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February 24, 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, D.C. 20044
VIA FEDERAL E-RULEMAKING PORTAL

RE: Comments on IRS NPRM, REG-134417-13

Dear Ms. Giuliano:

The National Rifle Association of America (the "NRA") respectfully submits the following comments in response to the Notice of Proposed Rulemaking (the "NPRM") issued by the Internal Revenue Service (the "Service") on November 29, 2013, entitled "Guidance for Tax-Exempt Social Welfare Organization on Candidate-Related Political Activities."

## I. Background

The NRA is the nation's oldest civil-rights organization, dedicated to defending the Second Amendment to the Constitution. Founded in 1871, more than four decades before federal income taxation was authorized by the Sixteenth

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Amendment in 1913, the NRA is now one of the largest tax-exempt "social welfare organizations" within the meaning of §501(c)(4) of the Internal Revenue Code.

The NRA is affiliated with four charitable organizations, each of which is tax-exempt under §501(c)(3): (1) The NRA Foundation; (2) The NRA Special Contribution Fund; (3) The NRA Civil Rights Defense Fund; and (4) The NRA Freedom Action Foundation. Accordingly, the NRA has a profound interest in the rules proposed by the NPRM, not only because of its own tax status, but also because of the tax status of its affiliates, which could be indirectly affected by the proposed new rules.

The NRA is concerned about the NPRM for another reason as well. Although our main focus is on the Second Amendment, the NRA, its affiliates and its approximately five million individual members are also committed to defending the entire Bill of Rights.

## II. Threshold Matters

Two threshold matters should be noted:

A. The NRA has always complied scrupulously with all applicable statutes, regulations and administrative rules. Our compliance with the tax laws has been extraordinarily expensive and time-consuming, however, in large part because so many of the Service's regulations and administrative rules governing social welfare organizations are vague and confusing. The NRA therefore applauds the

Service for striving to establish consistent treasury regulations governing the political activities of all §501(c)(4) organizations.

The current state of the law is derived principally from two revenue rulings by the Service, Rev. Rul. 2004-6, 2004-1 C.B. 328, and Rev. Rul. 2007-41, 2007-1 C.B. 1421, both of which were issued, as are all Service revenue rulings, without the public input or other review to which Treasury Department regulations are subject. As a result, the current set of rules is vague, confusing, and subject to arbitrary enforcement, a situation that almost invites political manipulation and abuse, as highlighted just last year by what is commonly known as the "IRS Targeting Scandal."

There are two constitutional perils to the sort of regulation that the Service is attempting here. The first is known as the "overbreadth doctrine," under which a law is void on its face if it "does not aim specifically at evils within the allowable area of [government] control, but [instead] sweeps within its ambit other activities that constitute an exercise" of protected expression.[1] The other peril is the "vagueness doctrine," which holds, among other things, that a law is void on its face, as a matter of Fifth Amendment due process rather than First Amendment free speech, if the law is so vague that people "of common intelligence must necessarily guess at its meaning

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[1] *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940) (striking down a statute banning all picketing). *See also Bd. of Airport Comm'r's of Los Angeles v. Jews for Jesus, Inc.*, 107 S.Ct. 2568 (1987)(striking down rule that proscribed all "First Amendment activities" in the airport terminal).

and differ as to its application."[2] The vagueness doctrine requires that the legislative body or agency promulgating rules draw bright lines so that the people being regulated know what they can and cannot do. The two doctrines are distinct: "an overbroad law need lack neither clarity nor precision, and a vague law need not reach activity protected by the First Amendment."[3]

These two doctrines present the Service with a dilemma: "to draft with narrow particularity is to risk nullification by easy evasion of the legislative purpose; to draft with great generality is to risk ensnarement of the innocent in a web designed for others."[4] Although distinct in theory, the vices of vagueness and overbreadth parallel one another insofar as they can both violate the First Amendment by impermissibly deterring free speech. Vagueness doctrine is usually about the constitutional vice of lack of fair notice of what the law prohibits. But when it comes to freedom of expression, the specificity and "fair notice" necessary to avoid impermissible vagueness can themselves become a vice—the "fair notice" may be *too effective* and thereby chill expression. Would-be speakers "sensitive to the perils posed by ... indefinite language avoid the risk ... only by restricting their conduct to that which is unquestionably safe. Free speech may not be so inhibited." *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964). One way of avoiding the "fair notice" problem is to make a

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[2] *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). *See also Hynes v. Mayor of Oradell,* 425 U.S. 610, 620 (1976)

[3] LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1033 (2d ed. 1988).

