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The Honorable Jacob J. Lew
Secretary of the Treasury
CC:PA:LPD:PR (REG-134417-14)
Room 5205
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

Dear Mr. Secretary:

Re: Comments in Response to Notice of Proposed Rulemaking on "Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities," 78 *Fed. Reg.* 71535 (November 29, 2013)

This letter presents comments of The Heritage Foundation, Inc. ("Foundation")[1] on the Notice of Proposed Rulemaking (NPRM) on "Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities" published by the Department of the Treasury's Internal Revenue Service (IRS) for public comment, 78 *Fed. Reg.* 71535 (November 29, 2013). The Notice requested comments on proposed amendments to part 1 of title 26 of the Code of Federal Regulations (CFR), concerning candidate-related political activity of tax-exempt social welfare organizations and related matters.

Under existing law and regulations, to qualify for tax exemption under section 501(c)(4) of the Internal Revenue Code (IRC or Code), a nonprofit organization must be "operated exclusively for the promotion of social welfare." The IRS has by regulation construed that statutory phrase to mean that the organization "is primarily engaged in promoting in some way the common good and general welfare of the people of the community" and "is operated primarily for the purpose of bringing about civic betterments and social

[1] The Foundation is a District of Columbia (D.C.) nonprofit corporation recognized as exempt under section 501(c)(3) of the Internal Revenue Code (IRC), with the mission "to formulate and promote conservative public policies based on the principles of free enterprise, limited government, individual freedom, traditional American values, and a strong national defense." The Foundation's Board of Trustees also has a role in the selection of the Board of Heritage Action for America, Inc., a D.C. nonprofit corporation recognized as exempt under IRC section 501(c)(4). Thus, the Foundation has an interest in implementation by the IRS of IRC sections 501(c)(3) and (c)(4) and in the proposed regulations, which affect organizations exempt from taxation under those sections. The Foundation submits these comments as permitted by law (see 5 U.S.C. §553(c), 2 U.S.C. §1602(8)(B)(x), and 26 U.S.C. §4911(d)(2)(E)).

improvements."[2] The IRS has by regulation further 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."[3] Thus, under existing IRS regulations, a 501(c)(4) organization may participate or intervene in political campaigns on behalf of or in opposition to a candidate for public office, but not so much so that such participation or intervention constitutes the primary engagement or primary purpose of the 501(c)(4) organization.[4] In sharp contrast, section 501(c)(3) of the Code completely prohibits organizations exempt from taxation under section 501(c)(3) from participation or intervention in political campaigns on behalf of or in opposition to candidates for public office. Separately, under IRC section 527(e)(2) and (f), if a 501(c)(4) organization chooses in a taxable year to engage at all in "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," the 501(c)(4) organization must pay for that taxable year a tax equal to the specified tax rate (currently 35%) multiplied by the lesser of its net investment income or the aggregate amount it spent on such activities.[5]

In plain English, viewed from the vantage point of 501(c)(4) organizations, the thrust of the proposed regulations in the NPRM is to expand what "counts" as political activity in deciding whether the level of political activity of a 501(c)(4) organization has climbed so high that such political activity has become its primary engagement or primary purpose and therefore the IRS will no longer treat it as engaged exclusively in social welfare and thus no longer tax-exempt.

For reader convenience, the specific recommendations in these comments for action or for changes to the proposed rules appear in boldface type. **The principal recommendation, discussed in parts 1 and 2 of these comments, is that the Secretary of the Treasury withdraw the NPRM and not issue the proposed rules, due to the lack of statutory authority for the proposed rules. On the chance that the Secretary of the Treasury**

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[2] 26 CFR §1.501(c)(4)-1(a)(2)(i).

[3] 26 CFR §1.501(c)(4)-1(a)(2)(ii). As discussed in parts 1 and 2 of these comments, no statutory authority or basis exists for this regulation carving participation or intervention in political campaigns out from the meaning of "social welfare."

[4] 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).")

