HOLTZMAN VOGEL PLLC
Attorneys at Law
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Law & Policy Update

Election Law • Lobbying and Government Ethics • Tax-Exempt Organizations

A New Guide to Exploring Candidacy

"Testing the Waters" Regulation and Recent FEC Guidance

A trio of recently closed cases at the Federal Election Commission (FEC) provides us with guidance on how the current Commissioners will apply the so-called "testing the waters" regulation. FEC regulations allow potential candidates to raise and spend federally-permissible funds on pre-candidacy activities intended to help them decide whether or not to run for election. Potential candidates are not required to file FEC reports during this decision-making period. When and if the person decides to become a candidate, he or she must file reports disclosing their "testing the waters" fundraising and spending.

For example, "testing the waters" may include conducting polls, making phone calls, or traveling the district to meet potential voters and constituents. One may not continue to "test the waters" after deciding to become a candidate. The FEC looks at a number of factors to determine whether a person has decided to become a candidate, including raising funds in excess of what could reasonably be expected to be used to explore

Continued on page 5

Also In This Issue....

2 FEC Clears Elton John

2 Shared Websites and Improper Political Activity

3 501(c)(4) Statute Challenged

3 IRS Eliminated the Advanced Ruling Period

4 Firm News and Updates

Lobbyists and New Stimulus Restrictions

New Restrictions Following Stimulus Bill

Following the enactment of the American Recovery and Reinvestment Act of 2009, more commonly known as the "stimulus bill," President Obama imposed new restrictions on the ability of registered federal lobbyists to communicate with the Executive Branch about specific stimulus spending proposals. In a Memorandum issued March 20, the President directed that "[a]n executive department or agency official shall not consider the view of a lobbyist registered under the Lobbying Disclosure Act of 1995 . . . concerning particular projects, applications, or IRS

Continued on page 7

IRS Regulation of 501(c)(3) Political Speech Challenged

Catholic Answers and Karl Keating v. United States

A federal lawsuit filed in the Southern District of California on April 3, 2009, challenged the IRS's regulation of political speech by 501(c)(3) nonprofit organizations. In *Catholic Answers and Karl Keating v. United States*, Catholic Answers argued that two "E-letters" discussing John Kerry and Holy Communion posted on a blog on the website of Catholic Answers, a 501(c)(3) organization, during the spring of 2004 did not constitute impermissible political intervention or political expenditures. Moreover, the organization asserted that the federal statute and regulations governing political intervention by 501(c)(3) organizations are unconstitutionally void for being vague and overbroad, and that they violate the First Amendment. The organization alternatively argued that the pertinent Treasury regulations must be narrowly construed, and that the Court must

Continued on page 6

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The FEC Clears Elton John

Complaint Dismissed After Finding No Laws Were Broken

The FEC dismissed a complaint filed against Elton John and Hillary Clinton's presidential campaign, finding that no laws were broken in connection with a benefit concert that Sir Elton played for Mrs. Clinton's campaign.

The Radio City Music Hall concert brought in $2.5 million for then-Senator Clinton. The costs of the concert were paid fully by Clinton's presidential campaign committee.

According to documents released by the FEC, "the Commission concluded that the artistic performance donated by Elton John, a foreign national, in connection with the Committee's fundraising concert does not constitute an in-kind contribution to Senator Clinton or her Committee in violation of" the prohibition against contributions by foreign nationals, "but rather is the type of volunteer activity specifically exempted from the Act."

It is unlawful for a foreign national, directly or indirectly, to make a contribution or donation of money or other thing of value, or make an expenditure in connection with a Federal, State, or local election, and it is also unlawful to solicit, accept, or receive any contribution or donation from a foreign national. However, the term "contribution" does not include the value of services provided without compensation by any individual who volunteers on behalf of a candidate or political committee. Volunteer activity must be limited to the provision of personal services in one's individual capacity. However, a foreign national volunteer may not be involved in the management or financial decision making of any political committee.