[4] *Id.* at 1033.

rule broad and concrete—"*Nobody, no organization*, gets to engage in the prohibited activity." Such a rule is easily comprehended, but it is nonetheless unconstitutional insofar as it sweeps within its ambit, and thereby punishes or prohibits, speech that is protected even when subsidized by a tax exemption, such as a truly non-partisan voter registration drive.

Vague rules that provide little guidance as to what is, and what is not, permitted, are infected with an additional vice—they invite arbitrary and inconsistent enforcement by the government. If the text of the rule provides little guidance to administrative officials (as well as to those whose conduct is subject to the rule), then enforcement becomes erratic and prone to abuse because the "language [calls] for the exercise of subjective judgment, unaided by objective norms."[5] We are concerned that the legal regime created by the Service's two revenue rulings fails both tests, both on its face and as enforced. Indeed, the NPRM itself refers to the analysis required by the two revenue rulings as "highly fact-intensive"—which is often a euphemism for "unpredictable and subjective." That, of course, is the very opposite of what a rule—particularly a rule affecting freedom of speech—should be. The only way for the Service to navigate successfully between the constitutional doctrines of overbreadth and vagueness is to write rules that are (1) clear and (2) minimally restrictive of constitutionally protected rights.

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[5] *NAACP v. Button,* 371 U.S. 415, 466 (1963) (Harlan, J., dissenting). *See also Big Mama Rag, Inc. v. United States*, 631 F.2d 1030 (D.C. Cir. 1980).

In short, the Constitution leaves the Service only a very narrow channel in which to regulate.

B. The NPRM has drawn criticism from across the entire political spectrum. Among other reasons, there is serious concern over the NPRM sweeping into its definition of Candidate Related Political Activity ("CRPA") all communications that happen to mention an identifiable candidate (any identifiable candidate, at any level of government, anywhere in the country) during 30 and 60 day windows preceding primary and general elections, respectively. That is true even if a communication is unquestionably legitimate issue advocacy, and there is every good reason to mention the candidate, *e.g.,* if he or she is about to vote on legislation that is the subject of the communication. In fact, even a communication with *no political or legislative nexus whatsoever* meets the definition of CRPA if it refers to a clearly identifiable candidate and occurs within the specified window.

Another concern is that the Service's proposed test for express advocacy includes a version of the open-ended "functional equivalent of express advocacy" test, which is something of a term of art in campaign finance law. Under the NPRM, communications "susceptible of no reasonable interpretation other than" a call for action vis-à-vis a candidate constitute CRPA. This formulation necessarily requires the Service to determine what qualifies as a "reasonable interpretation", which puts it squarely in the business of making subjective judgments in the political arena.

While some may embrace the widespread dissatisfaction with the NPRM as proof that the proposals are an even-handed, fair, and reasonable accommodation,[6] the fact that people and organizations from across the political spectrum who often agree on nothing else, nonetheless agree that the proposed rules infringe the right of free speech, underscores the significant flaws in the Service's proposals.

III. Specific Comments

On the merits of the NPRM, the NRA respectfully submits the following comments, which are not intended to be exhaustive:

1. Definitions. The NPRM asks for comments about whether the definition of political campaign intervention for organizations that qualify as charities within the meaning of §501(c)(3) should be the same as the definition of political campaign intervention for organizations that qualify as social welfare organizations under §501(c)(4). After noting that charities can engage in no political campaign intervention whatsoever while social welfare organizations can engage in some political campaign intervention to a limited extent, the NPRM wonders if "a more nuanced consideration of the totality of facts and circumstances may be appropriate" for charities than for social welfare organizations.

But having a different definition of political campaign intervention for charities than for social welfare organizations is a major mistake. The error is only

[6] See, e.g., "Change the Rules on Secret Money," New York Times Editorial, February 18, 2014.

compounded by the NPRM's suggestion that the definition governing charities should be "more nuanced." "Nuance" in this context is a vice, not a virtue. The current standard is so "nuanced" that it cannot be understood or applied fairly and consistently. Indeed, it is this "nuanced" standard, which affords the Service the great latitude in enforcement that led to last year's IRS Targeting Scandal. The definition of "political campaign intervention" and all related key terms should be the same for all organizations listed in §501(c).

