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February 26, 2014

The Honorable Jacob J. Lew
Secretary of the Treasury
CC:PA:LPD:PR (REG-134417-13)
Room 5205
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

*Re: Comments in Response to Notice of Proposed Rulemaking REG-134417-13,
“Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political
Activities,” 78 Fed. Reg. 71,535 (Nov. 29, 2013)*

Dear Secretary Lew:

We are Members of the United States House of Representatives Committee on House Administration (“Committee”), and we hereby submit our personal comments on the Notice of Proposed Rulemaking (“Proposed Regulations”) titled “Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities,” published by the Internal Revenue Service (“IRS”) at 78 Fed. Reg. 71,535 (Nov. 29, 2013). The Committee on House Administration has jurisdiction over Federal elections. Even if we accept at face value that the Proposed Regulations are motivated by considerations of tax policy – a proposition doubted by many – there is no question that they will have a substantial effect on conduct related to elections and the Government’s ability to regulate that conduct. Simply put, the Proposed Regulations would, if adopted, enhance the Government’s ability to restrict speech critical of it and use that ability to influence the outcome of elections.

After careful consideration of the IRS’ proposal, we strongly urge the IRS not to adopt the Proposed Regulations. Rather than merely clarifying existing law, the Proposed Regulations would significantly expand the IRS’ role in political activity by enlarging the scope of what activities the IRS deems, or might deem, to be political and would make the IRS arbiter over whether specific speech by a certain group might disqualify it from tax-exempt status. The Proposed Regulations would only expand the IRS’ position as a regulator of political speech – a

position that has a troubled and troubling history for an agency with vast enforcement power controlled by the administration of a single political party.

Additionally, imposing a new set of regulations on political activity months before an election would give the appearance of a political motivation behind the rulemaking and would cause confusion for organizations that operated far into the election cycle based on expectations created by the existing rules. Therefore, any adopted regulations should take effect no earlier than January 1, 2015.

I. Background.

The Code exempts “organizations not organized for profit but operated exclusively for the promotion of social welfare” from taxation. 26 U.S.C. § 501(c)(4)(A) (“501(c)(4) organizations”). By regulation, the IRS has deemed an organization to be “operated exclusively for the promotion of social welfare” if it is “primarily engaged in promoting in some way the common good and general welfare of the people of the community,” meaning an organization “which is operated primarily for the purpose of bringing about civic betterments and social improvements.” 26 C.F.R. § 1.501(c)(4)-1(a)(2)(i). In 1959, the IRS adopted Treasury Regulation § 1.501(c)(4)-1(a)(2)(ii), which provides that the “promotion of social welfare does not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office.”

If adopted, the Proposed Regulations would:

1. Amend Treasury Regulation § 1.501(c)(4)-1(a)(2)(ii) to redefine the phrase “operated exclusively for the promotion of social welfare,” by replacing the phrase “participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office” with the phrase “candidate-related political activity”;
2. Define “candidate-related political activity” effectively to mean “political campaign activity per se, such as contributions to candidates and communications that expressly advocate for the election or defeat of a candidate,” as well as “certain activities that, because they occur close in time to an election or are election-related, have a greater potential to affect the outcome of an election”;
3. Define “candidate” to mean “an individual who identifies himself or is proposed by another for selection, nomination, election, or appointment to any public office or office in a political organization, or to be a Presidential or Vice-Presidential elector, whether or not the individual is ultimately selected, nominated, elected, or appointed,” and any officeholder who is the subject of a recall election, and also to include not only candidates for elected office, but also for appointments or confirmations to Executive Branch positions and judicial nominations;

4. Effectively define “express advocacy” more expansively than presently understood, to include communications expressing a view on the selection, nomination, or appointment of individuals, or on the election or defeat of one or more candidates or of candidates to a political party, in any form (including websites and other electronic media);
5. Define “candidate-related political activity” to include any “public communication” that is made within 60 days before a general election or 30 days before a primary election and that clearly identifies a candidate for public office or political party (if before a general election), and define “public communication” to mean a communication made using broadcast, newspaper, or Internet media that constitutes paid advertising and is intended to reach at least 500 people;
6. Define “candidate-related political activity” to include “specified election related activities,” including voter registration and get-out-the-vote drives, distribution of material prepared by or on behalf of a candidate or an organization described in Section 527 (hereafter, a “527 organization”); preparation and distribution of a voter guide and accompanying material that refers to a candidate or political party; and the hosting of an event within 30 days of an election or 60 days of a general election at which one or more candidates in such election appear as part of the program; and
7. Specify that the activities paid for or directed by a 501(c)(4) organization’s officers, directors, or employees acting in that capacity or volunteering under its direction; communications made as part of the program at an official function of the organization, and communications paid for or distributed by the organization will be attributed to that organization. In addition, the Proposed Regulations specify that material posted on a 501(c)(4) organization’s website may constitute candidate-related political activity.

