

# New Nonprofit Congressional Probes

09.08.23 | Linda J. Rosenthal, JD



Washington, D.C. in the summer months is ordinarily hot, humid – and empty. Among those fleeing for several weeks are all 545 members of the U.S. Congress.

But during *this* year’s recess, some staffers remained on Capitol Hill, busy with the launch of two significant new nonprofit-sector investigations. The issues raised in these formal inquiries, both set in motion publicly in mid-August 2023, are among the most complex and controversial topics in modern federal tax-exemption law.

The first one in time, announced on August 7, 2023, is a bipartisan and historically cooperative Senate probe on the continual failure of too many nonprofit hospitals to meet the required minimal level of “community care.”

The second one is a production of the House Ways and Means Committee (GOP leadership only). Opened on August 14, 2023, it involves allegations of an alarming rise of “dark money” penetration into, and other improper uses of, 501(c)(3) and (4) organizations. While there is general agreement that there is a growing “dark money” problem in the nonprofit sphere, any consensus collapses at that point.

This post is an introduction and overview of each of these two new Congressional investigations, primarily through links to the key documents. For instance, we’ve included the official Congressional requests for information as well as selected responses along with third-party commentary and observations. Particularly in the “dark money” House investigation that set a response deadline of September 8th, there will likely be more activity even in the next few days.

## ***Nonprofit Hospitals***

The first-in-time probe begins with an [official request for information and assistance](#) from a bipartisan quartet of U.S. Senators, spearheaded primarily by Chuck Grassley (R-IA). He has long been

interested in the seemingly intractable problem of the nation's nonprofit hospitals providing far too little in required indigent care.

There have been repeated efforts over several years to prod the hospitals into meeting the commitment they implicitly accept in exchange for the valuable tax exemption. The Congressional outreach has also been directed to executive-branch officials in hopes that more and better oversight can lessen the problem.

There had been some successes before the pandemic hit. The new effort is to pick up where the earlier ones left off.

"Following reports that some nonprofit hospitals are using their tax status to restrict care and increase patient costs, U.S. Sens. Chuck Grassley (R-Iowa) and Elizabeth Warren (D-Mass.) called on the Treasury Inspector General for Tax Administration (TIGTA) and the Internal Revenue Service (IRS) to evaluate the hospitals' compliance with tax-exempt requirements and provide information on oversight efforts. Grassley and Warren are joined by Sens. Raphael Warnock (D-Ga.) and Bill Cassidy, M.D. (R-La.)." See *Bipartisan Senators Probe Potential Abuse Of Tax-Exempt Status By Nonprofit Hospitals* (August 9, 2023) *Press Release, Office of Sen. Charles Grassley*.

"We are alarmed," the lawmakers are quoting in the press release as saying, "by reports that despite their tax-exempt status, certain nonprofit hospitals may be taking advantage of [an] overly broad definition of 'community benefit' and engaging in practices that are not in the best interest of the patient." According to these Senators: "These practices – along with lax federal oversight – have allowed some nonprofit hospitals to avoid providing essential care in the community for those who need it most."

The August 7, 2023, information request is a single document including two related but distinct letters. The first is, jointly, to the Commissioner of Internal Revenue and to the head of the Tax Exempt and Government Entities (TE/GE) Division of the IRS. The second letter, which follows immediately after the close of the first one, is addressed to the Treasury Inspector General with specific oversight responsibilities on these matters. The differences in those two letters, both in the introductory narratives as well as in the questions presented for response, reflect the distinct responsibilities of each of the tax officials named.

The due date for each response is 60 days after the letter's (August 7th) date, although the Treasury officials may submit answers earlier than the deadline which is now just a few weeks away.

It's likely that the long-running collegiality among the Senators and the federal tax officials on this important topic will continue with this latest probe. There will, though, be considerable pushback by the organized hospital industry, by the individual nonprofit hospitals who continue to dispute that any problems exist (despite repeated media reports of billing horrors and outrages) and other stakeholders.

### ***The 501(c)(3) and (4) Politics Probe***

This second of the two Congressional investigations was launched on August 14, 2023, through a lengthy "Open Letter" from the House Ways & Means Committee, albeit drafted and signed *only* by

the GOP chairs of that committee and the Subcommittee on Oversight.

The title is: *Request for Information: Understanding and Examining the Political Activities of Tax Exempt Organizations under Section 501 of the Internal Revenue Code*. It is a comprehensive and heavily footnoted PDF document, including: background legal information, narratives of purpose and other commentary, a section of ten pointed questions, and requests for input, and attachments.

Addressed “to groups organized under Section 501(c)(3) or 501(c)(4), it is “an open letter ... “requesting information and input on existing rules and regulations governing them and foreign sources of funding for tax-exempt organizations and what, if any, policy changes Congress should consider.” See *Ways & Means Seeks Public Input on Tax-Exempt Organizations: Potential Violations of Rules on Political Activities, Inappropriate Use of Charitable Funds, & Rise in Foreign Sources of Funding* (August 14, 2023) *House Ways & Means Committee Press Release*.

It is also – apparently – just the first part of an “examination” by “The Committee on Ways and Means” that apparently will later include hearings. The purpose is to determine “whether entities that qualify as tax-exempt under Section 501 of the U.S. Code are abiding by the statutory and regulatory prohibitions against certain activities and whether foreign sources of funding are being funneled through such organizations to influence America’s elections.”

The deadline for comment was unusually tight: just two weeks. The original Labor Day cut-off was extended a few days through September 8, 2023. There have already been several formal responses submitted and available online along with commentary and observations by legal experts. More are expected to be made public in the coming days.

