



February 16, 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:

Thank you for the opportunity to provide comments in response to the Notice of Proposed Rulemaking (“NPRM”) proposing a new definition of political activity for 501(c)(4) social welfare organizations and possibly other types of tax-exempt organizations.

Nonprofit VOTE welcomes this proposal from the Department of the Treasury (“Treasury”) and the Internal Revenue Service (“IRS”) as a step toward limiting the partisan political activities of 501(c)(4) social welfare organizations and ensuring their primary purpose remains, as the law defines, “to promote the common good and general welfare of the people of the community.”<sup>1</sup> The proposal takes important steps in seeking to define what is considered partisan political activity and in raising the question of how much political activity should be permitted for organizations claiming exemption from federal income taxes under section 501(c)(4) of the Internal Revenue Code (“Code”). We need action to stop the rising abuse of 501(c) organizations, which have been used to channel large amounts of secret, undisclosed money to influence political campaigns.

However, in its effort to distinguish political activities from non-political activities, the proposed IRS rule goes too far in classifying as “candidate-related political activity” even nonpartisan voter engagement and voter education activities such as voter registration and get-out-the-vote (“GOTV”) activities, nonpartisan voter guides, and candidate debates or forums as “candidate-related political activity.” Even if nominally applied only to 501(c)(4)s, this overbroad definition will have an inevitable impact that chills the vital civic engagement work of 501(c)(3) organizations. Furthermore, nonpartisan voter engagement is certainly a valid way to

---

<sup>1</sup> Treas. Reg. § 1.501(c)(4)-1(a)(2).

promote social welfare and 501(c)(4) social welfare organizations should not be limited in their nonpartisan efforts.

Indeed, any rule defining political activity for tax-exempt organizations should create a definition that applies not only to 501(c)(4)s, but to all 501(c)s. Nonprofit VOTE is concerned that creating a definition of political activity that applies only to 501(c)(4)s would create unnecessary confusion and chill vital civic engagement work by 501(c)(3)s. Having different definitions of political activity for 501(c)(4)s and other 501(c)s would also leave open loopholes allowing political operatives to use these other types of 501(c) organizations – 501(c)(6) trade associations, and others – to conduct undisclosed partisan political efforts. The same definition of political activities should apply to these organizations, and the same limits on political activity should apply to all non-charitable 501(c) organizations – recognizing that 501(c)(3) charitable nonprofits already have a higher standard of an absolute prohibition on partisan activity.

Nonprofit VOTE recommends that Treasury revise this first draft of regulations to create rules that would protect all nonpartisan voter education and engagement, that would provide clear definitions of political activity, and that would apply to all tax-exempt organizations. In light of the significant changes to the proposed regulations that this would entail, we suggest that Treasury seek additional public comment on such a revised draft before promulgating any final rule.

The nonprofit sector has throughout our nation's history played a foundational role to encourage civic engagement and strengthen democracy. Charities and voluntary associations have long promoted active citizenship including promoting voter participation and undertaking nonpartisan voter education, voter registration drives, candidate forums and the like. Our democracy needs this spirit of civic engagement and nonpartisanship more than ever. We urge Treasury to use this opportunity to protect and affirm nonpartisan civic activity across all nonprofit and exempt organizations, not confuse or dilute it.

### **About Nonprofit VOTE**

Nonprofit VOTE, a 501(c)(3) nonprofit organization, partners with America's nonprofits to help the people they serve participate and vote. Nonprofit VOTE was founded in 2005 by a consortium of state nonprofit associations and national nonprofit networks to provide resources and trainings for the nonprofit sector on how to conduct nonpartisan voter participation and election activities. We are the largest source of nonpartisan resources to help nonprofits integrate voter engagement into their ongoing activities and services. Our goals are to:

- Provide high quality resources for charitable nonprofits to promote voter participation and engage with candidates on a nonpartisan basis.
- Build lasting capacity for nonpartisan voter and election engagement throughout the nonprofit sector.

- Encourage increased voter participation and active citizenship, especially among voters new to the process or with a recent history of lower participation.
- Develop and evaluate models for voter engagement by nonprofit service providers, identifying the most effective strategies for nonprofits to incorporate voter engagement into their ongoing activities.
- Strengthen the nonprofit sector and encourage new civic leadership.

