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Proposed Regs Define Candidate-Related Political Activities for Social Welfare Groups.

The IRS has issued proposed regulations (REG-134417-13) that provide guidance on political activities related to candidates that don't promote social welfare for purposes of tax-exempt status under section 501(c)(4). Comments and public hearing requests are due by February 27.

Organizations may apply for tax-exempt status under section 501(c)(4) if they operate to promote social welfare, which under the current rules doesn't include participation or intervention in political campaigns on behalf of, or in opposition to, any candidate for public office. The preamble to the proposed regs highlights the history of the "political campaign intervention" standard and the facts and circumstances analysis the IRS has applied over the years to determine whether an organization is engaged in that activity.

Treasury and the IRS have determined that more definitive rules on political activities related to candidates — rather than the current, fact-intensive analysis — would be helpful in applying the rules on qualification for tax-exempt status under section 501(c)(4). Accordingly, the proposed regs amend the current rules to provide that the promotion of social welfare does not include "candidate-related political activity," as defined under the regs.

Under the proposed regs, candidate-related political activity includes communications that expressly advocate for a clearly identified political candidate; communications made within 60 days of a general election, or within 30 days of a primary election, that clearly identify a candidate or political party; and communications expenditures that must be reported to the Federal Election Commission. Candidate-related political activity also includes any contribution that is recognized under campaign finance law as a reportable contribution and grants to section 527 political organizations and other tax-exempt organizations that conduct candidate-related political activities. The regs provide that a grantor may rely on a written certification from a grantee stating that it does not engage in, and will not use grant funds for, candidate-related political activity.

Other candidate-related political activities identified in the proposed regs include voter registration drives and "get out the vote" drives; distribution of material prepared by or on behalf of a candidate or by a section 527 political organization; preparation or distribution of voter guides that refer to candidates or political parties; and events held within 60 days of a general election, or within 30 days of a primary election, at which a candidate appears as part of the program. The regs are proposed to apply on the date that final regs are published in the Federal Register.

Treasury and the IRS have received requests for guidance on the meaning of "primarily" as used in the current rules under section 501(c)(4). Before deciding how to proceed, Treasury and the IRS have requested comments on what portion of an organization's activities must promote social welfare for an organization to qualify under section 501(c)(4) and whether more limits should be imposed on any or all activities that do not further social welfare. Comments are also requested on how to measure the activities of organizations seeking to qualify as section 501(c)(4) social welfare organizations for these purposes.

The proposed regs don't address the definition of political campaign intervention under section 501(c)(3), the definition of exempt function activity under section 527, or the application of section 527(f). Comments are requested on whether standards similar to those in the proposed regs should be adopted to define the political activities that do not further the tax-exempt purposes of other tax-exempt organizations and to promote consistent definitions across the tax-exempt sector.

Guidance for Tax-Exempt Social Welfare Organizations on

Candidate-Related Political Activities

[4830-01-p]

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG-134417-13]

RIN 1545-BL81

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations that provide guidance to tax-exempt social welfare organizations on political activities related to candidates that will not be considered to promote social welfare. These regulations will affect tax-exempt social welfare organizations and organizations seeking such status. This document requests comments from the public regarding these proposed regulations. This document also requests comments from the public regarding the standard under current regulations that considers a tax-exempt social welfare organization to be operated exclusively for the promotion of social welfare if it is "primarily" engaged in activities that promote the common good and general welfare of the people of the community, including how this standard should be measured and whether this standard should be changed.

DATES: Written or electronic comments and requests for a public hearing must be received by February 27, 2014.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG-134417-13), Room 5205, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG-134417-13), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW, Washington, DC, or sent electronically via the Federal eRulemaking Portal at <http://www.regulations.gov> (IRS REG-134417-13).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Amy F. Giuliano at (202) 317-5800; concerning submission of comments and requests for a public hearing, Oluwafunmilayo Taylor at (202) 317-6901 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in this notice of proposed rulemaking has been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collection of information should be sent to the Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, SE:W:CAR:MP:T:T:SP, Washington, DC 20224. Comments on the collection of information should be received by January 27, 2014.

Comments are specifically requested concerning:

Whether the proposed collection of information is necessary for the proper performance of the functions of the IRS, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the proposed collection of information;

How the quality, utility, and clarity of the information to be collected may be enhanced; and

How the burden of complying with the proposed collection of information may be minimized, including through forms of information technology.

