BEFORE THE U.S. DEPARTMENT OF TREASURY
INTERNAL REVENUE SERVICE

In The Matter of:	)
	)
Guidance for Tax-Exempt Social Welfare	)
Organizations on Candidate-Related Political	) **NPRM, REG-134417-13**
Activities	)
	)

COMMENTS OF CITIZENS UNITED AND CITIZENS UNITED FOUNDATION

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I. Introduction & Summary of Comments

Citizens United ("CU") and Citizens United Foundation ("CUF") respectfully submit these comments in response to the Notice of Proposed Rulemaking ("NPRM"), REG-134417-13, issued by the U.S. Department of Treasury ("Treasury") and Internal Revenue Service ("IRS" or "Service") on November 29, 2013. The NPRM seeks comments from the public on "proposed regulations that provide guidance to tax-exempt social welfare organizations on political activities related to candidates that will not be considered to promote social welfare." Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities, IRS REG-134417-13, 78 Fed. Reg. 71,535 (Nov. 29, 2013).

As a threshold matter, CU and CUF question the validity of the regulations excluding political campaign intervention from the definition of "promotion of social welfare." There is no statutory authority for this exclusion. Further, excluding political campaign intervention from the definition is irrational because public policy advocacy falls squarely within the contours of promoting social welfare, and political campaign intervention is one of the more effective means by which a section 501(c)(4) organization can advance its public policy advocacy agenda. In addition, the restrictions on political campaign intervention violate the First Amendment rights of section 501(c)(4) organizations because those activities are in no way subsidized by the government. As a principal recommendation, we urge Treasury and the IRS to abandon the regulatory changes proposed by the NPRM. Instead, the existing regulations should be amended by deleting the language excluding political campaign intervention from qualification as "promotion of social welfare." Making that one

simple change to the existing regulations negates the need for consideration of the regulatory revisions set out in the NPRM.

If the existing restrictions on political campaign intervention by section 501(c)(4) organizations are not repealed, CU and CUF urge Treasury and the IRS to withdraw the proposed regulations and terminology governing "candidate-related political activity" and focus instead on adopting clear and precise regulations that:

- Narrowly define political campaign intervention so that it is consistent with campaign finance law and leading U.S. Supreme Court precedents delineating political campaign activities from social welfare issue advocacy; and

- Set out a safe harbor establishing a 60% average expenditure threshold as meeting the requirement that a group be primarily engaged in social welfare activity in order to qualify for section 501(c)(4) tax-exempt status.

Citizens United and Citizens United Foundation request that a public hearing be held on this matter and that a representative of our organizations be permitted to testify at such hearing.

II. Interests of Citizens United & Citizens United Foundation

A. Citizens United

Citizens United ("CU") is a non-profit membership organization that is exempt from taxation under Section 501(c)(4) of the Internal Revenue Code. The organization, which was founded in 1988, is dedicated primarily to principles of limited government, national sovereignty and rights secured under the United States Constitution. CU has approximately 500,000 members and supporters throughout the United States.

CU employs a variety of formats to present its views and the views of its members on legislative and public policy issues to federal, state and local government officials, and the

general public. Channels of communication employed by the organization include direct mail, documentary films, handbills, internet websites, e-mail, television, radio, print publications, court briefs, conferences, seminars and other public forums. Public policy advocacy materials posted on and/or distributed through these channels of communication frequently refer to elected officials, persons who have been appointed to public office, candidates for election to public office and persons seeking appointment to (or confirmation of their nomination to) public office.

CU was the Petitioner in Citizens United v. FEC, 558 U.S. 310 (2010), the landmark U.S. Supreme Court case that opened the door to corporate participation in federal elections, including participation by incorporated tax-exempt social welfare organizations. Prior to the court decision, CU's federal election-related activities were limited to activities through its separate segregated fund, Citizens United Political Victory Fund, which is registered with the Federal Election Commission as a federal political action committee. Since the decision, CU has been able to engage in robust candidate-related speech, although such activities remain but a small portion of the organization's overall activities.

If adopted, the regulatory changes set out in the NPRM will have a direct and profound negative effect on CU. To avoid having its public policy advocacy materials re-categorized as political campaign intervention materials, CU would be required to censor materials posted on its internet websites by removing any content that: (a) refers to a candidate within 30 days prior to the candidate's primary election or (b) refers to a candidate or political party 60 days prior to the general election. This would be a daunting (if not impossible) task, requiring continuous monitoring and updating of website materials since primary election dates vary from jurisdiction to jurisdiction and year to year. During the

30/60 day blackout periods, CU would also be required to discontinue the marketing many of its documentary films simply because the films include one or more references to persons who happen to be candidates for an elective. Failure to do so would result in the entire work being labeled candidate-related political activity irrespective of the context in which the person is referenced. For example, a 90 minute documentary on the U.S. Constitution that included a few seconds of footage of an incumbent member of the U.S. House of Representatives speaking about how a bill becomes law would be deemed political campaign intervention if the incumbent was running for re-election and the film was distributed during the blackout periods.

B. Citizens United Foundation

Citizens United Foundation ("CUF") was established in 1992 as a non-partisan, non-profit research and education foundation, under Section 501(c)(3) of the Internal Revenue Code. CUF is dedicated to informing the American people about public policy issues which relate to traditional American values, including: the Constitution as the supreme limit on federal power, a strong national defense as the primary role of the federal government; free enterprise as the economic system that has enabled the American people to attain and maintain an historically high standard of living; belief in God and Judeo/Christian values as the fundamental attribute of our way of life; and the recognition of the family as the basic social unit of our society.

