Political Ads: Issue Advocacy or Campaign Activity Under the Tax Code?

name redacted
Legislative Attorney

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Summary

Television and radio airwaves are inundated with political ads right now, and their numbers will only increase as the November 2012 elections get closer. Some ads expressly tell viewers or listeners which candidate to vote for or against. Others take a different approach. These ads typically urge people to contact an elected official, who also happens to be a candidate in the upcoming election, and tell him/her to support an issue or piece of legislation. Sometimes they do not even mention any candidate/officeholder by name, yet some still feel political in nature.

The question of whether an advertisement has crossed the line into campaign activity is an important one under the tax laws, particularly for tax-exempt 501(c) organizations. There are two main reasons. First, 501(c)(3) charitable organizations (including churches and other houses of worship) are prohibited under the Internal Revenue Code (IRC) from engaging in campaign activity. They are, however, permitted to take policy positions and engage in an insubstantial amount of lobbying.

Second, other types of 501(c)s—primarily 501(c)(4) social welfare organizations, 501(c)(5) labor unions, and 501(c)(6) trade associations—may engage in campaign activity. However, it (along with any other non-exempt purpose activity) cannot be their primary activity. This standard has been the focus of congressional and public scrutiny, as 501(c) groups have reportedly spent millions of dollars on campaign activity in the post-*Citizens United* era, and allegations have been made that some should have their status revoked for engaging in too much campaign activity. Whether an advertisement is campaign activity is key in this context because a "true" issue ad, as defined for tax purposes, would not be counted as campaign activity when determining whether revocation of 501(c) status is appropriate.

The standard for determining whether something is campaign activity under the IRC is whether it exhibits a preference for or against a candidate. Clearly, ads that tell people who to vote for or against are campaign intervention. However, in situations involving something short of express advocacy, this standard does not lend itself to bright-line rules. Preference can be subtle, and the IRS takes the position that it is not always necessary to expressly mention a candidate by name. As a result, the line between issue advocacy and campaign activity can be difficult to discern.

The IRS has released two rulings that provide a non-exhaustive list of factors the agency considers when determining whether an issue advocacy communication is electioneering. The most important point to keep in mind is that the determination of whether an ad is actually campaign activity is entirely dependent on the facts and circumstances of each case. This requires looking at the ad in question, as well as being familiar with some of the organization's other activities (e.g., has the group run a series of similar ads?) and the election (e.g., has the issue been raised to distinguish among the candidates?).

Finally, the term "issue advocacy" is also used when people talk about campaign finance law and policy. The terminology used in tax and campaign finance law and policy do not always match. Thus, it should not be assumed that the characterization or treatment of an activity for campaign finance purposes necessarily results in the same characterization or treatment for tax purposes, and vice versa.

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The question of whether a political advertisement is issue advocacy (including lobbying) or campaign activity is an important one under the tax laws, particularly for tax-exempt 501(c) organizations. This is because the Internal Revenue Code (IRC) imposes limitations on the ability of 501(c) groups to engage in campaign activity. Any activity that is truly issue advocacy would not be subject to these limitations.

Some 501(c) groups—primarily 501(c)(3) charitable organizations, including houses of worship, charities, and educational institutions—are prohibited under the IRC from engaging in any campaign intervention.[1] They are, however, allowed to take positions on policy issues and conduct an insubstantial amount of lobbying.

Others types of 501(c)s—primarily 501(c)(4) social welfare organizations, 501(c)(5) labor unions, and 501(c)(6) trade associations[2]—may engage in campaign intervention. However, because these groups' primary purpose must be their tax-exempt purpose (e.g., promoting social welfare), campaign activity, along with any other non-exempt purpose activity, cannot be their primary activity.[3] Recently, this standard has received significant attention because 501(c) organizations have reportedly spent millions of dollars on campaign activity[4] and allegations have been made that some should have their tax-exempt status revoked.[5] Any activity that is truly issue

[1] IRC §501(c)(3) (organizations "organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition ... or for the prevention of cruelty to children or animals"). Among other things, "no substantial part" of the organization's activities may be lobbying, and it may "not participate in, or intervene in ... any political campaign on behalf of (or in opposition to) any candidate for public office." *Id.*

[2] IRC §501(c)(4) ("Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare...."); §501(c)(5) ("labor, agricultural, or horticultural organizations"); §501(c)(6) ("Business leagues, chambers of commerce, real estate boards, boards of trade, or professional football leagues ... not organized for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual").