The collection of information in these proposed regulations is in § 1.501(c)(4)-1(a)(2)(iii)(D), which provides a special rule for contributions by an organization described in section 501(c)(4) of the Internal Revenue Code (Code) to an organization described in section 501(c). Generally, a contribution by a section 501(c)(4) organization to a section 501(c) organization that engages in candidate-related political activity will be considered candidate-related political activity by the section 501(c)(4) organization. The special rule in § 1.501(c)(4)-1(a)(2)(iii)(D) provides that 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 authorized officer of the recipient organization stating that the recipient organization does not engage in any such activity and the contribution is subject to a written restriction that it not be used for candidate-related political activity. This special provision would not apply if the contributor organization knows or has reason to know that the representation is inaccurate or unreliable. The expected recordkeepers are section 501(c)(4) organizations that choose to contribute to, and to seek a written representation from, a section 501(c) organization.

Estimated number of recordkeepers: 2,000.

Estimated average annual burden hours per recordkeeper: 2 hours.

Estimated total annual recordkeeping burden: 4,000 hours.

A particular section 501(c)(4) organization may require more or less time, depending on the number of contributions for which a representation is sought.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and return information are confidential, as required by section 6103.

Background

Section 501(c)(4) of the Code provides a Federal income tax exemption, in part, for “[c]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare.” This exemption dates back to the enactment of the federal income tax in 1913. See Tariff Act of 1913, 38 Stat. 114 (1913). The statutory provision was largely unchanged until 1996, when section 501(c)(4) was amended to prohibit inurement of an organization’s net earnings to private shareholders or individuals.

Prior to 1924, the accompanying Treasury regulations did not elaborate on the meaning of “promotion of social welfare.” See Regulations 33 (Rev.), art. 67 (1918). Treasury regulations promulgated in 1924 explained that civic leagues qualifying for exemption under section 231(8) of the Revenue Act of 1924, the predecessor to section 501(c)(4) of the 1986 Code, are “those not organized for profit but operated exclusively for purposes beneficial to the community as a whole,” and generally include “organizations engaged in promoting the welfare of mankind, other than organizations comprehended within [section 231(6) of the Revenue Act of 1924, the predecessor to section 501(c)(3) of the 1986 Code].” See Regulations 65, art. 519 (1924). The regulations remained substantially the same until 1959.

The current regulations under section 501(c)(4) were proposed and finalized in 1959. They provide that “[a]n organization is operated exclusively for the promotion of social welfare if it is primarily engaged in promoting in some way the common good and general welfare of the people of the community.” Treas. Reg. § 1.501(c)(4)-1(a)(2)(i). An organization “embraced” within section 501(c)(4) is one that is “operated primarily for the purpose of bringing about civic betterments and social improvements.” *Id.* The regulations further 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.” Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii). This language is similar to language that appears in section 501(c)(3) requiring section 501(c)(3) organizations not to “participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office” (“political campaign intervention”). However, unlike the absolute prohibition that applies to charitable organizations described in section 501(c)(3), an organization that primarily engages in activities that promote social welfare will be considered under the current regulations to be operating exclusively for the promotion of social welfare, and may qualify for tax-exempt status under section 501(c)(4), even though it engages in some political campaign intervention.

The section 501(c)(4) regulations have not been amended since 1959, although Congress took steps in the intervening years to address further the relationship of political campaign activities to tax-exempt status. In particular, section 527, which governs the tax treatment of political organizations, was enacted in 1975 and provides generally that amounts received as contributions and other funds raised for political purposes (section 527 exempt function income) are not subject to tax. Section 527(e)(1) defines a “political organization” as “a party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function.” Section 527(f) also imposes a tax on exempt organizations described in section 501(c), including section 501(c)(4) social welfare organizations, that make an expenditure furthering a section 527 exempt function. The tax is imposed on the lesser of the organization’s net investment income or section 527 exempt function expenditures. Section 527(e)(2) defines “exempt function” as “the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any federal, state, or local public office or office in a political organization, or the election of Presidential or Vice-Presidential electors” (referred to in this document as “section 527 exempt function”).¹

Unlike the section 501(c)(3) standard of political campaign intervention, and the similar standard currently applied under section 501(c)(4), both of which focus solely on candidates for elective public office, a section 527 exempt function encompasses activities related to a broader range of officials, including those who are appointed or nominated, such as executive branch officials and certain judges. Thus, while there is currently significant overlap in the activities that constitute political campaign intervention under sections 501(c)(3) and 501(c)(4) and those that further a section 527 exempt function, the concepts are not synonymous.