Before turning to our specific concerns, it is important to note that these Proposed Regulations would further inject the IRS into the realm of political activity, an area in which it has little expertise and a history of susceptibility to abuse. The potential for abuse of authority to regulate political activity is the reason the Federal Election Commission (FEC) was structured so that no political party could control a majority of the Commission.¹ Whatever complaints have been leveled against the FEC, we are not aware of any case where a majority of the commissioners were shown to target a candidate or organization based on partisan bias.

In contrast, nearly every Presidential Administration since Franklin Roosevelt’s has been accused of using the IRS against domestic opponents. The Church Committee, formed by

¹ See 2 U.S.C. § 437C(a)(1) (providing that “[n]o more than 3 members of the Commission . . . may be affiliated with the same political party”); H. Rep. No. 94-917, at 3 (1976) (“[E]lection campaigns are the central expression of this country’s democratic ideal. It is therefore essential in this sensitive area that the system of administration and enforcement . . . does not provide room for partisan misuse . . .”).

Congress to investigate Federal domestic intelligence activities in the wake of Watergate, recounts in its 1976 report how the IRS targeted the Communist Party under President Eisenhower and numerous political opponents under President Kennedy.² Under President Kennedy, the IRS targeted then-candidate for governor Richard Nixon, and Nixon returned the favor when he became President by ordering an audit of Kennedy's former campaign manager.³ The Church Committee explains that, "[by] directing tax audits at individuals and groups solely because of their political beliefs, the [IRS] established a precedent for a far more elaborate program of targeting 'dissidents.'"⁴ More recently, the NAACP accused the IRS of politically-motivated harassment during the George W. Bush Administration.⁵

This is not the proper role of the IRS, and we share the views of then-Treasury Secretary George P. Shultz, who in 1973 testified before the House Committee on Ways & Means that:

[It is] essential both to our political processes and to the administration of the tax laws, that any rules adopted be clear rules so that we may carry forward the serious business of electing public officials and of collecting the revenue without injecting politics into the revenue system. Whatever solution is adopted, the objective, of course, must be to preserve the integrity and independence of our political system and its political parties. We urge that whatever rules you prescribe you adopt an approach that will minimize the involvement of the Internal Revenue Service in the affairs of our political system."⁶

All too often in its history, the IRS has been used by those who are in power as a political tool against those who are not.⁷ Of course we need not remind you of the most recent example, still under congressional investigation, where the IRS targeted 501(c)(4) organizations of exactly the type covered by the Proposed Regulations based on their political viewpoints.

In contrast to the successful record of the bipartisan FEC at avoiding regulatory decisions by the commissioners that are infected by partisan political goals, the IRS has a long history of exactly that. The last thing that should happen is to expand the scope of political activity subject to regulation by the IRS – precisely what the Proposed Regulations would do.

² See "Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, United States Senate: together with additional, supplemental, and separate views" at 53-54, 168 (April 26, 1976).

³ Robert F. Kennedy, Jr., "Obama and Nixon: A Historical Perspective," *Huffington Post* (May 20, 2013).

⁴ Final Report at 54.

⁵ Kelsey Snell, "IRS Targeted NAACP in 2004," *Politico* (May 13, 2013).

⁶ Hearings on General Tax Reform, Before the House Committee on Ways and Means, 93d Cong., 1st Sess., pt. 18, p. 6889 (1973) (statement of George P. Shultz, Treasury Secretary).

⁷ See Michael Scherer, "New IRS Scandal Echoes a Long History of Political Harassment," *Time* (May 14, 2013), available at: <http://swampland.time.com/2013/05/14/anger-over-irs-audits-of-conservatives-anchored-in-long-history-of-abuse/>.

II. The Proposed Regulations Could Leave Organizations With No Viable Nonprofit Status.

Broadening the scope of political activity so as to potentially exclude certain organizations from tax-exempt status under Section 501(c)(4) could have the perverse effect of driving those organizations into the shadows. By virtue of their Section 501(c)(4) status, such organizations are subject to oversight by the IRS with respect to their activities and provide information regarding such activities through Form 990. The Proposed Regulations, however, could transform at least some of these organizations into “tax orphans,” meaning that they would no longer qualify for either a 501(c)(4) or 527 status – and would have no other available tax-exempt status to operate within.

