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EO Training Materials Suggest 51 Percent Threshold for Social Welfare Activity.

The IRS instructs exempt organizations staff to determine whether an applicant for section 501(c)(4) status engages primarily in social welfare activities by interpreting “primarily” to generally mean 51 percent, but it does not assign a specific measurement for use in identifying nonqualifying activities such as political campaign intervention.

The instructions appear in training materials that were released to Tax Analysts on January 15 following a Freedom of Information Act request. The documents offer guidelines for employees working in the IRS EO Determinations unit on how to decide whether an organization engages primarily in social welfare activities and thus qualifies for exemption under section 501(c)(4).

In Exempt Organizations Determinations Unit 1b , the IRS tells trainees that 501(c)(4) organizations must operate “exclusively” for social welfare purposes but that “exclusively” means primarily. In determining whether the organization’s primary activity is social welfare, employees must not consider political campaign intervention or lobbying that is not germane to the purpose of the organization to be social welfare, the IRS instructs.

Although the trainee manual does not specify how to define “primary,” a separate document providing notes to the instructor on how to teach Lesson 2 of Unit 1b says that “primary” is generally understood to mean 51 percent.

That percentage also appears briefly in Exempt Organizations Determinations Unit 2 , in a section explaining that exempt organizations other than 501(c)(3) organizations “may generally make expenditures for political activities so long as such activities, in conjunction with any other non-qualifying activities, do not constitute the organization’s primary activity (51%).

“Take note that there is no established method to determine this percentage,” the section continues. “One method is simply to compare expenditures for non-qualifying activities to those of qualifying activities. However, this figure may prove unreliable for an organization using mainly volunteers to carry out their activities. An alternative method is to analyze the staff hours, both paid and volunteer, devoted to qualifying and non-qualifying activities.”

At a May 17 House Ways and Means Committee hearing, Rep. Charles B. Rangel, D-N.Y., asked former acting IRS Commissioner Steven Miller if 501(c)(4) organizations can make political contributions as long as it’s not the organization’s primary purpose. “You can do this for 49 percent of whatever the activities are, without technically violating the law?” Rangel asked Miller.

“That test is whether your primary activities are social welfare in nature,” Miller responded.

Rangel restated, “Primary means that technically you could [go up] to 49 percent political.”

“We’ve never been that precise,” Miller said.

Gregory L. Colvin of Adler & Colvin said he agrees with Miller. “The IRS has never been that precise with the 49 percent or with the 51 percent, because precision would require something definite to be measured — expenditures, staff time, volunteer time, amount of text appearing in communications, etc.,” he told Tax Analysts. “And the IRS would need to specify the allocation of overhead and other non-program expenses between primary and secondary activities, which it hasn’t done. The fact that Connie Rosenberg used percentages 25 years ago in order to convey the general sense of various conceptual adjectives and adverbs in informal training sessions does not rise to the level of setting or communicating a standard of compliance.”

Colvin was referring to Conrad Rosenberg, former branch chief of the IRS EO division, and “Rosenberg’s rules” , which assign percentages to words such as “solely,” “exclusively,” “substantially all,” and “primarily.”

According to an instructor note in the instructor guide to Exempt Organizations Unit 1a , the IRS hands out Rosenberg’s rules when explaining to EO employees in training how to interpret when a 501(c)(3) organization “operates exclusively” for one or more exempt purposes.

The instructor note says to stress that the percentages listed in Rosenberg’s rules are not law, but a useful guideline. “The various percentages were taken from different court cases, and different court cases assign different percentages for the same terms,” the note says.

Bloomberg News reported that the materials appear to contradict Miller’s testimony.

by Lindsey McPherson