Over the years, the IRS has stated that whether an organization is engaged in political campaign intervention depends upon all of the facts and circumstances of each case. See Rev. Rul. 78-248 (1978-1 CB 154) (illustrating application of the facts and circumstances analysis to voter education activities conducted by section 501(c)(3) organizations); Rev. Rul. 80-282 (1980-2 CB 178) (amplifying Rev. Rul. 78-248 regarding the timing and distribution of voter education materials); Rev. Rul. 86-95 (1986-2 CB 73) (holding a public forum for the purpose of educating and informing the voters, which provides fair and impartial treatment of candidates, and which does not promote or advance one candidate over another, does not constitute political campaign intervention under section 501(c)(3)). More recently, the IRS released Rev. Rul. 2007-41 (2007-1 CB 1421), providing 21 examples illustrating facts and circumstances to be considered in determining whether a section 501(c)(3) organization's activities (including voter education, voter registration, and get-out-the-vote drives; individual activity by organization leaders; candidate appearances; business activities; and Web sites) result in political campaign intervention. The IRS generally applies the same facts and circumstances analysis under section 501(c)(4). See Rev. Rul. 81-95 (1981-1 CB 332) (citing revenue rulings under section 501(c)(3) for examples of what constitutes participation or intervention in political campaigns for purposes of section 501(c)(4)).

Similarly, Rev. Rul. 2004-6 (2004-1 CB 328) provides six examples illustrating facts and circumstances to be considered in determining whether a section 501(c) organization (such as a section 501(c)(4) social welfare organization) that engages in public policy advocacy has expended funds for a section 527 exempt function. The analysis reflected in these revenue rulings for determining whether an organization has engaged in political campaign intervention, or has expended funds for a section 527 exempt function, is fact-intensive.

Recently, increased attention has been focused on potential political campaign intervention by section 501(c)(4) organizations. A recent IRS report relating to IRS review of applications for tax-exempt status states that "[o]ne of the significant challenges with the 501(c)(4) [application] review process has been the lack of a clear and concise definition of 'political campaign intervention.'" Internal Revenue Service, "Charting a Path Forward at the IRS: Initial Assessment and Plan of Action" at 20 (June 24, 2013). In addition, "[t]he distinction between campaign intervention and social welfare activity, and the measurement of the organization's social welfare activities relative to its total activities, have created considerable confusion for both the public and the IRS in making appropriate section 501(c)(4) determinations." *Id.* at 28. The Treasury Department and the IRS recognize that both the public and the IRS would benefit from clearer definitions of these concepts.

Explanation of Provisions

1. Overview

The Treasury Department and the IRS recognize that more definitive rules with respect to political activities related to candidates — rather than the existing, fact-intensive analysis — would be helpful in applying the rules regarding qualification for tax-exempt status under section 501(c)(4). Although more definitive rules might fail to capture (or might sweep in) activities that would (or would not) be captured under the IRS' traditional facts and circumstances approach, adopting rules with sharper

distinctions in this area would provide greater certainty and reduce the need for detailed factual analysis in determining whether an organization is described in section 501(c)(4). Accordingly, the Treasury Department and the IRS propose to amend Treas. Reg. § 1.501(c)(4)-1(a)(2) to identify specific political activities that would be considered candidate-related political activities that do not promote social welfare.

To distinguish the proposed rules under section 501(c)(4) from the section 501(c)(3) standard and the similar standard currently applied under section 501(c)(4), the proposed regulations would amend Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii) to delete the current reference to “direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office,” which is similar to language in the section 501(c)(3) statute and regulations. Instead the proposed regulations would revise Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii) to state that “[t]he promotion of social welfare does not include direct or indirect candidate-related political activity.” As explained in more detail in section 2 of this preamble, the proposed rules draw upon existing definitions of political campaign activity, both in the Code and in federal election law, to define candidate-related political activity that would not be considered to promote social welfare. The proposed rules draw in particular from certain statutory provisions of section 527, which specifically deals with political organizations and taxes section 501(c) organizations, including section 501(c)(4) organizations, on certain types of political campaign activities. Recognizing that it may be beneficial to have a more uniform set of rules relating to political campaign activity for tax-exempt organizations, the Treasury Department and the IRS request comments in subparagraphs a through c of this section of the preamble regarding whether the same or a similar approach should be adopted in addressing political campaign activities of other section 501(c) organizations, as well as whether the regulations under section 527 should be revised to adopt the same or a similar approach in defining section 527 exempt function activity.

a. Interaction with section 501(c)(3)