Shared Web-Site Arrangement and Campaigns

Sharing Your 501(c)(3) Website Can Lead to Impermissible Political Activity

On February 20, 2009, the Internal Revenue Service ("IRS" or "Service") issued a Technical Advice Memorandum ("TAM") in which a 501(c)(3) organization was found to have engaged in impermissible political campaign activity due to material posted on a related 501(c)(4) organization's web-pages that were contained within the 501(c)(3)'s website. On its web-pages, the 501(c)(4) posted candidate questionnaires and endorsements, which the IRS ultimately attributed to the 501(c)(3) organization. Although TAMs are not precedent with respect to other tax-exempt organizations, this private determination offers significant insight as to the Service's approach to shared websites and political activity, particularly with regard to Revenue Ruling 2007-41. In that authoritative ruling, the Service provided that if a 501(c)(3) posts something on its website that includes material which favors or opposes a candidate, then the 501(c)(3) would be treated as having engaged in impermissible political campaign activity.

In this case, the Service attributed the 501(c)(4)'s web-pages to the 501(c)(3) organization, regardless of the fact that the 501(c)(4) reimbursed the 501(c)(3) pursuant to a

Continued on page 8

Section 501(c)(4) Statute and Regulations Challenged

Christian Coalition of Florida, Inc. v. United States

A complaint was filed on behalf of the Christian Coalition of Florida ("CC-FL") on April 3, 2009 in the United States District Court for the Middle District of Florida. In *Christian Coalition of Florida, Inc. v. United States*, CC-FL asserted that it was wrongfully denied recognition as tax-exempt under section 501(c)(4). The organization submitted a 1024 application in 1993, and was issued a final adverse determination letter in 2008. The complaint argues that the organization was primarily engaged in social welfare activities, and therefore, should have received a favorable tax determination letter.

In addition, the complaint asserts that the underlying statutes and regulations relied upon by the IRS were void for being unconstitutionally vague and overbroad. In the alternative, the complaint argues that the Court was required to interpret the pertinent statute and regulation using a narrow construction. Specifically, CC-FL advocates applying the bright-line "express advocacy" standard with which we are familiar from the election law context to interpret the term "political activities."

The complaint also asserts that the term "primarily engaged" contained in the section 501(c)(4) regulations should be construed to mean "the major purpose of which", another standard from the election law context. The assertion is that this narrow construction would remove the problems of overbreadth and vagueness, but given the vagueness contained in the "major purpose" standard itself, that seems rather unlikely.

Facts

CC-FL is a nonprofit corporation organized in Florida, which advocates for the sanctity of life and traditional family values. The complaint explains that the CC-FL applied for recognition from exemption as a section 501(c)(4) organization, because it engages in a substantial amount of lobbying activity. In addition,

Continued on page 8

IRS Elimination of the Advanced Ruling Period for Public Charities

As previously published on OnPhilanthropy.com

The IRS recently changed the process to obtain formal classification as a public charity. Organizations that previously filed IRS form 1023 applications for recognition of tax-exempt status under 501(c)(3) which received advanced ruling determinations that *expire on or after June 9, 2008* are automatically being classified by the IRS as publicly supported charities. As such, these organizations are no longer required to file form 8734 in order to demonstrate compliance with the public charity test for public support.

Practice Tip: 501(c)(3) public charities should proactively consult with a qualified attorney, accountant or tax advisor when the organization is initially formed in order to address the public support test, even though the test will not be applied by the IRS until year six under the new rules.

As we know, the test for public support is met by 501(c)(3) organizations that are exempt under 509(a)(1) (i.e. organizations that are funded mainly by donations from the general public) by demonstrating that it receives at least 1/3 of its support from the general public, public charities and/or the government. If an organization fails this test, then the IRS can evaluate it under an alternative test based on the facts and circumstances. In order to be evaluated under the facts and circumstances test, an organization must receive at least 10% of its support from the general public and/or government, and it must be organized and operated so as to attract new and additional public support on a continuous basis. Other factors which the IRS may consider under a facts and circumstances evaluation include: the sources of support, the percentage of support, whether there is a representative governing body, the availability of public services and facilities provided by the charity, and other additional factors pertaining to membership organizations.

