REPORT

Overcaution and Confusion:
The Impact of Ambiguous IRS Regulation of Political Activities by Charities and the Potential for Change

November 2007

This report is based on an Aug. 3, 2007, panel discussion sponsored by OMB Watch that addressed the pros and cons of creating a bright-line rule defining what is and is not prohibited partisan intervention in elections by charities and religious organizations. The panelists, all legal experts on nonprofit organizations, addressed problems created by the current "facts and circumstances" test, which allows the Internal Revenue Service (IRS) to apply its interpretation of the standard on a case-by-case basis. They called for changes to the current IRS rules on campaign intervention by charities and debated the pros and cons of different approaches for bringing about such a change. This report summarizes that discussion and debate.

All panelists concluded that the time is ripe for clearer IRS rules on nonpartisan voter engagement. Furthermore, clearer rules will reduce nonprofit risk for participating, thereby providing new opportunities for strengthening our democracy.

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This report is available electronically at http://www.ombwatch.org/npadv/paci2rpt.pdf

The transcript of the panel discussion is available on NPAction.org at
http://www.npaction.org/article/articleview/782/1/247

Hear the audio file at
http://www.npaction.org/article/articleview/779

Introduction

This report is based on an Aug. 3, 2007, panel discussion sponsored by OMB Watch that addressed the pros and cons of creating a bright-line rule defining what is and is not prohibited partisan intervention in elections by charities and religious organizations. The panelists, all legal experts on nonprofit organizations, addressed problems created by the current "facts and circumstances" test, which allows the Internal Revenue Service (IRS) to apply its interpretation of the standard on a case-by-case basis. They called for changes to the current IRS rules on campaign intervention by charities and debated the pros and cons of different approaches for bringing about such a change. This report summarizes that discussion and debate.

Under the current tax code, charities, religious organizations and all other 501(c)(3) organizations are banned from participating or intervening in any political campaign on behalf of, or in opposition to, any candidate for public office. The IRS relies on a facts and circumstances test to determine on a case-by-case basis what is and is not permissible activity by charities. Partisan intervention can be either direct or indirect and is "not limited to the publication or distribution of written statements or the making of oral statements on behalf of or in opposition to candidates."[1]

Although the ban is over fifty years old, IRS regulations do not clearly define political intervention, and the case law on the topic is limited. Additionally, IRS enforcement of the ban takes place largely in secret because Section 6103 of the tax code prohibits the IRS from disclosing information about its investigations.[2] As a result, charities have little precedent to guide their decision making.

For charities concerned with the policies of the government – whether their focus is on the environment, taxation, children's welfare, or gun laws – the vagueness of the IRS facts and circumstances test has left the line between acceptable policy advocacy and unlawful political intervention extremely hazy. Nonprofit leaders' confusion has intensified as the increasing cost of political campaigns has forced many legislators to double as candidates for much of their tenure in office.

[1] Rev. Rul. 2007-41.
[2] 26 U.S.C.A. § 6103.

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The widespread uncertainty among charitable leaders regarding the IRS rules has deterred them from engaging in genuine issue advocacy and promoting civic engagement among citizens. Most charitable organizations cautiously manage their conduct, fearful of crossing an unknown line. The restraint of charitable organizations is troubling, particularly at a time when voters' rights have been challenged, nonpartisan discussion of critical issues has been stifled, and campaigns to reinvigorate American democracy have come under attack.

The widespread uncertainty among charitable leaders regarding the IRS rules has deterred them from engaging in genuine issue advocacy and promoting civic engagement among citizens.

All four panelists – Gregory Colvin of Silk Adler & Colvin; Beth Kingsley of Harmon Curran Spielberg & Eisenberg; Marcus Owens of Caplin & Drysdale; and Karl Sandstrom of Perkins Coie – are legal experts on nonprofit tax and election law (see end of report for a biography of each panelist). Kay Guinane – the Director of Nonprofit Speech Rights at OMB Watch – served as moderator.

