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COMMON CAUSE
Holding Power Accountable

February 27, 2014

CA: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 Sir or Madam:

Common Cause commends the Treasury Department ("Treasury") and the Internal Revenue Service ("IRS") for initiating its Notice of Proposed Rulemaking[1] to clarify the rules governing 501(c)(4) social welfare organizations and political campaign intervention. Common Cause shares your recognition that "both the public and the IRS would benefit from clearer definitions" of social welfare activity and campaign intervention.[2] This action is overdue but critically important to the health of our democracy. We also write to respectfully recommend some changes to the proposed regulations.

Over the past few years, some partisan political operatives have exploited ambiguity in the existing regulations to establish sham social welfare organizations that collectively spent hundreds of millions of dollars electioneering under a cloak of anonymity.[3] Rather than establish tax-exempt organizations in accordance with section 527, which requires donor disclosure, various partisan political organizations masqueraded as social welfare organizations instead. Their actions, and the rules that enabled them, undermined core democratic values of transparency, accountability and the rule of law.

At the same time, legitimate social welfare organizations have operated under vague rules ever since Treasury adopted its most recent regulations over fifty years ago.

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[1] Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities, 78 Fed. Reg. 71535 (proposed Nov. 29, 2013) (to be codified at 26 C.F.R. pt. 1).
[2] *Id.* at 71536.
[3] Kim Barker, *How Nonprofits Spend Millions on Elections and Call it Public Welfare*, PROPUBLICA, Aug. 18, 2012, http://www.propublica.org/article/how-nonprofits-spend-millions-on-elections-and-call-it-public-welfare; Center for Responsive Politics, Political Nonprofits, https://www.opensecrets.org/outsidespending/nonprof_summ.php (last visited February 10, 2014).

The current rule's language that social welfare organizations must be "*primarily engaged*" in social welfare activities is inconsistent with the enabling component in the tax code, which requires organizations to be "operated *exclusively* for the promotion of social welfare."[4] It is precisely this discrepancy, along with no clear definition of what constitutes intervention in political campaigns, that enabled several high-profile social welfare organizations to spend millions of dollars from undisclosed sources.

Moreover, the existing "facts and circumstances" approach to resolve questions of whether organizations are appropriately tax-exempt under section 501(c)(4) is unworkable in many cases and can result in overly burdensome inquiries to gauge compliance. The result is that voters remain in the dark about the sources of money flowing through these organizations to influence elections. This deprives them of valuable information to evaluate a political message.[5] Common Cause supports the goal of "adopting rules with sharper distinctions" to "provide greater certainty and reduce the need for detailed factual analysis."[6]

Partisan political operatives should not be able to use social welfare organizations as front groups to spend unlimited amounts of secret money influencing elections. Moreover, organizations need certainty that their activities encouraging nonpartisan civic participation will not run afoul of their tax-exempt status. Everyone will benefit from brighter lines if Treasury and the IRS appropriately draw them in the correct place.

Common Cause urges Treasury and the IRS to continue this critical process because amending the social welfare regulations is vital in a post-*Citizens United* environment of unlimited independent spending. We respectfully request that Treasury and IRS enact revisions to the proposed rules.

Common Cause

Common Cause is a nonpartisan, nonprofit social welfare advocacy organization founded in 1970 by John Gardner as a vehicle for citizens to make their voices heard in the political process and to hold their elected leaders accountable to the public interest.

Common Cause strives to strengthen our democracy by empowering our members, supporters and the general public to take action on critical policy issues. We employ a powerful combination of grassroots organizing, coalition building, research, policy development, public education, lobbying and litigation to win reform at all levels of government. As an independent voice for change and a watchdog against corruption

[4] 26 C.F.R. § 1-501(c)(4)-1; 26 U.S.C. § 501(c)(4) (emphasis added).
[5] *Citizens United v. FEC*, 558 U.S. 310, 370 (2010) (upholding disclosure of donors to corporations making independent expenditures so that "citizens can see whether elected officials are 'in the pocket' of so-called moneyed interests").
[6] 78 Fed. Reg. 71537.

and abuse of power, Common Cause does not endorse candidates or engage in partisan political activity.

With nearly 400,000 members and supporters and 35 state organizations, Common Cause remains committed to honest, open and accountable government, as well as encouraging citizen participation in democracy.