**Exponentially increased undisclosed political spending by 501(c)(4)s requires action.**

The unspoken – at least in the NPRM – context for these proposed regulations is the unprecedented levels of political activity by 501(c) organizations in the wake of the Supreme Court’s decision in *Citizens United v. Federal Election Commission* (“*Citizens United*”). Although the failure to clearly define or set clear limits on political activity by tax-exempt organizations is a longstanding problem, the problem has become urgent now that a small segment of the 501(c)(4) community have become major players in the partisan political arena. While, as described in these comments, Nonprofit VOTE is not satisfied with the draft regulations in their current form, we nonetheless applaud Treasury and the IRS for undertaking this effort and urge them to move forward with regulations in this area now as a necessary first step in addressing the influence of 501(c) political activity funded by unlimited contributions from undisclosed donors.

In the wake of the *Citizens United* decision striking down most limits on political spending, we have seen unprecedented growth in non-charitable 501(c) political activity, and the sources of funds behind that growth are generally unknown. The number of applications for recognition of 501(c)(4), 501(c)(5), and 501(c)(6) status rose from 4122 in 2009 (the year before *Citizens United*) to 6776 in 2012, a 64% increase.<sup>2</sup> Even an incomplete picture of 501(c) electoral spending shows an increase in political spending, from less than \$5.2 million in 2006 to more than \$300 million in 2012.<sup>3</sup> The sources of funds for this increased political spending are generally not disclosed because 501(c)s are generally not required to disclose their donors and because current FEC policy does not require disclosure of donors whose gifts to a reporting entity are not made specifically for the reported electoral expenditures.

---

<sup>2</sup> Treasury Inspector General for Tax Administration, *Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review*, May 14, 2013, Reference No. 2013-10-053, at 3, available online at <http://www.treasury.gov/tigta/auditreports/2013reports/201310053fr.pdf> (last accessed January 30, 2014). The increase in applications for recognition of 501(c)(4) status was 92%. *Id.*

<sup>3</sup> Analysis by the Center for Responsive Politics, available at [http://www.opensecrets.org/outsidespending/nonprof\\_summ.php](http://www.opensecrets.org/outsidespending/nonprof_summ.php) (last accessed January 30, 2014). This analysis only reflects spending by 501(c)s on independent expenditures and electioneering communications reported to the Federal Election Commission. Not reflected in these figures are other political spending by 501(c)s, including political spending at the state and local level, political spending for other types of federal political activity (e.g. political communications to members, ads favoring or opposing candidates that do not include “express advocacy” and that fall outside the time windows for “electioneering communications,” and political expenditures by 501(c)s that fall below reporting thresholds or are otherwise not reported by 501(c)s).

Unlimited spending to influence elections using funds from undisclosed sources threatens our democratic system. Democracy thrives when different visions for the future of our country can compete fairly. The shadow money flooding our political system threatens that ideal by allowing the contributions of a small number of persons and interests to drown out the voices of others.

To be sure, the NPRM does not concern itself with these larger policy implications of its proposal. Instead, it explains the rulemaking as necessary to address the problems with administering the law governing tax-exempt organizations, as revealed most recently and most strikingly by recent problems related to IRS review of tax-exemption applications from more politically ideological 501(c)(3) and 501(c)(4) organizations. It is certainly true that the fallout from these problems would be sufficient reason to justify this rulemaking even absent the concerns about the rising tide of undisclosed money in politics by non-charitable 501(c) organizations.

The flood of political spending from non-charitable 501(c) shadow groups, however, makes this rulemaking essential. Congress has made statutory decisions to limit the degree to which 501(c) organizations may engage in partisan political activity. Congress has decided that in order to engage in more political activity these organizations must do so through another type of tax-exempt organization – one exempt under section 527 of the Code – that is required to fully disclose its donors and its spending. Because there is no clear definition of political activity and no clear limits on how much of that activity is permissible, however, the non-charitable 501(c)s that the Supreme Court has freed from campaign finance law restrictions are able to flout the tax law as well.

Therefore, Nonprofit VOTE urges Treasury and the IRS to proceed with this rulemaking to define political activity and to set clear limits for how much political activity is permitted for non-charitable 501(c)s. Not only will doing so give nonprofits and IRS staff the clarity needed to comply with and enforce the law, but such clarity will also stem the flow of undisclosed political spending and encourage appropriate disclosure of the spending and sources of funds being used to influence elections.

**Any definition of political activity must expressly exclude nonpartisan voter education and engagement efforts.**

Although a clear definition of political activity is essential, the NPRM's proposed definition of "candidate-related political activity" is far too broad, treating as political a variety of activities that are, and historically have been, conducted in a nonpartisan, non-political way. In so doing, the NPRM threatens important voter education and voter engagement work that is at the heart of Nonprofit VOTE's charitable mission.

