The Heritage Foundation

LEGAL MEMORANDUM

No. 122 | MAY 12, 2014

The IRS Tries to Silence Political Speech Again—This Time with New Regulations

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Abstract

The IRS's proposed rules on "Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities" raise a host of serious concerns. The proposed rules ignore Supreme Court precedents and the Internal Revenue Code, fail to provide clear guidance to citizens and organizations attempting to comply with the Code and accompanying regulations, and threaten to restrict or violate the First Amendment rights of Americans. The IRS should not attempt to regulate in areas beyond its expertise and authority. Nor should it use the tax code as a substitute for campaign finance regulation under the Federal Election Campaign Act or attempt to circumvent Congress's decision in recent years not to pass highly controversial campaign finance legislation. The IRS should withdraw the notice of proposed rulemaking, and the proposed rules should never be implemented.

Americans are well aware of the targeting by the Internal Revenue Service (IRS or Service) of Tea Party and other conservative organizations applying for tax-exempt status under §501(c)(4) of the Internal Revenue Code (Code), which was revealed by the Treasury Inspector General for Tax Administration in May 2013.[1] Internal IRS e-mails and an investigation by the House Committee on Oversight and Government Reform reveal that the voluminous information requests to applicants, the multi-tiered review of their applications, and the long delays in granting exemptions were apparently intended to undermine the *Citizens United v. FEC*[2] decision by the U.S. Supreme Court and to squelch the political speech and political activity of conservative advocacy organizations.[3]

This paper, in its entirety, can be found at **http://report.heritage.org/lm122**

Produced by the Edwin Meese III Center for Legal and Judicial Studies

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Key Points

- The IRS's proposed new rules limiting the political speech and activity of §501(c)(4) organizations ignore Supreme Court precedents and the Internal Revenue Code.
- The proposed rules are confusing, fail to provide clear guidance, and appear to be an attempt to implement the "inappropriate criteria" used by the IRS to target Tea Party and other conservative organizations applying for tax-exempt status.
- The IRS rules would severely restrict or violate the First Amendment rights of Americans.
- They would undermine and interfere with the system of campaign finance laws and regulations established by Congress and the Federal Election Commission.
- The rules would embroil the IRS in an area in which it lacks both professional expertise and the structure and safeguards necessary to ensure that the agency is not discriminating against organizations based on their political beliefs and activities.
- The proposed rules should be withdrawn by the IRS and not adopted.

The IRS now has taken a regulatory initiative that threatens to burden the exercise of First Amendment rights by such tax-exempt organizations. On November 29, 2013, it released a notice of proposed rulemaking (NPRM) on "Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities," which would in essence implement the "inappropriate criteria" that the IRS used in its targeting scheme.[4] These proposed new rules would undermine and interfere with the system of campaign finance laws and regulations established by Congress and the Federal Election Commission (FEC), confuse regulated entities, and embroil the IRS in an area in which it lacks both professional expertise and the structure and safeguards necessary to assure the American people that their government will not discriminate against them on the basis of their political beliefs and activities.[5]

The IRS lacks the statutory authority to restrict the political activity of §501(c)(4) tax-exempt organizations and makes a fundamental error in claiming that "the promotion of social welfare," which is the stated purpose of organizations qualified under §501(c)(4), does not encompass political speech and political activity, particularly when such activity is not connected to any particular candidate. The changes proposed in the NPRM would seriously undermine the First Amendment rights and constitutional protections for §501(c)(4) organizations and their members as outlined by the Supreme Court in *Buckley v. Valeo*[6] and subsequent decisions, particularly the recent case of *Citizens United*.

By February 27, 2014, the deadline for public comments, the IRS had received more than 150,000 comments—the vast majority of them negative—which is a record number for an IRS rulemaking. In fact, according to IRS Commissioner John Koskinen, this was more than double the number of public comments that the Treasury Department and the IRS had received for all of their "draft proposals over the last seven years."[7]

According to Koskinen, the time the IRS will need "to sort through all those comments, hold a public hearing, possibly repropose a draft regulation and get more public comments" makes it "unlikely" that the IRS will be able to implement the new regulation before the end of 2014. However, this NPRM should be withdrawn entirely by the IRS, and the proposed rules should *never* be implemented.

The Rules Interfere with Congress's Statutory Scheme for Regulation and Are Beyond the Service's Expertise

Under the Federal Election Campaign Act of 1971 (FECA) as amended, Congress vested the FEC with exclusive jurisdiction for the civil enforcement of the federal election laws and for the effectuation of policy thereunder.[8] While this obviously does not preclude the IRS from issuing necessary regulations pursuant to the Code, it is a warning that Congress did not intend for other federal agencies, including the IRS, to attempt to stretch their regulatory authority by formulating policy to remedy what they perceive as flaws in the campaign finance system.