In contrast to CU, CUF does not engage in any activities that under the existing regulations would be considered direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office. CUF nonetheless has a direct interest in the NPRM because it seeks comments on whether the IRS should

revise its regulations governing section 501(c)(3) organizations to bring them in line with revisions that are proposed for section 501(c)(4) organizations. See NPRM, 78 Fed. Reg. at 71,537 (requesting comments "on the advisability of adopting an approach to defining political campaign intervention under section 501(c)(3) similar to the approach set forth in these regulations, either in lieu of the facts and circumstances approach reflected in Rev. Rul. 2007-41 or in addition to that approach" and "on whether any modifications or exceptions would be needed in the section 501(c)(3) context and, if so, how to ensure that any such modifications or exceptions are clearly defined and administrable").

III. Discussion & Analysis

A. There Is No Statutory Authority for the Existing Political Campaign Intervention Restrictions for 501(c)(4) Organizations

CU and CUF fully concur with the comments of The Heritage Foundation, Inc., questioning the statutory authority for the existing restrictions on political campaign intervention by section 501(c)(4) organizations. See The Heritage Foundation, Inc., Comments in Response to Notice of Proposed Rulemaking on "Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities" (December 19, 2013) at 5-7. While the Internal Revenue Code prohibits organizations exempted under section 501(c)(3) from participating or intervening in any political campaign on behalf of or in opposition to any candidate for public office, the Code includes no restrictions whatsoever on political campaign intervention by section 501(c)(4) organizations. Compare 26 U.S.C. § 501(c)(3) and 26 U.S.C. § 501(c)(4). In construing statutes, the U.S. Supreme Court has instructed:

> [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.

Russello v. United States, 464 U.S. 16, 23 (1983), quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972). Here that statutory presumption is quite strong because Congress clearly knew how to impose a "no substantial part" restriction when it enacted section 501(c). Congress imposed such a restriction on the lobbying activities of section 501(c)(3) organizations. In relevant part, section 501(c)(3) of the Code states: "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))." Had Congress intended to similarly limit the political campaign intervention activities of section 501(c)(4) organizations it could have easily done so with language paralleling the language used to restrict lobbying activities by section 501(c)(3) organizations. Thus, employing traditional tools of statutory construction, it is clear that Congress did not intend to restrict the political campaign intervention activities of section 501(c)(4) organizations, See Chevron v. National Resources Defense Council, Inc., 467 U.S. 837, 843 n. 9 (1984) (when through the use of traditional tools of statutory construction Congress' intention can be ascertained, "that intention is the law and must be given effect").

Our contention is further bolstered by Treasury's failure to set out in the administrative record any authority or justification for the restricting the political activities of section 501(c)(4) organizations when those restrictions were adopted in 1959. As The Heritage Foundation aptly points out in its comments:

> When the Secretary of the Treasury purported to impose by regulations 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.

The Heritage Foundation, Inc., Comments in Response to Notice of Proposed Rulemaking on "Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities" (December 19, 2013), at 5 n. 7.

By imposing through regulation a requirement that a section 501(c)(4) organization not engage in any substantial political campaign intervention activities, Treasury and the IRS have usurped Congress' law making powers because there is simply no statutory authority for those restrictions.

Further, the restrictions on political campaign intervention by section 501(c)(4) organizations are irrational. Longstanding IRS guidance makes clear that issue advocacy and public policy lobbying activities by section 501(c)(4) organizations qualify as core social welfare activities. For example, in Revenue Ruling 71-530, the IRS stated:

> Through presentations by qualified witnesses on pending or proposed tax legislation, the organization is promoting the common good and general welfare of the community by assisting legislators and administrators concerned with tax policy. Such activity helps the legislators and administrators form better judgments about the legislation.
>
> The fact that the organization's only activities may involve advocating changes in law does not preclude the organization from qualifying under section 501(c)(4) of the code.

Rev. Rul. 71-530, 1971-2 C.B. 237. Effectuating changes in public policy frequently requires the enactment of new laws or repeal of old laws, and this can only be accomplished if elected officials are receptive to the proposed changes. Elections are the chief means in this country by which citizens ensure that public officials are receptive to the will of the governed. Political campaign intervention by section 501(c)(4) organizations promotes social welfare in a manner similar to public policy advocacy and lobbying. By providing

voters with information on candidates and the candidates' positions on issues of importance to an organization, political campaign intervention by section 501(c)(4) organizations promotes the common good and general welfare of the community by helping voters form better judgments about whom to elect to public office and the impact that their choices will have on their community.[1] It therefore makes no sense to exclude political campaign intervention from the definition of promoting social welfare.

Restricting the political campaign intervention activities of section 501(c)(4) organizations violates the First Amendment rights of such entities. In contrast to Section 501(c)(3) organizations, which are subsidized through the receipt tax-deductible contributions, section 501(c)(4) organizations receive no such subsidy from the government.

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[1] This notion is far from unique to CU and CUF; it's a view shared by many. See, e.g. ACLU, Comments on Draft Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities (February 4, 2014) at 3 ("[S]ocial welfare organizations praise or criticize candidates for public office on the issues and they should be able to do so freely, without fear of losing or being denied tax-exempt status, even if doing so could influence a citizen's vote. Such advocacy is at the heart of our representative democracy. To the extent it influences voting, it does so by promoting an informed citizenry."); The Heritage Foundation, Inc., Comments in Response to Notice of Proposed Rulemaking on "Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities (December 19, 2013) at 5 ("The plain meaning of [the] 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.")(emphasis in original); Center for Competitive Politics, Comments on IRS NPRM, REG-234417-13 (December 5, 2013) at 2 ("[I]n a democracy, political education not only should but must fall within the definition of "social welfare" and "educational" activities that constitute exempt activities under §501(c)(4). Nothing in the statute requires exclusion of these functions from the definition of social welfare.") and Statement of Nan Aron, President, Alliance for Justice, Treasury, IRS proposal endangers citizens participation in democracy (Nov. 27, 2013)("The 501(c)(4) organizations we work with do not a engage in political work as their ultimate goal. They see political work as a means to an end . . . They conduct election activities like holding candidate forums and producing voter guides not to help individual candidates, but to help voters make informed decisions based on issues they care about.")(available at www.afj.org/press-room/press-releases/aft-treasury-irs-proposal-endangers-citizen-participation-in-democracy).