[3] *See* Treas. Reg. §1.501(c)(4)-1(a)(2)(ii); Rev. Rul. 81-95, 1981-1 C.B. 332 (ruling that lawful participation in campaign activity would not affect the 501(c)(4) status of a group whose primary activity was promoting social welfare); Gen. Couns. Mem. 34233 (December 30, 1969) (similar analysis for 501(c)(5)s and 501(c)(6)s). *See also* CRS Report R40183, *501(c)(4) Organizations and Campaign Activity: Analysis Under Tax and Campaign Finance Laws*.

[4] *See, e.g.,* Kim Barker, *Two Dark Money Groups Outspending All Super PACs Combined,* PROPUBLICA, August 13, 2012, available at http://www.propublica.org/article/two-dark-money-groups-outspending-all-super-pacs-combined (reporting that based on a ProPublica analysis of data compiled by Kantar Media's Campaign Media Analysis Group (CMAG), two 501(c)(4)s "had outspent each of the other types of outside spending groups in this election cycle, including political parties, unions, trade associations and political action committees ... "). The article reported the two 501(c)(4)s had spent almost $60 million on "TV ads to influence the presidential race," compared to $55.7 million by Super PACs and $22.5 million by parties. It explained that "CMAG develops its estimates based on regular surveys of TV stations of what they charge, plus discussions with media buyers about what they're paying," and the data differ from that reported to the Federal Election Commission because it "reflect[s] expenditures on broadcast TV ads, but not on ads aired on local cable or radio;" does not include "robo-calls and mailers that some groups must report to election officials;" and includes "TV ads that social-welfare nonprofits do not have to report to the FEC because of their content or the time frame in which they ran." *Id*. Not addressed in the article is the extent to which the data differs from that reported to the IRS, and there appears to be a high probability that some of the ads included in the CMAG data might be treated as issue advocacy, and not campaign activity, under the IRC. For further discussion of Super PAC spending, see CRS Report R42042, *Super PACs in Federal Elections: Overview and Issues for Congress*, by (name redacted).

[5] *See, e.g.,* Letter from J. Gerald Herbert, Executive Director, Campaign Legal Center, and Fred Wertheimer, President, Democracy 21, to Douglas H. Shulman, Commissioner, IRS, and Lois Lerner, Director, Exempt Organizations, IRS, dated April 17, 2012, available at http://www.democracy21.org/vertical/sites/%7B3D66FAFE-2697-446F-BB39-85FBBBA57812%7D/uploads/IRS_LETTER_CROSSROADS_GPS_4_17_12.pdf (asking the IRS to investigate Crossroads GPS, Priorities USA, American Action Network, and Americans Elect).

advocacy would not be counted as campaign intervention when determining whether a group has violated the primary purpose test.

Relatedly, even though some types of 501(c) organizations may engage in campaign activity under the IRC, they are subject to tax if they make an expenditure for "influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice-Presidential electors."[6] The tax is imposed at the highest corporate rate on the lesser of the organization's net investment income or the total amount of these expenditures.[7] True issue advocacy would fall outside the reach of the tax.

Issue Advocacy v. Campaign Activity

In order to understand what issue advocacy is under the tax code, it is helpful to begin by looking at its opposite—campaign intervention. The IRC and regulations offer little insight into what constitutes campaign intervention. The IRC does not define the term other than to say it "includ[es] the publishing or distributing of statements" on behalf of or in opposition to a candidate.[8] A Treasury regulation defines candidate as "an individual who offers himself, or is proposed by others, as a contestant for an elective public office, whether such office be national, State, or local."[9] As to what types of activities are campaign intervention, the regulation adds little besides specifying they include "the publication or distribution of written or printed statements or the making of oral statements on behalf of or in opposition to such a candidate."[10]

Clearly, any advertisement that expressly endorses or opposes a candidate is campaign activity.[11] It is also clear that there is no rule that campaign intervention occurs only when an organization expressly advocates for or against a candidate.[12] What is less clear is what happens when an ad merely refers to a candidate.

