(4)s, all progress seems to have stopped.

These rules are needed as never before. Candidates, voters, and elected officials need to hear from the nonprofit sector, which has on-the-ground experience in communities tackling issues like poverty and the environment. They especially need nonprofits' expertise during election years, so we don't want to silence local experts based in our communities.

Public opinion research shows a consistent pattern of public dissatisfaction with our governing systems. When so much public discourse is about what divides us as a country, the charitable sector remains one of the few places that still brings people together.

Clear rules to ensure that nonprofits can be active in our democracy are a key part of the solution. And these rules – with bright lines on what is considered nonpartisan – need to be enforced to stop the misuses that are distorting our democracy. Only the IRS can meet these needs and set universal tax standards for civic action at federal, state, and local levels.

The IRS proved it is up to the task when it wrote the 1990 charity lobbying rules, which provided bright-line guidance, including for acting on ballot measures across the country. These lobby rules have drastically reduced uncertainty about legislative activity for charities, with minimal controversy and fairly consistent enforcement by the IRS. This can be done for defining nonprofit political activity as well.

Your voice is needed to get the IRS back to work on developing clear and fair political activity rules:

1. **Contact your Member of Congress to tell them to keep this rider off the spending bill for the next fiscal year.** Tell them to let the IRS do its work so that charities across the country have clearer rules about what types of civic engagement activities they can undertake. Congress is already working on the spending bills that start Oct. 1, 2016 and they need to hear now that the IRS rider needs to be dropped.
2. **Contact your newspaper to tell them to end the rider.** This can be done through opinion pieces explaining why charities need clear rules to engage in nonpartisan civic engagement. Additionally, meeting with editorial boards to explain the rider and the harm it is causing will be very helpful. If you need help with op-eds or editorial board meetings, contact the Bright Lines Project.
3. **Educate other nonprofits about the rider and its problems.** Too many nonprofits do not know about the rider or the political activity rules that the IRS was developing. Briefing nonprofits about the issues and encouraging them to take action will really help. If you need any help with this task, contact the Bright Lines Project.

Delaying Political Activity Rules Ricochets Across the Country

Delaying this rulemaking will hamper the exercise of free speech throughout the nonprofit world. The remainder of this paper provides a few examples and more details about the rules.

Chilling Civic Participation by 501(c)(3)s, such as Charities and Churches

Charities rely on having a predictable definition of political activity so they can fulfill their missions without running afoul of the law when they enter the realm of public policy. However, when the definition is vague, they often shy away from action they could legally take because they do not want to risk their tax-exempt status.

Under the current rules, 501(c)(3)s, which are not allowed to do anything to support or oppose candidates for public office, can still do certain nonpartisan voter engagement and education activities to promote citizens' participation in our democracy. For example, an organization can distribute nonpartisan voter guides to help their constituents understand what is at stake in a given election. However, even though issues central to a nonprofit's mission are implicated, distributing such a guide can seem risky because the charity cannot easily know in advance whether the IRS would judge it to cross the line. The organization can hire expensive legal counsel to read the tea leaves of past IRS rulings, but political tax law is so haphazard even expert attorneys may not agree on the safest course. A charity wary of staying on the right side of the law might avoid publishing a voter guide at all rather than approach the undefined line between nonpartisan engagement and political intervention.

Here are more examples of how the IRS patchwork of rulings on political activity chills nonprofit speech, and how bright line definitions would greatly improve the situation. For details on fixes proposed by the Bright Line Project see www.brightlinesproject.org.

1. **Candidate Questionnaires.** IRS revenue rulings on candidate questionnaires and voter education have not been updated since 1980 and thus contain no guidance relevant to the Internet, social media, or any form of modern electronic communications.

An IRS revenue ruling from 1976 prohibits a charity from asking candidates, on a nonpartisan basis, to sign a code of fair and ethical campaign practices, because the result could favor candidates that sign the code and disfavor those who do not. However, the same result – comparing candidates' positions on issues – could be achieved with a candidate questionnaire such as that approved as nonpartisan in an IRS settlement with the Christian Coalition in 2005. This kind of inconsistency is unacceptable. The Bright Lines Project [regulations](#) propose a broad safe harbor for all forms of nonpartisan, even-handed voter education in all kinds of modern media, from live debates to written questionnaires to video clips.

2. **Protecting Nonprofit Lobbying.** The first draft of IRS regulations from 2013 would classify as political any mention of a candidate's name in any public communication within 60 days before a general election, with no exception for genuine lobbying that may be necessitated, for instance, by pending action in Congress. Past examples include

the expiration of the assault weapons ban in September of 2004 and the TARP bank-bailout legislation voted on just prior to the November 2008 election. BLP regulations propose a safe harbor to allow nonprofits to mobilize and lobby legislators by name and not be muzzled because it is close to election time. There should be no black-out dates for a perspective that is so essential to policymakers and the general public, when the legislature is still in session, even during an election year.

