

HOW A ONE WORD CHANGE IN 1959 HELPED LEAD TO THE ‘DARK MONEY’ EXPLOSION

BY JEFF BRINDLE | 03/30/15 10:59am

The flap over secret spending by independent groups is traceable to a little known one word change in an Internal Revenue Service (IRS) rule issued during the Eisenhower administration.

Congress, during the progressive era in 1913, passed legislation that exempted organizations from paying federal taxes if they acted for the common welfare of the community.

These organizations, called civic leagues, could only act in ways that promoted the common good and could not be involved in political activity.

This situation changed in 1959 when Dwight Eisenhower was president. The IRS promulgated a regulation that permitted non-profit civic leagues to participate in politics, as long their participation was minimal.

Previously, the groups had to operate “exclusively” for social welfare. After the change, social welfare had to be their “primary” purpose.

The new rule meant social welfare groups could venture into politics. Technically, these groups are called 501(c) 4 groups based on the section of the IRS code that pertains to the non-profit.

In time, toying with politics metamorphosed due to further IRS tinkering with the regulations. Now as long as 51 percent of a 501(c)4’s activity is non-political, the rest, 49 percent may involve political activity.

At first, the changes didn’t matter much. There were few campaign finance restrictions before the Watergate scandal that led to contribution limits and far more disclosure in the early 1970s. Some social welfare groups exploited the loophole in the 1980s and 1990s. But not many.

However, after Congress banned large “soft money” contributions to national political parties in 2002 as part of the McCain Feingold reforms, lawyers started looking for other ways to spread campaign money around without bumping into contribution limits.

Social welfare groups had an added advantage since they are not required to disclose their contributors to anyone other than the IRS.

The result? These independent non-profit groups now spend millions attempting to influence the outcome of elections, both at the state and national levels.

According to the Center for Responsive Politics, 501(c) 4 social welfare groups spent just \$2.6 million in 2002. By the 2012 election, the amount had reached \$257 million- nearly 100 times more than a decade earlier.

The long forgotten rule change, in tandem with McCain/Feingold in 2002 and the U.S. Supreme Court decision in Citizens United in 2010, transformed the electoral landscape, allowing independent groups to have an outsized influence over the process.

It has now come to light that the IRS is drafting a regulation that will be more precise in defining what constitutes political activity.

At this time, it is not exactly clear what the IRS has in mind. It is somewhat troubling given recent allegations that the IRS targeted tea party groups in an attempt to delay approval a 501(c)4 tax-exempt organizations.

However, if the draft change is more than an attempt to define more precisely political activity, does not favor one side over the other, does not overly delay approval for groups to participate, and seeks to treat 501(c)4's the same as political parties, PACs, and 527 non-profit groups, the change will be a step in the right direction.

Political parties and PACs, including Super PACs, are subject to registration and disclosure with the Federal Election Commission (FEC). 527 committees are tax-exempt groups that raise money for political activities, including voter mobilization and issue advocacy. They disclose their activities to the IRS. Emily's List is an example of a 527 committee.

In recent years, 501(c)4 groups have had a field day with respect to their political activity. Unlike political parties, PACs, and 527 committees, they are not subject to contribution limits or disclosure. They often operate anonymously.

Moreover, because of this advantage, they have begun to assume the roles traditionally played by political parties.

Besides supporting or opposing candidates, these independent groups produce and air political ads, send direct mail to specially targeted groups and individuals, undertake voter mobilization efforts, polling, opposition research, and effectively use social media.

Not only is their fundraising prowess on the par with more accountable political parties, but is out distancing the political parties in many corners of the country.

In New Jersey, for example, the 2013 legislative and gubernatorial elections witnessed independent groups spending \$41 million to \$14 million by the political parties.

Because some of these groups were 501(c) 4 groups, at least \$11 million was spent with no disclosure of information about contributors or expenses.

Independent spending made a difference in the legislative election in particular, with these groups pinpointing their efforts in targeted districts.

It is not a stretch of the imagination that in the next gubernatorial and legislative elections that \$41 million figure will be more than eclipsed.

Hopefully, the IRS soon will draft fair regulations involving 501(c)4 groups that even the playing field with political parties by applying similar disclosure rules to all entities.

Regulatory activity that accomplishes the above yet does not inhibit any group or individual's right to participate in the electoral process will constitute positive reform.

The New Jersey legislature also needs to enact legislation that requires more disclosure by these groups when they participate in state, county and local campaigns.

Jeff Brindle is the Executive Director of the New Jersey Election Law Enforcement Commission (ELEC). The opinions presented here are his own and not necessarily those of the Commission.