These proposed regulations do not address the definition of political campaign intervention under section 501(c)(3). The Treasury Department and the IRS recognize that, because such intervention is absolutely prohibited under section 501(c)(3), a more nuanced consideration of the totality of facts and circumstances may be appropriate in that context. The Treasury Department and the IRS request comments on the advisability of adopting an approach to defining political campaign intervention under section 501(c)(3) similar to the approach set forth in these regulations, either in lieu of the facts and circumstances approach reflected in Rev. Rul. 2007-41 or in addition to that approach (for example, by creating a clearly defined presumption or safe harbor). The Treasury Department and the IRS also request comments on whether any modifications or exceptions would be needed in the section 501(c)(3) context and, if so, how to ensure that any such modifications or exceptions are clearly defined and administrable. Any such change would be introduced in the form of proposed regulations to allow an additional opportunity for public comment.

b. Interaction with section 527

As noted in the “Background” section of this preamble, a section 501(c)(4) organization is subject to tax under section 527(f) if it makes expenditures for a section 527 exempt function. Consistent with section 527, the proposed regulations provide that “candidate-related political activity” for purposes of section 501(c)(4) includes activities relating to selection, nomination, election, or appointment of individuals to serve as public officials, officers in a political organization, or Presidential or Vice Presidential electors. These proposed regulations do not, however, address the definition of “exempt function” activity under section 527 or the application of section 527(f). The Treasury Department and the IRS request comments on the advisability of adopting rules that are the same as or similar to these proposed regulations for purposes of defining section 527 exempt function activity in lieu of

the facts and circumstances approach reflected in Rev. Rul. 2004-6. Any such change would be introduced in the form of proposed regulations to allow an additional opportunity for public comment.

c. Interaction with sections 501(c)(5) and 501(c)(6)

The proposed regulations define candidate-related political activity for social welfare organizations described in section 501(c)(4). The Treasury Department and the IRS are considering whether to amend the current regulations under sections 501(c)(5) and 501(c)(6) to provide that exempt purposes under those regulations (which include “the betterment of the conditions of those engaged in [labor, agricultural, or horticultural] pursuits” in the case of a section 501(c)(5) organization and promoting a “common business interest” in the case of a section 501(c)(6) organization) do not include candidate-related political activity as defined in these proposed regulations. The Treasury Department and the IRS request comments on the advisability of adopting this approach in defining activities that do not further exempt purposes under sections 501(c)(5) and 501(c)(6). Any such change would be introduced in the form of proposed regulations to allow an additional opportunity for public comment.

d. Additional guidance on the meaning of “operated exclusively for the promotion of social welfare”

The Treasury Department and the IRS have received requests for guidance on the meaning of “primarily” as used in the current regulations under section 501(c)(4). The current regulations provide, in part, that an organization is operated exclusively for the promotion of social welfare within the meaning of section 501(c)(4) if it is “primarily engaged” in promoting in some way the common good and general welfare of the people of the community. Treas. Reg. § 1.501(c)(4)-1(a)(2)(i). As part of the same 1959 Treasury decision promulgating the current section 501(c)(4) regulations, regulations under section 501(c)(3) were adopted containing similar language: “[a]n organization will be regarded as ‘operated exclusively’ for one or more exempt purposes only if it engages primarily in activities which accomplish one or more of such exempt purposes specified in section 501(c)(3).” Treas. Reg. § 1.501(c)(3)-1(c)(1). Unlike the section 501(c)(4) regulations, however, the section 501(c)(3) regulations also provide that “[a]n organization will not be so regarded if more than an insubstantial part of its activities is not in furtherance of an exempt purpose.” *Id.*

Some have questioned the use of the “primarily” standard in the section 501(c)(4) regulations and suggested that this standard should be changed. The Treasury Department and the IRS are considering whether the current section 501(c)(4) regulations should be modified in this regard and, if the “primarily” standard is retained, whether the standard should be defined with more precision or revised to mirror the standard under the section 501(c)(3) regulations. Given the potential impact on organizations currently recognized as described in section 501(c)(4) of any change in the “primarily” standard, the Treasury Department and the IRS wish to receive comments from a broad range of organizations before deciding how to proceed. Accordingly, the Treasury Department and the IRS invite comments from the public on what proportion of an organization’s activities must promote social welfare for an organization to qualify under section 501(c)(4) and whether additional limits should be imposed on any or all activities that do not further social welfare. The Treasury Department and the IRS also request comments on how to measure the activities of organizations seeking to qualify as section 501(c)(4) social welfare organizations for these purposes.