Specifically, the NPRM errs in treating as "candidate-related political activity":

- All voter registration and GOTV efforts. IRS guidance has historically recognized nonpartisan efforts to register voters and encourage them to vote as a legitimate charitable activity, permissible even for 501(c)(3)s which are absolutely banned from any political campaign intervention.<sup>4</sup> Indeed, Congress has enacted statutes recognizing nonprofit voter registration efforts as an appropriate activity.<sup>5</sup>
- All events featuring a candidate within 30 days of a primary or 60 days of a general election, which would include all nonpartisan candidate debates and forums. Such events have long been recognized as 501(c)(3)-permissible educational activities.<sup>6</sup>
- All voter guides, despite more than 30 years of guidance recognizing that nonpartisan voter guides may be produced as 501(c)(3)-permissible educational materials.<sup>7</sup>

Helping nonprofit organizations conduct these types of activities is the central mission of Nonprofit VOTE. Our organization was created to work with charitable nonprofit organizations that are key points of contact with communities that are new to the democratic process or that have a history of lower democratic participation.

Although, as drafted, the NPRM would only define such nonpartisan activity as political for 501(c)(4)s, as a practical matter such a definition would restrict the work of 501(c)(3)s as well. In our experience working with frontline 501(c)(3) human services providers, we have seen that these organizations understandably focus their limited resources on their core charitable service missions. They undertake nonpartisan voter registration, GOTV, voter education, and similar civic engagement work recognizing that the populations they serve are those most underrepresented in our democratic process and most in need of such assistance. Yet these organizations lack resources for expert legal advice in this area and are extremely reluctant to engage in any activity that they perceive might jeopardize their fundamental mission. Thus, any suggestion that civic engagement activities are deemed to be political for some 501(c) nonprofits is likely to lead cautious 501(c)(3) organizations to avoid these activities. Despite the value of civic engagement efforts by these key service agencies, many will drop such efforts.

For those 501(c)(3) organizations sophisticated enough to understand that voter registration, GOTV, and voter education would still be permissible in the wake of a rule such as that proposed by the NPRM, the organizations may find that financial support for such activities evaporates. The 501(c)(3) private foundations that have historically supported such work are

---

<sup>4</sup> See, e.g., Revenue Ruling 2007-41, discussing permissible voter registration and GOTV efforts.

<sup>5</sup> See, e.g., Code § 4945(f) (describing criteria for private foundation support of voter registration) and National Voter Registration Act, Pub. L. 103-31, Sec. 7, 107 Stat. 80 (requiring agencies providing public assistance or services to people with disabilities be required to offer voter registration assistance).

<sup>6</sup> See Revenue Rulings 66-256, 74-574, 86-95, and 2007-41, all describing such candidate events as permissible charitable activities.

<sup>7</sup> See, e.g., Revenue Ruling 78-248.

already cautious and too often confused about funding activities that might be deemed political. Just as the proposed rule would discourage civic engagement work by many risk-averse 501(c)(3) services providers, so many private foundations would likely cut off funding for such work if a regulation were adopted defining such work as political for 501(c)(4)s.

Therefore, Nonprofit VOTE urges Treasury and the IRS to provide clear guidance that *nonpartisan* civic engagement activities are permissible for all 501(c)s, including 501(c)(3)s. It would be helpful to include a safe harbor that excludes specific nonpartisan civic engagement activities that are *per se* nonpartisan. Existing IRS guidance, particularly Revenue Ruling 2007-41, provides examples of nonpartisan voter education, voter registration, and GOTV activities that should be included in this safe harbor. It may also be helpful for the regulations to address situations that do not fall within this safe harbor for *per se* nonpartisan activity but which may be deemed nonpartisan under a facts and circumstances test.

**Any definition of political activity must apply to all 501(c)s.**

The chilling effect that an overbroad 501(c)(4) definition of political activity would have on 501(c)(3) service providers and funders is only one reason that Treasury and the IRS should create a universal definition of political activity, rather than a special definition that applies only to 501(c)(4)s. A definition of political activities that applies to all tax-exempt organizations would provide clarity to the 501(c)(3) organizations most in need of it, eliminate incentives for political operatives to game the system, encourage non-charitable 501(c) organizations to conduct nonpartisan voter engagement work, and avoid the confusion and burden caused by multiple definitions.