Moreover, political campaign expenditures by section 501(c)(4) groups are subject to a direct tax. See 26 U.S.C. § 527(f)(imposing tax on political expenditures at the highest corporate income tax rate). Thus, from a First Amendment perspective, imposing restrictions on the political campaign intervention activities of section 501(c)(4) groups is not akin to imposing limits on the lobbying activities of Section 501(c)(3) groups. See Regan v. Taxation With Representation of Washington, 461 U.S. 540 (1983)(Congress may constitutionally restrict the lobbying activities of section 501(c)(3) organizations because it is not required to subsidize such activities). Instead, the restrictions on political campaign intervention are on par with the ban on political expenditures by corporations that was struck down in Citizens United v. FEC, 558 U.S. 310 (2010).

In light of the factors discussed above, CU and CUF urge Treasury and the IRS to withdraw the regulatory changes proposed by the NPRM, and, instead, amend the existing regulations by deleting the language in the current regulations at 26 CFR § 1.501(c)(4)-1(a)(2)(ii) that state: "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." Making that one simple revision to the existing regulations (along with minor technical corrections to the remaining language) negates the need for further consideration of the regulatory revisions set out in the NPRM.

B. The Proposed Rules & Terminology Governing "Candidate-Related Political Activities" Should Be Withdrawn In Favor of Clear and Precise Rules Narrowly Defining Political Campaign Intervention by Section 501(c)(3) and Section 501(c)(4) Organizations

The "facts and circumstances" approach that is currently employed to determine whether or not a section 501(c)(3) or section 501(c)(4) organization has engaged in political campaign intervention is deeply flawed. As the 7th Circuit U.S. Court of Appeals poignantly

highlighted in United Cancer Council v. Commissioner, a test predicated on the "'facts and circumstances' of each case" amounts to "no standard at all, and makes the tax status of charitable organizations . . . a matter of the whim of the IRS." United Cancer Council, Inc. v. Commissioner, 165 F.3d 1173, 1179 (7th Cir. 1999). If our principal recommendation to rescind the restrictions on section 501(c)(4) political activities is not embraced, CU and CUF would support, in principle, the adoption of "more definitive rules with respect to political activities related to candidates – rather than the existing, fact-intensive analysis" used by the IRS to determine tax-exempt status qualification. See 78 Fed. Reg. at 71,536. But the proposals set out in the NPRM take the wrong approach. We urge Treasury and the IRS to withdraw the proposed regulations and terminology defining "candidate-related political activity," and focus instead on adopting clear and precise regulations that:

- Narrowly define political campaign intervention so that it is consistent with campaign finance law and leading U.S. Supreme Court precedents delineating political campaign activities from social welfare issue advocacy; and

- Set out a safe harbor establishing a 60% average expenditure threshold as meeting the requirement that a group be primarily engaged in social welfare activity in order to qualify for section 501(c)(4) tax-exempt status.

1. The Regulations Should Include a Clear and Precise Narrow Definition of Political Campaign Intervention

a. Candidate-Related Political Activity is Defined Far Too Broadly

The centerpiece of the NPRM is a proposal to delete references to "direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office" from the regulations governing section 501(c)(4) qualification and replace those references with a new category of non-qualifying activities for social welfare organizations called "Candidate-Related Political Activity." See NPRM, 78 Fed.

Reg. at 71,537. This new category of non-qualifying activities captures not only the full range of activities deemed political campaign intervention under federal and state campaign finance laws and regulations, but also a broad array of activities that have traditionally been accepted as mainstream social welfare accomplishments. Among other things, the new category includes any issue advocacy communications near in time to an election if it "refers" to one or more candidates in that election. See id. at 71,541. The new category even covers endeavors that legitimately qualify under section 501(c)(3), including such things as voter registration drives, get-out-the-vote drives and hosting candidate debates within 30 days of a primary election or 60 days of a general election. See Id.

Since "candidate-related political activity" is defined far more broadly then political campaign intervention under the existing regulations (and far more broadly than the term is defined in the context of federal and state campaign finance law), we firmly oppose the proposal to substitute this new category of non-qualifying activity for the current references to direct or indirect political campaign intervention.

b. Political Campaign Intervention Should Be Narrowly Defined

Rather than adopting regulations that radically expand the types of activities that fall outside the definition of social welfare promotion, Treasury and the IRS should look to federal and state campaign finance laws, including leading judicial precedents, to draw clear and precise regulations demarcating political campaign activities from social welfare activities. The definition of political campaign intervention should be a narrow one, applying equally to section 501(c)(3) and section 501(c)(4) organizations. This narrow standard should encompass only direct or in-kind contributions to candidates and political organizations, and expenditures for communications that expressly advocate the election or defeat of a clearly

identified candidate. See Buckley v. Valeo, 424 U.S. 1, 79-80 (1976) (establishing that when a group not qualifying as a candidate or official "political" committee makes an expenditure, it can only be regulated for campaign finance purposes if the funds are "used for communications that expressly advocate the election or defeat of a clearly identified candidate"). Such restraint is imperative "'[b]ecause First Amendment freedoms need breathing space to survive, [meaning] government may regulate in the area only with narrow specificity.'" Id. (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)). The Supreme Court's decision in FEC v. Wisconsin Right to Life, Inc. also demands that political speech, particularly where it is intertwined with issue-advocacy, be regulated cautiously and narrowly. As Chief Justice Roberts emphasized in his controlling opinion:

> Discussion of issues cannot be suppressed simply because the issues may also be pertinent in an election. Where the First Amendment is implicated, the tie goes to the speaker, not the censor.