The campaign finance system is complex enough that a Supreme Court Justice recently noted, "this campaign finance law is so intricate that I can't fig-

1. *Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review*, Treasury Inspector General for Tax Administration, Ref. No. 2013-10-053 (May 14, 2013).
2. 558 U.S. 310 (2010).
3. *See, e.g.*, Staff of H. Comm. on Oversight and Gov't Reform, 113th Cong., Rep. on Lois Lerner's Involvement in the IRS Targeting of Tax-Eexempt Organizations (Mar. 11, 2014); Staff of H. Comm. on Oversight and Gov't Reform, 113th Cong., Rep. on Debunking the Myth that the IRS Targeted Progressives: How the IRS and Congressional Democrats Misled America about Disparate Treatment (Apr. 7, 2014).
4. 78 Fed. Reg. 71535 (Nov. 29, 2013).
5. This paper is based on comments filed with the IRS on February 27, 2014, by the author and seven other former commissioners of the FEC including Lee Ann Elliott, Thomas J. Josefiak, David M. Mason, Don McGahn, Bradley A. Smith, Michael E. Toner, and Darryl R. Wold.
6. 424 U.S. 1 (1976).
7. *Prepared Remarks of Commissioner of Internal Revenue Service John Koskinen Before the National Press Club* (April 2, 2014), available at http://www.irs.gov/uac/Newsroom/Prepared-Remarks-of-Commissioner-of-Internal-Revenue-Service-John-Koskinen-before-the-National-Press-Club-2014.
8. 2 U.S.C. §437c (b).

ure it out."[9] One commentator has suggested that campaign finance law is "so completely opaque that only six commissioners of the FEC and maybe a dozen other lawyers actually understand it."[10]

The inappropriateness of the Service regulating in this area and its lack of necessary expertise are illustrated by one part of the NPRM that proposes a regulatory scheme that is almost identical to a provision of federal campaign finance law that the Supreme Court *declared unconstitutional* in *Citizens United*. This lack of agency expertise is further reflected in the substantive errors made throughout the NPRM.

The Service Lacks Statutory Authority to Restrict Political Activity by §501(c)(4) Entities

To qualify for tax-exempt status under 26 U.S.C. §501(c)(4), a nonprofit organization must be "operated exclusively for the promotion of social welfare." The IRS's regulations have long stated that "[t]he 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."[11] The regulations provide, however, that §501(c)(4) organizations may participate in political campaigns as long as such participation does not constitute the "primary purpose" of the organization.[12]

The practical effect, then, is that for well over half a century, the IRS's regulations have recognized that §501(c)(4) organizations can lawfully and appropriately engage in substantial levels of political activity—as long as it is less than 50 percent of the organization's activities. In contrast, §501(c)(3) of the Code completely prohibits charitable organizations from participating or intervening in political campaigns on behalf of or in opposition to candidates for public office. *No such prohibition exists in §501(c)(4) of the Code.*

When Congress imposed a specific restriction on political activities in one paragraph of §501(c) but very pointedly omitted any such restriction in the very next paragraph, Congress is presumed to have intended the omission, as recognized in the well-established canon of statutory construction *expressio unius est exclusio alterius* ("the express mention of one thing excludes all others").[13] Issuance of a regulation by the IRS imposing a political restriction on §501(c)(4) organizations when Congress has spoken directly on the issue by placing such a restriction on §501(c)(3) organizations *but not* on §501(c)(4) organizations is contrary to congressional intent.[14]

When enacting §501(c)(4), Congress did not define "social welfare." However, in a democracy, political involvement and participation are certainly within the definitions of "social welfare." This is particularly so when Congress, in the statutory section immediately preceding, expressly prohibited other types of organizations from engaging in political activity.[15]