After briefly reviewing the history of the ban on campaign intervention, this report summarizes and contextualizes the points of consensus and debate that emerged during the discussion. Those points are as follows:

- In an increasingly complex world, the IRS is failing to provide adequate guidance on what constitutes political intervention
- Internet communications pose special problems
- The ambiguity of current IRS rules limits civic engagement and issue advocacy by charities and religious organizations
- Given recent developments, including the U.S. Supreme Court decision in *FEC v. Wisconsin Right to Life*, the time is right for the charitable community to push for clear rules
- Debate on the preferred form of revised guidelines (e.g., a bright-line rule) reflects a need to balance prevention of partisan activity and protection of issue advocacy
- Charities have several options for effecting a change in the rules, but the most promising path requires strong consensus and collaboration across the sector

In conclusion, this report identifies near-term actions the charitable community could take to initiate an effort to clarify the IRS's rules. The long-term goal of such an effort would be to clear the path for charities to engage more fully in democratic discourse.

Background on the IRS Ban on Charitable Involvement in Elections

The ban on partisan political activities by charitable organizations was passed by Congress in 1954. Since then, the IRS has relied upon a facts and circumstances test to determine whether a charity has illegally engaged in campaign intervention. The IRS rules strictly prohibit all written and oral expressions of support or opposition to a candidate. Charities that violate the rules jeopardize their tax-exempt status.

The secret nature of IRS audits has kept information on enforcement of the ban almost entirely confidential. Information has only been made public when one of three things occurred: 1) the IRS revoked the status of a charity; 2) the IRS publicly issued a ruling in redacted form; or 3) an organization announced that it was under investigation by the IRS for violating the political intervention ban and subsequently released information about the circumstances of its own case.[3] In the absence of concrete rules, the details of these cases can provide some guidance to the nonprofit community. However, the number of real or redacted cases that have become public is extremely limited, and it is impossible to find them on the IRS website.

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Since the 2004 election, the IRS has stepped up its enforcement of the ban on partisan electoral activity by charities and religious organizations through a controversial new program called the Political Activities Compliance Initiative (PACI). The result has been a number of unresolved audits and lingering questions about the standards used. To learn more about the new program and its impact on the nonprofit community, see OMB Watch's July 2006 report *The IRS Political Activities Enforcement Program for Charities and Religious Organizations: Questions and Concerns*.[4]

In June 2007, the IRS released Rev. Rul. 2007-41, which provided further guidance to charities and religious organizations as to what is and is not permissible under the prohibition on partisan intervention. The ruling includes 21 examples with IRS commentary on why the IRS does or does not consider the situation described to constitute a violation. The recent ruling does not establish any safe harbors or bright-line rules.

[3] Lloyd Hitoshi Mayer, "Grasping Smoke: Enforcing the Ban on Political Activity by Charities," *Notre Dame Law School Legal Studies Research Paper No. 07-38*. May 25, 2007.
[4] http://www.ombwatch.org/article/articleview/3496/1/432?TopicID=3

Points of Consensus and Debate from the Discussion

The IRS is failing to provide adequate guidance to charities in an increasingly complex world

During the August 3 discussion, the panelists acknowledged that the IRS's June 2007 Revenue Ruling provides additional guidance that will be useful to charities. Nonetheless, all four panelists agreed that, despite this advance, the IRS rules remain too vague to allow charities to accurately predict when a given action will be deemed a violation. According to Owens, the Revenue Ruling "did not move the state of the law forward." Colvin agreed and said, "The Revenue Ruling is still not a test that tells you what side of the line you would fall on."

In his comments, Owens drew attention to the disparity between the unclear IRS regulations on campaign intervention and the relatively transparent set of laws governing lobbying activities by nonprofits. Owens explained that the lobbying rules were the result of a committed effort by the charitable community in the mid-1980s. A coalition of charities worked with the IRS to ensure the lobbying rules were as clear as possible. Said Owens,

> "We have, in essence, two approaches to setting out definitions and boundaries for charities; one that is very usable and very clear for lobbying activity and one that is the exact opposite for political campaign intervention. We have the IRS basically letting the lobbying rules be self-enforcing. The IRS has not felt compelled to mount significant audit projects looking at the restrictions on lobbying activity by charities. In contrast, the IRS has been struggling with enormous issues of compliance on the political campaign intervention front."

