

the
BRIGHT LINES
project



215 Pennsylvania Avenue SE, Washington, D.C. 20003 | (202) 546-4996

The Bright Lines Project

.... to define political intervention
under the Internal Revenue Code

Drafting Committee:

Greg Colvin (chair), Beth Kingsley (vice-chair)

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www.brightlinesproject.org

Why Federal Tax Law Matters

- *Policy set by Congress, throughout the Internal Revenue Code, requires “political intervention” to be paid for with “after-tax” money.*
- No business expense deductions (IRC 162(e))
- Charities prohibited, no deduction (501(c)(3))
- Other exempt orgs ((c)(4), (c)(6)) limited
- Political orgs pay tax on investment income, must disclose donors (527)
- System is universal: federal, state, local, foreign
- Who else but the IRS could be the referee?

But what is political intervention?

- IRS: depends on all the facts and circumstances
- Intent is irrelevant
- More than express advocacy, but what?
- Multi-factor rules for issue advocacy v. political campaign ads (two different Revenue Rulings from 2004, 2007)
- SO, **some with big \$ abuse the system**
-and the speech of many is chilled

Problems

- Supreme Court's 2010 *Citizens United* decision blew the lid off federal & state prohibitions & limits on corporate & labor union independent political expenditures
- Leaving the tax code as the only law, and the IRS as the only enforcement agency, limiting independent expenditures
- However, IRS definition of political intervention is ***vague and unpredictable***

Problems for the IRS, internally

- Employees in Cincinnati, reviewing 501(c) applications, didn't know what political intervention was or how much was permitted, esp. for 501(c)(4) social welfare groups.
- So they used biased search terms to select them by name, such as "tea party" and "progressive."
- Only a handful of senior IRS attorneys in Wash DC, had expertise and experience to judge "facts and circumstances."
- IRS officials feared that denying exemption based on political intervention could lead to a Supreme Court constitutional challenge (e.g. void for vagueness).
- *RESULT: extra questions, long delays, affecting mainly conservative organizations (disproportionately? unclear).*

Current definition of political intervention

- To participate or intervene, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office.
 - “Candidate” means an individual who offers himself, or is proposed by others, as a contestant for an elective public office, whether national, State, or local.
 - Includes, but is not limited to, the publication or distribution of written or printed statements or the making of oral statements on behalf of or in opposition to such a candidate.
- = Depends on “all the **facts and circumstances.**”

...OK, so how much is permitted?

The limits seem to be, roughly speaking:

- 501(c)(3) – charities, churches, etc. 0%
- 501(c)(4), (5), (6) – social welfare, unions,
business assns <49%
 - or should it be 0%?
 - or 5-10-15%? (insubstantial)
 - 40% safe harbor? (ABA 2004, IRS 2013)
- 527 – political organizations >85%
- What if political activity is 50-85%?
 - *may be taxable entity, no exempt status*

The Bright Lines Proposal

Everything hinges on a clear, predictable, objective definition of “political intervention.” Could be:

- adopted as IRS/Treasury Regs under 2013-2014 Priority Guidance Plan
- enacted by Congress as new section 4956 of the Internal Revenue Code

Details? Visit www.brightlinesproject.org

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.***

Application – Code sections affected

- 501(c)(3) prohibition
- 501(c)(4), (5), (6), etc. limitation
- 501(c)(29) prohibition
- 4945, 4955 sanctions
- 170(c)(2)(D) denial of tax deduction
- 162(e) denial of business deduction
- 6033(e) proxy tax
- **527(e)(2), (f) – Congress needs to amend**

Express Advocacy

- (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.

Threshold Speech Rule

= 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*** on that candidate.

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.

Safe Harbors

- Four exceptions are available, but only if the communication does not consist of ***paid mass media advertising***. Possible definition:
- 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 service.
- IRS to update list every two years as needed to include similar media as changes in technology occur.

1. 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 (e.g. ***grass roots lobbying***)

2. Comparing Candidates

- Voter education 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 all current candidates (***debates, voter guides***)

3. Self-Defense

- A response by an organization to a public 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.

4. Personal, Oral Remarks at Official Meetings

- Remarks made by anyone (other than a candidate) present in person at a meeting of an organization held in a single location, with no announcement referring to any candidate, party, election, or voting.
- Covers only oral remarks about candidates made by and to persons in attendance, not any other form of communication, written, electronic, broadcast, etc.
- Must be speaker's personal opinion, not on behalf of the organization, not express advocacy (no endorsements).
- ***Church services, PTA meetings, etc.***

Use of Resources

- Providing any of the organization's resources, money or in-kind, goods, services, or facilities ... by ... any method of transfer ... 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.
- Not FMV transactions (no candidate preference).
- Includes contributions reportable under campaign finance laws.

Targeted Communications

- Communications that meet the threshold speech test, 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.

Facts and Circumstances

- ***In other cases***, evidence such as timing, range of issues discussed, disclaimers, disclosures, organization's history, impartiality of methods, or corrective steps, shall be considered ***only in the organization's defense*** --
- To meet its burden of proof, that the conduct furthered a proper exempt or business purpose, unrelated to intervening in the campaign of any candidate.

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Eve Borenstein

Greg Colvin

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Jim Joseph

Beth Kingsley

Abby Levine

John Pomeranz

Ezra Reese