FEC v. Wisconsin Right to Life, Inc., 551 U.S. 449, 474 (2007).

c. Terminology Should Be Consistent With Campaign Finance Law

Terms such as "contribution," "expenditure," "expressly advocate," "candidate," "clearly identified," "public communication," and "election" are well defined by federal and state campaign finance laws. There are no valid policy reasons for giving any of those terms broader application under section 501(c)(3) or section 501(c)(4) of the Internal Revenue Code than they are given under campaign finance law. For example, the NPRM seeks to define "candidate" to include not only an individual who seeks nomination for election, or election to elective public office, but also individuals who are appointed to public office. See NPRM, 78 Fe. Reg. at 71,541. The NPRM seeks to justify the inclusion of appointed officials within the definition of "candidate" because support of or opposition to the

appointment of such officials falls within the definition of an IRC section 527 exempt function. See Id. at 71,538. That explanation ignores the fact that for more than a quarter of a century the IRS has treated support for or opposition to the appointment of governmental officials as a legislative lobbying activity (and not political campaign intervention) when undertaken by a section 501(c)(3) organization. See IRS Notice 88-76, 1988-2 C.B. 392; and IRS Announcement 88-114, 1988-37 I.R.B. 26. Since support for or opposition to the appointment of individuals to governmental positions qualifies as legislative lobbying when undertaken by a section 501(c)(3) organization, it should similarly be characterized for a section 501(c)(4) organization, and should definitely not be classified as political campaign intervention.[2] Therefore individuals subject to appointment to public office should not be included within the definition of candidate.

Further, it is completely inappropriate to include within the definition of "candidate" individuals seeking or proposed by others for positions within a political organization, such as individuals seeking the chairmanship of the Democratic National Committee or Republican National Committee. Political parties and political committees are private organizations, not public institutions. Consequently, positions within political organizations cannot be fairly characterized as "public office." Treasury and the IRS have no business in seeking to regulate activities of a section 501(c)(4) organization concerning who serves in a leadership capacity within a private political organization.

One significant change that Treasury and the IRS should consider to the existing definition of "candidate" is deleting from the definition any individual who is merely

[2] As we explain more fully below, the definition of campaign intervention should be the same for section 501(c)(3) organizations and section 501(c)(4) organizations.

"proposed by another" to be a candidate. See 26 CFR § 501(c)(3)-1(c)(3)(iii). An individual who has taken no affirmative action to become a candidate, but who is merely proposed as such by one or more other persons should not be included with the definition because: (1) such individuals are not, in fact, actual candidates; and (2) handing third persons the absolute power to define when an individual is a candidate for elective public office creates too much opportunity for mischief. It is not difficult to image an adversary declaring a leader or spokesperson of a rival 501(c)(3) or 501(c)(4) organization to be a candidate for public office for the sole purpose of undercutting the effectiveness of that person or the rival organization.

While it is appropriate to include "independent expenditures" within the definition of political campaign intervention, it is inappropriate (and unconstitutional) to label all "electioneering communications" as political campaign intervention. The U.S. Supreme Court addressed that issue head-on in FEC v. Wisconsin Right to Life, 551 U.S. 449 (2007). The decision made clear that issue advocacy advertisements near in time to the date of an election cannot be prohibited merely because they refer to a clearly identified candidate. The Court struck down the ban because it "would effectively eliminate First Amendment protection for genuine issues ads," id. at 471, explaining "'the distinction between discussion of issues and candidates and advocacy of election or defeat of the candidates may often dissolve in practical application,'" id. at 474 (quoting Buckley, 424 U.S. at 42). An electioneering communication should only be considered political campaign intervention when it qualifies as the "functional equivalent of express advocacy," meaning the communication "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." Id. at 469-70.

A further problem with the definition of candidate-related political activity is that it fails to include any exceptions (or cost allocation mechanism) for communications that include mixed content. For example, if a group that regularly publishes a monthly magazine were to include a single article in the September or October edition of the magazine about the candidates it is endorsing in that year's general election, under the proposed rule, the entire cost of the magazine and its distribution would be classified as candidate-related political activity. Citizens United and other section 501(c)(4) organizations often include mixed content in their communications, especially those to their members. FEC rules exclude the content of member communications from the definition of "expenditure" under the Federal Elections Campaign Act. See 11 CFR § 100.134(a). But the definition of candidate-related political activities does not include a similar exclusion for member communications, nor does it include a means for allocating costs between candidate-related political activities and social welfare activities where a communication includes mixed content. Instead, the entire cost of a mixed message communication is classified as candidate-related political activity and excluded from the organization's social welfare activities. This will have the effect of denying Section 501(c)(4) groups an effective cost savings tool. Instead of sending a single communication that includes mixed content, multiple communications – one with political content and the other without such content – will be required in order to avoid having the costs associated with the non-political content being classified as political activity. For communications sent via U.S. mail, this would frequently result in a doubling of postage costs.