The Proposed Regulations seem to imply that organizations which no longer would qualify for exemption under Section 501(c)(4) might qualify as 527 organizations (and media commentary explicitly contemplates that outcome)⁸, but this is not necessarily true. It is not entirely clear at which point a 527 organization engaging in activities other than “exempt function” activities as defined in Section 527(e)(2) ceases to qualify as an organization described in Section 527.

For instance, an organization devoted to electing candidates who further its views on veterans’ health issues might “primarily” engage in “exempt function” activity as defined in Section 527(e)(2) during an election year by supporting the nomination or election of like-minded candidates, but then engage in some other social welfare activities (e.g., assisting disabled or needy veterans) in support of veterans the next year. Under the Proposed Regulations, it is not clear how an organization could do both, short of re-establishing a different tax-exempt status each year, which would be practically, logistically and administratively impossible.

The Proposed Regulations conspicuously do not define what amount of political activity would disqualify an organization from Section 501(c)(4) status. Therefore, an organization could engage in too little political activity for Section 527 status and too much for 501(c)(4) status.

Organizations falling into that gap, or concerned that they might, would likely have to conduct their activities as taxable non-profits, which are not subject to IRS oversight with respect to political activities or disclosure regarding such activities. Such a result is not consistent with rational and effective policy and surely is not what the IRS intends to happen.

If the IRS makes it impossible for organizations to act with flexibility and leaves them without any available tax-exempt status, it would at best add massively to the compliance costs of social welfare and political activity and at worst drive organizations away from both. Organizations

⁸ See, e.g., Editorial, “Change the Rules on Secret Money,” *The New York Times* (Feb. 18, 2014).

faced with these choices also may elect not to engage in political debate or commentary on the government altogether. By adding to the costs and risks of debate over what policies and candidates will best promote the nation's welfare, the Proposed Regulations have the potential to chill important speech. Even if that is not their intent, it is a grave consequence.

III. The Definition of “Candidate-Related Political Activity” in the Proposed Regulations is Ill-Conceived and Overbroad.

As described above, the Proposed Regulations would define “candidate-related political activity” broadly to include, among other activities, express advocacy, conduct of a voter registration drive, preparation of a voter guide, hosting an event at which one or more candidates are part of the program if within 60 days of a general election or 30 days of a primary, and any public communication, which is defined to include the mere act of an organization having a picture of a candidate somewhere on its website occurring within 60 days of a general election or 30 days of a primary. 78 Fed. Reg. 71,541.

In justifying its expansive terminology, the IRS states that it has “modified” concepts drawn from the federal election campaign laws “to reflect that section 501(c)(4) organizations may be involved in activities related to local or state elections (in addition to federal elections)” and that “candidates” exist at the state and local level, not just the Federal level regulated by the FEC. 78 Fed. Reg. 71,538.

With respect to both express advocacy and “public communications close in time to an election” (that is, “electioneering communications”), the IRS goes far beyond the scope of how those terms are commonly understood by defining those terms to include communications made via the Internet, including content posted on an organization's website. In comparison, for instance, the FEC expressly excludes Internet communications, apart from communications placed for a fee on another person's website, from its definition of “public communication,” 11 C.F.R. § 100.26, and with good reason. Simply put, a website is a passive form of communication in the sense that a viewer must affirmatively choose to visit the website. In contrast, the forms of “public communication” recognized by the FEC are all active in the sense that the responsible organization is actively disseminating the information to the public. Under these Proposed Regulations, the IRS could disqualify an organization such as the Sierra Club for tax-exempt status under Section 501(c)(4) if it simply had a picture of an incumbent candidate or a nominee for Secretary of Interior somewhere on its website within 60 days of a general election or 30 days of a primary.

Similarly, the IRS proposes to define “candidate” as “an individual who identifies himself or is proposed by another for selection, nomination, election, or appointment to any public office or office in a political organization, or to be a Presidential or Vice-Presidential elector, whether or not the individual is ultimately selected, nominated, elected, or appointed,” including “any

officeholder who is the subject of a recall election,” as well as “candidates for a broader range of offices (such as activities relating to the appointment or confirmation of executive branch officials and judicial nominees).” 78 Fed. Reg. at 71,538. This definition is so broad that it would include not only those individuals vying for elected office, but individuals who are not seeking elected office at all, including individuals whom *others* might think should be elected or appointed.

The proposed definition of “candidate” is unworkable and would reach individuals who clearly are not “candidates” under any common understanding of the term. For instance, the inclusion of Executive Branch and Judicial nominees within the term “candidate” means that an organization would be engaging in “candidate-related political activity” if it posted, or failed to take down, a picture of such an individual somewhere on the organization’s website within 60 days of a general election or 30 days of a primary election. There can be no rational basis for this timeframe, as Executive Branch and Judicial nominees by definition *are not candidates in any election occurring on a specific date*.