2. Definition of Candidate-Related Political Activity

These proposed regulations provide guidance on which activities will be considered candidate-related political activity for purposes of the regulations under section 501(c)(4). These proposed

regulations would replace the language in the existing final regulation under section 501(c)(4) — “participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office” — with a new term — “candidate-related political activity” — to differentiate the proposed section 501(c)(4) rule from the standard employed under section 501(c)(3) (and currently employed under section 501(c)(4)). The proposed rule is intended to help organizations and the IRS more readily identify activities that constitute candidate-related political activity and, therefore, do not promote social welfare within the meaning of section 501(c)(4). These proposed regulations do not otherwise define the promotion of social welfare under section 501(c)(4). The Treasury Department and the IRS note that the fact that an activity is not candidate-related political activity under these proposed regulations does not mean that the activity promotes social welfare. Whether such an activity promotes social welfare is an independent determination.

In defining candidate-related political activity for purposes of section 501(c)(4), these proposed regulations draw key concepts from the federal election campaign laws, with appropriate modifications reflecting the purpose of these regulations to define which organizations may receive the benefits of section 501(c)(4) tax-exempt status and to promote tax compliance (as opposed to campaign finance regulation). In addition, the concepts drawn from the federal election campaign laws have been modified to reflect that section 501(c)(4) organizations may be involved in activities related to local or state elections (in addition to federal elections), as well as the broader scope of the proposed definition of candidate (which is not limited to candidates for federal elective office).

The proposed regulations provide that candidate-related political activity includes activities that the IRS has traditionally considered to be political campaign activity per se, such as contributions to candidates and communications that expressly advocate for the election or defeat of a candidate. The proposed regulations also would treat as candidate-related political activity certain activities that, because they occur close in time to an election or are election-related, have a greater potential to affect the outcome of an election. Currently, such activities are subject to a facts and circumstances analysis before a determination can be made as to whether the activity furthers social welfare within the meaning of section 501(c)(4). Under the approach in these proposed regulations, such activities instead would be subject to a more definitive rule. In addition, consistent with the goal of providing greater clarity, the proposed regulations would identify certain specific activities as candidate-related political activity. The Treasury Department and the IRS acknowledge that the approach taken in these proposed regulations, while clearer, may be both more restrictive and more permissive than the current approach, but believe the proposed approach is justified by the need to provide greater certainty to section 501(c)(4) organizations regarding their activities and reduce the need for fact-intensive determinations.

The Treasury Department and the IRS note that a particular activity may fit within one or more categories of candidate-related political activity described in subsections b through e of this section 2 of the preamble; the categories are not mutually exclusive. For example, the category of express advocacy communications may overlap with the category of certain communications close in time to an election.

a. Definition of “candidate”

These proposed regulations provide that, consistent with the scope of section 527, “candidate” means an individual who identifies himself or is proposed by another for selection, nomination, election, or appointment to any public office or office in a political organization, or to be a Presidential or Vice-Presidential elector, whether or not the individual is ultimately selected, nominated, elected, or appointed. In addition, the proposed regulations clarify that for these purposes the term “candidate” also includes any officeholder who is the subject of a recall election. The Treasury Department and the IRS note that defining “candidate-related political activity” in

these proposed regulations to include activities related to candidates for a broader range of offices (such as activities relating to the appointment or confirmation of executive branch officials and judicial nominees) is a change from the historical application in the section 501(c)(4) context of the section 501(c)(3) standard of political campaign intervention, which focuses on candidates for elective public office only. See Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii). These proposed regulations instead would apply a definition that reflects the broader scope of section 527 and that is already applied to a section 501(c)(4) organization engaged in section 527 exempt function activity through section 527(f).

b. Express advocacy communications

These proposed regulations provide that candidate-related political activity includes communications that expressly advocate for or against a candidate. These proposed regulations draw from Federal Election Commission rules in defining “expressly advocate,” but expand the concept to include communications expressing a view on the selection, nomination, or appointment of individuals, or on the election or defeat of one or more candidates or of candidates of a political party. These proposed regulations make clear that all communications — including written, printed, electronic (including Internet), video, and oral communications — that express a view, whether for or against, on a clearly identified candidate (or on candidates of a political party) would constitute candidate-related political activity. A candidate can be “clearly identified” in a communication by name, photograph, or reference (such as “the incumbent” or a reference to a particular issue or characteristic distinguishing the candidate from others). The proposed regulations also provide that candidate-related political activity includes any express advocacy communication the expenditures for which an organization reports to the Federal Election Commission under the Federal Election Campaign Act as an independent expenditure.