Guidance released by the IRS shows that in any situation that falls short of express advocacy, this issue does not lend itself to bright-line rules. The focus is essentially on whether the activity exhibits a preference for or against a candidate. [13] Preference can be subtle,[14] and the IRS takes the position that it is not necessary for the organization to expressly mention a candidate by name—rather, referring to party affiliation or "distinctive features of a candidate's platform or

[6] I.R.C. §527(e)(2).

[7] I.R.C. §527(f).

[8] IRC §501(c)(3).

[9] Treas. Reg. §1.501(c)(3)-1(c)(3)(iii).

[10] *Id*.

[11] *See, e.g.,* Rev. Rul. 2004-6, 2004-1 C.B. 328.

[12] *See* Rev. Rul. 2007-41, 2007-1 C.B. 1421 (analyzing circumstances under which activities such as conducting voter registration drives, inviting candidates to speak at a group's function, engaging in issue advocacy, and selling goods or services to candidates fall within the category of impermissible campaign intervention for 501(c)(3) organizations); Judith E. Kindell and John Francis Reilly, *Election Year Issues*, IRS 2002 EO CPE TEXT, 346-49 (2002) (hereinafter *2002 EO CPE Text*).

[13] *See* Rev. Rul. 2007-41, 2007-1 C.B. 1421.

[14] *See id.*

biography" may be sufficient to identify a candidate.[15] As a result, the line between issue advocacy and campaign activity can be difficult to discern.[16]

The IRS Factors

The IRS has released two revenue rulings that discuss when an issue advocacy communication has crossed the line into campaign activity.[17] Both contain a non-exhaustive list of factors to be considered, as well as some examples. Consistent with the above discussion, there are no bright-line rules. Rather, the determination is made by looking at the facts and circumstances of each case, focusing on whether the ad or statement includes anything that indicates a candidacy should be supported or opposed based on the issue.[18]

A point to keep in mind is that these rulings indicate the IRS' position on this issue, but they have not been challenged in court and therefore no court has given its approval to the analysis contained in them. Some might argue that this point may be particularly relevant in a context like this one, where the classification of an activity as campaign activity subjects it to regulation and therefore may have First Amendment implications.[19] Commentators have raised constitutional concerns about the campaign intervention standard, arguing, among other things, that it may be unconstitutionally vague in at least some circumstances.[20] No court has addressed this issue.[21]

One of the rulings deals with the definition of campaign intervention in the context of the 501(c)(3) prohibition. It appears likely the same analysis would be used for the 501(c) primary purpose test.[22] According to the IRS, key factors to be examined in determining whether an issue advocacy communication crosses the line into campaign intervention include the following:

[15] *Id*.

[16] This issue does not just come up in the context of issue advocacy communications, as there are other types of activities that are political in nature (e.g., distributing voter guides, conducting get-out-the-vote drives, and hosting public forums) that may, depending on the specific facts and circumstances of each, be characterized as campaign intervention. For further discussion, see CRS Report R40141, *501(c)(3) Organizations and Campaign Activity: Analysis Under Tax and Campaign Finance Laws*, by (name redacted) and (name redacted).

[17] Rev. Rul. 2004-6, 2004-1 C.B. 328; Rev. Rul. 2007-41, 2007-1 C.B. 1421.

[18] *See, e.g.,* Rev. Rul. 2004-6, 2004-1 C.B. 328 (Situation 1).

[19] U.S. Const. Amend. I ("Congress shall make no law ... abridging the freedom of speech ... or the right of the people peaceably to assemble ..."); *see also* Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984) ("implicit in the right to engage in activities protected by the First Amendment [is] a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends").

[20] *See Comments of the Individual Members of the ABA Exempt Organizations Committee's Task Force on Section 501(c)(4) and Politics* (May 25, 2004), at 35-37, at http://www.abanet.org/tax/pubpolicy/2004/040525exo.pdf; James Bopp, Jr., *Tax Guide for Churches and Religious Organizations: Critique of IRS Publication 1828* (October 2002), at http://www.politicalresponsibility.com/taxguidecritique.pdf.

