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The Current IRS Firestorm over Conservative Political Nonprofits: Any Lessons for the Rest of the Tax-Exempt Community?

Jeff Tenenbaum discusses the IRS' inappropriate flagging of conservative political groups for additional review during the 2012 election season

On May 10, 2013, the nonprofit tax bar – and much of the country – was rocked by reports that Lois Lerner, director of the Internal Revenue Service's Exempt Organizations Division apologized for the Service's inappropriate flagging of conservative political groups for additional review during the 2012 election season. She made this apology in response to a question from longtime nonprofit tax attorney Celia Rody at the annual meeting of the American Bar Association's tax section in Washington, DC. Lerner admitted that would-be tax-exempt entities that included the words "Tea Party" or "patriot" in their applications for recognition of exempt status were singled out for additional scrutiny, including burdensome questionnaires and, in some cases, improper requests for the names of their donors.

And on May 14, 2013, the Treasury Inspector General for Tax Administration released his [report on the issue](#), concluding that "[e]arly in Calendar Year 2010, the IRS began using inappropriate criteria to identify organizations applying for tax-exempt status to review for indications of significant political intervention." The report said that "[t]he IRS . . . identified for review Tea Party and other organizations applying for tax-exempt status based upon their names or policy positions instead of indications of potential political campaign intervention." Would-be 501(c)(4) exempt organizations are permitted to engage in some political campaign intervention, but it cannot constitute the primary activity of the organization.

There has been no evidence to date that the IRS made approval or denial decisions regarding these exemption applications based on these criteria, but the fact that additional scrutiny was leveled on this basis alone is, without question, very troubling. The IRS must enforce the tax-exempt provisions of the federal tax code – especially if there are signs of abuse – but the Service has a strict obligation to do so objectively, without bias, and without regard to political viewpoints.

The IRS has undertaken major compliance projects targeting certain sectors of the tax-exempt community. Colleges and universities and credit counseling agencies are two recent examples. In fact, the [IRS' final report on its college and university compliance project](#) was just released last month ([click here](#) to read Venable's article on the report). In conducting such reviews, the IRS certainly had to use criteria to identify the colleges or universities, or the credit counseling agencies, to be subject to such scrutiny. Sometimes the name of an entity easily identifies itself as falling into a particular category, but sometimes it does not.

In the current firestorm, it is not at all clear how an entity's name suggests whether it will be engaged in prohibited political activity. It is understandable that, for efficiency reasons, the IRS tried to find ways to more easily identify would-be exempt organizations that might be engaged in impermissible political campaign activity (perhaps it could have focused on those groups that checked the box on the exemption application stating they would engage in political activities). That being said, there is no question that the manner in which the IRS went about doing so was wholly inappropriate.

There are legitimate concerns that organizations are using their 501(c)(4) tax-exempt status to engage in political activity that exceeds the current limits. Many in Congress have raised this as an issue. Thus, we can expect more attention by the IRS and others in this area.

In the end, are there any lessons for the broader tax-exempt community? Yes, but until the Treasury Inspector General's report is digested, it is too soon to say. More to come on that front in the coming weeks. But to nonprofit attorneys like this author – someone who works very closely with the IRS Exempt Organizations Division – this is a rare instance of a very public spotlight being shined on a

world that is usually reserved for the inside-baseball players that reside in Washington.

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