The Problem: Growing Misuse of 501(c)(4)s to Avoid Disclosure

It is long past time to update the regulations governing 501(c)(4) social welfare organizations. Treasury has not amended its rules governing them since President Eisenhower's second term in 1959. Meanwhile, the way Americans and candidates participate in political campaigns has undergone profound change, due in large part to changes in campaign finance law and advances in technology. Congress granted these organizations tax-exempt status to promote social welfare, not to operate as de facto political action committees that spend unlimited amounts of undisclosed money on elections.

Up to and including the 2006 election cycle, social welfare groups spent little to nothing on electioneering. Then a series of court decisions dramatically changed the status quo. First, the Supreme Court's 2007 decision in *FEC v. Wisconsin Right to Life* lifted prohibitions on corporate spending for election-related communications except for express advocacy and its functional equivalent.[7] That led to a sharp increase in spending on electioneering communications from nonprofit groups that, unlike political committees organized under section 527, do not disclose their donors. Then the Supreme Court's 2010 decision in *Citizens United* struck down all prohibitions on corporate independent expenditures. Combined with the D.C. Circuit's opinion in *SpeechNow.org v. FEC*, these decisions led to an explosion in non-party outside election spending.[8] It topped $1 billion in the 2012 elections.[9] Over $256 million of that came from a select few social welfare organizations, and another $55 million from 501(c)(6) business associations.[10]

With this increased spending came less transparency and disclosure. Spending by groups that do not disclose their donors accounted for 30% of outside spending in 2012.[11]

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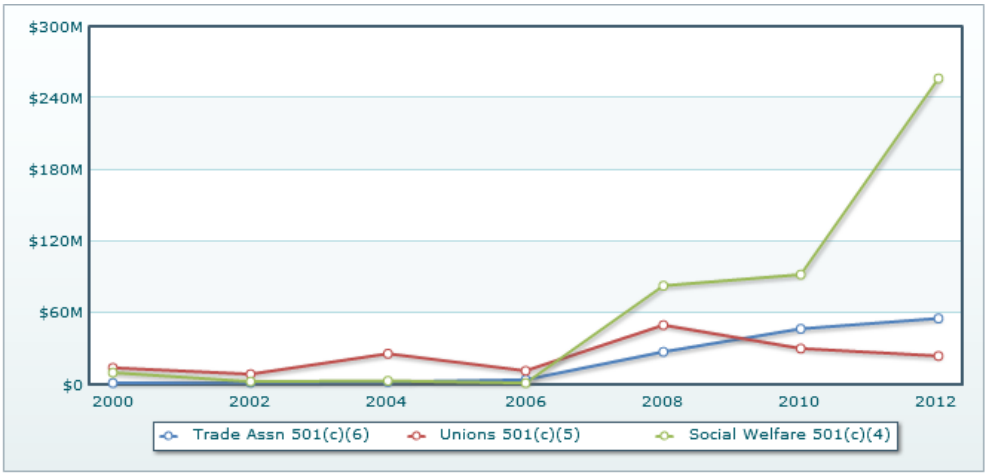
[7] 551 U.S. 449 (2007).
[8] 599 F.3d 686 (2010); Richard L. Hasen, *The Numbers Don't Lie*, SLATE, Mar. 9, 2012, http://www.slate.com/articles/news_and_politics/politics/2012/03/the_supreme_court_s_citizens_united_decision_has_led_to_an_explosion_of_campaign_spending_.html (last accessed Feb. 22, 2014).
[9] Center for Responsive Politics, Outside Spending by Cycle, http://www.opensecrets.org/outsidespending/index.php (last accessed Feb. 21, 2014).
[10] *Id.*
[11] Center for Responsive Politics, Outside Spending by Disclosure, Excluding Party Committees, http://www.opensecrets.org/outsidespending/disclosure.php (last accessed Feb. 25, 2014).

By contrast, just eight years earlier in 2004, nearly 100% of outside spending came from groups that disclose their donors. The below chart shows the dramatic rise in non-disclosing 501(c) nonprofit political spending over the past few election cycles:



Source: Center for Responsive Politics[12]

Meanwhile, as nonprofit political spending soared after *Citizens United* and *SpeechNow.org*, so did the number of applications from groups seeking 501(c)(4) tax-exempt status. They nearly doubled between 2010 and 2012, from 1,735 in 2010 to 3,357 in 2012.[13] Although 501(c)(4) social welfare organizations may self-declare without submitting a formal application to the IRS, the optional approval process provides them with more certainty that their operations will not jeopardize their tax-exempt status.