9. *McCutcheon v. Federal Election Commission*, 572 U.S. ___ (2014), Oct. 8, 2013 oral argument transcript at 17 (comments of Justice Scalia).
10. Peter Robinson, *Playing Hardball with Soft Money: Is Campaign Finance Reform Constitutional*? Uncommon Knowledge (July 30, 2003) (comments of Peter Robinson, attributed to Ben Ginsburg), available at http://www.hoover.org/multimedia/uncommon-knowledge/27108.
11. 26 CFR §1.501(c)(4)-1(a)(2)(ii).
12. *See* IRS Revenue Ruling 81-95, 1981 WL 166125 (1981) ("Since the organization's primary activities promote social welfare, its lawful participation or intervention in political campaigns on behalf of or in opposition to candidates for public office will not adversely affect its exempt status under section 501(c)(4) of the Code. Further this organization will be subject to the tax imposed by section 527 on any of its expenditures for political activities that come within the meaning of section 527(e)(2).").
13. *See, e.g.*, *Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion," quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)).
14. *See Entergy Corporation v. Riverkeeper, Inc.*, 556 U.S. 208 n. 4 (2009).
15. Indeed, if §501(c)(4) prohibited all political activities, as some have argued*, see, e.g.*, Citizens for Responsibility and Ethics in Washington, *Gill v. Department of Treasury Fact Sheet,* May 17, 2013, available at http://www.citizensforethics.org/page/-/PDFs/Legal/CREW%20vs.%20IRS/5-17-13_CREW_IRS_Lawsuit_Fact_Sheet.pdf, many organizations would become "orphans" under the tax code. They would no longer qualify under §501(c)(4), nor would they qualify as "political organizations" under 26 U.S.C. §527, because they would not be "organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures" as required by §527. The only other option would be to treat such organizations like the Sierra Club, the Planned Parenthood Action Fund, and the League of Women Voters as for-profit businesses, a result clearly not contemplated by Congress.

Existing IRS regulations defining "social welfare" for the purposes of §501(c)(4) begin and end with these provisions: "An organization is 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" and "[a]n organization embraced within this section is one which is operated primarily for the purpose of bringing about civic betterments and social improvements."[16]

If the IRS were to define "social welfare" more narrowly by creating a list of activities that qualified for the exemption, it would risk running afoul of the First Amendment. Searching inquiries into whether or not an organization's views and activities promote "social welfare" would most likely entail having the IRS engage in viewpoint discrimination. As Supreme Court Justice Robert H. Jackson once noted: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[17]

If the proposed rules become law, the regulations would turn IRS officers into arbiters of "social welfare," passing judgment on what is and is not in the best interests of the people. In our constitutional republic, such judgments are left to the people themselves.

Federal court cases defining "social welfare" have limited their analysis to whether the relevant activities are in some sense available to the public without attempting to define whether the activities subjectively promote "social welfare." In 1964, for example, the Court of Appeals for the Second Circuit held that providing a free library on socialism, communism, and the labor movement was exempt activity.[18] Some might contend that providing such a library is manifestly contrary to the social welfare; nevertheless, it is beyond the ken of any court or agency to pass judgment on such issues.

Promoting the common good and general welfare of the people for the purpose of bringing about civic betterment and social improvement must include advocacy in the election process. This is particularly true given the broad and extensive scope of modern government. In today's America, promoting "civic betterment and social improvement" is almost impossible without interacting with and attempting to influence government officials and legislators, as well as promoting the election of candidates with the principles and positions on issues that particular organizations believe are important to achieving their goals for promoting "social welfare."

By manipulating the definition of "social welfare" to exclude participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office or to exclude candidate-related political activity, the IRS is trying to impose political restrictions as a condition of receiving tax-exempt status as a §501(c)(4) organization *in direct conflict with* the decision by Congress in enacting §501(c)(4) *not* to impose political restrictions as such a condition.

The Proposed Rules Conflict with Section 527

The structure and specific provisions of §527 of the Code that govern political organizations prohibit the IRS from adopting restrictions on "candidate-related political activity" by §501(c)(4) entities.

Although entirely unmentioned by the IRS in the NPRM, the controversy over political activity by nonprofit organizations is wholly focused on whether (and which) organizations should be required to disclose the identity of their donors in publicly available reports. There is no question about whether nonprofit entities may engage in political activity; §527 explicitly *approves* political activity by nonprofit organizations. The material question is whether organizations conducting certain types and amounts of political activity are properly characterized under §501(c)(4) (or some other subdivision of §501(c)) or under §527. This distinction is important because, in contrast to §527 political organizations, §501(c)(4) organizations are not required to disclose their donors.

The IRS's attempt to exclude certain types of political activity from the definition of "social wel-

16. 26 CFR §1.501(c)(4)-1(a)(2)(i).

17. *West Virginia State Board of Educ. v. Barnette*, 319 U.S. 624 (1943).

18. *People's Educ. Camp Soc. Inc. v. C.I.R.*, 331 F.2d 923 (2nd Cir. 1964).

fare" is simply a backdoor method of expanding the definition of §527 exempt function activities. That approach cannot be squared with the plain meaning of the statute.

