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October 31, 2005

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

Re: Treatment of IRC Section 527 Organizations in Notice of Proposed Rulemaking on Political Committee Status (Notice 2004-6)

Dear Ms. Dinh:

Enclosed please find copies of the article mentioned in my testimony before the Commission in this matter. I appreciate the Commission holding the record open to allow this supplementary submission.

Sincerely,

Elizabeth Kingsley

Tax Notes

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By Fred Stokeld -- freds@tax.org An IRS official clarified last week that if a tax-exempt organization runs supposedly nonpartisan issue ads to influence the outcome of an election, the Service will consider the activity to be political as defined under *section 527.*

In remarks in Washington at a program sponsored by the D.C. Bar, Judith E. Kindell of the IRS Exempt Organizations Division discussed *Rev. Rul. 2004-6, 2004-4 IRB 328.* Released in December, the revenue ruling lists factors that tend to show an advocacy communication on a public policy issue for an exempt function under *section 527(e)(2),* which would subject the organization to tax.

The factors include communication that identifies a candidate for public office, is timed to coincide with an electoral campaign, and targets voters in a particular election. Also a factor is communication identifying the candidate's position on the public policy issue that is the subject of the communication, as well as communication that is not part of an ongoing series of substantially similar advocacy communications by the organization on the same issue. The IRS also notes as a factor whether the position of the candidate on the public policy issue has been raised as distinguishing the candidate from others in the campaign, either in the communication itself or in other public communications.

Factors that tend to show an advocacy communication is not for an exempt function under *section 527(e)(2)* are: one or more of the above-mentioned factors indicating an exempt function is not present; the communication identifies spe-

cific legislation, or a specific event outside the control of the organization, that the organization hopes to influence; the timing of the communication coincides with a specific event outside the control of the organization that the organization hopes to influence, such as a legislative vote; the communication identifies the candidate solely as a government official in a position to act on the public policy issue in connection with the event (for example, a legislator who can vote on the legislation); and the communication identifies the candidate solely in the list of key or principal sponsors of the legislation that is the subject of the communication.

Although most practitioners have called the revenue ruling helpful, some, such as Gregory L. Colvin and Rosemary E. Fei of Silk Adler & Colvin, San Francisco, expressed concern the guidance could provide a loophole through which unlimited amounts of soft money could be contributed to exempt organizations to run ads to influence the outcome of tight races. In a December 30 letter to Kindell, Colvin and Fei said they are troubled by the second example in the revenue ruling (Situation 2), which involved a *section 501(c)(6)* organization that runs ads promoting a trade bill in a state shortly before an election in which the incumbent senator is a candidate. The ads note the senator has opposed
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similar bills. Citing several factors, the revenue ruling concluded the ad was not for an exempt function under *section 527(e)(2)*.

Colvin and Fei said they are most concerned about a passage in Situation 2 and the other examples that say the ad "targets voters in a particular election." Although the IRS might interpret the language as disseminating the communication broadly to the public in an area where the election takes place, a political strategist would consider "targeting" to mean selecting certain states or congressional districts, and not others, for placing issue ads based on where close elections are taking place.

"Such intentional selection of 'battleground' or 'swing' states for issue advertising, to us, indicates that a significant, if not dominant, purpose of the ad is to influence the election of candidates in the targeted area," Colvin and Fei wrote. "That should be enough, in our view, despite the presence of a grass roots lobbying message, to cause the communication to fall under *section 527*."

At the D.C. Bar event, John Pomeranz of the Alliance for Justice and other practitioners raised the same concern. Kindell assured the audience that an exempt organization's decision to place an ad in a particular area because it may affect the result of an election would lead the IRS to believe it is an activity covered under *section 527(e)(2)*.

"All we intended when we said the communication targets the voters is that it was directed at the same voters," Kindell explained. "We didn't mean anything more than that." She added, "if you're choosing to run this message in a particular
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area because you believe it will influence the election, that's the definition of 527."

Pomeranz and others in the audience said running an ad in a hotly contested race doesn't necessarily mean the exempt organization is trying to influence an election; rather, the organization might believe its message may have more effect on a legislator who's in a tight race than on one who's not in the middle of an election campaign.

The reason the legislator might be persuaded by the organization's issue advocacy campaign is because the legislator is in a closely fought election, Pomeranz explained. "We're going to go to the senator who has a tough election race, so in a sense we've targeted a battleground state."

Kindell responded that an organization would have to be able to show that it placed ads during a tight race in a battleground state because it thought the ads would get a better response from the incumbent in the race, not because the organization wanted to affect the election's outcome.

"If there's something that you can show that says 'XYZ legislators could be persuaded to vote our way if we run this [ad] campaign,' that's a fact that tends to show that that's why you're doing it," Kindell said. "You have to have the facts to support that, because if we just see that you're going to battleground [states], we're going to say, 'You're going to battlegrounds. Doesn't that mean you're trying to influence an election?'"

Full Text Citations: *Rev. Rul. 2004-6.* Doc 2003-27045 (9 original pages); *2003 TNT 247-2*

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