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September 6, 2012

The Hon. Douglas Shulman
Commissioner;
Lois Lerner
Director of Exempt Organizations Division;
Internal Revenue Service
1111 Constitution Avenue NW
Washington, D.C. 20224

RE: American Bankers Association plan to establish a 501(c)(4) social welfare organizations for campaign intervention purposes

Dear Commissioner Shulman and Director Lerner:

The American Bankers Association (ABA) board of governors is approving a plan to establish a 501(c)(4) social welfare organization largely for the purpose of raising and spending funds for campaign intervention in the 2012 federal elections. Funds will be raised from the treasuries of corporate members of the association and other sources, and either spent on independent expenditures for or against U.S. Senate candidates or contributed to unnamed super PACs for the same purpose. According to ABA general counsel Dawn Causey, one of the reasons for creating a 501(c)(4) to carry out this function is so that the sources of the electioneering expenditures would not be disclosed to the public.

Should the ABA submit a Form 1024 seeking recognition of tax exemption under section 501(c)(4) for this new organization, Public Citizen requests that the Internal Revenue Service (IRS):

- Closely evaluate in its determination letter whether this new organization legitimately qualifies for 501(c)(4) tax status given the ABA's public statements regarding its purposes and anticipated activities.
- Revisit and clarify the "primary purpose" standards for determining whether an organization qualifies for 501(c) tax status or should register as a Section 527 political organization subject to disclosure requirements.

The American Bankers Association is led by former Oklahoma Governor Frank Keating. The Washington-based lobbying organization represents about 5,000 banks, from community lenders to major Wall Street firms like J.P. Morgan Chase & Co. In the first half of 2012, the ABA reported making $4.6 million in federal lobbying expenditures, focusing on weakening or repealing the Dodd-Frank Wall Street Reform and Consumer Protection Act and proposals to implement cost-benefit analyses for financial services regulations.[1] The ABA has spent significant funds this year looking to weaken regulations on derivatives trading, the Volcker rule, and the required creation of living wills for the orderly liquidation of failing companies. The ABA also has donated about $2.8 million to federal candidates this election cycle through its more stringently regulated and transparent political action committee.[2]

General Counsel Causey emphasized the importance of using nonprofit tax status to conceal donors from the public on a September 4th conference call briefing member firms. But she also warned members that the Internal Revenue Service or another agency could conceivably craft rules requiring disclosure of electioneering finances. “Today, we’re OK; tomorrow, I don’t know,” she said. “There is a risk.”[3]

Most of the legislative concerns of the American Bankers Association passed through the U.S. House of Representatives but have been stymied in the narrowly-controlled Democratic Senate. It is widely expected that the nonprofit electioneering group would focus on the Senate, but ABA lobbyist James Ballentine has not specified which Senate races the group would attempt to influence.

ABA staff defended the organization’s choice of using nonprofit tax status to conduct its planned undisclosed campaign intervention activity by asserting that the group would spend 51 percent of its funds on public issue advocacy and 49 percent on electioneering, thus attempting to justify the group’s primary purpose as a social welfare organization rather than a political organization – despite the fact that such “other” activities are peripheral to the group’s stated primary objective: campaign intervention.[4]

An increasing number of electioneering nonprofit groups contend that an organization that spends 51 percent of its funds on issue advocacy and 49 percent on electioneering complies with the Internal Revenue Code (IRC) and IRS regulations requiring that social welfare be the primary interest of the group. But the 51/49 percent test appears contrary to the tax code and has never been addressed by the IRS. Section 510(c)(4) of the IRC establishes tax exempt status for social welfare organizations “not organized for profit but operated *exclusively* for the promotion of social welfare….”[5] IRS regulations allow such groups to intervene in campaigns as long as such activity is not their “primary purpose.” But the agency has never clarified the “primary purpose” standard or explicitly stated that it is always satisfied by an organization whose expenditures for social welfare purposes constitute 51 percent of its budget.