With regard to a 501(c)(3) charity exempt under

Continued on page 9

FIRM NEWS AND UPDATE

Visit the HoltzmanVogel Law Blog

We've added a blog to our website, where you can keep up to date on legal news and other items of interest. We track developments related to the rules and regulations affecting political committees, corporate PACs, trade associations, non-profit groups and advocacy organizations, and we'll also keep you updated on the lobbying and ethics world.

The new blog is located at **http://www.holtzmanlaw.net/blog/** and is designed to supplement our newsletter.

Be sure to check back often as we're always adding new material.

Larry Levy to Participate in the NYC Conflicts of Interest Board Training

On **May 20th**, Larry Levy will once again be an instructor/panelist in the New York City Conflicts of Interest Board ("COIB") annual training seminar. This year Larry will join Mark Davies, Director of COIB in examining Pre-employment restrictions such as the Obama administration ban affecting lobbyists. CLE credits are available to participants.

Jason Torchinsky to Speak at NSCL Conference

Jason Torchinsky will be speaking **June 14, 2009** in San Francisco, CA at the National Conference of State Legislatures' "Take a Closer Look at Redistricting" regional redistricting conference. Jason will participate in a panel discussion on the impact of the Voting Rights Act on the decennial redistricting process. More information on the conference can be found at www.nscl.org.

Larry Levy Elected to the 2009 RNLA Board of Governors

Larry Levy, resident partner in HoltzmanVogel's New York office, was elected to the 2009 Board of Governors of the Republican National Lawyers Association and became the vice-chairman of the national election education committee. He will be presenting at the summer election education program. More information on the RNLA can be found at www.rnla.org.

a potential candidacy, the person's own statements referring to himself as a candidate, and conducting activities over a protracted period of time. Contrary to one common misperception, a potential candidate who is "testing the waters" does *not* automatically become a formal candidate upon raising $5,000. In fact, potential candidates, on several occasions, have raised $100,000 or even $200,000 without running afoul of the "testing the waters" provisions.

The hardest cases arise when individuals engage in "testing the waters" activities when the conventional wisdom is that they already are candidates, even if they have not yet said so formally.

In MUR 5934, the FEC considered Fred Thompson's "testing the waters" activities, and focused on his own statements and the fact that his organization "signed a lease for an office building that it purportedly planned to use as campaign headquarters." In one interview, Senator Thompson said, "I can't remember exactly the point that I said, 'I'm going to do this, but when I did, the thing that occurred to me: 'I'm going to tell people that I am thinking about it and see what kind of reaction I get to it.'" Over two months later, Senator Thompson said "We are going to be getting in if we get in, and of course, we are in the testing the waters phase . . . we're going to be making a statement shortly that will cure all of that. But yeah, we'll be in traditionally when people get in the race." Four Commissioners (the three Republicans and Democrat Ellen Weintraub) found Senator Thompson's statements to be "intentionally ambiguous," but "not sufficient by themselves to find reason to believe a violation [of the testing the waters regulation] occurred." Additionally, they found that signing an office lease is not "dispositive."

The same group of Commissioners reached similar conclusions in MUR 5930, involving Kirk Schuring, who explored candidacy in Ohio's 16th District. In this case, Mr. Schuring stated that he would run for Congress if the incumbent retired. He stated that the incumbent "congressman knows we're doing this and gave his permission . . . I am running in concert with his making a decision." Later, he stated that "it is important that a candidate and an organization be in place in the event that the congressman decides to retire." When the incumbent did announce his retirement, Mr. Schuring filed his Statement of Candidacy the next day. The four Commissioners concluded that "[w]here an individual conditions his own candidacy upon an incumbent's decision, the individual cannot be said to have decided to run until the condition precedent occurs." In other words, a "conditional statement of candidacy" can preserve one's "testing the waters" eligibility.