d. A 501(c) Organization's Grants To A Section 501(c)(4) Group Should Be Presumed An Expenditure for Social Welfare Purposes

The proposed revisions to the regulations also go too far in creating a presumption that a contribution to a 501(c) organization is for the purpose of underwriting political

campaign intervention, if the organization receiving the contribution engages in any level of candidate-related political activity. This proposal is especially overbearing in light of the broad definition that the proposed rules seek to give to candidate-related political activities. Rather than create a presumption that a contribution is for a political purpose (and the need for a special rule to overcome the presumption) if the group receiving the gift engages in any level political campaign intervention, Treasury and the IRS should follow the approach adopted by the Federal Election Commission for reporting receipts received by a non-political committee that are used to pay for independent expenditures. Such receipts are only considered political contributions subject to FEC reporting where they are "made for the purpose of furthering the reported independent expenditure." 11 CFR § 109.10(e)(vi). In other words, a gift to a section 501(c)(4) organization by another 501(c) organization should only be considered a "contribution" in the context of political campaign intervention where the gift is specifically made for the purpose of furthering an organization's political campaign intervention activities (i.e. where the gift is specifically earmarked for political campaign intervention or is given in response to a solicitation stating that it will be used for political campaign intervention activities). Except where designated to further political campaign intervention, a section 501(c) group that makes a general gift to section 501(c)(4) organization should be able to rely on the receiving group's tax-exemption classification as determined by the IRS in concluding that its gift qualifies as an expenditure for a social welfare purpose. After all, in order to qualify for section 501(c)(4) exemption, the organization receiving the grant must be "primarily engaged" in social welfare activities. See 26 CFR § 1.501(c)(4)-1(a)(2)(i).

Additionally, we are unaware of any empirical studies showing that section 501(c)(4) organizations that receive gifts from other section 501(c) organizations are using those gifts primarily to fund political intervention activities. The absence of such data is hardly surprising given the small role that section 501(c)(4) groups play in election campaigns. Estimates put total election spending for the 2012 election cycle between $5.2 billion and $7 billion. Compare Billion-Dollar Democracy: The Unprecedented role of Money in the 2012 Elections, Demos/U.S. PIRG Education Fund at 3 (available at www.demos.org/sites/default /files/publications/BillionDollarDemocracy _1.pdf) and Total 2012 Election Spending: $7 billion, Sunlight Foundation Blog (available at http://sunlightfoundation.com/blog/ 2013/01/31/total-2012-election-spending-7-billion/). Of the total, section 501(c)(4) groups have been credited with spending approximately $267 million. See Billion-Dollar Democracy at 4. That amounts to somewhere between 3.8% and 5.1% of total election spending for the 2012 election cycle.

More significantly, the available data shows that section 501(c)(4) groups spend but a trifling of their total expenditures on election campaign activities. According to IRS statistics, in 2009 and 2010 (the most recent years for which the IRS has released statistics), section 501(c)(4) groups spent approximately $161.6 billion on all activities. See SOI Tax Stats – Charitable & Other Tax-Exempt Organizations Statistics (available at www.irs.gov/uac/SOI-Tax-Stats-Charities-and-Other-Tax-Exempt-Organizations-Statistics). During the 2010 election cycle, section 501(c)(4) groups spent about $92 million on political campaign activities. See Open Secrets, Political Nonprofits (available at http;//www.opensecrets.org/outsidespending/nonprof_summ.php). That amounts to just a bit more than one twentieth of one percent of their overall spending. Assuming a similar level

of aggregate expenditures by section 501(c)(4) groups during the 2012 election cycle, the $267 million spent on politics in the cycle would be less than two tenths of one percent of all section 501(c)(4) expenditures during the cycle. [3]

There is simply no reason to presume, as the rule would do, that a gift from a section 501(c) organization to a section 501(c)(4) organization will be used primarily (or at least disproportionately), to fund political campaign intervention activities where the receiving group is primarily engaged in social welfare activities. The appropriate remedy where a section 501(c)(4) spends excessively on political campaign intervention is for the IRS to revoke that group's tax-exempt status. The IRS should not seek to punish other section 501(c) organizations that contribute to a section 501(c))(4) organization by characterizing their gifts as political expenditures merely because the group receiving the gift engages in a permissible level of political activities. Instead, the contributing 501(c) organization should be able to rely on the tax-exempt determination made by the IRS so long as that determination remains in effect.[4]

e. <u>The Definition of Political Intervention Should Be The Same For Section 501(c)(3) and Section 501(c)(4) Organizations</u>

If political campaign intervention by section 501(c)(4) organizations is to be restricted, the definitions of what constitutes political campaign intervention should apply

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[3]If the proposed regulations expanding the definition of restricted political activities are adopted, the percentage of expenditures devoted to campaign intervention will likely increase in future years. But that will be attributable to the dramatic expansion of activities falling within the definition of political campaign intervention, not an increase in actual outlays for political activities.