[5] See IRS Revenue Ruling 2004-6, 2003 WL 23009324 (December 24, 2003) ("When an advocacy communication explicitly advocates the election or defeat of an individual to public office, the expenditure clearly is for an exempt function under §527(e)(2). However, when an advocacy communication relating to a public policy issue does not explicitly advocate the election or defeat of a candidate, all the facts and circumstances need to be considered to determine whether the expenditure is for an exempt function under §527(e)(2).")

may nevertheless issue proposed rules, recommendations for specific changes in the proposed rules appear after parts 1 and 2.

1. The Secretary Lacks Statutory Authority to Prescribe Political Restrictions for 501(c)(4) Organizations

Under IRC section 7805(a), the Secretary of the Treasury "shall prescribe all needful rules and regulations for the enforcement" of the IRC. Congress thus delegated by law to the Secretary the authority to make rules to carry out the provisions of the Internal Revenue Code -- not to make law that differs from the Code that Congress enacted. Yet, in conflict with the Code, the IRS has purported for decades to prohibit an organization from maintaining its tax-exempt status under section 501(c)(4) if the primary engagement or primary purpose of the organization is participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office. Both the existing regulation restricting political activities of a tax-exempt 501(c)(4) organization and the regulation proposed in the NPRM have no basis in federal law.

Section 501(a) of the IRC states:

> *§ 501. Exemption from tax on corporations, certain trusts, etc.*
>
> *(a) EXEMPTION FROM TAXATION.--An organization described in subsection (c) or (d) or section 401(a) shall be exempt from taxation under this subtitle unless such exemption is denied under section 502 or 503.*

In turn, sections 501(c)(3) and 501(c)(4) state:

> *(c) LIST OF EXEMPT ORGANIZATIONS.--The following organizations are referred to in subsection (a): . . .*
>
> *(3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.*
>
> *(4)(A) Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.*

(B) Subparagraph (A) shall not apply to an entity unless no part of the net earnings of such entity inures to the benefit of any private shareholder or individual. [emphasis added]

Section 501(c)(3) makes clear that an otherwise qualified organization "organized and operated exclusively" for a listed charitable, educational, or other purpose does not qualify for tax-exempt status unless the organization "does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office."[6] Section 501(c)(4), in sharp contrast, allows an otherwise qualified organization "operated exclusively for the promotion of social welfare" to qualify for tax-exempt status without imposing a restriction on participation or intervention in a political campaign.

When Congress includes a particular restriction on political activities in one paragraph of subsection 501(c) and omits any such restriction in the very next paragraph, Congress is presumed to have intended the omission. *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)). Issuance of a regulation by the IRS imposing a political restriction on 501(c)(4) organizations when Congress has directly spoken to the issue, imposing such a restriction on 501(c)(3) organizations but not 501(c)(4) organizations, is unreasonable, see *Entergy Corporation v. Riverkeeper, Inc.*, 556 U.S. 208 n. 4 (2009).

While Congress may have the constitutional power to enact a law that takes away the tax exemption of a section 501(c)(4) social welfare organization that has as its primary engagement or primary purpose participation or intervention in a political campaign on behalf of or in opposition to a candidate for public office, see *Regan v. Taxation With*

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[6] The section 501(c)(3) political restriction as a condition of tax exemption originated as a Senate floor amendment to the House-passed bill (H.R. 8300 of the 83rd Congress) that became the Internal Revenue Code of 1954. Senator Lyndon B. Johnson (D-TX) offered the amendment on the Senate floor on July 2, 1954. The Senate adopted the amendment after a brief and non-substantive discussion. In the subsequent House-Senate conference to iron out differences on H.R. 8300, the Senate amendment was retained in the final bill and thereby became part of IRC section 501(c)(3). See 1954 U.S. *Code Congressional and Administrative News* 5280, 5306, House Report No. 2543 of the Committee of Conference to accompany H.R. 8300) ("Amendment No. 102a(2): The House bill provided that certain organizations (corporations, funds, etc., organized and operated exclusively for religious, charitable, etc., purposes) described in section 501(c)(3) will lose their tax-exempt status if any substantial part of the activities is carrying on propaganda, or otherwise attempting to influence legislation. The Senate amendment provides that such organizations will lose their tax-exempt status if they participate or intervene (including the publishing or distributing of statements) in a political campaign on behalf of any candidate for public office. The House recedes."). In 1987, Congress enacted a tax upon expenditures by a section 501(c)(3) organization that violates the political activity restriction in section 501(c)(3) and a tax upon the manager of such an organization when the expenditure is knowing and willful. 26 U.S.C. §4955. Also in 1987, Congress also granted authority to the Internal Revenue Service to file suit in certain circumstances for injunctions to prevent 501(c)(3) organizations from making political expenditures disallowed by section 501(c)(3). 26 U.S.C. §7409.