Discussions by officials of the American Bankers Association suggest that the primary objective of its new 501(c)(4) organization is to provide an avenue for the flow of undisclosed money into the 2012 Senate races from corporate members of the association. Public Citizen requests that

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[1] U.S. Secretary of the Senate, lobbying disclosure database, available at: http://soprweb.senate.gov/

[2] Federal Election Commission, campaign finance reports, available at: http://www.fec.gov/disclosure.shtml

[3] Robert Schmidt and Phil Mattingly, “Banker Plan Would Fund Super-PACs to Sway Senate Races,” *Businessweek* (Sep. 5, 2012)

[4] Id.

[5] 26 U.S.C. §510(c)(4) (emphasis added).

the IRS closely scrutinize the financial and political activities of the ABA's social welfare organization in determining whether the group can justify a 501(c) nonprofit tax status.

If the organization does indeed attempt to justify its nonprofit tax status using the 51/49 percent test, Public Citizen requests that the IRS critically evaluate whether such a test reasonably complies with the spirit and the letter of the Internal Revenue Code.

Moreover, irrespective of whether the Service determines that the 51/49 percent approach should function as a guideline for the primary purpose test, we ask that special attention be given to this particular case, and similar instances that have arisen or may arise, when an organization states explicitly or demonstrates through its actions that its primary purpose is or will be electioneering, and then seeks to "save" its 501(c) status by tacking on -- or claiming that it will tack on -- additional, non-electioneering expenditures. That is, even if the IRS continues to rely in part on the 51/49 percent approach, we ask it also consider other factors in assessing primary purpose. Based on public statements from American Bankers Association officials, it appears to us that such an approach would counsel a denial of the new organization's 501(c) status. In other words, when an organization's non-electoral activities are merely a cover for the activities of a group whose creation is motivated by the purpose of making electoral expenditures without reporting contributions, the organization's primary purpose should be considered to be influencing elections, not advancing social welfare.

In today's largely unregulated campaign finance environment – especially in the wake of the *Citizens United* decision that opened the floodgates to corporate treasury funds in federal, state and judicial elections – the tax code and ambiguous IRS regulations are being increasingly exploited by political operatives to launder unlimited and anonymous funds into elections. The public statements by the American Bankers Association reflect this attitude of abusing the tax code for its own political purposes.

It is time for the IRS to play a more proactive role in protecting the integrity of the Internal Revenue Code.

The September 5, 2012, *Businessweek* article discussing the recent decision by the American Bankers Association is provided below.

Sincerely,

Robert Weissman, President
Public Citizen

Allison Zieve, Director
Public Citizen's Litigation Group

Scott Nelson, Counsel
Public Citizen's Litigation Group

Lisa Gilbert, Acting Director
Public Citizen's Congress Watch

Craig Holman, Government Affairs Lobbyist
Public Citizen

Bloomberg Businessweek

Banker Plan Would Fund Super-PACs to Influence U.S. Senate Races

Robert Schmidt and Phil Mattingly, ©2012 Bloomberg News

Published 1:32 p.m., Wednesday, September 5, 2012

Sept. 5 (Bloomberg) -- A banking trade group is preparing to set up a political fund that would allow members to funnel money anonymously to pro-industry candidates in the final months of the U.S. elections.

The American Bankers Association board is set to vote tomorrow on a plan to create a nonprofit that would donate to super-political action committees, or super-PACs, that can spend unlimited amounts on TV ads and other campaign activities.

ABA officials, during a conference call yesterday to brief member firms, said they intend to raise several million dollars in the next few weeks and concentrate their contributions on six to 12 fiercely contested U.S. Senate races. Attempts in the Republican-controlled House to roll back regulation of the financial industry, particularly the 2010 Dodd-Frank Act, have so far run aground in the Democratic-controlled Senate.

The ABA's effort comes only two months before elections for president and Congress. Craig Holman, a lobbyist for Public Citizen, which tracks the influence of money on politics, said donations from the nonprofit could affect some races.

"They still have plenty of time to roll out a giant campaign," Holman said. "They can set this up overnight and tap into any number of sources in the financial services industry."

