

February 27, 2014

Ms. Amy F. Giuliano
Office of the Associate Chief Counsel (Tax Exempt and Government Entities)
CC:PA:LPD:PR (REG-134417-13)
Room 5205
Internal Revenue Service
P.O. Box 7604, Ben Franklin Station
Washington, DC 20044
VIA FEDERAL E-RULEMAKING PORTAL

RE: PROPOSED GUIDANCE FOR TAX-EXEMPT SOCIAL WELFARE
ORGANIZATIONS ON CANDIDATE-RELATED POLITICAL ACTIVITIES

Dear Ms. Giuliano:

We submit these comments as attorneys representing tax-exempt organizations that advocate on a variety of issues from a wide range of viewpoints, some typically associated with liberal or progressive views and some typically associated with conservative views. We join in filing these comments to applaud the decision to try to craft regulations that seek to provide desperately needed guidance on political activities by tax-exempt organizations, but also to highlight the key ways in which we believe the current proposal falls short.

Each of us in our respective practices representing 501(c) organizations is all too familiar with the problems related to existing law and guidance on exempt-organization political activity. There is no clear definition of what constitutes political activity for these organizations, and the current “facts and circumstances” analysis is inherently ambiguous. There are also disputes about how much of this undefined political activity would jeopardize the tax-exempt status of 501(c) organizations that are permitted to engage in these activities. This lack of clarity chills permissible activity by more cautious organizations, leads to inadvertent error by others, and encourages unscrupulous organizations to flout the law. Because the law itself is not clear, we often find ourselves unable to give our clients the clear answers they seek and should reasonably expect. And, as demonstrated most recently by the problems in Internal Revenue Service determinations that came to light in the spring of 2013, agency staff charged with enforcing the law are themselves uncertain about definitions and permissible levels of political activity by tax-

exempt organizations.¹ These problems are not new,² but they have become more pressing with higher profile 501(c) political activity in the wake of the Supreme Court's Citizens United decision.³

In light of this past experience, we would welcome clear and fair guidance regarding the definition of and limits on exempt organization political activity, but the proposed regulations fall well short of this goal. We urge the Department of the Treasury and the Internal Revenue Service to issue new or revised proposed regulations that address the following comments and serious concerns we have about the current draft regulations:

- Whatever rules are crafted defining political activity should apply as universally as possible throughout the tax code, applying not only to 501(c)(4)s, but also to other 501(c)s, and also applying, to the degree possible, to other matters, including the proxy tax paid by some 501(c) entities under 6033(e) and the denial of a business expense deduction under 162(e)(1)(B).⁴
- Whatever limits on political activity are set for 501(c)(4)s should also apply to 501(c)(5)s, 501(c)(6)s, and other 501(c)s permitted to engage in political activity.
- Rules should attempt to define political activity clearly and narrowly and should seek to exclude nonpartisan election-related and non-election-related activities that are not attempts to influence the outcome of elections, including:
 - nonpartisan voter registration
 - nonpartisan get-out-the-vote efforts
 - nonpartisan voter guides
 - candidate debates and forums

¹ See Treasury Inspector General for Tax Administration, *Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review* (Reference Number: 2013-10-053), noting determination staff difficulty evaluating applications for recognition of tax-exempt status from groups apparently engaged in political activity and recommending guidance on “what constitutes political campaign intervention,” as well as guidance on how much of such activity 501(c)(4) organizations could do under the “primary purpose” test and related matters.

² See, e.g., Comments of the Individual Members of the [American Bar Association Tax Section] Exempt Organizations Committee's Task Force on Section 501(c)(4) and Politics, May 25, 2004, available online at <http://www.americanbar.org/content/dam/aba/migrated/tax/pubpolicy/2004/040525exo.authcheckdam.pdf> (last visited February 18, 2014), highlighting the need for guidance defining and setting permissible limits on 501(c)(4) political activity.

³ 558 U.S. 310 (2010), striking down federal election law prohibition on use of corporate funds for independent political expenditures.

⁴ Although we believe that the same definition of political activity should be used in the context of the eligibility for exemption and the tax on political activities under Section 527, we believe that it would require congressional action to harmonize that definition and that the Secretary cannot accomplish this goal through regulation.

- events prior to an election that feature, in a non-candidate capacity, government officials who are candidates
- lobbying and other communications near an election that mention a candidate or political party in a non-election-related context (including old references still available on an organization's website as an election approaches)
- The definition of "candidate" should not include persons:
 - who have taken steps to seek non-elective public office, or positions as officers of non-governmental political organizations; or
 - who are merely "proposed by others" (such as bloggers or news media outlets) as candidates but whom the organization making the communication has not referred to as a candidate.
- Regulations should, to the degree possible, not impose burdensome recordkeeping obligations, such as requiring organizations to:
 - allocate costs for previous communications that remain available (e.g., on a website) within the 30- or 60-day pre-election time periods; and
 - calculate the value of the efforts of volunteers to the organization.
- A volunteer's or official's personal political activities should not be attributed to the organization unless such activities are either subsidized or endorsed by the organization.
- Grants to another 501(c) organization should not be treated as a political expenditure if the contribution is reasonably structured to prevent use of the funds for political activity.

Recent court rulings and other events have made apparent the need for regulations to clarify existing Internal Revenue Code provisions related to political activity.⁵ This rulemaking and all of the suggestions we make here fall within the authority of the Department of the Treasury to "prescribe all needful rules and regulations for the enforcement of this title."⁶

We note that the significant gap between our suggestions and the currently proposed regulations should not be seen as an insurmountable barrier to a good final rule. It is worth remembering (as many of us still practicing do) that comments on the initial draft regulations defining 501(c)(3)

⁵ E.g., I.R.C. § 501(c)(3) (excluding from exemption organizations that "participate in, or intervene in (including the publishing or distributing of statement), any political campaign on behalf of (or in opposition to) any candidate for public office"), I.R.C. § 162(e) (prohibiting business deduction for expenses related to "participation in, or intervention in, any political campaign on behalf of (or in opposition to) any candidate for public office").

⁶ I.R.C. § 7805.

lobbying were nearly all negative.⁷ Yet after reviewing those comments and working closely with the regulated community, Treasury and the IRS produced the current regulations, widely and justifiably praised for their clarity and workability. We believe that a similar effort in this case can likewise succeed. We urge you to make the attempt.

Sincerely,

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(Firms listed for identification purposes only. All co-signers do so in their individual capacities.)

⁷ For a good short history of the 501(c)(3) lobbying rulemaking, see Judith E. Kindell & John F. Reilly, *Lobbying Issues* in EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM FOR FISCAL YEAR 1997, 283 - 284 (1996).