2. Measurement Issues. The NPRM asks for comments about (i) "what proportion of [§501(c)(4)] organization activities must promote social welfare," and (ii) "how to measure the activities of [§501(c)(4)] organizations." These are revealing questions, largely because they highlight the fact that for decades the Service has been attempting to enforce the law without providing clear answers to either.

Commentators often say that total dollars spent is the measure and that a social welfare organization must therefore spend at least 51% of its budget on social welfare activities. It appears that this position has sometimes been adopted by Service.[7] On other occasions, however, the Service has taken the position that the dollars spent by the organization is not the right measure and that, particularly if volunteers are involved, the proper measure may be the hours devoted to activities by

[7] *See* "EO Materials Suggests 51 Percent Threshold for 501(c)(4) Groups," Tax Notes, January 27, 2014, page 394.

said volunteers. And in other instances the Service has suggested that the key element is neither dollars nor hours, but management "effort." Unsurprisingly, the Service has never provided a coherent explanation of how these different indices of social-welfare activity might be measured, weighed or compared.

This "keep-'em-guessing" facts-and-circumstance test is intolerable and must be replaced. The new regulations should state clearly and precisely exactly *what* is to be measured and *how* it is to be measured. Particularly with respect to tax laws that affect First Amendment rights, a system that has clear, comprehensible lines is essential.

3. "Earmarking." The NPRM creates this new concept of "candidate-related political activity" and provides that a contribution from a §501(c)(4) organization to a §501(c) organization that engages in candidate-related political activity will constitute such activity by the contributor organization—that is, by the §501(c)(4) social-welfare organization. A "special rule," however, provides that this attribution of the recipient political organization's political purpose to the contributing social-welfare organization will not occur if (i) the contributor organization obtains an official written representation stating that the recipient organization does not engage in such political activity and (ii) the contribution is subject to a written restriction prohibiting such use.

This would be major change in the law, and it is neither warranted nor welcome. Currently, it is both permitted and common for a §501(c)(4) entity to make

contributions to another tax-exempt entity that engages in political campaign intervention without the contribution by the §501(c)(4) entity being regarded as impermissible political campaign intervention—so long as there is an agreement that prohibits the use of the contribution for that purpose. Despite the visceral appeal of the simple theory that all contributed monies are fungible, the acceptance at face value of a contributor's "earmarked" donation—whether positive ("Use my donation for Purpose X") or negative ("Do not use my donation for Purpose Y")—has long been common throughout the entire range of tax-exempt organizations. Moreover, it has been expressly and repeatedly approved by the Service in a variety of contexts.

For example, Treas. Reg. section 53.4945-2(a)(6)(i) provides that a private foundation (which cannot engage in any lobbying) may make a grant to a public charity (which can engage in a limited amount of lobbying), *provided that the grant is not "earmarked" for influencing legislation. See also* Virginia G. Richardson & John Francis Reilly, *Public Charity or Private Foundation Status Issues under IRC 509(a)(1)-(4), 4942(j)(3), and 507*, 2003 EO CPE Text, page B-93. In addition, under Treas. Reg. section 1.162-20(c)(3), dues paid to a labor union or a trade association are *not* deductible to the extent that the funds are used for lobbying or for campaign intervention activities; in other words, the earmarking of the money will be respected by the Service and accepted at face value. Indeed, Congress itself has expressly approved of such earmarking. *See* H. R. Rep. No. 213, 103d Cong. 1st Sess. 607,

n. 64 (1993) (allows "special assessments for grass roots lobbying or campaign expenses").