Representation of Washington, 461 U.S. 540 (1983) (upholding lobbying restrictions as a condition of tax exemption), Congress has not enacted any such law. Section 501(c)(4), unlike section 501(c)(3), does not impose a restriction on political activities. The Secretary of the Treasury has no power to impose such a restriction on 501(c)(4) organizations by himself.[7] Under the Constitution, "an agency literally has no power to act . . . unless and until Congress confers power upon it." *Louisiana Public Service Commission v. Federal Communications Commission* (FCC), 476 U.S. 355, 374 (1986). Administrative agencies may issue regulations only pursuant to authority Congress delegates to them by law. *American Library Association v. FCC*, 406 F. 3d 689, 691 (D.C. Cir. 2005). **Accordingly, due to lack of authority to impose the proposed political restrictions as a condition of tax exempt status for 501(c)(4) organizations, the Secretary of the Treasury should withdraw the NPRM and not issue the proposed rule.**

2. The Secretary Cannot Manufacture a Meaning for "Social Welfare" That is Contrary to Law

As discussed above, the Internal Revenue Code imposes a political restriction as a condition for tax exempt status for 501(c)(3) organizations, but not for 501(c)(4) organizations. When, as here, Congress has intentionally excluded political restrictions on 501(c)(4) organizations, the Secretary of the Treasury cannot impose them by himself by defining the statutory term "social welfare" to incorporate the political restrictions that Congress excluded. The statutory authority of the Secretary of the Treasury to prescribe rules allows him to enforce the law -- not flout the law.

The Secretary of the Treasury prescribed the existing 501(c)(4) implementing regulation, which states that "[a]n 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 that "[a]n organization embraced within this section is one which is operated primarily for the purpose of bringing about civic betterments and social improvements."[8] The plain meaning of that definition of "social welfare" includes promoting the common good and general welfare of the people for the purpose of bringing about civic betterments and social improvements through advocating, *in the electoral process*, principles and those who espouse them.[9]

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[7] When the Secretary of the Treasury purported to impose by regulation on 501(c)(4) organizations the political restriction imposed by statute on 501(c)(3) organizations, the Secretary did not even bother to explain why he did so or what his imagined legal authority to do so might be. See Federal Registers of February 26, 1959, page 1421 (proposed rule) and of June 26, 1959 (final rule).

[8] 26 CFR §1.501(c)(4)-1(a)(2)(i).

[9] When the original tax exemption for "social welfare" organizations was enacted in the Tariff Act of 1913, 38 Stat. 114 (1913), the meanings of the terms "social" and "welfare" were clearly broad enough to comprehend promoting the well-being of the public as an aggregate body, through means now referred to as political. The definition of "social" in 1913 was:

> *So"cial (?), a. [L. socialis, from socius a companion; akin to sequi to follow: cf. F. social. See Sue to follow.]*

To the extent that the IRS regulation imposes the common good/general welfare and civic betterment/social improvements standards for construing "social welfare," the regulation is consistent with the plain meaning of the section 501(c)(4). But the regulation goes on to carve out from the plain meaning of "social welfare" certain political activities. The regulation states 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."[10] Similarly, the Secretary proposes in the NPRM new regulations stating that "[t]he promotion of social welfare does not include direct or indirect candidate-related political activity . . . ."[11] By twisting the meaning 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 Secretary has attempted to impose political restrictions as a condition of tax-exemption on section 501(c)(4) organizations in the face of the decision by Congress in

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1. Of or pertaining to society; relating to men living in society, or to the public as an aggregate body; as, social interest or concerns; social pleasure; social benefits; social happiness; social duties. Social phenomena." J. S. Mill.