The term “candidate-related political activity” becomes even more troubling when one considers the IRS’ proposed inclusion of “election-related” activities in its definition. As proposed by the IRS, these would include actions that historically and commonly have been considered to be social welfare activities, such as nonpartisan voter registration drives, get-out-the-vote efforts, distribution of voter guides, and even holding an event at which one or more candidates will be present as part of the program within 60 days of a general election or 30 days of a primary.⁹ Under this proposal, a 501(c)(4) organization such as the Rotary Club would be conducting political activity, thereby jeopardizing its tax-exempt status, if it were to host a debate between two or more candidates or simply permit a judicial nominee to speak at an event.

IV. If Adopted, The Proposed Regulations Should Become Effective No Earlier Than January 1, 2015.

Given the recent scandal involving the IRS’ improper targeting of ideologically conservative groups, it is surprising and unfortunate that the IRS would choose this time to propose new regulations that would have the effect of significantly restricting the ability of 501(c)(4) organizations to engage in political activity. A cynical observer might conclude that the Administration is attempting to complete through regulation what began through a misguided or abusive administrative process: namely, to neutralize a class of tax-exempt organizations which individuals have turned to in recent years as vehicles for funding social welfare and other political activity questioning government policies.

⁹ In comparison, the FEC expressly excludes nonpartisan voter registration and get-out-the-vote efforts from its definition of “expenditure.” 11 C.F.R. § 100.133.

The 2014 election cycle is now more than half-way complete, and primary and general elections are mere months away. To make effective any new regulations before those elections would create confusion for these groups and give the appearance of changing the rules in the middle of the game. Therefore, in the event the IRS does adopt any of the Proposed Regulations, we urge the IRS to delay their respective effective dates until after the elections, and no sooner than January 1, 2015.

V. If the Existing Regulations Are To Be Amended, They Should Expand Rather Than Restrict the Role of Political Activity in “Social Welfare”.

The Proposed Regulations purport to provide more definitive rules with respect to “political activities related to candidates – rather than the existing, fact-intensive analysis – [] in applying the rules regarding qualification for tax-exempt status under section 501(c)(4).” 78 Fed. Reg. 71,536. To this end, the Proposed Regulations would amend Treasury Regulation § 1.501(c)(4)-1(a)(2)(ii) to replace the current reference to “direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office” with the phrase “direct or indirect candidate-related political activity.” 78 Fed. Reg. 71,537.

This proposal is rooted in the belief that social welfare activity does not include political activity. But one can think of few activities intended more clearly to promote the general welfare of the United States than engaging in the political process. Both the legislative history and the plain language of the statute itself support a view that political activity benefits the social welfare. If the IRS proposes to amend Treasury Regulation § 1.501(c)(4)-1(a)(2)(ii), it should be to expand rather than restrict the political activity permitted as part of the social welfare function.

A. Statutory Construction

The language of Section 501(c)(4) clearly demonstrates that political activity is a form of social welfare activity. As noted above, a 501(c)(4) organization is one that is “operated exclusively for the promotion of social welfare,” and the IRS has interpreted this to mean that such an organization must be “primarily engaged in promoting in some way the common good and general welfare of the people of the community.” 26 C.F.R. § 1.501(c)(4)-1(a)(2)(i). Though the statute defines neither social welfare nor general welfare, both are inextricably linked with the ability of citizens to engage in political activity.

Our Constitution contains two references to “general welfare”: (1) in the Preamble, which lists “promot[ing] the general Welfare” as a motivating factor in establishing the Constitution; and (2) Article 1, Section 8, which provides that “Congress shall have Power To [] provide for the common Defence and general Welfare of the United States” [sic]. Our Founding Fathers clearly understood that governance issues and engagement in the political process go hand-in-hand with the “general welfare” of our society.

This point is further demonstrated by even a cursory comparison of Sections 501(c)(4) and 501(c)(3). For 60 years, Congress has expressly forbidden Section 501(c)(3) organizations from participating or intervening in political campaigns. 26 U.S.C. § 501(c)(3). In contrast, it has added no such prohibitive language to Section 501(c)(4), even as it amended the statute in 1996 to prohibit the inurement of an organization's net earnings to private shareholders or individuals. 26 U.S.C. § 501(c)(4)(B). It is the IRS, not Congress, that has separated political activity from social welfare.