The proposed rules seek to remedy the lack of clarity in the IRS's regulations that created a serious backlog in the processing of IRS 501(c)(4) applications. The IRS wrote in June 2013 that "no precise definition exists in relevant revenue rulings, cases, or regulations" to decide if an organization is "'primarily' engaged in social welfare activities" and that "the statute does not provide clear guidance on how the determination should be made."[14] This means that "trying to determine whether [an organization] is primarily engaged in social welfare activities" may result in many "'close calls' based on the current laws and regulations and the specific facts and circumstances of each individual submission" which "thereby often require a sophisticated legal and complex factual review to evaluate the application."[15] The lack of clarity in the existing rules creates an unnecessary burden on legitimate social welfare groups and stands in the way of any or timely meaningful enforcement.

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[12] Center for Responsive Politics, Political Nonprofit Spending by Type, http://www.opensecrets.org/outsidespending/index.php (last accessed Feb. 21, 2014).
[13] TREASURY INSPECTOR GENERAL FOR TAX ADMINISTRATION, INAPPROPRIATE CRITERIA WERE USED TO IDENTIFY TAX-EXEMPT APPLICATIONS FOR REVIEW 3 (2013).
[14] IRS, CHARTING A PATH FORWARD AT THE IRS: INITIAL ASSESSMENT AND PLAN OF ACTION 25 (2013).
[15] *Id.* at 22.

It is precisely the lack of common sense, bright-line standards that paved the way for partisan political organizations to assume the identity of social welfare nonprofits. Karl Rove, a founder of Crossroads GPS (a purported 501(c)(4)) explained on national television that its leadership "knew right from the get-go they were going to be looked at closely. So the laws and rules that the IRS has promulgated for decades were followed very closely by GPS for exactly that. [Crossroads GPS's leaders] knew they'd get extra scrutiny."[16]

Notwithstanding Mr. Rove's claims, Crossroads GPS spent over $71 million from secret sources on political expenditures – more than any other social welfare nonprofit in the 2012 election cycle. All the while, the "laws and rules" Mr. Rove claimed Crossroads GPS "followed very closely" required 501(c)(4) organizations to operate "*exclusively for the promotion of social welfare*" which "*does not include direct or indirect participation in political campaigns on behalf of or in opposition to any candidate for public office.*"[17] The law hardly seems to authorize social welfare organizations to spend tens of millions on political campaign commercials. The only fig leaf Crossroads GPS can hide behind is the "primarily engaged" regulatory language governing 501(c)(4)s, which the IRS itself acknowledges has "no precise definition," and which contradicts the plain meaning of the tax code.[18]

Ultimately, it is the secrecy that social welfare organizations provide to donors that makes them attractive vehicles for political spending. Carl Forti, Political Director for American Crossroads, the Super PAC section 527 sister organization of Crossroads GPS, put it bluntly when he told a post-election forum that:

> [Y]ou know, disclosure was very important for us, which is why the 527 [American Crossroads] was created. ***But some donors didn't want to be disclosed, and therefore, a (c)(4) [Crossroads GPS] was created.*** … Whether [donors] would have – whether they would have given ultimately or not, I don't know. ***I know [donors] were more comfortable giving to a (c)(4). And so we created one***."[19]

Voters deserve to know who is attempting to influence their votes. Disclosure allows the electorate to evaluate the strength, content and agenda of political messages, and is an important tool to rein in corruption. That is why courts have repeatedly upheld

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[16] ABC News *This Week* (ABC television broadcast June 2, 2013).
[17] 26 C.F.R. § 1.501(c)(4)-1.
[18] *Supra* note 14; *compare* 26 U.S.C. § 501(c)(4), *with* 26 C.F.R. § 1.501(c)(4)-1(a)(2).
[19] Carl Forti, Remarks on Panel, Annenberg Public Policy Center of the University of Pennsylvania, "Cash Attack 2010: Political Advertising in a Post-*Citizens United* World," Dec. 13, 2010, Washington, DC (transcript by Federal News Service http://www.factcheck.org/UploadedFiles/2011/01/rep_panel.pdf) (emphasis added).

disclosure requirements.[20] Specifically, the Court ruled 8-1 in *Citizens United* that disclosure "permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency [in political spending] enables the electorate to make informed decisions and give proper weight to different speakers and messages."[21] *Citizens United* cited prior campaign finance cases that upheld disclosure requirements, citing "evidence in the record that independent groups were running election-related advertisements 'while hiding behind dubious and misleading names.'"[22] Consistent with this important First Amendment value, the law requires Super PACs and other section 527 organizations to disclose their donors when they spend money to influence elections.

