

# IRS May Revise 501(c)(4) Rulemaking; Revokes Group's 501(c)(3) Status for Political Activity

May 2014

Internal Revenue Service (IRS) Commissioner John Koskinen recently signaled that his agency will “possibly re-propose a draft regulation” concerning how it intends to treat the political activities of 501(c)(4) social welfare organizations. According to prepared remarks at a recent National Press Club appearance, Koskinen stated, “This means that it is unlikely we will be able to complete this process before the end of the year.” Separately, the IRS also recently made public its final determination to revoke the tax status of a 501(c)(3) public charity for engaging in political intervention.

As *Election Law News* reported in January, the IRS released a proposal last November to create a new category of regulated “candidate-related political activities,” which could not constitute a 501(c)(4) group's “primary purpose.” Among the activities the agency proposed to restrict were non-partisan voter guides and voter registration and get-out-the-vote drives, candidate debates held within 30 days of a primary or 60 days of a general election, and issue ads mentioning candidates within the 30- and 60-day time windows.

According to Commissioner Koskinen's remarks, the IRS received more than 150,000 comments by the time the agency stopped accepting written comments at the end of February, “a record for an IRS rulemaking comment period.” In a subsequent *Washington Post* interview, Commissioner Koskinen nonetheless reiterated his intent to eventually enact a rule on this issue to provide additional “clarity” on what constitutes political campaign intervention for 501(c)(4)s. Under the current regulations, a 501(c)(4) group cannot be “operated primarily” for the purpose of “participation or intervention in political campaigns.”

A recent IRS adverse determination letter issued to a 501(c)(3) public charity provides several examples of what the agency considers political campaign intervention. Unlike 501(c)(4) groups, 501(c)(3) entities are entirely barred from undertaking this class of activity. In a letter dated December 30, 2013, but only released publicly on April 18 of this year, the IRS informed an entity that its status as a 501(c)(3) charity was being revoked. Although the IRS letter did not publicly identify the entity, *USA Today* was able to match up the facts described in the letter with the Patrick Henry Center for Individual Liberty.

Among the numerous posts on the Patrick Henry Center's website the IRS cited as political intervention: The group urged the “reelect[ion]” of President George W. Bush, characterized then-Senator John Kerry as “nothing but a skunk,” and called his “true character . . . highly questionable.” The group also included similar

language in its fundraising solicitations concerning the 2004 presidential election, as well as then-Senator Hillary Clinton's 2006 re-election campaign and prospective 2008 presidential campaign.

While the IRS noted that some of the statements "supporting or opposing candidates" were not explicit, it concluded that "[t]here is no requirement under the section 501(c)(3) prohibition on political campaign intervention that such statements explicitly reference voting and there is no exception for fundraising solicitations."

The attorneys in Wiley Rein's Election Law practice group continues to monitor the latest developments in the IRS's regulation of political activity and advise clients on the implications for them.