The four Commissioner coalition dissolved in MUR 5945, however. In that case Kieran Michael Lalor unquestionably referred to "my candidacy" and "my campaign," and made other statements that, in the words of Commissioner Weintraub, "indicated that he was no longer testing the waters." For example, Mr. Lalor said, "The early support for my candidacy is confirmation that voters in the district are excited to embrace a true conservative." He referred to "my campaign of ideas and solutions," and said that "[t]he more people I meet, the more I'm encouraged that I am going to ultimately make the decision to run . . . . It would take something major – maybe the second coming of Ronald Reagan in the 19th District – to take me off track." These statements were enough to convince the three Democrat Commissioners that Mr. Lalor had decided to become a candidate and removed himself from the "testing the waters" period. The three Republican Commissioners, however, voted instead "to close the file in this matter under the Commission's prosecutorial discretion because it involved a first-time candidate, a small amount of financial activity, and the questionable application of the Commission's testing the waters rules." The Republicans noted Mr. Lalor's other assertions that he was still exploring candidacy, and gave less weight to his "political rhetoric" about Ronald Reagan. More generally, the Republicans explained that "the testing the waters rules . . . should not operate harshly to potentially lead to an investigation and penalty when the level of financial activity at issue is less significant relative to other matters before the Commission and there are overwhelming contemporaneous indications that the individual was, in fact, still exploring candidacy."

In light of these three cases, one conclusion stands out: the potential candidate's own statements are (it seems) the crucial factor in determining whether the person has exceeded the limits of the "testing the waters" provision, and those statements will be scrutinized by both complaint-filers and the FEC. The three Republicans, though, appear to have little appetite for parsing a potential candidate's words so long as there is some ambiguity or conflicting statements regarding candidacy. Commissioner

Weintraub, as evidenced in the Lalor case, only voted to find a violation where the potential candidate publicly referred to "my candidacy" and "my campaign," while affording Senator Thompson and Mr. Schuring the benefit of the doubt when they made convoluted or ambiguous statements to the press. The lesson should be that an informed potential candidate who chooses his or her words carefully should have no trouble testing the waters.

IRS Reg. of 501(c)(3) Pol. Speech con't

apply the bright-line standard for express advocacy with which we are familiar from the election law context.

Applying the bright-line standard for express advocacy to existing IRS rules and regulations would arguably provide clarification for 501(c)(3) organizations as to what activity constitutes impermissible political activity. Doing so could result in a greater degree of latitude for 501(c)(3) organizations, by decreasing any chilling effect currently brought about by a combination of ambiguous definitions and the subjective "facts and circumstances" test, and potentially severe consequences for the organizations such as the loss of their tax-exempt status. In the current case involving Catholic Answers, the outcome of the IRS's initial inquiry would have been different had the bright-line standard for express advocacy been applied. Although the organization did not have its tax-exempt status revoked, the organization was subjected to an intensive IRS audit and ultimately required to pay excise taxes and its president had to refund the amount of the political expenditures to the organization. Most significantly, the IRS's adverse ruling arguably has had a chilling effect on this organization's exercise of free speech, and on perhaps the speech of others as well.

Facts

At issue in *Catholic Answers*, are two E-letters posted by the president of the organization, Karl Keating, on April 13, 2004 and May 11, 2004. The complaint describes the two E-letters as focusing on the Catholic Church's teachings as to the authority to withhold Holy Communion from politicians and/or candidates who obstinately persevere in manifest grave sin. (Since Catholics believe in the Real Presence under the appearances of bread and wine, according to Canon Law, Catholics "obstinately persevering in manifest grave sin" are not supposed to be admitted to Holy Communion. There is great debate about the application of this rule by Church leaders, particularly when it relates to politicians.)

In the first E-letter, Keating lamented the fact that John Kerry took Communion at Mass on Easter Sunday in 2004, despite being "vociferously pro-abortion", and chastised Church bishops for failing to forbid Kerry and other politicians from receiving Communion. Keating pointed out that in 1962 some Catholic politicians in Louisiana who opposed pleas to end racial segregation in schools were excommunicated. Keating wrote that Kerry "is precisely the kind of politician who should be denied Communication at Catholic parishes because [of] his strong endorsement of abortion."

The complaint maintains that although John Kerry was the presumptive Democratic nominee for President on April 13 when the first E-letter was posted, the E-letter did not mention John Kerry's status as a candidate or encourage readers to vote for or against him. Notwithstanding these legal conclusions drawn in the complaint, the E-letter does refer to Kerry as a politician, and states that he flunks the test given in Catholic Answers' voter guide. In the past, it has been determined that voter guide communications that treat certain candidates positively or negatively may constitute express advocacy. In addition, the E-letter at least indirectly references the election by stating that "November 2 is still half a year off, plenty of time for things to cool down after bishops all over the country read the sacramental riot act to hundreds of Catholic politicians."