[21] Recently, a 501(c)(3) group filed suit in federal court arguing, among other things, that the 501(c)(3) prohibition was void for vagueness. The case was dismissed on procedural grounds and, in January 2012, the Supreme Court denied the group's petition for certiorari. *See* Catholic Answers, Inc. v. United States, No. 11-511, 2009 U.S. Dist. LEXIS 96070 (S.D. Cal., 2009), *affirmed by* 438 Fed. Appx. 640 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1143 (January 23, 2012). A similar case in the 501(c)(4) context was also dismissed on procedural grounds. *See* Christian Coalition of Fla., Inc. v. United States, No. 5:09-cv-00144-WTH-GRJ, 2010 U.S. Dist. LEXIS 80186 (M.D. Fla., 2010), *affirmed by* 662 F.3d 1182 (11th Cir. 2011).

[22] *See* Rev. Rul. 81-95, 1981-1 C.B. 332.

- whether it identifies a candidate for a given public office by name or other means, such as party affiliation or distinctive features of a candidate's platform or biography;
- whether it expresses approval or disapproval for any candidate's positions or actions;
- whether it is delivered close in time to an election;
- whether it refers to voting or an election;
- whether the issue it addresses has been raised as one distinguishing the candidates;
- whether it is part of an ongoing series by the group on the same issue and the series is not timed to an election; and
- whether its timing and the identification of the candidate are related to a non-electoral event (e.g., a scheduled vote on legislation by an officeholder who is also a candidate).[23]

The other ruling addresses whether an expenditure for an issue advocacy expenditure is subject to the 527(f) tax. It is generally similar to the above, but there are some differences. According to that ruling, factors that tend to show that an expenditure for an issue advocacy communication is taxable include the following:

- the communication identifies a candidate for public office;
- the communication identifies the candidate's position on the subject of the communication;
- the candidate's position has been raised (either by the communication or in other public communications) to distinguish him or her from other candidates;
- the communication is timed to coincide with an electoral campaign;
- the communication is targeted at voters in a particular election; and
- the communication is not part of an ongoing series of substantially similar advocacy communications by the organization on the same issue.[24]

Factors that tend to show the expenditure is not taxable include the following:

- the absence of one or more of the above factors;
- the communication identifies specific legislation or an event outside the organization's control that the organization hopes to influence;
- the communication's timing coincides with a specific event outside the organization's control that it hopes to influence;

[23] *See* Rev. Rul. 2007-41, 2007-1 C.B. 1421.

[24] *See* Rev. Rul. 2004-6, 2004-1 C.B. 328.

- the candidate is identified solely as a government official who is in a position to act on the issue in connection with a specific event (e.g., will vote on the legislation); and
- the candidate is identified solely in a list of the legislation's key sponsors.[25]

It is not clear that the differences between the two rulings have much practical import for purposes of the general discussion contained in this report.[26] This is illustrated by the fact that, as discussed below, both include examples and the same conclusion would be reached for each example under either ruling.

Application of the Factors

The determination of whether an advertisement is actually campaign activity is entirely dependent on the facts and circumstances of each case. This requires actually looking at the ad in question. Additionally, it requires being familiar with the organization's other activities—e.g., is the group running a series of ads on the issue, and one just happens to coincide with an election? It also requires knowing information about the election—e.g., has the issue been raised to distinguish the candidates?

Illustrating the importance of the overall context in which the ad is run, and not just the text of the ad itself, is the fact that it is not necessary for the ad to expressly mention a candidate by name. Rather, the IRS takes the position that simply referring to such things as party affiliation or "distinctive features of a candidate's platform or biography" may be sufficient in some cases to count as identifying a candidate.[27]

According to the IRS, a statement or ad is "particularly at risk" of being classified as campaign intervention when it refers to candidates or to voting in an upcoming election.[28] However, even in those situations, "the communication must still be considered in context before arriving at any conclusions," thus emphasizing that any determination is highly fact specific.

The following example shows how these points come together. Shortly before an election, a group whose mission is to educate the public about community development issues releases an ad that discusses some general issues and mass transit in particular.[29] It ends with the following:

> For those of you who care about quality of life in District X and the growing traffic congestion, there is a very important choice coming up next month. We need new mass transit. More highway funding will not make a difference. You have the power to relieve the congestion and improve your quality of life in District. Use that power when you go to the polls and cast your vote in the election for your state Senator.[30]

[25] *See id*.