The Proposed Regulations Are a Necessary First Step to Fix the Problem

Political operatives should not circumvent the constitutionally sound bedrock policy of disclosure by exploiting vague regulations governing organizations that Congress never anticipated would engage in electioneering. We applaud the efforts of Treasury and the IRS to modernize these social welfare regulations so that partisan political tacticians no longer abuse our rules to hide important information from voters.

At the same time, we support the goals of providing "greater certainty to section 501(c)(4) organizations regarding their activities and reduce the need for fact-intensive determinations."[23] In the wake of so many new applications for social welfare status after *Citizens United*, providing this certainty will decrease the need to spend valuable organizational and IRS resources engaging in lengthy investigations to resolve "close calls." It will mean less intrusive questioning from the IRS of social welfare operations. Importantly, new rules will not prevent anyone from spending money to influence elections. Rather, political organizations will need to disclose the sources of money funding their political expenditures.

We applaud the objective of differentiating candidate-related political activity from the promotion of social welfare. This is a critical step toward achieving the goal of greater clarity in the law.

However, while brighter lines are laudable, the proposed regulations paint with too broad a brush in some areas, while leaving out massive political spending in others, and should be amended.

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[20] *See* Letter from Fred Wertheimer, President, Democracy 21 & Trevor Potter, President, Campaign Legal Center to Senators, Nov. 14, 2013, *available at* http://www.democracy21.org/wp-content/uploads/2013/11/LETTER-TO-HSE-AND-SENATE-ON-COURTS-REJECTING-CHALLENGES-TO-DISCLOSURE-FINAL-11-1-3-13.pdf.
[21] *Citizens United*, 558 U.S. at 371.
[22] *Id*. at 367.
[23] 78 Fed. Reg. 71538.

Below, Common Cause comments on the specifics of the proposed regulations, and recommends some significant changes. Our recommendations are couched in terms of a baseline policy, long supported by the Supreme Court, that transparency is a critical element in a democracy and that voters have a right to know who is spending money to influence their choices, while recognizing the importance of avoiding unnecessary burdens on nonpartisan civic engagement and advocacy.

1. ***Traditional nonpartisan voter education, registration and mobilization activities should not be considered political activity.***

The proposed definition of "candidate-related political activity" covers some conduct that is neither candidate-related nor political. Classifying traditionally nonpartisan activities that expand democratic participation as "candidate-related political activity" will dampen civic engagement and exacerbate uncertainty among participants in other areas of the nonprofit sector, including 501(c)(3) public charities.

Voter Registration and GOTV. The proposed rule is overbroad in that it classifies voter registration drives and get-out-the-vote ("GOTV") activities as "candidate-related political activity." This is a prime example of where this proposal paints with too broad a brush. Nonpartisan voter registration activities and nonpartisan GOTV voter mobilization activities are inherently about engaging the electorate in matters of civic responsibility, such as voting, and should not constitute "candidate-related political activity."

This provision of the proposed rule should be amended to exempt truly nonpartisan voter registration and nonpartisan GOTV activities from the definition of "candidate-related political activity." The IRS has provided some guidance to 501(c)(3) public charities in this regard, and those principles should apply in this context as well.[24] Such voter registration and GOTV drives should not, for example, indicate a bias or preference for specific candidates or candidates of a political party. No reference to a candidate or political party should be made by representatives of the social welfare organization in conducting these activities, by employees, officers of volunteers. [25]

Nonpartisan Voter Guides. The proposed rule is overbroad in that it covers *all* voter guides. It is true that some voter guides may easily constitute "candidate-related political activity" because social welfare organizations could design and distribute them to sway the electorate in the direction for or against a candidate or slate of candidates. For example, voter guides that identify only one clearly identified candidate should be classified as "candidate-related political activity."

[24] IRS FS-2006-17.
[25] Rev. Rul. 2007-41.

However, in some communities, voter guides are the only tool that voters have to survey the full panoply of candidates up for election. Voter guides can also provide basic, nonpartisan information about the identity and background of political candidates. Such nonpartisan voter guides should be exempted from the definition if they otherwise comport with the guidelines governing nonpartisan voter guides that 501(c)(3) public charities are entitled to distribute without jeopardizing their tax-exempt status. The IRS addressed this issue in detail in Revenue Ruling 78-248, which allows 501(c)(3) organizations to produce and distribute nonpartisan voter guides, and should maintain its current approach here.