When Congress established a separate tax-exempt status for “political organizations” under Section 527, that action did not exclude political activity from the umbrella of social welfare activity. Congress created the Section 527 exemption after the IRS, having “[h]istorically [] not generally required the filing of income tax returns by political organizations,” issued several rulings taking the position that political organizations were subject to certain forms of taxes.¹⁰ Noting the “delicate balance between the need to protect the revenue and [] the need to encourage political activities which are the heart of the democratic process,” the Finance Committee explained that the legislation creating the Section 527 exemption would formally recognize “political organizations [] as tax-exempt organizations, since political activity (including the financing of political activity) as such is not a trade or business which is appropriately subject to tax.”¹¹ The Finance Committee clearly intended that Section 501(c)(4) organizations, like the new Section 527 organizations, would be permitted to engage in political activity, noting that “the bill generally treats these [501(c)(4)] organizations on an equal basis for tax purposes with political organizations.”¹²

In practice, 501(c)(4) organizations do not pay any tax if they have either net investment income or political activity of zero. A 501(c)(4) paying taxes on its political activity may, in order to reduce its tax payments, choose to form a 527 to perform that activity. However, not all organizations will be in that position and some that are may prefer not to take advantage of the 527 option. Nothing in the statute tells them they must move political activity to a 527 organization in order to preserve their 501(c)(4) status.

B. Legislative History

As the Proposed Regulations correctly state, the current Section 501(c)(4) exemption dates to the Tariff Act of 1913, 38 Stat. 114, which exempts from taxation “civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare.” When enacted, the term “social welfare” commonly would have been understood to include political activity. A 1913 dictionary defined “social” to mean “Of or pertaining to a society; relating to men living in society, or to the public as an aggregate body; as, social interest or concerns; social

¹⁰ S. Rep. No. 93-1357, at 25-26 (Dec. 16, 1974), *reprinted in* 1974 U.S.C.C.A.N. 7478, 7501-02.

¹¹ *Id.* at 26.

¹² *Id.* at 29.

pleasure; social benefits; social happiness; social duties; social phenomena.”¹³ It defined “welfare” to include “well-doing or well-being in any respect; the enjoyment of health and the common blessings of life; exemption from any evil or calamity; prosperity; happiness.”¹⁴ Political activity is clearly both “social”- and “welfare”-related under these definitions.

In 1924, the Treasury Department elaborated that social welfare means “purposes beneficial to the community as a whole” and generally, but not exclusively, includes “organizations engaged in promoting the welfare of mankind, other than [Section 501(c)(3) organizations].” *See* 78 Fed. Reg. 71535 (quoting Regulations 65, art. 519 (1924)). Political activity is entirely consistent with this language as a form of “social welfare” activity.

In 1954, Congress added language providing that Section 501(c)(3) organizations may not “intervene in [] any political campaign on behalf of any candidate for public office.” Revenue Act of 1954, 68A Stat. 163 § 501(c)(3) (Aug. 16, 1954). Congress did not provide similar statutory language prohibiting 501(c)(4) organizations from such activity. Moreover, in 1956 the IRS proposed regulations, which it later withdrew, to clarify the meaning of “social welfare,” and these Proposed Regulations did not suggest that political activity was inconsistent with the promotion of social welfare. *See* 21 Fed. Reg. 465 (Jan. 21, 1956).

VI. Request for Public Hearing.

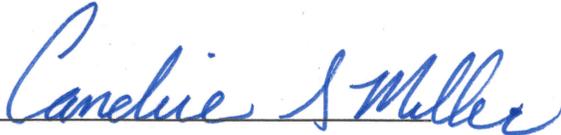
We hereby request a public hearing to discuss the Proposed Regulations and submitted comments.

¹³ *Webster’s Revised Unabridged Dictionary*, p. 1365 (Noah Porter, ed., G&C Merriam Co. (1913))

¹⁴ *Id.* at 1640

Thank you for your consideration of these comments.

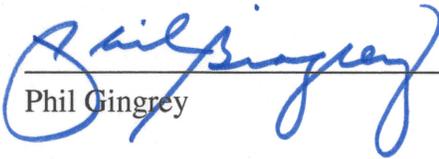
Sincerely Yours,



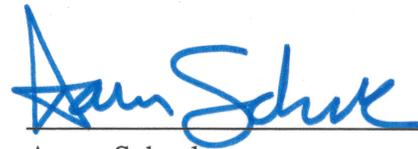
Candice S. Miller
Chairman



Gregg Harper



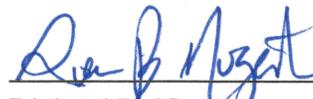
Phil Gingrey



Aaron Schock



Todd Rokita



Richard B. Nugent