[26] The IRS has at times taken the position that activities prohibited as campaign intervention under Section 501(c)(3) are correspondingly treated as being a taxable expenditure under Section 527(f). *See, e.g.*, Priv. Ltr. Rul. 9652026 (October 1, 1996); Priv. Ltr. Rul. 9725036 (March 24, 1997); Priv. Ltr. Rul. 9808037 (November 21, 1997); Priv. Ltr. Rul. 199925051 (March 29, 1999).

[27] Rev. Rul. 2007-41, 2007-1 C.B. 1421.

[28] *Id*.

[29] *See id.* (Situation 16). The example presented in this report has been modified from the one in the ruling.

[30] *Id*.

While the ad references the upcoming election, no candidate is identified by name at any point during it. The group's position on mass transit is clearly stated, but the ad is silent on how any candidate running in the election feels about the issue. Is this campaign intervention? Making the determination would require knowing additional facts not discussed in the ad. The most important would likely be whether mass transit and/or highway funding had been raised during the election to distinguish the candidates, looking at such things as whether it was a prominent issue in the campaign; whether either candidate had made it a part of his/her platform; and whether other public communications discussed the candidates' position on it. If the answer is yes, then the IRS would likely find the ad to be campaign intervention, particularly in light of the ad including the group's position on the issue.[31]

Illustrative Examples

The two rulings contain several examples that are useful because they address the treatment of a very common type of ad where people are urged to contact an elected official, who is also a candidate, to support or oppose an issue or legislation. The examples illustrate how the factors are applied in order to determine whether anything in the ad indicates support or opposition to the official's candidacy.

The first example involves a situation with pending legislation. A group runs an ad that states pending Senate legislation would provide educational opportunities for state residents and identifies one of the state's Senators as someone who had previously opposed similar bills. The ad ends by urging people to contact the Senator and tell him/her to vote for the bill. The ad was published in newspapers throughout the state shortly before a Senate vote on the bill, which was also right before a primary election in which the Senator was running. Educational issues had not been raised to distinguish the Senator from other candidates. The IRS ruled the ad was not campaign intervention.[32] While the ad was run shortly before an election and identified the Senator's position as contrary to that of the group, it did not mention the election or Senator's candidacy; education issues had not been raised as distinguishing the Senator from other candidates; the ad's timing and identification of the Senator were directly related to the bill and an upcoming Senate vote; and the Senator was in the position to vote on the bill.

Two other examples illustrate how a few changes in the fact pattern can result in a different outcome. An anti-death penalty group runs television ads that included information about countries that have abolished the death penalty and alleged inequities in its application. In one example, the ads were run regularly before scheduled executions and end by noting the governor's support of the death penalty and encouraging people to contact him/her to stop the upcoming execution. One of these ads is run before a scheduled execution, which coincides with an election in which the governor is running. In the other example, the ad was not part of an ongoing series timed to run before scheduled executions, and it ended by noting that the governor's support for the death penalty and encouraging people to contact him/her to demand a moratorium. That ad was run shortly before the election, when no executions were scheduled in the near future. The IRS ruled that the first example was not campaign activity because the ad was part of an ongoing series of substantially similar advocacy communications; identified an event outside the group's control that it hoped to influence; its timing coincided with the event;

[31] *See id.*

[32] *See* Rev. Rul. 2007-41, 2007-1 C.B. 1421 (Situation 14).

and the candidate was a public official in a position to take action in connection with the event.[33] On the other hand, the second example was determined to be campaign activity because it identified the governor shortly before an election in which he/she was a candidate; identified the governor's position as opposite to that of the group; was not part of an ongoing series; and was not timed to coincide with a non-electoral event.[34]

As the second death penalty example illustrates, when there is no pending legislative vote or other non-electoral activity, the IRS rulings suggest it can be difficult for an ad to avoid being classified as campaign activity. Another example of this principle involves an education reform group that released an ad supporting an increase in state funding for public education. The ad encourages people to "Tell the Governor what you think about our under-funded schools," without indicating the governor's position on public education funding. The ad, which was not part of an ongoing series, was run several times, the first of which was before an election in which the governor was running for reelection. At that time, no legislative vote or other non-electoral activity was scheduled. The governor's opponent had made public education funding an issuing in the campaign by highlighting, in public appearances and campaign literature, the governor's veto of a tax increase to fund education. The IRS ruled this was campaign intervention because it identified a candidate; was run shortly before the election; was not part of an ongoing series; was not timed to coincide with a nonelectoral event; and even though the ad did not state the governor's position on the issue, the issue has been raised by the other candidate as a way to distinguish them.[35] The same result was reached on a similar fact pattern except that the issue had not been raised to distinguish the candidate/officeholder from any opponents, but the ad did identify his/her position as agreeing with that of the group.[36]

