

## QUESTIONS FOR THE RECORD

Senate Judiciary Committee  
“Current Issues in Campaign Finance Law Enforcement”  
April 9, 2013

Senator Amy Klobuchar

Responses from Gregory L. Colvin, Adler & Colvin, San Francisco

1. *Executive Branch Role* - Given that legislative solutions may be difficult to enact, what are the most important steps that executive branch agencies, including the FEC, IRS, and the FCC, should take in providing oversight of the activities of Super PACs and other related groups?

Since my law practice is devoted to nonprofit, tax-exempt law, I will focus on the steps the Internal Revenue Service can take. As you know, my testimony and my supplemental statement address the question of IRS oversight in depth and I will not repeat all that here. In short, I believe that the IRS, exercising its regulatory authority, could and should:

A. Reconsider its interpretation of the primary purpose test for Section 501(c)(4) and other non-charitable 501(c) exempt organizations, so that the upper limit for political campaign activities is reduced from “less than primary” to “insubstantial.” This would be more consistent with other precedents requiring that “private benefit” activities within a 501(c)(4) entity be limited to an insubstantial level, such as the *Vision Service Plan* decision. Following those precedents, the presence of a single non-exempt purpose, if substantial in nature, would defeat the entity’s tax exemption. Revenue Ruling 81-95 would need to be withdrawn and a new ruling issued to clarify the tax treatment of political campaign activities, and the Service should make plain that this principle applies similarly to other tax-exempt classifications, such as (c)(5) labor unions, (c)(6) trade associations, and (c)(7) social clubs. Otherwise, the public interest (c)(4) groups would be disadvantaged compared to the other 501(c) organizations that serve special interests and are expected to be, in the wake of *Citizens United*, even more active in politics.

B. Promulgate regulations defining “political intervention” clearly and consistently for all parts of the Internal Revenue Code that rely upon that term, including the prohibition in Section 501(c)(3), the limitation applicable to other Section 501(c) categories, and the denial of business expense deduction under Section 162(e). The vague and uncertain “facts and circumstances” approach used by the IRS should be replaced with bright line definitions, safe harbor exceptions, and illustrative examples, patterned after the public charity and foundation lobbying regulations that the Service issued in 1990. The 2013-14 Priority Guidance Plan for the IRS and Treasury should launch this regulations project, with public hearings and other input, and a target date of January 1, 2016, for completion.

C. As an interim measure, provide bright-line definitions and exceptions to distinguish issue advocacy from political campaign advertising for all purposes under the Internal Revenue Code, by issuing a new Revenue Ruling before January 1, 2014. The two multiple-factor tests that presently apply to issue ads, found in Revenue Rulings 2004-6 and 2007-41, should be withdrawn and replaced with a single test. This would allow the Service to put an improved rule in place for issue ads in the 2014 elections, while it pursues the comprehensive regulatory reform to be finished in time for the 2016 campaign season.

2. *Rules on Coordination - Could the IRS or the FEC make stronger rules to curb coordination between outside groups and candidates? What could such rules look like?*

The FEC has greater expertise than does the IRS when it comes to distinguishing independent from coordinated expenditures, and so the FEC should take the lead on forging stronger rules. Under federal tax law, independent and coordinated political expenditures are treated equally as political intervention, so the IRS has not needed to define them separately. However, if the FEC could provide improved guidance on the question of what constitutes “coordination,” defining coordinated expenditures as contributions to the candidates involved, it would be a simple matter for the IRS to follow suit. Hopefully, state election commissions would do so as well. Tax-exempt organizations in particular need to know what contacts and communications they may have with candidates without crossing the line into coordination. For example, a charity should be able to inject its issues into the campaign by asking candidates to take a position on fair pay for working women. However, the charity must avoid paying for any communications to voters on such issues that are improperly coordinated with the candidates.

3. *Impact of Citizens United - There has been a lot of discussion about what the real world impact of Citizens United has been and will be going forward.*

- *Can you describe in general terms what trends or major shifts you have seen in campaign finance since the Citizens United ruling?*
- *What, in your view, has this done to the public’s perception of our elections and our government?*

I believe we have seen a range of public perceptions, from greater enthusiasm for civic engagement in some quarters to greater apathy in others. Internet technology has made receiving information and acting upon it much easier and cheaper, and there is, at least for now, a sense that grass roots groups can take on the big moneyed interests and compete for political influence at many levels and in many segments of government. On the other hand, as organizing methodologies become more sophisticated, the level of investment needed to compete will be an increasingly high barrier to entry.

From my perspective representing tax-exempt organizations and their donors, the trends I have seen since *Citizens United* (and the related *SpeechNow* decision allowing the formation of SuperPACs) are as follows.

- We have seen a cultural shift, by a small but growing set of very wealthy individuals, toward a willingness to invest very large amounts of their own money to influence federal, state, and local elections, including by running for office themselves.
- A few large corporations and other businesses have begun to test the waters, making contributions to independent expenditure committees, and more are sure to follow in future years. Even if most businesses refrain from making obvious political expenditures in their own names, those that do will figure out how to realize an enormous return on their investments in political influence.
- Labor unions, who did not seek or want the *Citizens United* ruling, have had to increase spending from their general treasury funds to try to match business-side spending, focusing on ground operations now that they can reach out beyond their members to the general public.
- Generally, the number of donors and amounts of money raised in both direct and independent contributions has increased, due not only to *Citizens United* and *SpeechNow* but also to the efficiency of Internet solicitation and the use of critical issues to motivate people to give.
- The overall escalation of campaign spending at all levels of government has increased the price of running for office, the time needed to court large donors, and the need to develop outside allies to augment the candidates' and parties' own efforts.
- Certainly the ability of very large donors to invest in outside support for their favored political party nominees has led to the continuation of certain campaigns for nomination far past the point when they would otherwise be viable. An article in the *Columbia Journalism Review* suggested that outside spending after *Citizens United* has had more impact in primary elections than in general elections so far.<sup>1</sup>
- Before the *Citizens United* decision, nonprofit as well as business corporations were prohibited from making independent expenditures in federal elections and in half of the states. When that prohibition fell away, the weakness of the IRS limitations on political spending by Section 501(c) organizations was exposed.
- Charitable 501(c)(3) organizations are still banned from political intervention by the tax code, but the IRS definition of that term is vague and amorphous. Most charities stay far away from election activity, but some are getting more aggressive with voter guides, candidate litmus tests, and even sermons that endorse candidates.
- Those 501(c) organizations NOT banned from political spending by the tax code, but simply limited by the "less than primary" (49%) test, have become the

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<sup>1</sup> [http://www.cjr.org/united\\_states\\_project/how\\_super\\_pacs\\_succeeded\\_in\\_20.php?page=all](http://www.cjr.org/united_states_project/how_super_pacs_succeeded_in_20.php?page=all)

vehicles of choice for donors wishing to avoid public disclosure. They include (c)(4) social welfare groups and (c)(6) business and professional associations.

- While the new (c)(4) funds affiliated with SuperPACs may have become the most controversial, the (c)(6) category is the most likely to be exploited by business corporations seeking anonymity because their trade associations already have huge primary lobbying operations that provide natural cover for secondary independent political expenditures. Further, a (c)(6) can overtly pursue business interests; it has no requirement to promote social welfare purposes as a (c)(4) does.
- As I detail in my main testimony, the inability of the IRS, so far, to regulate 501(c) political spending qualitatively (allowing thinly-disguised and targeted “issue” ads) or quantitatively (allowing 49% to be spent on express political campaigning) has led to massive abuses and a crisis in public trust for the nonprofit sector.