This probe is likely to be quite different from the cooperative effort underway in the Senate related to the nonprofit hospitals issue.

It’s not unfair to characterize this House of Representatives probe as partisan political theater; several of the distinguished respondents, some linked below, have pulled no punches in this regard.

While the official press release from the House Ways and Means Committee (majority) paints a benign picture of what’s planned, the official request – the “Open Letter,” is seriously compromised by its use of *only* Democratic or left-aligned (purported) examples of abuses and dark-money infiltration, when the true record is replete with credible evidence of right-wing and conservative instances.

The following blog posts by nonprofit law experts help set the stage – (at this still early point in what could become a long and messy spectacle) – to understand the issue and to correct the record:

- *Ways and Means Committee Requests Information on Nonprofit Political Campaign Intervention* (August 17, 2023) Gene Takagi, Esq., *NEO Law Blog*; see also *Extension: Responses to Ways and Means Committee Request for Information on Nonprofit Political Campaign Intervention* (September 7, 2023) Gene Takagi, Esq., NEO Law Group (includes full submission by five distinguished nonprofit law professors to Committee)
- *Congress to Examine Political Activities of Nonprofits* (August 17, 2023) Craig Engle, Esq., & Shira Helstrom, Esq., *ArentFoxSchiff*

- *House Ways and Means Committee Issues Request for Information Regarding Political Activities of Tax-Exempt Organizations* (September 1, 2023) Laura Butzel, Esq., *et al*, *Patterson Belknap Exempt Organization Alert*.

Through about September 7, there have already been several important and impressive responses to the House *Request for Information* from major heavy hitters from the nonprofit community and from the academic world. These respondents have approached the task of responding with seriousness and diligence, but without backing off, where needed, from what they see as their duty to correct various misunderstandings of law, and other statements and purported evidence.

See, for example:

- **National Council of Nonprofits** (September 5, 2023):

The president/CEO and the board chair of the nation's largest association of nonprofit organizations presented a comprehensive and heavily footnoted and otherwise supported *formal response*.

Notably, this NCN submission was addressed not just to the Republican committee and subcommittee chairs but also to the corresponding ranking members. "The National Council of Nonprofits appreciates this opportunity to respond to the ... "Chairs' letter" ... regarding perceived "political" activities of taxexempt, nonprofit organizations..."

Continuing with an appropriately robust and necessary pushback, NCN's top officials say they "... embrace this chance to highlight the core beliefs and activities of nonprofit organizations and to correct common misperceptions about the 'why' and 'how' of charitable operations." Further, they "... emphasize up front that as people deeply engaged in America's charitable nonprofits, [they] do not see systemic or widespread abuses suggested in the Chairs' letter. Still, [they] welcome the scrutiny and all efforts to root out bad actors seeking to politicize or exploit the charitable nonprofit sector."

See also:

- **Response by Tax-Exempt Organization Scholars to Request for Information** (September 1, 2023), reprinted in full with permission in the NEO Law Blog.

"Five of the most respected scholars of tax-exempt organizations" submitted a comprehensive and hard-hitting reaction and response to the House Request for Information. They are: Professors Ellen P. April, Roger Colinvaux, Brian Galle, Philip Hackney, and LLOYD Hitoshi Mayer.

Right off the bat, they respond forcefully. For instance, they "emphasize that in no case do the laws applicable to tax-exempt organizations forbid all political activity, a term almost without boundaries if 'political' means related to government. The tax law delineates among a wide array of advocacy or 'political' activities, some of which are limited, and others of which are not."

They also quickly dispel the "... widespread misapprehension that tax law requires section 501(c)(3) organizations to be nonpartisan as a general matter, that is, to avoid taking positions with respect to legislation and public policy issues that might consistently align with one party or another. That is simply not the case."

Elaborating on this point, they add: “Section 501(c)(3) organizations are required to abstain only from activities that support or oppose a candidate for public office. For lobbying (to the extent permitted) and for issue advocacy, section 501(c)(3) organizations are free to take positions that are partisan in the sense that they might as a practical matter favor one party or another. The ability of nonprofits to express their opinions on the issues of the day is crucial to ensuring the pluralism and diversity of viewpoints we prize as a society.”

These distinguished scholars continue in that vein, page after page, while also mentioning the points on which additional thought and clarification will be helpful. For example, they mention that “...[u]nquestionably, guidance is needed regarding the definition of campaign intervention permitted to tax-exempt organizations, especially with respect to section 501(c)(4) organizations. There is currently no official guidance as to the extent to which section 501(c)(4) organizations can engage in campaign intervention without violating the requirement that they primarily engage in social welfare. Neither is there guidance as to how to measure such activity, whether, for example, only by dollars spent or also by including such factors as volunteer time.”

While pointing out deficiencies and outright distortions and mistakes in the House majority’s information request, these five professors have been respectful of the process. Each has acknowledged that there is cause for concern in connection with improper political activities and infiltration of dark money into the nonprofit ecosystem that should be investigated.

This impressive tour-de-force is capped off with an attachment listing a staggering catalog of directly relevant scholarly articles by each of these experts in nonprofit law, concluding with an invitation “to contact any of us if you have any further questions.”

### ***Conclusion***

Stay tuned for additional links, as straggler responses become available, as well as status updates. There could be developments, with predictable fireworks, almost immediately in the House probe on political activity.

*–Linda J. Rosenthal, J.D., FPLG Information & Research Director*