FEDERAL ELECTION COMMISSION
Washington, DC 20463

October 7, 2005

MEMORANDUM

TO: The Commission
General Counsel
Staff Director
Public Information
Press Office
Public Records

FROM: Mai T. Dinh MTD
Assistant General Counsel

SUBJECT: IRS Comment on Electioneering Communications

Attached please find one comment submitted by the Internal Revenue Service in response to Notice 2005-20, Notice of Proposed Rulemaking on Electioneering Communications, published in the *Federal Register* on August 24, 2005 (70 FR 49508). The comment period ended on September 30, 2005.

Attachments

cc: Deputy General Counsel
Associate General Counsel
Congressional Affairs Officer
Executive Assistants

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OFFICE OF
CHIEF COUNSEL

October 7, 2005

VIA E-MAIL & REGULAR MAIL

Ms. Mai T. Dinh
Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Notice of Proposed Rulemaking on Electioneering Communications, 70 F.R. 49508 (Aug. 24, 2005)

Dear Ms. Dinh:

Thank you for sending to us a copy of the Notice of Proposed Rulemaking (NPRM) relating to electioneering communications. The NPRM proposes to modify the exemptions to the definition of "electioneering communications" contained in the previous rule. Because the Federal Election Commission and the Internal Revenue Service are to work together to promulgate rules, regulations and forms which are mutually consistent, we are providing a brief explanation of the relevant Federal tax laws, regulations and rulings regarding the prohibition on campaign intervention and the restriction on private benefit applicable to tax-exempt organizations described in section 501(c)(3) of the Internal Revenue Code ("Code").

Background and the Notice of Proposed Rulemaking

Under the Bipartisan Campaign Reform Act ("BCRA"), corporations, including those that are exempt from taxation because they are described in section 501(c) of the Code, are barred from making "electioneering communications." A communication is defined as an electioneering communication under BCRA if: (1) it occurs within 30 days of a primary election for federal office or within 60 days of a general election for Federal office; (2) it includes the name and/or likeness of, or otherwise clearly identifies, a candidate for federal office; and (3) it is targeted to the relevant electorate for that candidate. The Federal Election Commission is authorized under BCRA to issue regulations that exempt certain types of communications from the definition of electioneering communications as long as the regulations do not exempt communications that "promote, support, attack, or oppose" ("PASO") a federal candidate or officeholder.

Specifically, the NPRM proposes to amend 11 CFR 100.29(c)(6), which currently exempts from the "electioneering communication" definition any communication that is paid for by

any organization operated under section 501(c)(3) of the Code. The proposed amendment would continue to exempt communications paid for by section 501(c)(3) organizations, subject to two limitations. First, communications paid for by section 501(c)(3) organizations would not be exempt if they PASO a Federal candidate. In addition, communications of a section 501(c)(3) organization would not be exempt if the organization is directly or indirectly established, financed, maintained or controlled by a Federal candidate or officeholder.

Summary of the Section 501(c)(3) Restrictions on Campaign Intervention and Private Benefit

The tax laws and regulations do not allow section 501(c)(3) organizations to promote or oppose candidates for Federal office. In addition, the tax laws provide several consequences for this type of activity. But the tax laws do not prohibit a candidate or officeholder from being involved with a section 501(c)(3) organization. An organization, however, will not meet the requirements of section 501(c)(3) if it confers a substantial private benefit on the candidate or officeholder or if it otherwise serves the private interests of the candidate or officeholder.

Campaign Intervention

Section 501(c)(3) provides that organizations exempt from Federal income tax under section 501(a) because they are described in section 501(c)(3) cannot participate in or intervene in (including the publishing or distributing of statements) a political campaign on behalf of (or in opposition to) any candidate for public office. Treas. Reg. § 1.501(c)(3)-1(a)(1) provides that a section 501(c)(3) organization must be organized and operated exclusively for exempt purposes specified in section 501(c)(3). Treas. Reg. § 1.501(c)(3)-1(c)(3)(i) provides that an organization is not operated exclusively for one or more exempt purposes if it is an "action" organization. Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii) provides that an organization is an "action" organization if it participates or intervenes, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office. The term "candidate for public office" means 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. Activities which constitute participation or intervention in a political campaign on behalf of or in opposition to a candidate include, but are not limited to, 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.

The consequences for section 501(c)(3) organizations that promote or oppose candidates for Federal office include revocation of exempt status under section 501(a) as an organization described in section 501(c)(3), and imposition of section 4955 taxes on political expenditures. The prohibition against campaign intervention by 501(c)(3) organizations is an absolute prohibition. In the case of flagrant political expenditures, section 6852 provides that a section 501(c)(3) organization may have an immediate

assessment of income tax and section 4955 tax payable. In addition, section 7409 allows in the case of flagrant participation in a political campaign on behalf of or in opposition to a candidate for public office a civil action to enjoin a section 501(c)(3) organization from making further political expenditures and other appropriate relief to preserve charitable assets.

Please note that the Internal Revenue Service has published several revenue rulings illustrating that a section 501(c)(3) organization may engage in several types of activities related to an election if the activities do not evidence a bias that would favor one candidate over another, oppose a candidate in some manner or have the effect of favoring a candidate or a group of candidates. Rev. Rul. 78-248, 1978-1 C.B. 154 (discussing publication of voter guides), Rev. Rul. 78-248, 1978-1 C.B. 154 (discussing publication of candidate questionnaires), Rev. Rul. 86-95, 1986-2 C.B. 73, (discussing candidate forums), and Rev. Rul. 74-574, 1974-2 C.B. 160 (discussing the provision of free air time to candidates).

The NPRM asks whether communications that may be permitted grass roots lobbying communications under Treas. Reg. § 56.4911-2(b)(2)(i) may result in some section 501(c)(3) organizations making communications that PASO a Federal candidate. Last year the Internal Revenue Service published Rev. Rul. 2004-6, 2004-6 I.R.B. 328, which provides that organizations described in section 501(c)(4), section 501(c)(5) and section 501(c)(6) may, consistent with their exempt purpose, publicly advocate positions on public policy issues. The ruling also states that this type of advocacy may include lobbying for legislation. Finally, the ruling states that because advocacy communications may discuss the positions of officeholders who are also candidates, the communication may be one that is for an "exempt function" (i.e., a communication that influences or attempts to influence an election) and subjects the organization to tax under section 527(f).

While section 501(c)(3) organizations are restricted from engaging in more than an insubstantial amount of lobbying, their exempt purpose may also be furthered by lobbying. The ruling provides that "all the facts and circumstances must be considered to determine whether an expenditure for an advocacy communication relating to a public policy issue is for an exempt function under section 527." While expenditures for an exempt function under section 527 pertain to those expenditures that are made to influence elections, the same rationale applies for determining whether a communication by a section 501(c)(3) organization constitutes prohibited campaign intervention or permissible advocacy. In line with the ruling, when an advocacy communication of a section 501(c)(3) organization explicitly advocates the election or defeat of a candidate for public office, the organization is violating the campaign intervention prohibition. When the advocacy communication does not explicitly advocate the election or defeat of a candidate, all the facts and circumstances need to be considered to determine whether the organization is engaging in prohibited political activity.