2. Ready or disposed to mix in friendly converse; companionable; sociable; as, a social person.

3. Consisting in union or mutual intercourse.

Best with thyself accompanied, seek'st not Social communication. Milton.

4. (Bot.) Naturally growing in groups or masses; -- said of many individual plants of the same species.

5. (Zoöl.) (a) Living in communities consisting of males, females, and neuters, as do ants and most bees. (b) Forming compound groups or colonies by budding from basal processes or stolons; as, the social ascidians. Social science, the science of all that relates to the social condition, the relations and institutions which are involved in man's existence and his well-being as a member of an organized community; sociology. It concerns itself with questions of the public health, education, labor, punishment of crime, reformation of criminals, and the like. -- Social whale (Zoöl.), the blackfish. -- The social evil, prostitution. Syn. -- Sociable; companionable; conversible; friendly; familiar; communicative; convival [sic]*; festive.*

The definition of "welfare" in 1913 was:

Wel"fare` (?), n. [Well + fare to go, to proceed, to happen.] 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.

How to study for the people's welfare. Shak.
In whose deep eyes Men read the welfare of the times to come. Emerson.

Webster's Revised Unabridged Dictionary (G & C. Merriam Co., 1913, edited by Noah Porter) ("social" from page 1365, "welfare" from page 1640), online at http://machaut.uchicago.edu/websters.

[10] 26 CFR §1.501(c)(4)-1(a)(2)(ii).

[11] Proposed 26 CFR §1.501(c)(4)-1(a)(2)(ii), 78 *Fed. Reg.* at 71541.

enacting section 501(c)(4) not to impose political restrictions as such a condition. The Secretary's existing and proposed regulation therefore is manifestly contrary to the law and is of no force.

Accordingly, for the reasons set forth in this part 2, the Secretary of the Treasury should not adopt the proposed 26 CFR §1.501(c)(4)-1(a)(2)(ii) that states "The promotion of social welfare does not include direct or indirect candidate-related activity, as defined in paragraph (a)(2)(iii) of this section." and should instead revise existing 26 CFR §1.501(c)(4)-1(a)(2)(ii) as follows (deletions in brackets, additions underscored):

> **(ii) *[Political or social] Social activities.* [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. Nor is an] An organization is not operated primarily for the promotion of social welfare if its primary activity is operating a social club for the benefit, pleasure, or recreation of its members, or is carrying on a business with the general public in a manner similar to organizations which are operated for profit.**

Although section 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 section 501(c)(4) organization, such an organization remains subject as applicable to the Federal Election Campaign Act, other Federal laws, and state laws concerning political activities.

3. Proposed Regulation Contains Insufficiently Tailored Definitions of the Terms "Candidate" and "Candidate-Related Political Activity"

The term "candidate" in proposed 26 CFR §1-501(c)(4)-1(a)(2)(iii)(B)(*1*) includes both "an individual who publicly offers himself" as a candidate and "an individual who . . . is proposed by another" as a candidate. The term also treats an individual as a candidate if the individual publicly seeks, or is proposed by a third person for, nomination or appointment to office.

As to one who "publicly offers" himself for office, the question arises as to what constitutes such a public offering. A 501(c)(4) organization seeking to comply with the rules restricting candidate-related activity as proposed by the NPRM needs to know when an individual is, and is not, a candidate. A regulation that invites debate about whether an individual has, or has not, "offered" himself publicly as a candidate fails to meet the NPRM preamble's oft-repeated goal of avoiding fact-intensive tests in favor of definitive rules. The definition of the term candidate should follow a bright-line test tied to a readily verifiable public action establishing candidacy, such as the filing of a Statement of Candidacy under the Federal Election Campaign Act, which becomes available on the Federal Election Commission website, or the filing of required candidate qualification documents with state election officials.