[4] Our position here is consistent with the regulations and guidance governing reliance on an IRS-issued final determination letter by contributors to section 501(c)(3) organizations and other entities to whom contributions are deductible. <u>See</u> 26 CFR § 1.509(a)-7(a); and Rev. Proc. 2011-33 (June 20, 2011).

equally to 501(c)(3) and 501(c)(4) organizations.[5] There are no valid policy reasons for defining political intervention by section 501(c)(4) organizations more broadly than the term would be applied to section 501(c)(3) organizations. The explanation that "because such intervention is absolutely prohibited under section 501(c)(3), a more nuanced consideration of the totality of facts and circumstances may be appropriate in that context," NPRM, 78 Fed. Reg. 71,537, doesn't hold water. First, as we point out in section III.A. of these comments, the Internal Revenue Code imposes no restrictions whatsoever on the level of political activities of section 501(c)(4) organizations. The restrictions are purely a creature of regulatory overreach. Second, defining the term more broadly for section 501(c)(4) organizations than section 501(c)(3) organizations creates confusion and will lead to absurd outcomes. For example, under the existing regulations, expenditures for non-partisan voter registration activities, candidate debates and get-out-the-vote activities qualify as legitimate organizational accomplishments under sections 501(c)(3) and 501(c)(4), but, under the proposed rules, such activity would be classified as candidate-related political activity that cannot be counted as an exempt purpose accomplishment when undertaken by a section 501(c)(4) organization. Yet the exact same activities, if undertaken by a section 501(c)(3) organization, would continue to qualify as an exempt purpose accomplishment. That's an absurd result.[6]

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[5] While the definition of what constitutes political campaign intervention should be the same under sections 501(c)(3) and section 501(c)(4), we are not proposing that section 501(c)(4) organizations be subject to the ban on political campaign intervention that Congress has imposed on section 501(c)(3) organizations.

[6] The absurdity would not be remedied by making it unlawful for the section 501(c)(3) groups to undertake such activities. Non-partisan voter registration activities have long been recognized as core section 501(c)(3) undertakings, see Judith E. Kindell and John Francis Reilly, Election Year Issues, IRS 2002 EO CPE TEXT at 378-379, as have non-

In a similar vein, under the proposed regulations an issue advocacy advertisement that mentions the name of a bill's sponsor near in time to when the sponsor is facing re-election would be considered a candidate-related activity for a section 501(c)(4) group but would still be considered a lobbying expenditure (but not campaign intervention) if undertaken by a section 501(c)(3) organization.

Just as it is constitutionally impermissible to ban political speech based on the corporate identity of the speaker, see Citizens United, 558 U.S. at 365, what constitutes political campaign intervention under the Internal Revenue Code should not vary with the particular sub-section of the code that a group seeks exemption under. If the political activities of section 501(c)(4) groups are to be restricted, Treasury and the IRS should draft clear and precise rules narrowly defining political campaign intervention that apply equally to section 501(c)(3) and section 501(c)(4) organizations. Further, the rules should be consistent with the common understanding of such activity under federal and state campaign finance laws, as well as judicial precedent distinguishing election-related political activity from issue advocacy.

2. "Primarily Engaged" Standard

The NPRM also seeks comments on whether the "primarily engaged" requirement for section 501(c)(4) status should be revised. See NPRM, 78 Fed Reg. at 71,537-38. Under the existing regulations:

> An organization is operated exclusively for the promotion of social welfare if it is **primarily engaged** in promoting in some way the common good and general welfare of the people of the community.

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partisan get-out-the-vote activities and the sponsoring of candidate debates. See Rev. Rul. 2007-41, 2007 C.B. 1421.

26 CFR § 1.501(c)(4)-1(a)(2)(i)(emphasis added). Treasury and the IRS are considering whether this standard should be modified or retained, and if retained, "whether the standard should be defined with more precision or revised to mirror the standard under the section 501(c)(3) regulations." 78 Fed. Reg. at 71,537. More specifically, comments are requested on:

> what proportion of an organization's activities must promote social welfare for an organization to qualify under section 501(c)(4) and whether additional limits should be imposed on any or all activities that do not further social welfare . . . [and] how to measure the activities of organizations seeking to qualify as section 501(c)(4) social welfare organizations for these purposes.

Id. at 71,538.

a. More Than Half a Century of Reliance

CU and CUF urge Treasury and the IRS not to revise the existing regulations providing that an organization is operated exclusively for the promotion of social welfare within the meaning of section 501(c)(4) if it is "primarily engaged" in promoting in some way the common good and general welfare of the people of the community. Treasury and IRS are not writing from a clean slate. The standard is deeply rooted in tradition and has been relied upon by section 501(c)(4) organizations for over fifty years in structuring their operations and activities.

The reliance interest is too strong to justify further limiting the level of non-social welfare activities that will disqualify a group for section 501(c)(4) status. This concern is especially acute if regulations were adopted to mirror the prohibition on political campaign intervention applicable to section 501(c)(3) organizations. For example, from 2007 through 2010, CU undertook protracted litigation against the Federal Election Commission to vindicate its constitutional right to broadcast a documentary film it produced that was critical

of Hillary Clinton, who at the time the litigation was initiated was a candidate for President of the United States. That effort culminated in the landmark U.S. Supreme Court decision vindicating the organization's First Amendment right (and the rights of all domestic incorporated entities) to support or oppose candidates seeking election to public office. See Citizens United v. FEC, 558 U.S. 310 (2010). If regulations are adopted imposing a blanket prohibition on political campaign intervention by section 501(c)(4) organizations, CU, after having spent hundreds of thousands of dollars in litigation costs to vindicate its right to air political documentary films, would have to abruptly curtail the making of political documentaries similar to Hillary The Movie, even though such films are but a small part of the organization's overall activities.[7]

Numerous other section 501(c)(4) organizations would be adversely affected by such a ban, too. And the impact would be quite broad if the prohibition covered the wide array of activities falling within the proposed definition of "candidate-related political activities." For example, on July 18, 2013, Public Citizen, a prominent left of center section 501(c)(4) organization, posted an article on its internet website under the headline banner: "Cordray Conformation Another Victory for Public Citizen's Consumer Protection Efforts." The article describes Public Citizen's multi-year lobbying campaign to win Richard Cordray's confirmation as director of the Consumer Financial Protection Bureau, stating:

> It's a victory we've been working toward for a long time . . . . We called on the Senate to confirm Cordray quickly . . . Tens of thousands of Public Citizen activists called and emailed their senators to demand that they confirm Cordray . . . . In January 2012, after exhaustive attempts to move Cordray through the traditional Senate confirmation process, Obama used a recess appointment to put Cordray in charge of the CFPB. . . . . But a

[7] CU would, of course, challenge any such regulations as contrary to the central holding of Citizens United.