A series of court decisions and regulatory changes in 2010 unraveled previous federal limits on political donations. The donors pool their money in nonprofits, which keep contributor names secret, and super-PACs, which have amassed $350 million through the end of July.

Private Donations

The ABA's proposed fund would be a nonprofit, or 501(c)(4), which would allow the organization to disburse money into key Senate races and fund advocacy efforts.

The financial industry has so far kept a low profile in the 2012 campaign, in part because banks remain targets for both political parties for their role in the 2008 financial crisis. While Wall Street banks and their employees have given millions to presidential and congressional campaigns, some of the largest banks have stayed away from overt political activities like funding the parties' conventions.

The ABA is led by former Oklahoma Governor Frank Keating, a Republican. The Washington-based trade group represents about 5,000 banks of all sizes, from community lenders to large Wall Street firms like JPMorgan Chase & Co. The association also donates money to candidates through a more stringently regulated political action committee that has given more than $2.8 million so far this election cycle to candidates of both parties.

Nonprofit Fund

ABA Chief Operating Officer Michael Hunter confirmed the plans and said that, if approved, the nonprofit's activities will be decided by its board. Not all ABA members are expected to take part.

"It's not like we're going to be opening the cash spigots and influencing races across the country," Hunter said in an interview. He noted that other trade groups fund similar advocacy-focused nonprofits.

On the conference call, Dawn Causey, the ABA's general counsel, said she couldn't promise that the Internal Revenue Service or another agency wouldn't craft rules that would require nonprofit funds to reveal their donors.

"Today, we're OK; tomorrow, I don't know," she said. "There is a risk."
Senate Focus

ABA officials on the briefing call, led by James Ballentine, executive vice president of congressional relations and political affairs, didn't specify which Senate races they would seek to influence.

Democrats, who control the chamber by a narrow margin, are on the defensive in the 2012 races, trying to hold on to 23 seats while Republicans are only defending 10.

The Rothenberg Political Report, a non-partisan publication that follows elections, listed five Senate races as "pure toss- ups" on Sept. 3, three of which are held by Democrats. A sixth seat, held by retiring Nebraska Senator Ben Nelson, is listed as "Republican favored" and another, the seat held by retiring Wisconsin Senator Herb Kohl, is rated as a toss-up that "tilts Republican." Included in the list of "pure toss-ups" is the race in Massachusetts where Senator Scott Brown, a Republican, is facing off against Elizabeth Warren, the Harvard professor whose brainchild, the Consumer Financial Protection Bureau, drew fierce opposition from the banking industry in 2010.

'Real Battle'

"The real battle when it comes to Congress is the Senate," said Holman, who noted that the ABA would likely target senators that have stood in the way of changes to the Dodd-Frank financial regulatory overhaul.

Ballentine said the requested donation varies depending on the size of the bank. Large firms, with $11 billion or more in assets, are being asked for a minimum of $10,000. Medium-sized banks were asked to give at least $5,000 and the smallest $1,000.

Foreign banks could only make donations via one of their U.S.-domiciled subsidiaries, staff said on the call.

Hunter said that if all the trade group's members contributed at the minimum level the fund would have a war chest of about $6 million. A more likely scenario, he said, was that 40 percent or 50 percent would give money. Some members also expressed a willingness to give more than the minimum, he said on the call.

In accord with federal rules, ABA staff members said that the fund would spend 51 percent of its money on "public issue advocacy," such as research, policy papers and media campaigns. The other 49 percent would be used for so-called independent expenditures that aren't coordinated with campaigns and can be used to promote the candidates, often through advertising. In practice, they said, much of that money would be donated super- PACs that share the ABA's electoral goals.

--With assistance from Julie Bykowicz in Washington. Editors: Maura Reynolds, Gregory Mott

To contact the reporters on this story: Robert Schmidt in Washington at rschmidt5@bloomberg.net; Phil Mattingly in Washington at pmattingly@bloomberg.net

To contact the editor responsible for this story: Maura Reynolds at mreynolds34@bloomberg.net