c. Public communications close in time to an election

Under current guidance, the timing of a communication about a candidate that is made shortly before an election is a factor tending to indicate a greater risk of political campaign intervention or section 527 exempt function activity. In the interest of greater clarity, these proposed regulations would move away from the facts and circumstances approach that the IRS has traditionally applied in analyzing certain activities conducted close in time to an election. These proposed regulations draw from provisions of federal election campaign laws that treat certain communications that are close in time to an election and that refer to a clearly identified candidate as electioneering communications, but make certain modifications. The proposed regulations expand the types of candidates and communications that are covered to reflect the types of activities an organization might conduct related to local and state, as well as federal, contests, including any election or ballot measure to recall an individual who holds state or local elective public office. In addition, the expansion of the types of communications covered in the proposed regulations reflects the fact that an organization’s tax exempt status is determined based on all of its activities, even low cost and volunteer activities, not just its large expenditures.

Under the proposed definition, any public communication that is made within 60 days before a general election or 30 days before a primary election and that clearly identifies a candidate for public office (or, in the case of a general election, refers to a political party represented in that election) would be considered candidate-related political activity. These timeframes are the same as those appearing in the Federal Election Campaign Act definition of electioneering communications. The definition of “election,” including what would be treated as a primary or a general election, is consistent with section 527(j) and the federal election campaign laws.

A communication is “public” if it is made using certain mass media (specifically, by broadcast, in a

newspaper, or on the Internet), constitutes paid advertising, or reaches or is intended to reach at least 500 people (including mass mailings or telephone banks). The Treasury Department and the IRS intend that content previously posted by an organization on its Web site that clearly identifies a candidate and remains on the Web site during the specified pre-election period would be treated as candidate-related political activity.

The proposed regulations also provide that candidate-related political activity includes any communication the expenditures for which an organization reports to the Federal Election Commission under the Federal Election Campaign Act, including electioneering communications.

The approach taken in the proposed definition of candidate-related political activity would avoid the need to consider potential mitigating or aggravating circumstances in particular cases (such as whether an issue-oriented communication is “neutral” or “biased” with respect to a candidate). Thus, this definition would apply without regard to whether a public communication is intended to influence the election or some other, non-electoral action (such as a vote on pending legislation) and without regard to whether such communication was part of a series of similar communications. Moreover, a public communication made outside the 60-day or 30-day period would not be candidate-related political activity if it does not fall within the ambit of express advocacy communications or another specific provision of the definition. The Treasury Department and the IRS request comments on whether the length of the period should be longer (or shorter) and whether there are particular communications that (regardless of timing) should be excluded from the definition because they can be presumed to neither influence nor constitute an attempt to influence the outcome of an election. Any comments should specifically address how the proposed exclusion is consistent with the goal of providing clear rules that avoid fact-intensive determinations.

The Treasury Department and the IRS also note that this rule regarding public communications close in time to an election would not apply to public communications identifying a candidate for a state or federal appointive office that are made within a specified number of days before a scheduled appointment, confirmation hearing or vote, or other selection event. The Treasury Department and the IRS request comments on whether a similar rule should apply with respect to communications within a specified period of time before such a scheduled appointment, confirmation hearing or vote, or other selection event.

d. Contributions to a candidate, political organization, or any section 501(c) entity engaged in candidate-related political activity

The proposed definition of candidate-related political activity would include contributions of money or anything of value to or the solicitation of contributions on behalf of (1) any person if such contribution is recognized under applicable federal, state, or local campaign finance law as a reportable contribution; (2) any political party, political committee, or other section 527 organization; or (3) any organization described in section 501(c) that engages in candidate-related political activity within the meaning of this proposed rule. This definition of contribution is similar to the definition of contribution that applies for purposes of section 527. The Treasury Department and the IRS intend that the term “anything of value” would include both in-kind donations and other support (for example, volunteer hours and free or discounted rentals of facilities or mailing lists). The Treasury Department and the IRS request comments on whether other transfers, such as indirect contributions described in section 276 to political parties or political candidates, should be treated as candidate-related political activity.

The Treasury Department and the IRS recognize that a section 501(c)(4) organization making a contribution may not know whether a recipient section 501(c) organization engages in candidate-related political activity. The proposed regulations provide that, for purposes of this definition, a

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

e. Election-related activities

The proposed definition of candidate-related political activity would include certain specified election-related activities, including the conduct of voter registration and get-out-the-vote drives, distribution of material prepared by or on behalf of a candidate or section 527 organization, and preparation or distribution of a voter guide and accompanying material that refers to a candidate or a political party. In addition, an organization that hosts an event on its premises or conducts an event off-site within 30 days of a primary election or 60 days of a general election at which one or more candidates in such election appear as part of the program (whether or not such appearance was previously scheduled) would be engaged in candidate-related political activity under the proposed definition.