As to one "who . . . is proposed by another" as a candidate, this third-party proposal standard is unworkable. From the individual's point of view, (a) the individual may become a candidate for purposes of this regulation without even knowing it, simply because someone else publicly proposed that the individual be elected to an office; (b) the individual may become a candidate for purposes of the IRS proposed regulation on candidate-related political activity, even though he or she is not, in fact, a candidate under applicable election law; (c) a third person who wishes the individual political or personal ill will may publicly propose the individual for election simply to impose the burden on the individual that may result from 501(c)(4) organizations distancing themselves from the individual due to the IRS proposed rules on candidate-related political activity; and (4) the IRS proposed rule does not permit the individual to reject the third-party's statement proposing candidacy, and thereby escape the IRS proposed rule's consequences as to how 501(c)(4) organizations relate to the individual.

From the 501(c)(4) organization's point of view, under the proposed candidate-related political activity rule, the organization must monitor untold numbers of channels of communication for statements by people proposing that individuals be elected to office, so that the 501(c)(4) treats such individuals as candidates for purposes of compliance with the rule. A regulation that allows third parties to make an individual a "candidate" for purposes of the regulation by proposing the individual for public office thus imposes an undue burden on such individuals and on 501(c)(4) organizations.

The IRS proposed regulation also stretches the term "candidate" beyond its common meaning in the political context. Under the regulation, an individual who publicly offered himself, or whom a third party proposed, for a presidential nomination or appointment to any Senate-confirmed presidential appointment positions in the executive or judicial branches, or for a gubernatorial nomination or appointment to similar positions at the state level, would thereby become a "candidate." Thus, for example, a 501(c)(4) organization that urged the President to nominate or appoint an individual to any one of thousands of Senate-confirmed presidential appointment positions or to refrain from doing so would be engaged in candidate-related political activity under the proposed rule. A 501(c)(4) organization serves the social welfare when it advises a President concerning nominations or appointments; indeed, the proposed regulation inappropriately burdens the constitutional prerogative of the presidency to obtain such advice by discouraging 501(c)(4) organizations from providing such advice. 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.")

The facts that IRC section 527(e)(2) includes in its definition of a taxable "exempt function" references to nominations and appointments, and that section 527(f) imposes a tax on section 501(c)(4) organizations that make expenditures for such an "exempt function," provides no authority whatever for the IRS to impose as a condition on tax-exemption restrictions on section 501(c)(4) organizations concerning advocacy for or against nominations or appointments when section 501(c)(4) itself contains none of the statutory language that appears in section 527(e)(2). The desire of the IRS to have some

sort of parallelism regarding political activity in its regulations implementing sections 501(c)(3), 501(c)(4), and 527 is not a lawful basis for limiting the freedom to engage primarily in political activity of section 501(c)(4) organizations when Congress has intentionally refrained from limiting such freedom in enacting section 501(c)(4). The regulations should differ, because the statutory provisions they implement differ.

The IRS proposed regulation goes even further when it stretches the term "candidate" beyond its common meaning to include an individual who offers, or is proposed by another, to serve in office in a political organization. For example, under the proposed rule, an individual becomes a "candidate" because the individual asks for, or is proposed by others to receive, the votes of the members of the Democratic National Committee or the Republican National Committee for party chairman. The IRS has no business whatever discouraging by regulation communications between a private 501(c)(4) organization and a private political organization such as the DNC or the RNC regarding who serves as an officer in the private political organization. It is bad enough for the federal government to decide to take away tax-exempt status because of conduct involving communications with a federal or state electoral nexus; it is beyond the pale for the federal government to do so because of purely private conduct involving communications between purely private actors about matters in which government has no interest at stake.

Since First Amendment standards "must give the benefit of any doubt to protecting rather than stifling speech," [12] the definition of "candidate-related political activity" should not reach a communication unless it contains express advocacy. The right to free speech, especially in a political context, should not depend upon the judgment of the IRS or a jury about whether words that do not advocate supporting or opposing a candidate nevertheless are susceptible of only one reasonable interpretation and that interpretation is one of "implied" advocacy. The "implication" is in the eye of the beholder or the ear of the listener; the words should speak for themselves.