"We have, in essence, two approaches to setting out definitions and boundaries for charities; one that is very usable and very clear for lobbying activity and one that is the exact opposite for political campaign intervention." — Marcus Owens

Managing nationwide compliance with the campaign intervention ban has been difficult, at least in part because IRS regulations specify only a few forms of issue advocacy as generally allowable. Many more of the advocacy activities that charities could and do engage in are not defined. Most confusing, the facts and circumstances test allows the IRS to take into account any factors IRS deems relevant to its decision, without specifying what they are. This approach has left the IRS open to complaints of partisan enforcement of the ban.

Kingsley explained that many charitable leaders seek her legal guidance

as to whether a particular voter engagement activity or issue advocacy campaign will violate IRS rules. According to Kingsley,

> "As a result of the uncertainty, a lot of the time when we are advising clients, we are doing a risk analysis. We are talking to them about the fact that there is no precedential guidance that gives them a clear answer and that it is quite possible the IRS would not approve of the course of action they are proposing, although we do not know."

Kingsley gave the example of a recent nonprofit client who wanted to issue a press release on a presidential candidate's announcement of support for the nonprofit's policy recommendations, for which they had been advocating for years. The client, however, was unsure about whether this represented a show of support for a candidate that would violate the IRS ban on campaign intervention. Because of a lack of precedential guidance and the ambiguity of the IRS rules, Kingsley explained that she, regrettably, could not give this client – like many before – a definitive yes-or-no answer.

Internet communications pose special problems

In her remarks, Kingsley also drew attention to the glaring lack of IRS guidance on the use of the Internet, e-mail and other relatively new communications technologies for political communications. Despite rapid advances in these types of technology, IRS guidance on what is permissible via the Internet, websites, e-mail and blogs has only been "trickling out." In the recent Rev. Rul. 2007-41, only three of the 21 examples clarified IRS rules on these types of technology. The three situations all related to the use of websites, and according to Kingsley, were "too simple" to provide actionable guidance to nonprofits. The ruling made no reference to e-mail communications, blogs or social-network websites.

Particularly troubling to Kingsley was the IRS's insistence in the Revenue Ruling that organizational Web postings be treated the same way as printed or oral material. With that claim, the IRS asserted that nonprofits are responsible for ensuring that any Web links provided on their websites do not mention or link to partisan or candidate-related materials (Situation 20). Kingsley disputed this approach as too burdensome, saying that nonprofits should not be expected to continuously monitor the content of all websites to which their own website maintains links. "If I have a link to another organization's website," she said, "I do not believe I should be responsible for a

change in content on that [other] website."

Ambiguity of current IRS rules chills civic engagement of charities

The panelists agreed that charitable participation in elections and policy discussion – when conducted in a nonpartisan manner – should be encouraged as a means of fostering democratic discourse. Sandstrom argued nonprofit engagement in policy debates should be "viewed as a sign of health – we should promote issue discussion." Colvin agreed and said, "It should always be, at least in my view, a free speech entitlement to criticize or praise public officials."

"It should always be, at least in my view, a free speech entitlement to criticize or praise public officials." — Gregory Colvin

Panelists observed that the IRS seems to take the opposite view, discouraging advocacy by charities instead of supporting activities that fall within the rules. Owens noted that several of his clients have been audited as a consequence of criticizing an incumbent's policies. In his opinion, such speech should be protected under the First Amendment. Sandstrom compared the IRS approach to the efforts of the Centers for Disease Control and Prevention (CDC) to eliminate disease, saying the IRS "is concerned about this disease of political activity and [believes] they have to care for these 501(c)(3)s or else they will come to suffer."

The panelists agreed that the current IRS enforcement approach effectively discourages issue advocacy by charities because the burden of compliance has fallen largely on the nonprofit community. Many of the panelists' nonprofit clients have decided against advocacy activities that likely would have advanced their charitable missions because they feared an IRS audit. Charitable executives and board members, perhaps appropriately, feel a responsibility to guard their organizations from an IRS investigation. They understand that – even if their organization is ultimately vindicated of any wrongdoing – an audit would distract the organization from its day-to-day objectives, drain financial resources (according to Owens, the legal cost of fighting such an audit is over $100,000), and attract negative publicity, perhaps ultimately leading to a decrease in funding for their organizations.