The Treasury Department and the IRS acknowledge that under the facts and circumstances analysis currently used for section 501(c)(4) organizations as well as for section 501(c)(3) organizations, these election-related activities may not be considered political campaign intervention if conducted in a non-partisan and unbiased manner. However, these determinations are highly fact-intensive. The Treasury Department and the IRS request comments on whether any particular activities conducted by section 501(c)(4) organizations should be excepted from the definition of candidate-related political activity as voter education activity and, if so, a description of how the proposed exception will both ensure that excepted activities are conducted in a non-partisan and unbiased manner and avoid a fact-intensive analysis.

f. Attribution to a section 501(c)(4) organization of certain activities and communications

These proposed regulations provide that activities conducted by an organization include, but are not limited to, (1) activities paid for by the organization or conducted by the organization's officers, directors, or employees acting in that capacity, or by volunteers acting under the organization's direction or supervision; (2) communications made (whether or not such communications were previously scheduled) as part of the program at an official function of the organization or in an official publication of the organization; and (3) other communications (such as television advertisements) the creation or distribution of which is paid for by the organization. These proposed regulations also provide that an organization's Web site is an official publication of the organization, so that material posted by the organization on its Web site may constitute candidate-related political activity. The proposed regulations do not specifically address material posted by third parties on an organization's Web site. The Treasury Department and the IRS request comments on whether, and under what circumstances, material posted by a third party on an interactive part of the organization's Web site should be attributed to the organization for purposes of this rule. In addition, the Treasury Department and the IRS have stated in guidance under section 501(c)(3) regarding political campaign intervention that when a charitable organization chooses to establish a link to another Web site, the organization is responsible for the consequences of establishing and maintaining that link, even if it does not have control over the content of the linked site. See Rev. Rul. 2007-41. The Treasury Department and the IRS request comments on whether the consequences of establishing and maintaining a link to another Web site should be the same or different for purposes of the proposed definition of candidate-related political activity.

Proposed Effective/Applicability Date

These regulations are proposed to be effective the date of publication of the Treasury decision adopting these rules as final regulations in the Federal Register. For proposed date of applicability, see § 1.501(c)(4)-1(c).

Statement of Availability for IRS Documents

For copies of recently issued Revenue Procedures, Revenue Rulings, Notices, and other guidance published in the Internal Revenue Bulletin or Cumulative Bulletin, please visit the IRS Web site at <http://www.irs.gov> or the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866, as supplemented by Executive Order 13563. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. It is hereby certified that this rule will not have a significant economic impact on a substantial number of small entities. This certification is based on the fact that only a minimal burden would be imposed by the rule, if adopted. Under the proposal, if a section 501(c)(4) organization chooses to contribute to a section 501(c) organization and wants assurance that the contribution will not be treated as candidate-related political activity, it may seek a written representation that the recipient does not engage in candidate-related political activity within the meaning of these regulations. Therefore, a regulatory flexibility analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Requests for Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. The Treasury Department and the IRS generally request comments on all aspects of the proposed rules. In particular, the Treasury Department and the IRS request comments on whether there are other specific activities that should be included in, or excepted from, the definition of candidate-related political activity for purposes of section 501(c)(4). Such comments should address how the proposed addition or exception is consistent with the goals of providing more definitive rules and reducing the need for fact-intensive analysis of the activity. All comments submitted by the public will be made available for public inspection and copying at www.regulations.gov or upon request.

A public hearing will be scheduled if requested in writing by any person who timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the public hearing will be published in the Federal Register.

Drafting Information

The principal author of these regulations is Amy F. Giuliano, Office of Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1 — INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 1.501(c)(4)-1 is proposed to be amended by revising the first sentence of paragraph (a)(2)(ii) and adding paragraphs (a)(2)(iii) and (c) to read as follows:

§ 1.501(c)(4)-1 Civic organizations and local associations of employees.