To take account of these major shortcomings of the definition of "candidate," the Secretary of the Treasury should revise proposed 26 CFR §1-501(c)(4)-1(a)(2)(iii)(B)(*1*) to read as follows (deletions in brackets, additions underscored):

> **(*1*) "*Candidate*" means an individual who, [publicly offers himself, or is proposed by another, for selection, nomination, election, or appointment] <u>with respect</u> to any federal, state, or local public office [or office in a political organization], or [to be a] <u>position of</u> Presidential or Vice-Presidential elector, [whether or not such individual is ultimately selected, nominated, elected, or appointed] <u>(i) has, in the case of a federal office, filed a Statement of Candidacy under the Federal Election Campaign Act or, in the case of a state or local office, made an equivalent filing under State or local law, or (ii) when Federal, State or local law provides for no such filing, declares publicly candidacy for such office or position</u>. Any officeholder who is the subject of a recall election shall be treated as a candidate in the recall election.**

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[12] *Citizens United v. Federal Election Commission*, 558 U.S. 310, 327 (2010) (quoting *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 469 (2007)).

The Secretary also should revise the definition of "candidate-related political activity" in 26 CFR §1-501(c)(4)-1(a)(2)(iii)(A)(*1*) so that it reads as follows (deletions in brackets, additions underscored):

> **(iii) *Definition of candidate-related political activity*—(A) *In general.* For purposes of this section, candidate-related political activity means:**
>
> **(*1*) Any communication (as defined in paragraph (a)(2)(iii)(B)(*3*) of this section) expressing a view on, whether for or against, the [selection, nomination,] election[, or appointment] of one or more clearly identified candidates or of candidates of a political party that [—**
>
> **(*i*) C] contains words that expressly advocate, such as "vote," "oppose," "support," "elect," "defeat," or "reject;" [or**
>
> **(*ii*) Is susceptible of no reasonable interpretation other than a call for or against the selection, nomination, election, or appointment of one or more candidates or of candidates of a political party;] . . .**

Tailoring the definition of the terms "candidate" and "candidate-related political activity" properly, as set forth above, helps provide clear and practical guidance to 501(c)(4) organizations regarding political activity.

4. Proposed Regulation is Overinclusive in Defining a "Clearly Identified" Candidate

Because the IRS proposed regulation defines as "candidate-related political activity" express advocacy regarding a "clearly identified" candidate, the meaning of the term "clearly identified" plays a significant role in the regulatory regime. The definition of "clearly identified" in proposed 26 CFR §1-501(c)(4)-1(a)(2)(iii)(B)(*2*) goes too far in reaching the mere identification in a communication of an individual who happens to be a candidate. The definition of "clearly identified" should reach only those communications that expressly identify an individual in the context of the individual's candidacy.

Revenue Ruling 2007-41, 2007 WL 1576989 (June 18, 2007), which relates to the statutory prohibition on political campaign participation by 501(c)(3) organizations, sensibly recognized that individuals who happen to be candidates may appropriately appear at the events of 501(c)(3) organizations in a non-candidate capacity. Similarly, a person who happens to be a candidate should be able to appear at the events of 501(c)(4) organizations in a non-candidate capacity. The mere fact that an individual who appears at a 501(c)(4) event happens to be a candidate for public office should not by itself trigger the proposed campaign-related political activity rules; only when the event states a connection between the individual and the individual's candidacy should the rules classify the individual as a "clearly identified" as a candidate. Likewise, a 501(c)(4) organization should be free at all times to refer exclusively to the legislative activities of a public officeholder, such as by listing a set of an officeholder's votes in a legislature to

demonstrate the extent to which the votes reflect agreement with the organization's principles, commonly called a "scorecard;" such a listing does not connect an officeholder to a campaign, nor of itself advocate or oppose the officeholder for re-election. The narrowing of the definition of "clearly identified" so as to permit references outside the candidate context to individuals who happen to be candidates also eliminates the substantial regulatory overreaching that otherwise would occur (such as the need to censor and purge from 501(c)(4) organization websites references outside a campaign context to individuals who happen to be candidates) with the pre-primary election 30 day and the pre-general election 60 day communications and events bans in proposed 26 CFR §1-501(c)(4)-1(a)(2)(iii)(A)(*2*) and (*8*).