Section 527(e)(2) defines an "exempt function" for political organizations as "the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice-Presidential electors...." Pursuant to §527(e)(1), only entities "organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for [a §527(e)(2)] exempt function"[19] are required to register as a "political organization" and to disclose receipts and disbursements to the public. Section 527 approves of §527 exempt function activity by §501(c)(4) exempt organizations so long as it is not their primary purpose and is not activity subject to a tax (§527 organizations are subject to tax only on gross income derived from nonexempt functions).[20]

Congress has addressed what constitutes political activity by exempt organizations in 26 U.S.C. §527 and has defined the consequences of engaging in such activity as the primary purpose of an organization (public disclosure). If the IRS wishes to mandate public disclosure of donors and finances due to political activity—other than §527 exempt function activity or as a consequence of activity that is not an organization's primary purpose—then the IRS must amend the §527 regulations *directly* (to the extent it has authority to do so consistent with the statute's structure and text).

The IRS cannot simply import the proposed definition of "candidate-related political activity" in the NPRM into §527 because the proposed definition lacks the "purpose of influencing" limitation contained in §527(e)(2). Nonpartisan voter registration drives, candidate forums, and communications about issues merely referring to candidates or political parties may all be conducted without any "purpose of influencing" an election.

The NPRM proposes a new definition of political activity, unburdened by statutory warrant, because using statutorily defined terms would plainly foreclose the fundamental though unmentioned objective of the NPRM: requiring §501(c)(4) tax-exempt organizations to disclose their finances to the public as a result of political activity other than that defined in §527. Requiring such public disclosure would transform entities that do not engage in §527 exempt function activity as their primary purpose (if at all) into §527 political organizations—a result that is flatly foreclosed by the statute.

The Proposed Rules Interfere with the Congressionally Approved System for Regulating Campaign Finance

Although §501(c)(4) does not impose—and the Secretary of the Treasury by himself lacks authority to impose—political restrictions as a condition of tax exemption for a §501(c)(4) organization, such an organization remains subject to FECA and the regulations promulgated by the FEC, as well as state laws governing political activities. The NPRM contains proposed rules that conflict with FEC regulations on the definition of political activity, which could lead to great confusion and place organizations under conflicting federal directives.

As noted above, FECA grants the FEC "exclusive jurisdiction" for the civil enforcement of the federal election laws and for the formulation of policy thereunder.[21] The NPRM states that it is being undertaken at this time because "[r]ecently, increased attention has been focused on potential political campaign intervention by section 501(c)(4) organizations." Conspicuously absent from the NPRM is any concern about revenue collection for the government. Indeed, every indication points to the conclusion that this rulemaking is not an attempt to clarify a matter of tax administration or to collect previously uncollected tax revenue, but an attempt to impose new restrictions on political speech in response to pressure from a single political party.

Numerous political officials have pressured the IRS to impose new restrictions on §501(c)(4) entities. They include President Barack Obama, who publicly accused conservative §501(c)(4) organizations of "posing as not-for-profit, social welfare and

19. 26 U.S.C. §527(e)(1).

20. *See* 26 U.S.C. §527(f); Erika Lunder, *Political Organizations Under Section 527 of the Internal Revenue Code*, CRS Report for Congress, No. RS21716 (Jan. 11, 2005).

21. 2 U.S.C. §437c(b).

trade groups" and called them "a problem for democracy" and a "threat to our democracy." [22] He was joined by Senator Max Baucus (D–MT), chairman of the Senate Finance Committee, as well as Senators Michael Bennet (D–CO), Al Franken (D–MN), Charles Schumer (D–NY), Sheldon Whitehouse (D–RI), Jeff Merkley (D–OR), Jeanne Shaheen (D–NH), Tom Udall (D–NM), and Dick Durbin (D–IL), who demanded that the IRS investigate conservative §501(c)(4) organizations.[23]

On April 9, 2013, Senator Whitehouse even held a hearing of the Senate Judiciary Subcommittee on Crime and Terrorism on the activities of nonprofits. He falsely accused them of violating federal laws and berated Patricia Haynes, Deputy Chief of Criminal Investigations at the IRS, for not prosecuting conservative organizations. He called the IRS "toothless" in its regulation of §501(c)(4) organizations.[24]

This political pressure on the IRS occurred as it became increasingly apparent that the FEC, the Federal Communications Commission, and the Securities and Exchange Commission would not stretch their regulatory authority in the face of political pressure and, most important, as Congress repeatedly rejected efforts to enact new restrictions on §501(c)(4) organizations, such as those in the DISCLOSE Act.[25]

There are important reasons why Congress chose to concentrate civil regulation of the federal election laws in a single agency—the FEC. The first is greater coherence in the law and, correspondingly, easier public understanding and compliance. A major source of public confusion over campaign finance laws has been the IRS's failure to bring its definition of political "expenditure" into conformance with the Supreme Court decision in *Buckley v. Valeo*, which adopted the "express advocacy" standard for determining political spending.