> recess appointment lasts only two years. Cordray was soon re-nominated, and the fight to confirm him began anew. And, once again, tens of thousands of Public Citizen activists called and emailed their senators, demanding they confirm Cordray.

See www.citizenvox.org/2013/07/18/cordray-confirmation-another-public-citizen-victory/.

The activities the article describes Public Citizen as having undertaken fall squarely within the scope of candidate-related political activity as defined in the NPRM. Cordray was a "candidate" because he was proposed by President Obama for appointment to a federal office. And Public Citizen engaged in candidate-related political activity with respect to his appointment for public office, because the group issued communications that expressly advocated his confirmation by the U.S. Senate. See NPRM, 78 Fed. Reg. at 71,541. If, as proposed by the NPRM, these type of lobbying activities are redefined as political campaign intervention, and such political activities are banned for section 501(c)(4) groups, Public Citizen's operations would be disrupted much like those of CU.

Important judicial precedents have also relied on the "primarily engaged" standard. In FEC v. Beaumont, the U.S. Supreme Court observed: "An organization 'may carry on lawful political activities and remain exempt under section 501(c)(4) as long as it is primarily engaged in activities that promote social welfare.'" 539 U.S. 146, 150 n. 1 (2003), quoting Rev. Rul. 81-95, 1981-1 C.B 332. Lower courts have relied on the standard in precedential opinions, some dating back to near in time when the standard was adopted. See Ocean Pines Association, Inc. v. Commissioner, 672 F.3d 284, 288 (4th Cir. 2012) (citing the "primarily engaged" standard is determining whether certain of the organization's revenues were subject to unrelated business income tax); People's Educational Camp Society, Inc. v. Commissioner, 331 F.2d 923, 932 (2nd Cir. 1964), cert. denied, 379 U.S. 839 (1964) (affirming the Tax Court's determination that the organization did not qualify for section

501(c)(4) status because its "primary purpose [had] in fact become the running of a commercial resort."); Mutual Aid Association of the Church of the Brethren v. United States, 578 F. Supp. 1451, 1455 (D. Kan. 1983) (noting for purposes of section 501(c)(4) determination: "The term 'exclusively,' as used in the statute and regulations, has not been strictly interpreted, but has been construed to mean 'primarily.'"); Santa Cruz Building Association v. United States, 411 F. Supp. 871, 880 (E.D. Mo. 1976) (Claim for section 501(c)(4) tax exemption "must fail. Organizations primarily engaged in profit making and nonsocial welfare activities can not take an exemption under this section."); Polish American Club, Inc. v. Commissioner, 33 T.C.M (CCH) 925 (U.S.T.C. 1974) ("It is clear from the record that Polish American Club was conceived and operated primarily as a social club and not as an organization operated primarily for bringing about civic betterments and social improvements . . . We, therefore, hold that petitioner would not qualify as an exempt civil club under section 501(c)(4)."); Lake Petersburg Association v. Commissioner, 33 T.C.M. (CCH) 259 (U.S.T.C. 1974) (Association does not qualify for section 501(c)(4) exemption because it "was operated primarily for the benefit of its members rather than for the benefit of the entire community."); and Los Angeles County Remount Association v. Commissioner, 27 T.C.M. (CCH) 1035 (U.S.T.C. 1968) ("The term 'exclusively' as used in [section 501(c)(4)] is interpreted to mean 'primarily.'").

While there are undoubtedly many other reasons for retaining the existing "primarily engaged" standard, we submit that the more than half a century of reliance that has occurred here is sufficient in and of itself to justify retaining the standard.

b. Multi-Year 60% Safe Harbor Election

Rather than revise the "primarily engaged" standard, the IRS should offer a safe harbor election that is similar to (but not identical to) the 60% spending standard set out in the June 24, 2013, report by then Acting IRS Commissioner Daniel Werfel. See Charting a Path Forward at the IRS: Initial Assessment and Plan of Action, IRS Report, at 14 (Jun. 24, 2013) (available at http://www.irs.gov/pub/newsroom/Initial%20Assessment%20and%20Plan%20of%20Action.pdf). The safe harbor should provide that an organization that spends on average at least 60% of its expenditures on social welfare activities will been deemed as being primarily engaged in promoting the common good and general welfare of the people of the community.[8] The 60% threshold should be an average threshold measured over a rolling four-year period rather than a single year snapshot of a group's expenditures.