Nonpartisan Debates and Forums. The proposed rule defines hosting or conducting an event within 30 days of a primary election or 60 days of a general election at which one or more candidates in such election appear as part of the program as "candidate-related political activity." Certainly it is strong evidence that an event is intended to influence the outcome of that candidate's election if an organization invites only one candidate to an event, or only candidates that align with a social welfare organization's narrow issue focus.

However, without an exemption for nonpartisan events, such as nonpartisan candidate debates and forums, this component is too broad. Just as Treasury and the IRS should exempt nonpartisan voter registration and GOTV activities from the definition of "candidate-related political activity," they should do the same for nonpartisan forums and debates. Forums held for the purpose of educating and informing voters, which provide fair and impartial treatment of all participating candidates, and which do not promote or advance one candidate over another, should not count against an organization's social welfare activities *so long as such events are emphatically nonpartisan*.[26] The IRS's guidance for 501(c)(3) organizations is instructive in this regard. Social welfare organizations holding such events should, for example, invite all candidates seeking election for a particular office, and debate moderators should express clearly at the beginning of the event that any discussions or views did not constitute the views of the sponsoring social welfare organization. Sponsoring organizations should give participating candidates equal opportunities to respond to a wide ranging scope of questions. The IRS has long acknowledged the value that 501(c)(3)s provide to voters with these types of nonpartisan events, and should not change course in this area.

[26] Rev. Rul. 2007-41.

2. ***Express advocacy and reportable federal election expenditures are rightly covered, but the proposed regulations need to include state election expenditures as well.***

The proposed rule appropriately categorizes as "candidate-related political activity" communications that expressly advocate for the election (or defeat) of a candidate, including communications that are susceptible of no reasonable interpretation other than a call for the election or selection of one or more candidates or of candidates of a political party. This is by definition candidate-related political activity because it necessarily involves intervention in a political campaign and calls for the election or rejection of a clearly-identified candidate.

Similarly, the proposal appropriately covers all expenditures for communications that must be reported to the Federal Election Commission, including independent expenditures and electioneering communications. These are by their very nature political expenditures concerning candidates for political office and are correctly categorized as "candidate-related political activity."

However, because 501(c)(4) organizations may participate in candidate-related political activity at the state and local levels as well, the proposed rule needs to be broadened to include expenditures that trigger reporting requirements under state campaign finance laws and regulations.

3. ***The proposed regulations concerning electioneering communications close to an election need to include a targeting threshold, so as not to impede typical issue advocacy activities.***

The proposed rule also appropriately covers "public communications" within 30 days of a primary or 60 days of a general election (the "30/60 day window") that mention a clearly identified candidate. This generally tracks the intent and purpose of the definition of "electioneering communications" in our campaign finance laws and regulations.[27] In so doing, the proposed rules will appropriately cover "sham" issue ads that purport to advocate for or against an issue of public policy, but are in fact squarely aimed at electing or defeating a candidate because of how close in time they appear before an election.

However, the definition of a "public communication" (§ 1.501(c)(4)-(a)(2)(iii)(B)(5) (proposed)) is far too broad because it includes all communications that appear by "broadcast, cable, or satellite; [o]n an Internet Web site; [i]n a newspaper, magazine, or other periodical; [i]n the form of paid advertising; or [t]hat otherwise

[27] *See* 11 C.F.R. § 100.29.

reaches, or is intended to reach, more than 500 persons." Particularly for social welfare organizations that engage in direct or grassroots lobbying activities (which they are entitled to do without limit), such an overbroad definition of a "public communication" would inappropriately classify some of a social welfare organization's non-campaign, non-electioneering lobbying communications as "candidate-related political activity" if the communication takes place in the 30/60 day window. For example, an organization's press release mentioning a bill sponsor by name (who is also a candidate for office) that appears on the organization's website, or a staffer's op-ed describing an important upcoming vote on a bill that names its sponsor (and is a candidate), or an internet-accessible public letter to elected officials up for election that concerns proposed legislation would all count as "candidate-related political activity" if is made within the 30/60 day window. The catch-all provision for communications that reach more than 500 persons would also encompass messages to an organization's membership base (if it's a membership-based organization).