A second concern is expertise in the operation of campaigns and political money and in the complex area of constitutional law surrounding the regulation of money in politics. As this NPRM demonstrates, the IRS is ill-prepared to undertake political regulation. In February, IRS Commissioner Koskinen testified before the House Appropriations Committee that the IRS budget has been reduced by $900 million, causing the Service to reduce staffing by 10,000 employees. He further added that the staff shortage would hinder efforts to collect revenue.[26] It seems remarkable, then, that the IRS is devoting substantial resources and staff to changing a 55-year-old regulation in a way that will drag the IRS into an area of law in which it lacks expertise.

Third, the IRS lacks the type of safeguards that Congress put in place to assure citizens that campaign finance regulation would not be used to stifle political opposition to the party in power. Specifically, the FEC is an independent agency and, unlike Treasury and the IRS, not directly accountable to the party controlling the White House. Additionally, the FEC has a bipartisan makeup, assuring public confidence that its decisions are based on the legal and factual merits rather than on partisan or ideological considerations. The IRS lacks both of these important institutional safeguards.

The dangers that this creates for IRS involvement in the political process should be obvious in light of the Inspector General's report of May 2013 and the ensuing congressional investigation. Whether or not IRS personnel acted contrary to laws or ethical norms or targeted particular ideologies, it should be apparent that the IRS's status within the Treasury Department, as part of the Obama Administration and as an agency controlled by a single political party, will leave any political involvement subject to claims that the Service is being misused for partisan purposes.

22. Kimberley A. Strassel, *An IRS Political Timeline*, Wall St. J. (June 6, 2013).

23. Letter from Sen. Max Baucus to IRS Commissioner Douglas H. Shulman (Sept. 28, 2010); Letter from Senators Michael Bennet, Al Franken, Chuck Schumer, Sheldon Whitehouse, Jeff Merkley, Jeanne Shaheen, and Tom Udall to IRS Commissioner Douglas H. Shulman (Feb. 16, 2012); Letter from Sen. Dick Durbin to IRS Commissioner Douglas H. Shulman (Oct. 11, 2010).

24. Tarini Parti and Byron Tau, *DOJ, IRS Tight-Lipped on Campaign Finance Probes*, Politico (April 9, 2013); available at http://www.politico.com/story/2013/04/doj-irs-tight-lipped-on-campaign-finance-probes-89816.html. The full hearing may be viewed at http://www.senate.gov/isvp/?comm=judiciary&type=live&filename=judiciary040913.

25. S. 3628, H.R. 5175, Democracy Is Strengthened by Casting Light on Spending in Elections Act. This bill was defeated after a cloture vote failed in 2010.

26. Diane Freda, *Koskinen Dismisses Calls to Withdraw Proposed Rules on 501(c)(4) Activities*, Bloomberg BNA (Feb. 6, 2014); Written Testimony of John A. Koskinen Before the House Appropriations Committee, Subcommittee on Financial Services and General Government on the State of the IRS (Feb. 26, 2014).

This perception is entirely natural because the IRS *has* been used for such inappropriate purposes in the past.[27] Revenue collection in the United States relies on voluntary compliance. These proposed rules, which would drag the IRS into partisan politics (and indeed have already done so), seriously threaten the credibility of the IRS as a nonpartisan, politically disinterested agency—a reputation essential to its mission.

Additionally, Congress created a detailed enforcement process and advisory opinion process at the FEC. The FEC advisory opinion process, in particular, is designed to provide advice to speakers on a timely basis and with a certitude that is lacking in IRS procedures.[28] There is no mechanism at all that would enable the IRS to provide such advice on a timely basis. This is particularly important given that, in the field of campaign finance, the courts have specifically noted the harms of delayed and intrusive governmental investigations.[29]

Inappropriate Definition of "Candidates" and "Candidate-Related Political Activity"

Beyond these structural concerns, the specifics of the NPRM raise many significant problems and demonstrate that the IRS is ill-equipped to take on the role of political arbiter that it seems so eager to assume.

A most basic problem is the term "candidate" in the proposed regulation, which includes both "an individual who publicly offers himself" as a candidate and anyone who is "proposed by another" for nomination or appointment to office.

Making this regulation dependent on whether or not someone "publicly offers" himself for office will lead to great uncertainty and confusion since there is no definition of what constitutes a public offering. It would put §501(c)(4) organizations in the difficult position of having to determine whether or not someone is a candidate. If an individual said publicly that he was "considering" whether to run for office, would that fit the definition? If a newspaper reported that an individual had spent a certain amount of money travelling to different areas to speak to key decision makers about whether or not to run for office, would that be a "public offering"?

The proposed rules do not specify. It would be a serious mistake for the IRS to propose a regulation that would invite argument and debate about whether or not an individual has "offered" himself publicly as a candidate. Such a regulation would also sharply fail to meet the NPRM's stated goal of trying to implement "clearer definitions" and avoid fact-intensive inquiries.