To ensure that individuals who happen to be candidates can appear at 501(c)(4) organization events or in 501(c)(4) communications or legislative scorecards in a non-candidate capacity, the Secretary of the Treasury should revise proposed 26 CFR §1-501(c)(4)-1(a)(2)(iii)(B)(*2*) to read as follows (deletions in brackets, additions underscored):

> **(*2*) "*Clearly identified*" means the name of the [candidate] <u>individual</u> involved appears, a photograph or drawing of the [candidate] <u>individual</u> appears, or the identity of the [candidate] <u>individual</u> is apparent by reference, such as by use of the [candidate's] <u>individual's</u> recorded voice or of terms such as ["the Mayor," "your Congressman," "the incumbent,"] "the Democratic nominee[,]" or "the Republican candidate for County Supervisor[.]," <u>in connection with a communication or setting which conveys that the individual is a candidate.</u> [In addition, a candidate may be "clearly identified" by reference to an issue or characteristic used to distinguish the candidate from other candidates.]**

The above changes to the proposed definition of "clearly identified" helps to ensure that the proposed regulation does not sweep into the ambit of the term "candidate-related political activity" 501(c)(4) organization activities outside a campaign context that communicate about or involve individuals who happen to be candidates.

5. <u>Technical Correction to Eliminate Circularity from the Definition of "Communication"</u>

The definition of the term "communication" in proposed 26 CFR §1-501(c)(4)-1(a)(2)(iii)(B)(*3*) includes the word "communication," resulting in a circular definition. **To eliminate the logical difficulties posed by the self-referential definition, the Secretary of the Treasury should revise proposed 26 CFR §1-501(c)(4)-1(a)(2)(iii)(B)(*3*) to read as follows (deletions in brackets, additions underscored):**

> ***(3)* "Communication" means any [communication] <u>conveyance of information</u> by whatever means, including written, printed, electronic (including Internet), video, or oral communications.**

Use in the definition of the phrase "conveyance of information" in lieu of the word "communication" maintains the meaning of the definition while eliminating its circularity.

6. Technical Correction to Eliminate Non-Public Communications from Definition of "Public Communication"

The definition of the term "Public communication" in proposed 26 CFR §1-501(c)(4)-1(a)(2)(iii)(B)(*5*) consists, with one exception, of categories of communications that by their nature reach the public (or, in the catchall category, more than 500 people). The exception is the first category, which defines as "Public communication" any communication "By broadcast, cable, or satellite." The references to cable and satellite sweep into the definition of "Public communication" a large mass of private communications, because often a communication carried by cable or by satellite is limited to just a single sender and a single recipient, as often is the case with a telephone call carried by cable or satellite. **To remove the non-public communications from the definition of "Public communications," the Secretary of the Treasury should revise proposed 26 CFR §1-501(c)(4)-1(a)(2)(iii)(B)(*5*) to read as follows (deletions in brackets, additions underscored):**

> **(*5*) "*Public communication*" means any communication (as defined in paragraph (a)(2)(iii)(B)(*3*) of this section)—**
>
> **(*i*) [By broadcast, cable, or satellite] Broadcast, including over the air, by cable, or by satellite;**
> **(*ii*) On an Internet Web site;**
> **(*iii*) In a newspaper, magazine, or other periodical;**
> **(*iv*) In the form of paid advertising; or**
> **(*v*) That otherwise reaches, or is intended to reach, more than 500 persons.**

The use of "Broadcast" as a verb rather than a noun in the change makes clear that the first category reaches communications to the public, whether by television, radio, cable, or satellite, but does not reach private communications (as private communications are not broadcast).