Instead, the definition of "communication" and "public communication" should be amended to mean communications made by print, broadcast, cable, satellite, or electronic means that are targeted to the relevant electorate above a prescribed threshold. The definition of "electioneering communications" under federal election law includes a targeting element, thereby only covering broadcast ads that "can be received by 50,000 or more persons" in the district of a House candidate or state of a Senate candidate.[28] The proposed regulations should incorporate a similar standard, and scale the threshold to the size of the relevant federal, state or local electorate.

In addition, the proposed regulations should expressly exclude communications to the press, such as press releases or op-eds, or to a social welfare organization's members and supporters, if the entity is a membership organization.

4. The proposed regulations correctly cover distribution of materials prepared by a candidate or section 527 organization.

Materials distributed and prepared by a candidate or by a section 527 organization are inherently candidate-related, and distributing such materials is appropriately classified as "candidate-related political activity." Materials prepared by political parties should also be covered.

5. The proposed regulations should be expanded to cover electioneering communications outside of the 30/60-day window.

The communications provisions need to be strengthened in another critical respect. The proposed regulations are under-inclusive because they do not cover

[28] *Id.* at § 100.29(b)(5).

communications *outside* of the 30/60 day window that fall short of express advocacy but are undoubtedly political and aimed at the election or defeat of a candidate. The final rules should account for communications that are intended to sway voters about the qualifications of candidates for elected office but fall short of the "magic words" necessary for express advocacy and might appear before the 30/60 day window. At the same time, such an amendment to the proposed rules must also balance Treasury and the IRS's goal of providing clear guidelines and avoiding fact-intensive analyses. One possibility that Common Cause urges Treasury and IRS to consider is a campaign finance law provision that defines "Federal election activity" to include communications that refer to "a clearly identified candidate for Federal office" that "promotes or supports a candidate for that office or attacks or opposes a candidate for that office."[29] The Supreme Court upheld this "PASO" test in *McConnell v. FEC,* 540 U.S. 93 (2003).

The use of a PASO test, if combined with the targeting thresholds discussed above, will capture the lion's share of sham issue ads and similar electioneering without unduly burdening the issue advocacy work of legitimate social welfare organizations.

6. ***The proposed regulations should not include communications concerning nominees for appointment to public office.***

The proposed definition of "candidate" (§ 1.501(c)(4)-(a)(2)(iii)(B)(1) (proposed)) includes individuals named for "nomination" or "appointment" to public office, even if they are nominees or appointee-designates for offices that are not electoral in nature. The definition of a candidate is overly broad because it would encompass, for example, communications about federal judicial nominees or federal executive branch nominees, neither of which, except for some very limited circumstances, are candidates for an *electoral* office. Common Cause recommends refining the definition of "candidate" to include only communications concerning individuals that stand for election. This will preserve the ability of social welfare organizations that engage in grassroots lobbying concerning non-electoral offices, such as federal judicial nominees, to communicate with their members, the press and the public without such communications counting as "candidate-related political activity."

7. ***The proposed regulations rightly cover transfers of funds, but need to be refined.***

The proposed rule appropriately covers the transfers of funds between social welfare organizations, including any contributions that would otherwise be reportable under federal, state or local campaign finance law, as well as transfers of social welfare organization funds to section 527 organizations. Moreover, the proposed rule correctly

[29] 2 U.S.C. § 431(20)(A)(iii).

covers transfers to other social welfare organizations if the recipient social welfare organization engages in "candidate-related political activity."

This provision is necessary to prevent further abuse of the tax laws to hide donors. It will discourage the funneling of contributions through multiple social welfare organizations so that only the name of a faceless social welfare organization constitutes the "donor." Political operatives have already engaged in these sorts of shell games in the last two election cycles. They are an affront to transparency and voter information.

The proposed rule is appropriately tailored because of a safe harbor that allows the contributor organization to "obtain[] a written representation from an authorized officer of the recipient organization stating that the recipient organization does not engage in such activity" and "[t]he contribution is subject to a written restriction that it not be used for candidate-related political activity."[30] In so doing, the contribution will not be considered "candidate-related political activity." Beyond this self-certification process, Treasury and the IRS might consider requiring recipient organizations to account for any such funds by placing them in a separate segregated account that will not be used on candidate-related political activity, or requiring an organization wishing to receive such transfers to separately identify the source of funding for their political activity. Such a requirement would provide an important safeguard and layer of enforcement.