To create a definition of political activity for 501(c)(4)s without providing similar clarity for 501(c)(3)s is to ignore the higher priority. There are more 501(c)(3) organizations than all other types of tax-exempt organizations combined. Unlike 501(c)(4)s and other categories, 501(c)(3)s risk loss of their tax-exempt status if they engage in any political activity, which makes the current ambiguity in what constitutes political campaign intervention a greater risk for 501(c)(3)s. It is worth recalling that approximately one third of the organizations on the “be-on-the-lookout” or “BOLO” lists that were at the heart of the recent IRS scandal were 501(c)(3)s. A clear definition of political activity is needed, both for 501(c)(3)s required to comply with the law and the IRS staff charged with enforcing it.

A definition of political activity that applies only to 501(c)(4)s would also encourage abuse of other types of tax-exempt organizations. In the wake of heightened public attention and regulatory scrutiny of 501(c)(4) involvement in elections, we have seen increased use of

501(c)(6) organizations for such activities.<sup>8</sup> Indeed, a definition of political activity that defines GOTV efforts as political for 501(c)(4)s and not 501(c)(3)s might encourage partisan funders to move political money into 501(c)(3) organizations, targeting their efforts to turn out key constituencies with a mere patina of nonpartisanship (and getting the additional benefit of a tax deduction for a supposedly charitable contribution). Charitable nonprofits do not want that taint.

In contrast, a fair definition of political activity would actually encourage true nonpartisan efforts to engage citizens in the democratic process. Rules providing assurance that nonpartisan civic engagement will not be treated as political would certainly encourage support for such efforts by 501(c)(3)s and their funders. Such rules would also encourage nonpartisan efforts by 501(c)(4) organizations, confident that these efforts would be treated as part of the organization's "social welfare" purpose. Likewise, 501(c)(5) unions, 501(c)(6) trade associations, and other types of tax-exempt organizations could conduct or fund nonpartisan voter registration, GOTV, and similar efforts confident that such efforts would not be treated as part of the limited political work that these organizations may permissibly conduct.

Finally, a universal definition of political activity would avoid the significant burden that multiple definitions would create for 501(c)(4)s affiliated with other tax-exempt organizations. Many 501(c)(4) organizations, for example, operate as affiliates of 501(c)(3) organizations, which may have created the 501(c)(4) to engage in advocacy efforts beyond those permitted for the 501(c)(3).<sup>9</sup> Often these related organizations share staff, office space, and other resources. Having different definitions of political activity for such related organizations would create confusion for shared staff charged with complying with the rules applicable to each organization and administrators required to report on each organization's compliance in annual Form 990 information returns and other government filings.

For all of these reasons, Nonprofit VOTE urges Treasury to craft a more carefully drawn definition of political activity that would apply not only the 501(c)(4)s, but also to 501(c)(3)s and other types of tax-exempt organizations.

### **Conclusion**

Treasury and the IRS have taken an important first step in undertaking this rulemaking. The need to provide clarity to nonprofit organizations and to IRS staff charged with enforcing the applicable law would be reason enough, but this rulemaking also offers an important opportunity to ensure that nonprofits across all 501c organizations are never vehicles to funnel

---

<sup>8</sup> See, e.g., Alex Seitz-Wald, "Koch Brothers Break New Ground in Dark Money," NATIONAL JOURNAL, September 13, 2013 (describing the 501(c)(6) organization Freedom Partners as "the first in what could be a new class of weapons in the secret money arms race").

<sup>9</sup> See, *Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1983) (discussing the creation of such related 501(c)(4)s in the context of the 501(c)(3) limits on lobbying).

large amounts of money for the purpose of intervening in political campaigns beyond their primary social welfare and civic purpose.

Nonetheless, the proposed rule is unacceptable in its current form. In particular, the rule errs in treating as political nonpartisan voter registration, GOTV, and voter education, flying in the face of decades of guidance recognizing this vital civic engagement work as permissible charitable and educational activity. Any final rule should be significantly revised to protect and encourage this important work.

Once this more carefully drawn rule is created, it should be applied universally to all tax-exempt organizations to avoid confusion and prevent abuses.

Nonprofit VOTE looks forward to another opportunity to comment on a revised draft of proposed regulations that address these concerns prior to the promulgation of any final rule.

Thank you for your efforts to address these important issues and for considering our comments. We look forward to further developments.

Sincerely,

A handwritten signature in black ink that reads "George Pillsbury". The signature is written in a cursive, slightly slanted style.

George Pillsbury  
Executive Director