7. Freedom of Speech Calls for Elimination of Proposed Prohibition on Pre-Election Communications Referring to Clearly Identified Candidates or Parties

The prohibition in proposed 26 CFR 1.501(c)(4)-1(a)(2)(ii) and (iii)(A)(*2*) that includes in the definition of "candidate-related political activity," and thereby excludes from the definition of "promotion of social welfare," 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" raises serious constitutional concerns. In *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), the U.S. Supreme Court struck down, as a violation of the First Amendment guarantee of freedom of speech, a Federal Election Commission (FEC) regulation that prohibited a 501(c)(4) corporation from making a 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. The

Court stated that "[w]e find no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers"[13] and noted that "[b]y suppressing the speech of manifold corporations, both for-profit and nonprofit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests."[14] The Court noted that it gave "due deference" to the efforts of Congress to address either the appearance or reality of improper influences on elected officials from independent expenditures, but concluded that "[a]n outright ban on corporate political speech during the critical pre-election period is not a permissible remedy."[15]

When the Supreme Court has so forcefully struck down as unconstitutional censorship an attempt by the FEC to restrict by regulation a corporation's 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, the IRS should not attempt to impose the same censorship in issuing a regulation to implement section 501(c)(4). The IRS proposed regulation counts the making of certain political speech in a pre-election period against a 501(c)(4) organization in assessing whether the organization remains engaged exclusively in the promotion of social welfare. The IRS regulation may well create an unconstitutional condition on the retention of section 501(c)(4) tax-exempt status, but even if it does not, the IRS regulation clearly discourages free speech and, moreover, the type of speech -- political speech -- that is at the core of the First Amendment's guarantee.[16]

Accordingly, consistent with the constitutional freedom of speech, the Secretary of the Treasury should revise proposed 26 CFR 1.501(c)(4)-1(a)(2)(iii)(A) by striking: "(*2*) Any public communication (defined in paragraph (a)(2)(iii)(B)(*5*) of this section) 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 a general election, refers to one or more political parties represented in that election;" and redesignating succeeding sections.

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[13] 558 U.S. at 341.

[14] 558 U.S. 354.

[15] 558 U.S. 361.

[16] See cases discussed in *Agency for International Development v. Alliance for Open Society International, Inc.*, 133 S. Ct. 2321 (2013). See also *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) ("For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech."); *Speiser v. Randall*, 357 U.S. 513, 518 (1958) ("It cannot be gainsaid that a discriminatory denial of a tax exemption for engaging in speech is a limitation on free speech."). Cf. *Regan v. Taxation with Representation*, 461 U.S. 540, 550 (1983) ("... Congress -- not TWR or this Court -- has the authority to determine whether the advantage the public would receive from additional lobbying by charities is worth the money the public would pay to subsidize that lobbying, and other disadvantages that might accompany that lobbying.").

8. Section 501(c)(4) Organizations Should be Encouraged to Help Individuals to Register to Vote and Then to Vote

As the U.S. Supreme Court has said, "[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." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). Section 501(c)(4) provides for tax exempt status for non-profit organizations "operated exclusively for the promotion of social welfare." There can be no doubt that helping fellow citizens exercise their right to vote is a high example of "social welfare." The IRS regulations should encourage 501(c)(4) organizations to help citizens to register to vote and then to vote. **The Secretary of the Treasury should revise proposed 26 CFR §1-501(c)(4)-1(a)(2)(iii)(A)(*5*) by striking "(*5*) Conduct of a voter registration drive or 'get-out-the-vote' drive;" and redesignating succeeding sections accordingly.**

* * * * *

The Secretary of the Treasury should, for the reasons set forth in parts 1 and 2 above, withdraw the NPRM and not issue the proposed rules, due to the lack of statutory authority for the proposed rules. If the Secretary of the Treasury nevertheless issues proposed rules, the Secretary should make the recommendations for specific changes in the proposed rules that appear in parts 3 through 8 above.

Thank you for your consideration of these comments on the proposed regulations.

Sincerely,

David S. Addington
Group Vice President for Research

Attachments: 8 copies (filed in nonuplicate as directed by NPRM, 78 *Fed. Reg.* 71540)