The NPRM proposal would thus reverse a well-established and workable rule for no good reason. Moreover, the NPRM's proposal would apply *only with respect to §501(c)(4) entities* and recipient entities to which they contribute—organizations that are both exercising their rights under the First Amendment. Under the NPRM, earmarking would continue to be allowed for §501(c)(5) organizations and §501(c)(6) organizations, as well as in all other contexts. Not only would such a discriminatory enforcement regime be blatantly unfair and logically inconsistent, it would raise serious constitutional questions as well. This aspect of the NPRM is therefore completely unacceptable.[8]

4. Voter Registration Drives, Get-Out-The Vote Activities and Voter Guides

In an apparent effort to avoid making the "highly fact-intensive" judgments that both strain its resources and expose it to charges of bias against speech by particular organizations, the Service proposes a *per se* rule that sweeps into the definition of candidate-related political activity *all* voter registration activities, *all* get-

[8] This is a particularly odd result if, as might be thought in the aftermath of the IRS Targeting Scandal, the Service would like to reduce its exposure to claims of political bias. As has been recently reported to no one's surprise, §501(c)(4) organizations as a group tend to contribute to Republican/conservative campaigns, while §501(c)(5) organization (*i.e.*, labor unions) tend to contribute to Democratic/liberal campaigns. *See* Diana Furchgott-Roth, "The IRS Should Not Regulate Political Speech," Tax Notes Today, January 13, 2014.

out-the-vote drives and *all* voter guides. On its face, such a rule has the superficial appeal of being concrete and easy to understand and to apply, thereby avoiding the vice of vagueness. The rule has additional intuitive appeal because many (perhaps most) supposedly "nonpartisan" voter registration drives, get-out-the-vote activities and voter guides in fact are driven by the purpose of electing particular candidates and/or members of a particular party that are favored by the organization sponsoring these purportedly "nonpartisan" activities. Everyone, including the Service, knows this. But everyone, including the Service, pretends not to know this, largely because the Service has encouraged, indeed almost required, the pretense.

Moreover, in avoiding vagueness, the proposed rule sweeps too widely and thereby falls victim to the constitutional vice of overbreadth. Not every registration drive or voter-guide is, in fact, partisan. Yet the proposed rule would suppress them too. Furthermore, the proposed rule is discriminatory. The NPRM proposes to change *only* the rules governing social-welfare organizations; charities would not be affected. That distinction makes no sense; indeed, it is, if anything, backwards. Under current law charities cannot engage in *any* political campaign intervention, yet the Service has repeatedly ruled that charities may sponsor "nonpartisan" voter registration activities, get-out-the-vote drives and voter guides.[9] Thus, under the

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[9] *See, e.g.*, Kindell & Reilly, "Election Year Issues," 1993 CPE Text, at 427 and Kindell & Reilly, "Election Year Issues," 2002 CPE Text, at 378-379; *See also* Tech. Adv. Mem. 9117001 (Sept. 5, 1990); Rev. Rul. 76-456, 1976-2 C.B. 151; Rev. Rul. 78-248, 1978-1 C.B. 154; and Rev. Rul. 80-282, 1980-2 C.B. 178.

NPRM as currently written, charities will be able to engage in an unlimited amount of these types of candidate-related political activity, but social welfare organizations will not. And, unlike the social welfare organizations, the charities will be using tax-deductible dollars to do so. This result cannot be defended.

## IV. Concluding Observations

Last year's IRS Targeting Scandal is not unique—it is merely the most recent illustration of the discriminatory and politically biased enforcement activity that vague and overbroad revenue rules make possible. Consider, for example, the illegal public release of the Application for Recognition of Exemption (Form 1024) of Crossroads Grassroots Policy Strategies.[10] Consider also the September 17, 2013, *USA Today* article that published the Service's confidential internal 2011 list of organizations that faced unmerited delay and excessive scrutiny because the Service had labeled them "political advocacy cases."

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[10] See Kim Barker, *Karl Rove's Dark Money Group Promised IRS It Would Spend 'Limited' Money on Elections*, ProPublica (Dec. 14, 2012, 11:19 AM), http://www.propublica.org/article/what-karl-roves-dark-money-nonprofit-told-the-irs. *ProPublica* subsequently declared that "[t]he same IRS office that deliberately targeted conservative groups applying for tax-exempt status in the run-up to the 2012 election released nine pending confidential applications of conservative groups to ProPublica late last year." Kim Barker and Justin Elliott, *IRS Office That Targeted Tea Party Also Disclosed Confidential Docs From Conservative Groups*, ProPublica (May 13, 2013, 5:40 PM), http://www.propublica.org/article/irs-office-that-targeted-tea-party-also-disclosed-confidential-docs.

To be sure, the Service has always denied having a double standard and, especially now, would like to refute any suggestion that it does. But the rules proposed by the NPRM are a big step in the wrong direction.

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Thank you for your consideration of the foregoing.

Sincerely,

Chris W. Cox
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