Research on this issue supports the panelists' personal experience. A survey of 501(c)(3) organizations found that 43 percent believe incorrectly they cannot host a candidate debate or forum.[5]

[5] *Seen but not Heard: Strengthening Nonprofit Advocacy* by Bass, Arons, Guinane and Carter, Aspen Institute 2007 p. 20.

Kingsley reflected on the difficulty of advising nonprofit clients on the IRS ban:

> "Sometimes I say [to nonprofit clients], 'I think that if you have the resources and the time and the energy to fight them [the IRS], you have a really good chance of winning,' but most of my clients don't want to be a test case. So we see them [nonprofits] stepping back and not doing things that I think are quite defensible."

Many charities, according to Kingsley, are continuously engaged in this type of risk analysis, weighing the pros and cons of potential advocacy and citizen engagement efforts.

The time is right for the charitable community to push for revised rules

The panelists agreed that a change in IRS regulations is needed, and that the nonprofit sector needs to be proactive in pushing for such change. The panelists each asserted they would strongly support a rule that would eliminate any of the vast uncertainties that currently exist. "I think it's time for some new solutions to be proposed and for a more open and constructive dialogue to occur within the charitable sector on this important issue," Owens said. Colvin agreed and said,

> "Some would say [in the nonprofit community] let sleeping dogs lie, but I believe we need a change … we are increasingly, with every election period, passing the point beyond which it feels tolerable to have no safe standard …. So I think maybe the sleeping dogs have to be roused."

Three developments in the past few years have shed light on the failings of the IRS regulations and have increasingly made the status quo intolerable.

First, passage of the Help America Vote Act (HAVA), which became effective in October 2002, prompted many 501(c)(3) organizations to initiate work on several voter engagement issues, including administration of elections, protection of voters' rights, and get-out-the-vote campaigns. If HAVA's ambitious goals are to be realized, greater participation from the nonpartisan sector will be needed. The ambiguity of the current rules hampers these efforts.

Second, the intensified enforcement effort by the IRS under the PACI program has further encumbered the ability of the nonprofit

community to engage in legitimate issue advocacy. Under the PACI program's "expedited" or "fast track" process, the IRS can initiate an investigation into a charity at any time during the year, and there is no timeframe or deadline for an IRS agent to complete an investigation. For several organizations, the audit process has lasted several years with no resolution in sight.

Third, the June 2007 Supreme Court ruling in *FEC v. Wisconsin Right to Life* (*WRTL*) called attention to the First Amendment issues implicated when the political expression of nonprofits is limited, as under the current ban on campaign intervention by charities. The potential impact of the decision was a major topic of discussion at the panel. The panelists speculated that the regulatory environment in which the IRS has maintained vague rules may have fundamentally changed with the *WRTL* decision.

In their 5-to-4 decision, the justices ruled the federal electioneering communications ban unconstitutional when applied to genuine issue ads. The case challenged a provision in the Bipartisan Campaign Reform Act of 2002 (BCRA), which barred corporations, including nonprofits, from paying for broadcasts that mention federal candidates 60 days before a general election or 30 days before a primary (known as the blackout period).

Facts and circumstances, according to the ruling in* FEC v. Wisconsin Right to Life*, are not sufficient when the First Amendment is at stake.

In his majority opinion, Chief Justice John Roberts argued that it is inconsistent with our right to free speech for the government to outlaw a certain communication based on an analysis of either the presumed intent of the speaker or the impact of the communication on a given audience. Either test, according to Roberts, is too subjective to be used as a rationale for limiting speech. Such facts and circumstances, according to the ruling, are not sufficient when the First Amendment is at stake.

In light of the *WRTL* opinion and the primacy the Court placed on protection of speech under the First Amendment, Sandstrom strongly believes that the IRS can no longer limit the political advocacy of 501(c)(4)s and will have to clarify the rules for charities. Otherwise, according to Sandstrom, the IRS will face a defeat similar to the one handed to the FEC in *WRTL*. He contended that "if Wisconsin Right to Life was a (c)(3) [and] was running precisely the same ad, [representing] an insubstantial amount of their activity, this court would not permit the IRS either to impose an excise tax or revoke their status because they ran those ads."

