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NEWSLETTER

Tax Exempt Organizations Engaging in Political Activity Continue to Face Scrutiny

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Since the *Van Hollen v. FEC* decision was issued requiring organizations that make electioneering communications to publicly disclose nearly all their donors, tax exempt organizations have been hesitant to make electioneering communications and instead have begun making independent expenditures. Under current Federal Election Commission (FEC) regulations, an organization that makes independent expenditures need only disclose donors who contributed specifically for the purpose of making the independent expenditures.

The shift from electioneering communications to independent expenditures, however, has drawn attention to the tax issues that 501 (c)(4) social welfare organizations face when making independent expenditures, a type of political campaign activity. Under the Internal Revenue Code, a 501(c)(4) organization is permitted to engage in political campaign activity-such as making independent expenditures-but it cannot become the organization's primary purpose. This determination is made by evaluating the facts and circumstances of each organization; there is no brightline test.

The *Van Hollen* decision coincided with pro-regulatory groups' renewed calls for the Internal Revenue Service (IRS) to investigate certain 501(c)(4) organizations that have been politically active in this year's federal elections. The pro-regulatory groups also asked the IRS to initiate a rulemaking directed at 501(c)(4) organizations. Although the IRS has not responded to the pro-regulatory groups' requests, the agency has taken some public action in recent weeks with respect to 501(c)(4) organizations.

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In late June, for example, the IRS announced plans to send a questionnaire to 501(c)(4), 501(c)(5) (unions) and 501(c)(6) (trade associations) organizations focusing on political campaign activities and related compliance with annual filing requirements. IRS questionnaire responses, which are voluntary, have historically been a key IRS method for developing risk models and setting audit thresholds. The IRS previously announced in its 2011 and 2012 exempt organization work plans that it would be devoting additional resources to 501(c)(4), 501(c)(5) and 501(c)(6) organization compliance, with a focus on political campaign activity.

The IRS also recently made public a private letter ruling revoking a 501(c)(4) organization's tax-exempt status. The IRS determined that the 501(c)(4) organization was "not operated primarily for the promotion of social welfare" because its activities served to primarily benefit the organization's founder and the founder's political agenda and platforms. Although the IRS revoked the organization's tax exemption on the basis of private benefit, the IRS also noted in the private letter ruling that the organization had "not established that [its] primary activity is not to engage in direct or indirect political intervention." The organization's founder had used the organization to advance his political agenda.