(a) * * *

(2) * * *

(ii) * * * The promotion of social welfare does not include direct or indirect candidate-related political activity, as defined in paragraph (a)(2)(iii) of this section. * * *

(iii) Definition of candidate-related political activity — (A) In general. For purposes of this section, candidate-related political activity means:

(1) Any communication (as defined in paragraph (a)(2)(iii)(B)(3) of this section) expressing a view on, whether for or against, the selection, nomination, election, or appointment of one or more clearly identified candidates or of candidates of a political party that —

(i) Contains words that expressly advocate, such as “vote,” “oppose,” “support,” “elect,” “defeat,” or “reject;” or

(ii) Is susceptible of no reasonable interpretation other than a call for or against the selection, nomination, election, or appointment of one or more candidates or of candidates of a political party;

(2) Any public communication (defined in paragraph (a)(2)(iii)(B)(5) of this section) 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;

(3) Any communication the expenditures for which are reported to the Federal Election Commission, including independent expenditures and electioneering communications;

(4) A contribution (including a gift, grant, subscription, loan, advance, or deposit) 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 organization described in section 501(c) that engages in candidate-related political activity within the meaning of this paragraph (a)(2)(iii) (see special rule in paragraph (a)(2)(iii)(D) of this section);

(5) Conduct of a voter registration drive or “get-out-the-vote” drive;

(6) 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;

(7) 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); or

(8) 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 appear as part of the program.

(B) Related definitions. The following terms are defined for purposes of this paragraph (a)(2)(iii) only:

(1) “Candidate” means an individual who publicly offers himself, or is proposed by another, for selection, nomination, election, or appointment to any federal, state, or local public office or office in a political organization, or to be a Presidential or Vice-Presidential elector, whether or not such individual is ultimately selected, nominated, elected, or appointed. Any officeholder who is the subject of a recall election shall be treated as a candidate in the recall election.

(2) “Clearly identified” means the name of the candidate involved appears, a photograph or drawing of the candidate appears, or the identity of the candidate is apparent by reference, such as by use of the candidate’s recorded voice or of terms such as “the Mayor,” “your Congressman,” “the incumbent,” “the Democratic nominee,” or “the Republican candidate for County Supervisor.” In addition, a candidate may be “clearly identified” by reference to an issue or characteristic used to distinguish the candidate from other candidates.

(3) “Communication” means any communication by whatever means, including written, printed, electronic (including Internet), video, or oral communications.

(4) “Election” means a general, special, primary, or runoff election for federal, state, or local office; a convention or caucus of a political party that has authority to nominate a candidate for federal, state or local office; a primary election held for the selection of delegates to a national nominating convention of a political party; or a primary election held for the expression of a preference for the nomination of individuals for election to the office of President. A special election or a runoff election is treated as a primary election if held to nominate a candidate. A convention or caucus of a political party that has authority to nominate a candidate is also treated as a primary election. A special election or a runoff election is treated as a general election if held to elect a candidate. Any election or ballot measure to recall an individual who holds state or local elective public office is also treated as a general election.

(5) “Public communication” means any communication (as defined in paragraph (a)(2)(iii)(B)(3) of this section) —

(i) By broadcast, cable, or satellite;

(ii) On an Internet Web site;

(iii) In a newspaper, magazine, or other periodical;

(iv) In the form of paid advertising; or

(v) That otherwise reaches, or is intended to reach, more than 500 persons.

(6) “Section 527 organization” means an organization described in section 527(e)(1) (including a separate segregated fund described in section 527(f)(3)), whether or not the organization has filed notice under section 527(i).

(C) Attribution. For purposes of this section, activities conducted by an organization include activities paid for by the organization or conducted by an officer, director, or employee acting in that capacity or by volunteers acting under the organization’s direction or supervision. Communications made by an organization include communications the creation or distribution of which is paid for by the organization or that are made in an official publication of the organization (including statements or material posted by the organization on its Web site), as part of the program at an official function of the organization, by an officer or director acting in that capacity, or by an employee, volunteer, or other representative authorized to communicate on behalf of the organization and acting in that capacity.

(D) Special rule regarding contributions to section 501(c) organizations. For purposes of paragraph (a)(2)(iii)(A)(4) of this section, a contribution to an organization described in section 501(c) will not be treated as a contribution to an organization engaged in candidate-related political activity if —

(1) The contributor organization obtains a written representation from an authorized officer of the recipient organization stating that the recipient organization does not engage in such activity (and the contributor organization does not know or have reason to know that the representation is inaccurate or unreliable); and

(2) The contribution is subject to a written restriction that it not be used for candidate-related political activity within the meaning of this paragraph (a)(2)(iii).

(c) Effective/applicability date. Paragraphs (a)(2)(ii) and (iii) of this section apply on and after the date of publication of the Treasury decision adopting these rules as final regulations in the Federal Register.

John Dalrymple

Deputy Commissioner for Services

and Enforcement.

FOOTNOTE

1 In 2000 and 2002, section 527 was amended to require political organizations (with some exceptions) to file a notice with the IRS when first organized and to periodically disclose publicly certain information regarding their expenditures and contributions. See sections 527(i) and 527(j).

Citations: REG-134417-13