The definition of "candidate" should follow a bright-line test tied to when an individual is easily identified as an actual candidate, such as when he files a Statement of Candidacy with the FEC (FEC Form 2) or files required candidate qualification documents with state election officials. It should be noted that the FEC has a considerable body of law addressing the thorny issues of when a person becomes a candidate.

The inclusion of anyone proposed by a third party as a candidate is also completely impractical and a recipe for mischief. Under the IRS's proposed definition, an individual who is not a candidate could be considered a candidate for federal tax purposes without even knowing it simply because someone else publicly proposed that the individual be elected to an office. Someone could be considered a candidate even though he or she is not a candidate under FEC regulations or applicable state election law. If a third party wanted to cause political difficulties or other problems for a particular individual, the third party could publicly propose the individual for election simply to cause §501(c)(4) organizations to distance themselves from the named individual due to IRS compliance concerns. The IRS-proposed definition does not even provide an opt-out for the proposed candidate to avoid the consequences of being involuntarily named as a candidate.

This definition would force §501(c)(4) organizations, in order to avoid a possible violation of the IRS rule on so-called candidates, to monitor all election and political news for statements made by people proposing that individuals be elected to office. This

27. Elizabeth MacDonald, *The Kennedys and the IRS,* Wall St. J. (Jan. 29, 1997); Laura B. Chisolm, *Exempt Organization Advocacy: Matching the Rules to the Rationales*, 63 In. L.J. 201 (Spring 1988).

28. *See* 2 U.S.C. §437f. The FEC must reply within 60 days to a request for an advisory opinion and within 20 days to a candidate in the 60-day period prior to the election.

29. *See, e.g.*, *Federal Election Commission v. Wisconsin Right to Life*, 551 U.S. 449, 473-474 (2007).

would impose an unwarranted and excessive burden on such organizations.

The proposed IRS regulation also widens the term "candidate" far beyond its accepted meaning in the political context and applicable federal law. Under the proposed regulation, a candidate would include not just individuals running for elective office, but also anyone nominated or selected for any "public office." Thus, the IRS definition would include presidential nominees to any Senate-confirmed positions in the executive or judicial branches as well as gubernatorial nominations or appointments to similar positions at the state level. This is at odds with the definition of a federal candidate in federal campaign finance law as "an individual who seeks nomination for election, or election, to Federal office."[30] Nominees to the judicial and executive branches who do not need to stand for election are clearly *not* "candidates."

Yet under the IRS definition, if a §501(c)(4) organization criticized or supported the President's nominees to any of the thousands of available positions within the federal government, the organization would be engaged in "candidate-related political activity." Many of these nominees fill crucial positions that have great power and authority over a host of government actions, regulations, and funds that fundamentally affect social issues (and thus social welfare). The proposed regulation would, in essence, prevent or severely restrict the ability of §501(c)(4) organizations to speak or provide advice on such nominations. In fact, the proposed regulation may very well be unconstitutional because it would also limit the ability of any President to obtain such advice from §501(c)(4) organizations.[31]

The proposed regulation contains additional deficiencies. For example, it would limit comments on a judicial nominee within 30 days of a primary election. But where, geographically, is a judicial nominee a candidate? Presumably, a judicial nominee is a candidate nationally, meaning that, beginning on February 2 (30 days before the Texas primary on March 4, 2014) through Election Day in November, no organization could make *any* public communications naming a judicial nominee (including, for example, simply reporting on a case on which the nominee has ruled while serving as a judge on a lower court) without jeopardizing the organization's nonprofit status. That is an absurd result.

The proposed IRS definition also invades the private sphere in an unprecedented fashion when it widens the term "candidate" to include an individual who is seeking to serve in office in a political organization such as the Democratic National Committee or the Republican National Committee. The IRS has no basis for interfering in communications between a §501(c)(4) organization and a political party organization over who is or is not appropriate to serve as an officer of the political party.

The proposed IRS regulation gives too broad a definition to the term "clearly identified" candidate, since it includes merely providing the name of the candidate, his photograph, or even just his title such "the Mayor" or "your Congressman." The definition of "clearly identified" candidate should reach only those public communications that *expressly* identify an individual in the context of the individual's candidacy. Simply introducing a Member of Congress at an event as "Congressman Smith" does not constitute election-related activity. Again, FECA requires that communications be intended to influence an election, and the Supreme Court made clear in *Buckley* that a narrow definition of the phrase is constitutionally required to prevent overbreadth issues.

Candidates should be able to appear at events sponsored by §501(c)(4) organizations in a noncandidate capacity. The IRS itself previously recognized this when it held in a Revenue Ruling that individuals who happen to be candidates may appropriately appear at events sponsored by §501(c)(3) organizations in a noncandidate capacity.[32] Similarly, a person who happens to be a candidate should be able to appear at the events of §501(c)(4) organizations in a noncandidate capacity.