In the second E-letter, Keating wrote that "Kerry and other politicians do not just hold opinions in favor of abortion. Through their legislative powers they determine whether abortion is widespread or restricted or (in theory) abolished, and through their statements they influence public opinion." Moreover, Keating asserted that promoting abortion is an excommunicable offense, and that therefore, those who are liable to excommunication, should not receive Holy Communion.

The complaint asserts that the May 11 E-letter also did not mention John Kerry's status as a candidate or encourage readers to vote for or against him. However, the E-letter does include an observation made in a previous post regarding the voter guide that "abortion is such a heinous sin that people advocating for it should forfeit our votes. If a

candidate is wrong on such a basic issue, what trust can be put in his judgment when it comes to a lesser matter, such as what tariff rate, if any, should be applied to sugar?"

After conducting an extensive audit of the organization, the IRS concluded that these two E-letters constituted impermissible political expenditures because they *"oppose[d] the election of a specific candidate running in the November 2004 presidential election."* (emphasis added) The organization was assessed excise taxes under section 4955 in the amount of $102.23, but did not have its tax-exempt status revoked. In addition, Keating was obligated to pay Catholic Answers $831.41, in order to demonstrate to the IRS that the organization had "corrected" the instances of impermissible political intervention.

Legal Arguments

In the complaint, Catholic Answers sets forth the following legal arguments.

First, section 4955 of the Internal Revenue Code, which provides for taxes on political expenditures of 501(c)(3) organizations, and federal regulations accompanying this code section, are unconstitutionally void for vagueness and for "lacking of terminology susceptible to objective assessment." Section 4955 defines the term "political expenditures" to mean "any amount paid or incurred by a section 501(c)(3) organization in any participation in, or intervention in (including the publication or distribution of statements), any political campaign on behalf of (or in opposition to) any candidate for public office." In addition, the complaint takes issue with the IRS's facts and circumstances approach set forth in Revenue Ruling 2007-41 for determining whether an organization is participating or intervening in impermissible political campaign activity, likening the test to the "I know it when I see it" approach.

Second, the complaint asserts that section 4955 and the accompanying regulations are also unconstitutionally void under the First Amendment for being overbroad, because portions of the statute and regulations lack specificity. Portions of Treasury Regulation section 1.501(c)(3)-1(c)(3)(iii), including the part which reads, "participates or intervenes, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office" are overbroad, because they have been interpreted by the IRS as encompassing speech that is not limited to activities and communications such as express advocacy of the election or defeat of clearly identified candidates.

Finally, in the alternative, the organization asserts that the Court is required to narrowly construe regulations section 53.4955(d) and section 1.501(c)(3)-1(c)(3)(iii) such that the term "political expenditures" is limited to "communications that include explicit words of advocacy of election or defeat of a candidate", applying a bright-line "express advocacy" test in order to protect First Amendment speech "from the unconstitutional chill which results from the overbreadth and vagueness of these regulations."

Conclusion

This case is in the first stages of what will likely be a lengthy journey through the federal trial and appeals courts. While this case may not be definitively resolved for some time, the outcome of this case will help to determine whether the IRS' current system of evaluating political intervention by charities is constitutionally valid.

Lobbyists and Fed Comm. Restrictions con't

applicants for funding under the Recovery Act *unless such views are in writing*" (emphasis added). These written communications must then be made public within three days and posted on the department's or agency's "recovery website." The reason for these new restrictions, according to the President's Memorandum, is that the stimulus bill "is not intended to fund projects for special interests" and "we must not allow Recovery Act funds to be distributed on the basis of factors other than the merits of proposed projects or in response to improper influence or pressure."

Executive branch and agency officials may engage in oral communications with registered lobbyists only to the extent those communications concern only "general Recovery Act policy," and do not "extend to or touch upon particular projects, applications, or applicants for funding." However, these general discussion oral communications must be publicly disclosed by the government official. Disclosure of general oral communications must be made public within three days and posted on the department's or

agency's "recovery website."