3. **Oral Political Speech.** The IRS prosecuted All Saints Episcopal Church in Pasadena, California, due to comments made about George Bush and John Kerry by a guest minister from the pulpit on a Sunday in 2004, which eventually resulted in no revocation of tax-exemption, but only after a prolonged, expensive IRS audit that articulated no rationale for the final decision. The Bright Lines Project proposed regulations have a safe harbor for such oral commentaries made in person at a nonprofit meeting, including a worship service, so long as the speaker does not expressly advocate a candidate's election or defeat. At present, there are no constraints on IRS authority to question what may be said in a Sunday church sermon about a pending election.

501(c)(3)s provide policymakers, prospective candidates, and the general public with nonpartisan expertise critical to the public policy and civic process. As trusted institutions, they serve as an essential source of information due to their depth and breadth of experience on important issues like education, immigration, workforce development, civic engagement, and even tax reform. As these types of issues enter public discourse in the two years leading up to an election, it is important that voters, policymakers, and candidates continue to rely on charities for their vital perspectives. Unfortunately, without more clarity in the rules defining political activity, nonprofits may be reluctant to fulfill their important role as trusted experts to both the public and policymakers.

Until the IRS is permitted to move forward on the construction of fair, clear, predictable standards to define tax-exempt political intervention, the examples of chilled First Amendment speech, as well as abusive manipulation of nonprofit organizations to hide political donations, will proliferate.

Dismantling Enforcement

A workable definition is required to ensure that organizations operating in good faith can comply with the law and that the IRS can enforce the law against those that operate in bad faith. An example of how difficult enforcement is in the absence of clear rules came to light on February 9th, when the Center for Responsive Politics revealed that the [IRS had approved 501\(c\)\(4\) status for Crossroads GPS](#). The decision was made by a single IRS appeals officer in Fresno who was faced with two vague, inconsistent, multi-factor revenue rulings issued in 2004 and 2007 to distinguish nonpartisan issue advocacy from political campaign advertising that favors or disfavors named candidates. Consequently, he could not be sure that Crossroads GPS had crossed the line.

The problems with approving social welfare status for such a group, despite its obviously dominant level of political intervention, reveal that the facts and circumstances test can be

stretched so far that it is effectively meaningless. Indeed, Crossroads GPS explicitly blamed the unclear IRS rules in support of their belief that they were within acceptable limits for political spending.

Fortunately for them, they had the resources to spend on lawyers to contest the issue of their eligibility for 501(c)(4) status, but for most nonprofits the risk-averse choice is to avoid doing any activity that approaches the undefined line. This creates a world where some well-funded nonprofits are willing to challenge the IRS and do much more political activity and civic participation than smaller nonprofits that cannot afford expert legal representation and a prolonged tax controversy.

The Bright Lines Project's proposed regulations would treat most of the ads broadcast by Crossroads GPS as targeted to close elections, during the named candidate's election year, and therefore would undeniably be political intervention. Our proposed rules would follow common sense and narrow the discretion of the IRS to decide such cases in unexpected ways.

Harming our Democracy

A handful of large nonprofit campaign-related entities -- 501(c)(4)s and (c)(6)s -- are [on track](#) to spend a record amount of money in this year's presidential elections, on activities that common sense would deem to be political. The effect of the vague rules amounts to a declaration that the IRS will not regulate their political spending, clearing the way for even more undisclosed money to pour into our elections.

On the other hand, the need for nonpartisan leadership from the vast majority of legitimate tax-exempt charitable organizations during elections has never been more urgent. Voter registration and turnout levels in America are still far too low. More obstacles to voting have been created by states that have imposed voter identification and other rules curtailing access to the polls. Voters are often not sufficiently aware of the issues and candidates' positions, going down the ballot below the presidential level. Particularly in this presidential election year, the lack of clear rules stands in the way of voters being able to educate themselves adequately on who should be trusted with leading our country and enacting laws at federal, state, and local levels. Predictable, fair IRS rules universally setting the same standards for all are what we need.

Silencing the Public's Voice

The most troubling aspect of the congressional rider delaying this rulemaking is that it removes the public's voice from a topic they really do care about. [Polling from the summer of 2014](#) shows that voters of all party persuasions believe that clear rules are important for nonprofits, and the public submitted more than 170,000 comments on the original NPRM. But rather than allow the public to continue to give their input, the rider locks up the decision making process within the IRS building, perpetuating a system to determine political activity that everyone knows isn't working.

The Future

The situation is not without hope. The prohibition on rulemaking expires at the end of September, 2016. The IRS and Treasury have had plenty of time before the rider went into effect to review the comments they got on the last Notice of Proposed Rulemaking, and should be able to hit the ground running as soon as this rider expires with the release of a new proposal that permits another round of public comments. This would include public hearings across the country to gather input from a full spectrum of nonprofit activists. To make this happen, Congress must not add another rider to the next spending bill that would tie the hands of the IRS from moving forward with a new proposal on nonprofit political activity rules.

A system of clear rules and safe harbors is the best way to ensure that nonprofits can be active in our democracy without undue IRS interference. All nonprofits -- both those that can and those that cannot support or oppose candidates -- must know what actually constitutes political intervention under the tax code. The good rules we need to make that happen in the nonprofit sector are within our reach.

For further information, please contact Emily Peterson-Cassin (epetersoncassin@citizen.org) or Greg Colvin (Colvin@adlercolvin.com) or visit www.brightlinesproject.org.