

## Finance Committee Democrats back tighter rules to curb excessive political activity by nonprofits

Senate Democratic taxwriters this week called for legislative and regulatory changes that they argued would help ensure that tax-exempt entities—particularly social welfare groups organized under section 501(c)(4)—are not engaging in impermissible levels of political activity and urged the Internal Revenue Service to make better use of the enforcement tools it already has at its disposal to combat potential abuses.

The discussion arose during a May 4 hearing convened by the Subcommittee on Taxation and IRS Oversight to examine laws and enforcement mechanisms related to political activity of exempt organizations. (A background report on current law governing tax-exempt organizations and their political activity was released by the Joint Committee on Taxation staff in conjunction with the hearing.)

**URL:** <https://www.jct.gov/publications/2022/jcx-7-22/>

### Promoting transparency

Subcommittee Chairman Sheldon Whitehouse, D-R.I., explained in his opening statement that “the statute governing section 501(c)(4) organizations states they must be ‘operated exclusively for social welfare’”; but he noted that “the IRS muddied the waters with a regulation that allowed social welfare organizations to devote up to 49.9 percent of their spending to political activities and still qualify for [tax-exempt] status.”

Section 501(c)(4) organizations, which are not required to disclose the names of their donors, began to proliferate in the wake of the Supreme Court’s decision in *Citizens United v. Federal Elections Commission*, Whitehouse said, and political expenditures among these organizations jumped accordingly—from \$103 million in the decade before the decision to more than \$1 billion in the decade after the ruling. According to Whitehouse, evidence of election-related irregularities among this fast-growing segment of the nonprofit sector began to emerge as early as 2012 when “a ProPublica investigation found that roughly three in ten of the 501(c)(4) organizations surveyed reported to the [Federal Elections Commission (FEC)] that they had spent money on electioneering, but reported to the IRS they spent no money to influence elections directly or indirectly.”

**Donor disclosure:** Addressing the perceived lack of transparency among some tax-exempt groups regarding their political activity, Whitehouse asked witness Philip Hackney of the University of Pittsburgh School of Law about the impact of final regulations issued by the Treasury Department in 2020 rescinding a rule that had required tax-exempt entities—other than those organized under section 501(c)(3) or section 527—to disclose to the IRS on their annual Form 990 the names and addresses of donors who contribute \$5,000 or more.

**URL:** <https://s3.amazonaws.com/public-inspection.federalregister.gov/2020-11465.pdf>

Hackney, who worked in the IRS Office of Chief Counsel on issues related to tax-exempt sector from 2006-2011, replied that the IRS had required disclosure of information about large donors for as long as Form 990 has been in existence and that the decision to roll back that requirement was “of significant concern.” According to Hackney, “the IRS knows information reporting matters” and dropping the donor-disclosure

requirement was “problematic for revenue collection, enforcement of laws, and the perception of equal enforcement.”

Another witness, former FEC Chair Ann Ravel, agreed that eliminating the requirement “impairs an already somewhat dysfunctional process” at the IRS for identifying potential violations of laws limiting political activity by tax-exempts and will “increase [the agency’s] inability to enforce the law.”

Addressing a separate disclosure issue, Democratic subcommittee member Debbie Stabenow of Michigan called for passage of the Disclose Act (S. 443), a measure sponsored by Whitehouse that, among other things, would require 501(c)(4) groups and other organizations to disclose to the Federal Elections Commission the names of donors who have given \$10,000 or more during an election cycle. A House companion measure (H.R. 1334) is sponsored by Rep. David Cicilline, D-R.I.

[URL: https://www.congress.gov/bill/117th-congress/senate-bill/443/text](https://www.congress.gov/bill/117th-congress/senate-bill/443/text)

[URL: https://www.congress.gov/bill/117th-congress/house-bill/1334/text](https://www.congress.gov/bill/117th-congress/house-bill/1334/text)

Enforcement issues: Whitehouse contended that the problem of impermissible political activity on the part of nonprofits has been exacerbated by the fact that the IRS appears to be doing little to enforce existing rules. According to Whitehouse, a 2018 report from the Treasury Inspector General for Tax Administration estimated that over 1,000 cases of impermissible political activity among 501(c)(4) groups were not referred to an IRS committee tasked with recommending audits, and a 2020 Government Accountability Office report found that the Service conducted only 14 audits of 501(c)(4) groups between 2010 and 2017.

[URL: https://www.treasury.gov/tigta/auditreports/2019reports/201910006fr.pdf](https://www.treasury.gov/tigta/auditreports/2019reports/201910006fr.pdf)

[URL: https://www.gao.gov/assets/710/705927.pdf](https://www.gao.gov/assets/710/705927.pdf)

Witness Philip Hackney told the panel in his opening statement that the lackluster enforcement effort by the IRS is due in part to resource constraints. He noted that between 2010 and 2018, as applications for 501(c)(4) status were skyrocketing, the agency’s budget declined by 20 percent, and that between 2010 and 2019 the Exempt Organizations division shrank from 889 employees to 559. The recently enacted IRS budget bump for fiscal year 2022 is an improvement, he said, but still does not leave the agency in a position to vigorously enforce the nation’s tax laws.

In exchanges with Whitehouse and subcommittee member Elizabeth Warren, D-Mass., however, Hackney also faulted the IRS for not taking basic enforcement actions within its purview, such as coordinating with the FEC to ensure that organizations are consistently reporting their political activity to the government agencies that oversee them. (Ann Ravel, the former FEC chair, likewise told the panel in her opening statement that the IRS, the FEC, and the Justice Department do not routinely engage in the kind of rigorous information sharing that could help the government identify potential election-related violations on the part of nonprofit groups.)

Hackney also told Warren that reinstating the requirement for exempt organizations to disclose significant donors on their Form 990 filings is an immediate action the Treasury Department and IRS could take to strengthen the government’s hand in enforcing prohibitions against improper political activities.

## Protecting privacy

For his part, subcommittee ranking member John Thune of South Dakota argued that some of the changes sought by Democrats—particularly, requiring 501(c)(4) to disclose names and addresses of their larger donors—could raise free-speech and right-to-privacy concerns.

“[A]llowing Americans to privately give to causes that they care about is a fundamental component of protecting free speech and the First Amendment,” Thune said in his opening statement. “Partisan legislation to force tax-exempt groups to choose between spreading their message and protecting donors’ privacy runs a real, and potentially corrosive, risk of chilling free speech.”

One of the GOP’s invited witnesses, Scott Walter of the Capital Research Center, agreed with Thune about potential privacy implications of increased disclosure and said that concerns among exempt organizations about protecting the identity of donors cut across ideological lines.

According to Walter, left-leaning organizations as well as right-leaning organizations “believe their donors’ privacy needs to be respected. We’ve had anonymous speech since the beginning of the Republic. . . . This position is “not unreasonable.”

Another GOP witness, Bradley Smith of the Institute for Free Speech, told the panel in response to a question from Thune about the Disclose Act that the “tendency for *ad hominem* attacks on individuals is a problem in US politics and that emphasizing donor disclosure as a policy matter would be “poisonous” to the political system.

“Once money is given as a donation the individual donor no longer has any control over it,” he said, adding that “the focus on who is speaking is quite wrong and one of the reasons the Supreme Court has protected individuals’ rights to free speech and association.”

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