The mere appearance of an individual at an event should not automatically be construed as "candidate-related" activity by a "clearly identified" candidate unless the event specifically states a connection between the individual and the individual's candidacy. If an organization invites Senator Smith

30. 2 U.S.C. § 431(2).

31. *See In re Cheney*, 406 F.3d 723, 728 (D.C. Cir. 2005) ("In making decisions on personnel and policy, and in formulating legislative proposals, the President must be free to seek confidential information from many sources, both inside the government and outside.").

32. Revenue Ruling 2007-41, 2007 WL 1576989 (June 18, 2007).

to speak on an issue such as environmental regulation, the fact that Senator Smith is also a candidate for reelection should not trigger IRS scrutiny unless Senator Smith is specifically identified by the organization as a candidate for reelection in its publicity and communications about the event.

Similarly, a §501(c)(4) organization should be free to discuss and publish the legislative activities and record of any elected public officeholder, such as by listing an officeholder's votes in a legislature to demonstrate the extent to which those votes reflect agreement or disagreement with the organization's principles. Yet the proposed IRS regulation would consider the "preparation or distribution of a voter guide that refers to one or more clearly identified candidates" as "candidate-related political activity."

Such a voter guide does not necessarily connect an officeholder to an election campaign. It simply rates the positions of officeholders on various issues. Implementing such a regulation would require organizations to censor and purge from their websites any discussion of the positions taken by public officeholders on issues of importance to the organizations if the officeholders are running for reelection. This would directly violate the First Amendment rights of §501(c)(4) organizations and their members to engage in political speech.

The proposed NPRM considers "candidate-related political activity" to include communications that do not expressly advocate for or against specific candidates if those communications are "susceptible to no reasonable interpretation other than a call for or against the selection, nomination, election, or appointment of one or more candidates of a political party." But such broad language is open to wide interpretation and disagreement on whether particular language can reasonably be interpreted to be the equivalent of a direct call for electoral action for or against a particular candidate. Federal courts have repeatedly rejected FEC efforts to use such an amorphous definition as unconstitutional.[33]

The IRS appears to have drawn this language from past FEC rules. However, the complexity of this regulation—which, as the Supreme Court pointed out, was "a two-part, 11-factor balancing test"[34]—and the difficulty of determining whether a communication is "susceptible of no reasonable interpretation" other than as the equivalent of express advocacy caused the Supreme Court to conclude that this restriction was a prior restraint that violated the First Amendment. The IRS seeks, in essence, to implement its own version of this prior restraint in violation of the First Amendment.

The *only* type of activity and communication that should be considered "candidate-related political activity" is *express* advocacy on behalf of or in opposition to clearly identified candidates: advocacy that directly and explicitly asks individuals to vote for or against candidates running for election to federal, state, or local offices—i.e., individuals who are expressly recognized as candidates by applicable federal or state law. This standard would harmonize the IRS definition with what the Supreme Court has constitutionally mandated under FECA.

Unconstitutional Electioneering Communications Proposal

The proposed NPRM would include in the definition of "candidate-related political activity" any "public communication...within 30 days of a primary election or 60 days of a general election that refers to one or more clearly identified candidates in that election or, in the case of general election, refers to one or more political parties represented in that election."

In *Citizens United*, the Supreme Court struck down an almost identical federal campaign finance statutory provision that prohibited for-profit and nonprofit corporations and labor unions from using their general treasury funds to make a "broadcast, cable, or satellite communication" within 30 days of a primary election or 60 days of a general election that referred to a clearly identified candidate for federal office.[35] The Court found "no basis for the

33. *See, e.g., Virginia Society for Human Life, Inc. v. FEC*, 263 F.3d 379 (4th Cir. 2001) (Finding 11 CFR §100.22 unconstitutional); *Maine Right to Life Committee v. FEC.*, 914 F.Supp. 8 (D.Me. 1995), *aff'd per curiam*, 98 F.3d 1 (1st Cir. 1996), *cert. denied*, 118 S.Ct. 51 (1997); *FEC v. Christian Action Network*, 894 F.Supp. 946 (W.D. Va. 1995), *aff'd* 92 F.3d 1178 (4th Cir. 1997)(unpublished); *Right to Life of Duchess Co., Inc. v. FEC*, 6 F.Supp. 2d 248 (S.D. N.Y. 1998).

34. *Citizens United v. FEC*, 130 S.Ct. at 895.