In addition, social welfare organizations that transfer money to a section 527 organization should be required to identify the original donors of those funds.

8. The proposed regulations should apply to other 501(c) organizations as well.

As the chart on page 4 demonstrates, other 501(c) organizations, such as business associations and labor unions, have engaged in significant political spending in recent elections (although nowhere near the high levels of some select social welfare organizations).

If the proposed rule only affects the activities of 501(c)(4) social welfare organizations, political operatives could simply shift their actions to other tax-exempt nonprofits that do not require disclosure. This would not solve the underlying problem that lies at the heart of this issue, which is undisclosed political spending to influence the outcome of candidate elections.

Common Cause strongly urges Treasury and the IRS to advance the goal of clarity by providing greater uniformity across all 501(c) organizations so that candidate-related political activity is understood not to constitute the exempt purpose of any 501(c)

[30] 26 C.F.R. § 1.501(c)(4)-(a)(2)(iii)(D)(1),(2) (proposed).

organization. At the same time, it is critical that such a definition be narrower than the one provided in the proposed rule to account for the concerns expressed above.

9. ***The proposed regulations should set a limit on how much political activity a 501(c) organization can engage in, before being required to establish a section 527 organization.***

Even with a clear, precise definition of "candidate-related political activity," political organizations and operatives could still use social welfare organizations to spend millions of dollars on political expenditures and electioneering from secret sources unless the IRS establishes a clear ceiling.

Without question, the record $267 million in political expenditures funneled through social welfare organizations in the 2012 elections gravely subverted the right of voters to know the identity and origin of major political spenders. Knowing their identity helps them fully evaluate political messages aimed at influencing their votes. This charade must not be repeated.

At the same time, there is no practical rule that will cover every single dollar of political activity, nor should the law subject social welfare organizations to overly burdensome requirements after some have operated for decades within a system that allowed *some* activities that do not exclusively advance their tax-exempt purpose.

New common-sense regulations should allow some modest amounts of activity that is unrelated to a 501(c) organization's exempt purpose without jeopardizing the organization's tax-exempt status. Regulations governing 501(c)(3) organizations already reflect this policy – specifically, where they state that an "organization will not be so regarded [as operated exclusively for one or more purposes] if more than an insubstantial part of its activities is not in furtherance of an exempt purpose."[31]

Similarly, Treasury and the IRS should consider a corollary provision to govern social welfare organizations (and other 501(c) entities). Such a rule would permit a small amount of candidate-related political activity, so long as it is not more than an insubstantial part of its activities and ***so long as there is a mechanism to require disclosure of the sources of money spent on candidate-related political activity over a clearly defined dollar threshold***.

Like the 501(h) lobbying expenditure limit that some public charities utilize to provide certainty that lobbying will not constitute "more than an insubstantial" amount of its charitable purpose, Treasury and the IRS could promulgate a similar candidate-related political activity expenditure limit for social welfare organizations and other 501(c)

[31] 26 C.F.R. § 1.501(c)(3)-1(c)(1).

entities. Such a 501(h) corollary will provide certainty that organizations will not jeopardize their tax status if they stay within a clearly established limit, which like the 501(h) test should be scaled to the size of the organization and include a strict spending cap.

Importantly, such a bright-line threshold expenditure limit should be conditioned on a system for disclosure. Organizations that utilize this exemption to make major candidate-related political expenditures should be required to disclose the sources of their contributions, unless the donors specifically prohibit use of their funds on candidate-related political activity and the money is kept in a separate segregated fund that is firewalled from political spending.

The proposed rules should also make clear that political expenditures over the prescribed limit are not prohibited, but rather must be made through a section 527 organization or other comparable segregated fund that requires donor disclosure.

Conclusion

It is critical to the preservation of an open, honest and accountable government that Treasury and the IRS tackle the difficult task of shining a light on political spending by nonprofits. While the proposed rules as currently written are significantly flawed, the job can and must be done. There are many organizations that support the goals of this rulemaking and are committed to continuing this process.

The proposed rules, including our recommendations, in no way prohibit political activity, including the hundreds of millions of dollars in political expenditures that outside groups spent in 2012. They would instead require such political organizations to disclose the sources of their spending, which the Supreme Court has repeatedly upheld as important to further the First Amendment interest in an informed electorate.

Common Cause respectfully requests a public hearing.

Respectfully submitted,

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