An ad released shortly before an election without a link to a pending non-electoral action may not always be campaign activity. One IRS example dealt with a union that advocated for better law enforcement personnel conditions. The union ran a series of ads that called for more federal money for law enforcement. The series ran in large newspapers throughout the state regularly throughout the year, and one time an ad was published right before an election in which one of the state's Senators was up for reelection. The ad urged people to contact both of the state's Senators to support increased federal funding, without indicating either one's position on the issue. At the time it ran, no legislative vote or other Senate activity on the issue was scheduled. Law enforcement issues had not been raised as an issue to distinguish the Senator from any opponent. The IRS ruled this was not campaign activity because it was part of an ongoing series of substantially similar advocacy communications by the group; it identified both Senators as public officials who would vote on this issue; did not identify the position of the Senator who was running for reelection; and law enforcement issues had not been raised in the election to distinguish the Senator from any opponent.[37]

[33] *See* Rev. Rul. 2004-6, 2004-1 C.B. 328 (Situation 5).

[34] *See id*. (Situation 6).

[35] *See* Rev. Rul. 2007-41, 2007-1 C.B. 1421 (Situation 15); Rev. Rul. 2004-6, 2004-1 C.B. 328 (Situation 4).

[36] *See* Rev. Rul. 2004-6, 2004-1 C.B. 328 (Situation 3).

[37] *See* Rev. Rul. 2004-6, 2004-1 C.B. 328 (Situation 1).

Comparison of Tax and Election Law

When it comes to regulating the political activities of tax-exempt organizations, both the IRC and the Federal Election Campaign Act (FECA) have a role to play. One recurring issue is that similar or identical terms in tax and campaign finance law and policy do not always have the same meanings. Thus, it should not be assumed that the characterization or treatment of an activity for campaign finance purposes necessarily results in the same characterization or treatment for tax purposes, and vice versa.

When thinking about activities that the tax world might consider to be "issue advocacy" or "campaign intervention," the campaign finance world might be concerned about whether the relevant activities are "independent expenditures" or "electioneering communications." It seems clear that any "independent expenditure," which by definition involves expressly advocating for or against a candidate,[38] is per se campaign intervention for purposes of the IRC.

"Electioneering communications" present a trickier situation. FECA defines them as broadcast, cable, or satellite communications that refer to a federal candidate and are made within 60 days of a general election or 30 days of a primary.[39] As discussed above, there is no analogous bright-line standard in the IRC for determining whether communications that merely refer to a candidate are campaign intervention. Rather, making this type of determination for tax law purposes requires looking at the facts and circumstances of each case to assess whether the communication indicates a preference for or against the candidate. The communication's timing is only one factor to consider.

Because of this mismatched intersection between tax and campaign finance law, it is possible that an issue advocacy communication might, depending on its timing and content, be an electioneering communication under FECA, but not be treated as campaign intervention under the IRC. Thus, it appears that just because a group reports an ad as an electioneering communication to the Federal Election Commission (FEC), this does not necessarily mean the ad would be treated as campaign intervention for purposes of the IRC. The opposite is true as well—not all campaign activity under the IRC will necessarily be reported to the FEC. What this means in practice is that, for example, when trying to figure out whether a 501(c) group has violated the primary purpose test by engaging in "too much" campaign activity, the amount reported to the FEC might not accurately reflect the amount of campaign activity actually engaged in for tax purposes.

[38] 2 U.S.C. §431(17) (defining "independent expenditure" as an expenditure by a person who expressly advocates for the election or defeat of a clearly identified candidate and is not made in cooperation with or at the suggestion of such candidate).

[39] 2 U.S.C. §434(f)(3)(A).

Author Contact Information

(name redacted)
Legislative Attorney
[redacted]@crs.loc.gov, 7-....

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