The other three panelists were not as confident that the *WRTL* decision suggested willingness by the Court to overturn or curtail the current ban on political campaign intervention. Colvin noted that courts may view charities as different from other legal entities in matters of free speech, due to the tax "subsidy" they receive, as noted in the courts in *Regan v. Taxation With Representation* (461 U.S. 540).[6]

Debate on bright lines reflects a need for balance between preventing partisan activity and protecting genuine issue advocacy

Despite overwhelming consensus on the need for more lucid IRS rules, panelists debated the best mechanism for achieving that goal. The two types of rule changes discussed were bright lines and safe harbors. A bright-line rule is an objective legal standard that outlines what is and is not absolutely permissible. The purpose of a bright-line rule is to give the regulated community adequate notice of what the law is and increase the predictability and reliability of legal decisions. A safe harbor, in contrast, only defines a subset of permitted activities, leaving the remainder in a gray area.

The major advantage of a bright line, according to the panelists, is the precise and detailed guidance it provides to decision makers

The major advantage of a bright line, according to the panelists, is the precise and detailed guidance it provides to nonprofit decision makers. Colvin referred to the three-part rule defining the restrictions on grassroots lobbying by charities as an example of a helpful bright-line rule. According to Colvin, "The rule provides specific requirements as to what you can say or not say, as well as specific time periods during which certain types of speech are prohibited."

The panelists also acknowledged the difficulties of creating bright-line rules in the context of campaign intervention. Kingsley expressed concern that disingenuous individuals or organizations could take advantage of "loopholes" in such a rule. She expressed worry over "the difficulty of capturing everything that might be abusive in terms of a charity attempting to influence the political process, while also allowing all of the really good issue advocacy and voter engagement activity that we think these organizations should be engaged in."

Colvin endorsed the idea of creating a safe harbor, arguing that charities would benefit from the certainty that at least some activities are definitely safe. He said, "We'd like to be able to tell our clients that

[6] In that case, the U.S. Supreme Court ruled that both tax-exempt status and the ability to receive tax deductible contributions are a form of subsidy that is administered through the tax system.

although there are many gray areas … there are certain areas that are so safe that you can proceed without worrying that the IRS will revoke your tax exemption."

The disadvantage of a safe harbor, as Colvin acknowledged, is that many situations would remain ambiguously defined under the law. Kingsley seconded Colvin, noting that a narrowly defined safe harbor provision would likely encourage charities to take on only the activities described under the safe harbor, essentially becoming an "upper bright line." Both comments underscored the need for thoughtful and deliberate consideration of the implications of any future change.

Charities have options for effecting change, but the most promising path will require strong consensus and collaboration across the sector

The charitable community has several potential strategies available for bringing about a change in IRS rules on campaign intervention. After quickly reaching agreement on the need for such a revision, the panelists spent significant time discussing ways to achieve that goal.

One option would be litigation, which appears more feasible in light of the *WRTL* decision. There are several disadvantages to this approach, however. First, a legal challenge to the current IRS regulations on political campaign intervention would require a charity to pursue costly and time-consuming litigation. Very few charities are capable and willing to bear the expected costs.

Second, it is unlikely that a case would reach trial. When previous IRS audits investigating the political activities of charities have been challenged, the IRS has typically backed down. For example, in the recent case of the NAACP, the IRS stopped the investigation after the NAACP publicly and aggressively defended itself. It is unclear why the IRS would choose to take such a fight to the courts in the future.

Third, the decision in such a case, should it reach trial, may not necessarily favor the nonprofit community's interests or achieve the goal of more transparent IRS regulations. The resulting decision, even if favorable, could be too narrowly tailored to the specific facts of the case before the court to be useful to the charitable sector.

A more viable option for changing the rules would be to directly engage the IRS. Owens noted that in 1986 and 1987, the IRS and the

charitable community collaborated intensely – in an "unprecedented manner," according to Owens – on the development of mutually agreeable rules on lobbying. The collaboration constructively led to the development of a bright-line test and a variety of clear standards. The panelists, however, noted that the IRS would be unlikely to suddenly engage in this type of collaboration without an outside inducement to do so because the current rules give them total discretion.

Another strategy for effecting a change in the IRS rules would be through a congressional mandate. Congress could devise a bright-line test per the recommendations of the charitable sector, or add intermediate sanctions to the IRS enforcement tool box, such as advisory letters. Passage of such a mandate would require a strong, collaborated push from across the different interests represented in the charitable community.