A four year rolling average of expenditures is a better measure of an organization's overall primary activities than a single year snapshot of expenditures because the four year rolling average normalizes annual fluctuations in expenditures, thereby providing a more accurate long-term gauge of an organization's overall social welfare activities as they relate to non-qualifying activities. This is especially true with respect to the measurement of political campaign intervention expenditures because the federal government and most state governments operate on two year legislative election cycles and four year executive office

[8] In 2004, members of the American Bar Association's "Exempt Organizations Committee's Task Force on Section 501(c)(4) and Politics" proposed a similar safe harbor election for section 501(c)(4) organizations. The primary difference between what we propose and what the ABA committee members proposed is the time period covered by the safe harbor test. We propose a multi-year test, while the committee members opted for a single year test. See American Bar Association, Comments of the Individual Members of The Exempt Organizations Committee's Task Force On Section 501(c)(4) and Politics (May 25, 2004) at 7-13 and 43-45 (available at www.americanbar.org/content/dam/aba/migrated/tax/ pubpolicy/2004/040525exo.authcheckdam.pdf).

election cycles. If Treasury and the IRS opt to retain restrictions on political campaign intervention activities by section 501(c)(4) organizations, a safe harbor employing a four year rolling average of expenditures would provide a far more accurate assessment of an organization's overall social welfare activities in relation to any political campaign intervention activities and other non-qualifying activities than a single year snapshot comparison of expenditures. Any organization that engages in political campaign activities is likely to have a significantly higher percentage of political expenditures in an election year than in a non-election year. This point was underscored in a recent statement issued by several Federal Election Commission commissioners, who took the FEC's Office of General Counsel to task for focusing on an organization's single year expenditures rather than its overall spending over several years in arguing that the organization was a political committee because its "major purpose" was to intervene in Federal elections. The Commissioners explained:

> Groups that wish to communicate their message when citizens are most receptive are likely to support or oppose federal candidates during an election year. Thus, by focusing on a single calendar year, OGC's approach artificially limits the major purpose analysis to the time period when spending to support or oppose the nomination of candidates for federal office is likely to be at its highest and disregards all of an organization's non-election activities, undertaken in off-years, regardless of how substantial they may be.

See MUR 6081 (American Issues Project, Inc.), Statement of Reasons of Vice Chairman Donald F. McGahn and Commissioners Caroline C. Hunter and Matthew S. Peterson (July 25, 2013) at 16 (available at http://eqs.fec.gov/eqsdocsMUR/13044340543.pdf). Treasury and the IRS should not make a mistake similar to that of the FEC's Office of General Counsel. Any safe harbor that is enacted should use a multi-year rolling average of

expenditures that compares social welfare expenditures with non-social welfare expenditures in measuring whether a group is primarily engaged in social welfare activities.[9]

Finally, the usage a multi-year rolling average to measure an organization's overall social welfare spending in relation to non-social welfare spending would be consistent with the approach that Treasury and the IRS have adopted in other exempt organization qualification contexts. A five year rolling average of public support is used to determine if a 501(c)(3) organization qualifies for public charity classification under the 33⅓ percent public support test. See 26 CFR § 1.170A-9(f)(4)(i). And a four multi-year rolling average is used to determine if a section 501(c)(3) organization has engaged in excessive lobbying where election is made under 26 U.S.C. § 501(h). See 26 CFR § 1.501(h)-3(c)(7). Since the existing exempt organization regulations already employ multi-year rolling averages to gauge public support and lobbying expenditures in the context of section 501(c)(3) organizations, implementing a safe harbor that measures a section 501(c)(4) organization's social welfare

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[9] As a matter of sound public policy, members of the American Bar Association's "Exempt Organizations Committee's Task Force on Section501(c)(4) and Politics" expressed support for a multi-year test over a single-year test in their 2004 comments, stating:

> We discussed the possibility that a multi-year test might more accurately reflect the overall nature of an organization's activities, and be less susceptible to distortion because political expenditures are concentrated in a brief period of time around elections, while other social welfare programs are likely to be conducted on an ongoing basis. Some of us felt strongly that as a policy matter, a 2- or even 4-year period would be more appropriate for measurement.

American Bar Association, Comments of the Individual Members of The Exempt Organizations Committee's Task Force On Section 501(c)(4) and Politics (May 25, 2004) at 9 (available at www.americanbar.org/content/dam/aba/migrated/tax/pubpolicy/2004/040525exo.authcheckdam.pdf). The reason the committee members proposed a single-year test over a multi-year test was concern over whether the IRS had statutory authority to adopt a multi-year test, not the merits of a single-year test over those of a multi-year test. See id. at 9-10 and 45.

expenditures in relation to its non-qualifying expenditures on a multi-year rolling average would not be a difficult regulatory undertaking for Treasury and the IRS.

IV. Conclusions

For the reasons set forth above, CU and CUF urged Treasury and the IRS to withdraw the regulatory revisions set forth in the NPRM. Instead, the existing regulations governing section 501(c)(4) organizations should be amended by deleting the language excluding political campaign intervention from qualification as "promotion of social welfare." There is no statutory authority for this regulatory restriction. The restriction is also irrational. Providing voters with information on candidates and candidates' positions on issues clearly promotes the common good and general welfare of the community because it helps voters form better judgments about who to elect to public office and the impact that their choices will have on their community. Furthermore, the restriction violates the First Amendment rights of section 501(c)(4) organizations. Rescinding the restrictions on political campaign intervention by section 501(c)(4) organizations would negate the need for consideration of the regulatory revisions set out in the NPRM.

If Treasury and the IRS decline our recommendation to repeal the restrictions on political campaign intervention by section 501(c)(4) organizations, we then urge the withdrawal of the proposed regulations and terminology governing "candidate-related political activity." Treasury and the IRS should instead focus on adopting clear and precise regulations that:

- Narrowly define political campaign intervention so that it is consistent with campaign finance law and leading U.S. Supreme Court precedents delineating political campaign activities from social welfare issue advocacy; and

- Set out a safe harbor establishing a 60% average expenditure threshold as meeting the requirement that a group be primarily engaged in social welfare activity in order to qualify for 501(c)(4) tax-exempt status.

Citizens United and Citizens United request that a public hearing be held on this matter and that a representative of our two organizations be permitted to testify at such hearing.

Respectfully Submitted,

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