On April 7, the Office of Management and Budget (OMB) issued additional guidance to the Executive Branch to assist in the implementation of the President's order. Under the OMB guidelines, the communication restrictions do not apply to "general questions about the logistics of Recovery Act funding or implementation." Thus, a registered lobbyist may ask Executive Branch personnel how to apply for stimulus funding, how to conform to deadlines, to which agencies or officials applications or questions should be directed, or request information about program requirements and agency practices. Communications containing only general, logistical questions are not required to be publicly disclosed.

OMB also clarified what sorts of communications qualified as "general Recovery Act policy" issues. Examples include "discussions supporting funding of certain general populations, categories of projects, or broad geographical areas." Again, oral communications regarding general policy issues are permissible, but must be publicly disclosed. The Executive Branch official is required to complete a disclosure form that includes the date of contact, the names of all parties to the conversation, the name of the lobbyist's client(s), and a one-sentence description of the substance of the conversation.

Prohibited oral communications regarding "particular projects, applications, or applicants for funding" was defined by OMB to include any "discrete and identifiable transaction, or set of transactions . . .in which specific parties have expressed an interest." Communications of this nature must be made in writing by registered lobbyists, and will be placed on the public record.

The President's policy is scheduled to be reviewed in late May, and we expect further revisions to be made following that review.

Shared Website Arrangements con't

reimbursement agreement. The Service found that the 501(c)(3)'s banner, logo, site links, and disclaimers and copyright notices were included on every page of the organization's website, including those pages supposedly designated for the 501(c)(4) organization. Apparently however, according to the IRS, the only visual distinction between the layout of the 501(c)(3) organization and the 501(c)(4) organization's web-pages was that the 501(c)(4)'s logo and address appeared below the 501(c)(3) group's banner on the pages designated for use by the 501(c)(4). Thus, the Service determined that the banner and visual representations of the web-pages were "virtually indistinguishable" from the 501(c)(3) organization's website, and found that the 501(c)(3) was engaged in impermissible political campaign activity.

In light of this private determination, tax-exempt organizations (particularly those which engage in some political activity) with shared websites are well advised to evaluate their website arrangements.

501(c)(4) Statute Challenged con't

the complaint indicates that CC-FL prepared voter guides based on candidate questionnaires during national and state elections. The voter guides provided members with information on a number of issues, and included all viable candidates for the offices sought. Importantly, the complaint asserts that the voter guides evidenced no preference for any candidate or group of candidates. The CC-FL also prepared legislative scorecards, indicating how members of the Florida Senate and House of Representatives voted on particular pieces of legislation.

According to the complaint filed by CC-FL, the IRS based its adverse determination on the following factors: (1) the organization engaged in activities that primarily constituted political intervention on behalf of or in opposition to candidates for public office; (2) CC-FL's organizational structure is virtually identical to that of a political party, and was implemented primarily to intervene in political campaigns; (3) the organization's legislative scorecards constituted political intervention based on the IRS's conclusion that they were prepared and distributed to coincide with national and state elections; and (4) the organization's voter guides constituted political intervention, based upon the frequency of "no response" which was listed for Democratic candidates compared to their Republican counterparts.

Legal Arguments

The complaint first asserts that CC-FL should have been considered an organization exempt under section 501(c)(4), because it was primarily engaged in social welfare activities, not political activity. According to the complaint, the IRS even acknowledged in the

determination letter, that CC-FL "engage[d] in extensive lobbying activities." Furthermore, even if the IRS determined that some of CC-FL's activities constituted political activity, a 501(c)(4) organization may engage in some lawful political activities, so long as the organization is primarily engaged in activities that promote social welfare.

With respect to voter guides, the complaint cites IRS Revenue Ruling 78-248 which permits non-partisan voter guides that "consist of either voting records of the candidates on a wide variety of issues or responses by candidates to a questionnaire covering a broad range of issues important to the electorate." In a separate revenue ruling, the IRS has stated that whether a voter guide constitutes political intervention depends on a facts and circumstances test, a test which the complaint asserts is impermissibly vague and overbroad.