35. 2 U.S.C. §§ 434(f)(3)(A) and 441b(b)(2).

proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers."[36]

The Court concluded that "[a]n outright ban on corporate political speech during the critical pre-election period" was clearly unconstitutional as a violation of the First Amendment's guarantee of freedom of speech.[37] The government was "suppressing the speech of manifold corporations, both for-profit *and nonprofit*," preventing "their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests."[38]

When the Supreme Court has struck down as unconstitutional a federal campaign finance provision restricting public communications within 30 days of a primary election or 60 days of a general election that refer to one or more clearly identified candidates in that election, the IRS may not impose the very same type of regulatory restrictions on §501(c)(4) organizations.

The IRS operates in a different area of law, and the consequences of the IRS rules would not be a *complete* prohibition on speech. However, the proposed rules would force speakers to accept unfavorable or punitive treatment under the tax code for their activity. It is generally understood that the government may not do indirectly what it is prohibited from doing directly. The history of this IRS rulemaking, as well as the proposed rules themselves, clearly indicates that this is the objective. Certainly, no evidence—with IRS regulations governing §501(c)(4) organizations on the books for over 50 years—indicates that Congress suddenly wishes to impose higher taxes on nonprofit entities. To the contrary, Congress has repeatedly *rejected* the type of restrictions that the IRS now proposes to impose by administrative fiat.

The proposed IRS regulations would clearly restrict speech that is unrelated to elections and candidates. For example, if Congress scheduled a vote on a bill affecting important social welfare issues within the 60-day window of the general election, the proposed rules would restrict a §501(c)(4) organization from running an advertisement on television informing the public about the merits of the bill and asking viewers to call particular Members of Congress to vote for or against the bill if any of those Members are candidates for reelection. The IRS would consider this to be "candidate-related political activity" even though the advertisement has nothing whatsoever to do with the election campaign of the Member of Congress and everything to do with trying to influence whether the bill is passed or defeated.

Beyond these serious constitutional issues, the IRS's lack of expertise in the regulation of political speech is evident from the proposed rules, which would actually require nonprofit organizations to remove long-dated comments from their public webpages. The ACLU noted in comments it filed with the IRS:

> [T]he proposed blackout rules would cover vast amounts of content that has absolutely nothing to do even with issue advocacy, let alone partisan politicking. For instance, it could cover copies of publicly filed lawsuits with government defendants, requests under the Freedom of Information Act, any communication addressed to a candidate currently holding elective or appointed office or even 50-state legal surveys mentioning covered officials.[39]

Once again, the proposed rules conflict with Congress's decision to create a single, exclusive agency—the FEC—for civil enforcement of the federal campaign finance laws and for the promulgation of policy thereunder, and the proposed rules demonstrate the pitfalls of the IRS devoting resources to unnecessary regulation that falls outside of its core mission.

Improper Classification of Voter Registration and Get-Out-the-Vote Activity

The NPRM would classify "conduct of a voter registration drive or 'get-out-the-vote' drive" at certain times as "candidate-related political activity."

36. 558 U.S. at 341.
37. 558 U.S. 361 (emphasis added).
38. 558 U.S. 354 (emphasis added).
39. Letter from Laura Murphy, Director, Washington Legislative Office of ACLU, to Commissioner John A. Koskinen (Feb. 4, 2014), available at http://www.campaignfreedom.org/wp-content/uploads/2014/02/2-4-14-ACLU-Comments-to-IRS.pdf.

It is remarkable that a federal agency would seek to restrict activities intended to help citizens to exercise their right to vote and would seek to classify such activities as not in the interest of "social welfare."

In a democratic society, nonpartisan get-out-the-vote drives and voter registration efforts are undeniably activities that support "social welfare." As long as all of these activities are conducted on a nonpartisan basis, they should not be considered "candidate-related political activity" or activity that Congress intended to restrict when conducted by nonprofit, nonpartisan organizations.

The U.S. Supreme Court has said that "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live."[40] IRS regulations should *encourage*, not discourage, organizations from helping citizens to register and to vote, as well as to educate the public about important policy issues facing the country.

Conclusion

Regulations issued by the federal government should respect Supreme Court precedents, comply with the provisions of the Internal Revenue Code enacted by Congress, provide clear guidance to citizens and organizations attempting to comply with the Code and accompanying regulations, and not restrict or violate the First Amendment rights of Americans. Such regulations should also provide clear bright-line rules that can easily be understood and followed by tax-exempt organizations across the country.

The IRS should not attempt to regulate in areas beyond its expertise and authority. Nor should it use the tax code as a substitute for campaign finance regulation under FECA or attempt to circumvent Congress's decision in recent years not to pass highly controversial campaign finance legislation.

The Internal Revenue Service's notice of proposed rulemaking violates all of the foregoing precepts. The IRS should withdraw it, and the proposed rules should not be adopted.

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40. *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).