Owens said he could envision an effective campaign targeted at Congress if several organizations were willing to invest time and resources into developing a proposal for how IRS rules should be amended. With strong congressional support and pressure from the charitable sector, Owens believes the IRS would be forced to revise the current rules. Colvin speculated that the next election cycle may expose a "level of abuse" (in the wake of the *WRTL* decision) that may force Congress to fundamentally alter the way in which political communications are currently regulated. This could open a window of opportunity for the charitable community to realize clearer, more precise rules on when and how they can participate in election-related activities.

Looking Forward

Clarifying the rules on political intervention would benefit 501(c)(3) organizations, the public at large and the IRS. With more certain rules, charities and religious organizations could engage more readily in education and advocacy activities that promote their missions. Citizens would subsequently gain from the increase in informed policy dialogue. Such an outcome would align with the democratic vision of an America where competing ideas are discussed and debated as a means to reaching consensus. In addition, more transparent rules would likely increase overall compliance with the ban, and therefore, ease the problem of enforcement for the IRS.

The expected gain from a revision of IRS rules would be a more informed and dynamic discussion of policy issues – not just politics – at election time.

The IRS rules are not likely to be revised, though, without a strong push for a change from the charitable and religious communities. Each panelist expressed a willingness to participate in a sector-wide effort to clarify the current IRS rules. The ultimate goal would be a revised set of regulations that would enable charitable leaders to manage their advocacy activities during elections in a way that advances their missions, without fear that they are violating the rules. The expected gain from a revision of IRS rules would be a more informed and dynamic discussion of policy issues – not just politics – at election time.

Panelist Biographies

Gregory Colvin
Attorney at Silk Adler & Colvin, expert and author on nonprofit lobbying and political activities. Co-Chair of the Subcommittee on Political and Lobbying Organizations and Activities of the Exempt Organizations Committee of the Tax Section of the American Bar Association.

Beth Kingsley
Attorney at Harmon Curran Spielberg & Eisenberg, specializing in tax exemption, lobbying, policy advocacy and federal election law. Co-chair of the ABA Exempt Organizations Committee's Subcommittee on Forms, Rulings, and Administrative Developments.

Marcus Owens
Former IRS Director of Exempt Organizations Division and attorney at Caplin & Drysdale. Represents a broad range of tax-exempt organizations. Projects include organizations interested in public policy but concerned with legislative and political activities.

Karl Sandstrom
Attorney at Perkins Coie, specializing in political and federal campaign finance law. Wrote the friend of the court briefs on behalf of charities in *FEC v. Wisconsin Right to Life* with co-author Ezra Reese. Teaches at Washington College of Law, American University. Served as a Commissioner on the Federal Election Commission from 1998-2002.

Moderator: Kay Guinane
Attorney and Director of Nonprofit Speech Rights at OMB Watch, where she monitors and analyzes federal legislative and regulatory actions that affect nonprofit speech rights and related advocacy.

Additional Resources

FROM THE INTERNAL REVENUE SERVICE

Revenue Ruling 2007-41
http://www.irs.gov/pub/irs-drop/rr-07-41.pdf

Final Report, Political Compliance Initiative 302
http://www.irs.gov/pub/irs-tege/final_paci_report.pdf

Fact Sheet
http://www.irs.gov/newsroom/article/0,,id=154712,00.html

Charities, Churches, and Educational Organizations - Political Campaign Intervention
http://www.irs.gov/charities/charitable/article/0,,id=155030,00.html

Report on IRS Review of Alleged Political Campaign Intervention
http://www.irs.gov/charities/article/0,,id=135406,00.html

Tax Talk Today
http://www.taxtalktoday.tv/

IRS Publication 1828, Tax Guide for Churches and Religious Organizations
http://www.irs.gov/pub/irs-pdf/p1828.pdf

NONPROFIT RESOURCES

IRS Political Activities Enforcement Program for Nonprofit Groups: Questions & Concerns
http://www.ombwatch.org/pdfs/paci_full.pdf

NPAction.org
www.npaction.org

OMB Watch
www.ombwatch.org

Alliance for Justice
www.afj.org

Advancement Project
www.advancementproject.org

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