Next, the complaint asserts that section 501(c)(4), which provides for the definition of a social welfare organization, and pertinent treasury regulations are unconstitutionally vague and "lacking of terminology susceptible to objective assessment." This lack of objective standards, the complaint asserts, "enables discriminatory and arbitrary denial of tax exempt status by the IRS." In addition, the regulations purporting to expand upon the definition of "political intervention" simply provide that political intervention includes "the publication or distribution of written or printed statements of the making of oral statements on behalf of or in opposition to such a candidate." The complaint cites a Congressional Research Service publication on the topic, in which the government stated that "the statute and regulations do not offer much insight as to what activities are prohibited."

The complaint also asserts that section 501(c)(4) and the regulations thereunder are overbroad under the First Amendment. CC-FL alleges that portions of the statute and regulations lack specificity, are subject to interpretation by the IRS and may reach speech and activities which do not constitute political intervention.

Finally, in the alternative, CC-FL asserts that the Court is required to apply a narrow construction to treasury regulation 1.501(c)(4)-1(a)(2)(ii) in order to remove the overbreadth and vagueness issues. The complaint states that the term "political activities" should be construed to mean "those communications that include explicit words of advocacy of [the] election or defeat of a candidate." *Buckley v. Valeo, 424 US 1, 43 (1976).* In addition, the phrase "primarily engaged" contained in treasury regulation 1.501(c)(4)-1(a)(2)(i) should be construed by the Court to mean "the major purpose of which." *Buckley, 424 US at 79 (1976).*

IRS Eliminates Advance Ruling Period con't

509(a)(2) (i.e. organizations that receive their support from a combination of donations and fees for exempt activities), the public support test is met by demonstrating that not more than 1/3 of its financial support comes from gross investment income *and* that its receives more than 1/3 of its financial support from contributions, membership fees and gross receipts from activities related to its exempt functions. Whether or not a public charity has met the public support test is evaluated utilizing the current year and a four-year look-back period.

In September 2008, the IRS issued temporary regulations eliminating the advanced ruling procedures. Under the old rules, an organization filed form 1023 seeking recognition under 501(c)(3) by stating that it anticipated being a publicly supported charity on an on-going basis. If the application was approved, the organization was typically treated as a 501(c)(3) public charity for a 5-year period known as the "advanced ruling period." After the end of the 5-year period, the organization was then required to file form 8734 demonstrating that the organization had actually met the public support test. If the organization did not meet the public support test at that time, then it was deemed a private foundation. Generally, private foundations are subject to a stricter regulatory regime as compared to public charities.

Practice Tip: New organizations with a small number of donors may have trouble meeting the public support test, and should therefore consult a qualified tax advisor and accountant for advice on alternative solutions and/or the consequences of being deemed a private foundation.

Under the IRS's new rules, organizations apply for public charity status, and approved organizations are automatically deemed such during their first five years. Then, beginning with year six, organizations are required to demonstrate that they meet the public support test by providing certain financial information on Schedule A of the form 990. The public support test utilized by the IRS continues to be

based on a five year period consisting of the current year and the 4 years immediately preceding the current year. The evaluation of whether an organization is meeting the test for public support now begins in the sixth year. By instituting its new rules, the IRS has in effect simplified the process for obtaining public charity status by eliminating the advanced ruling determination period.

Practice Tip: Organizations should consult with legal counsel to initiate fundraising from the general public, public charities and/or the government near the start of the five year public support test periods.

Finally, previously under the old procedures, the IRS would notify organizations toward the end of their 5-year advanced ruling period and enclose a copy of the form 8734. However, since the issuance of the temporary regulations, the IRS has instead been notifying organizations of the new rules concerning public charity status. Note, the IRS indicated that it inadvertently mailed copies of form 8734 along with their notifications about the new rules to some organizations. However, organizations should *not* file form 8734 unless their advanced ruling periods ended prior to June 9, 2008.

Practice Tip: Organizations that received advanced rulings that expire prior to June 9, 2008 are still required to file form 8734.

http://www.onphilanthropy.com/site/News2?page=NewsArticle&id=7779