Graves Garrett LLC

Edward D. Greim
edgreim@gravesgarrett.com
Direct Dial: (816) 256-4144
Fax: (816) 817-0863

Clayton J. Callen
ccallen@gravesgarrett.com
Direct Dial: (214) 453-2502
Fax: (214) 853-4358

February 27, 2014

Via Electronic Mail:
Office of Management and Budget
Attn: Desk Officer for the Department of the Treasury
Office of Information and Regulatory Affairs
Washington, DC 20503
www.regulations.gov

Re: Comments Regarding REG – 134417 - 13

On behalf of Missouri Alliance for Freedom, Citizens for Self-Governance, Inc., and Empower Texans, Inc., we respectfully submit the following comments in regard to Notice of Proposed Rulemaking REG-134417-13 (the "Notice"). The proposed rules would impose sweeping new restrictions on Section 501(c)(4) "social welfare" organizations by defining "candidate-related political activity" to include vast swaths of non-partisan, issue-oriented activities aimed at promoting the "social welfare." Simply put, not only do the proposed regulations place an unconstitutional burden on such organizations, they undermine the very purpose for which such organizations exist: promotion of the "social welfare."

We agree that the current "facts and circumstances" approach to determine whether the activities of a Section 501(c)(4) organization constitute candidate advocacy lacks sufficient clarity. *See* 26 C.F.R. § 1.527(e)(2); IRS Rev. Rul. 2004-6. Thus, we commend the IRS for recognizing the need for clarity, particularly in light of the First Amendment interests at issue, which require bright-line rules. However, the quest for clarity does not require, or in any way justify, significantly curtailing the ability of Section 501(c)(4) organizations to address relevant public policy issues and engage in non-partisan election-related activities. Yet, that is precisely what the proposed regulations threaten to do, as the IRS concedes by noting that the regulations "might sweep in" activities that would not "be captured under the IRS's traditional facts and circumstances approach." This, in itself, is a significant understatement, as the regulations would prohibit Section 501(c)(4) organizations from engaging in a wide array of non-partisan issue related activities that such organizations have long been permitted to perform.

When drawing lines in the area of "core political speech" (as the proposed regulations attempt to do), the United States Supreme Court has emphasized that "the First Amendment requires us to err on the side of protecting political speech rather than suppressing it." *FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 457 (2007) ("*WRTL II*"). Likewise, a "[d]iscussion 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." *Id.* at 474.

The proposed regulations, however, invert this principle by restricting vast amounts of protected speech under the guise of limiting campaign intervention by Section 501(c)(4) organizations. Put simply, the proposed regulations would "throw out the baby with the bathwater." In addition, the proposed regulations fail to accomplish their stated goal of providing "more definitive rules" containing "sharper distinctions" in order to "provide greater certainty and reduce the need for detailed factual analysis." As a result, Section 501(c)(4) organizations will again be faced with uncertainty concerning their activities, which alone will chill protected speech.

In the Notice, the IRS has requested comments "on whether there are specific activities that should be included in, or excepted from, the definition of candidate-related political activity." As explained below, we respectfully request a more wholesale review of the proposed definition of "candidate related political activity," to ensure that the definition provides bright-line rules while not restricting constitutionally protected issue advocacy.

- **<u>"Functional Equivalent" of Express Advocacy</u>**

The IRS is correct to note the inherent uncertainty that results from the current "facts and circumstances" analysis. Simply put, vague speech restrictions are the antithesis of free speech. Specifically, as the Supreme Court has noted,

> the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.

Buckley v. Valeo, 424 U.S. 1, 42 (1976). Vague speech restrictions in this context, therefore, "blanket[] with uncertainty whatever may be said" and compel speakers to "hedge and trim." *Id.* (citations omitted).

Addressing these "constitutional deficiencies," *Buckley* applied a limiting construction to the statutory phrase "relative to a candidate", restricting the law's reach "only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate…." *Id.* at 43. To give meaning to this limiting construction, *Buckley* held that the law could only apply to communications containing *express words* of election advocacy such as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," "reject." *Id.* at 43, n. 52.

Buckley serves as the model for addressing unconstitutional vagueness in compliance with the First Amendment. The IRS' proposed definition of "candidate-related political activity," however, drastically departs from *Buckley*'s example. Under the proposed regulations, the definition of "candidate-related political activity" includes the following:

> (*1*) Any communication (as defined in paragraph (a)(2)(iii)(B)(*3*) of this section) expressing a view on, whether for or against, the selection, nomination, election, or appointment of one or more clearly identified candidates or of candidates of a political party that—
>
> (*i*) Contains words that expressly advocate, such as "vote," "oppose," "support," "elect," "defeat," or "reject;" or
>
> (*ii*) Is susceptible of no reasonable interpretation other than a call for or against the selection, nomination, election, or appointment of one or more candidates or of candidates of a political party…

§ 1.501(c)(4)-1(a)(iii)(1).

Subpart (a)(iii)(1)(i) reflects the so-called "magic words" of express advocacy prescribed by *Buckley*, which provides clarity to speakers and avoids the unconstitutional vagueness issues addressed in *Buckley*. Subpart (a)(iii)(1)(ii), however, goes beyond these "magic words" to encompass communications "susceptible of no reasonable interpretation other than a call for or against the selection, nomination, election, or appointment of one or more candidates…." *Id.* This phrase, plucked from Justice Roberts' opinion in *WRTL II*, provides no such

clarity. As the litany of campaign finance jurisprudence in this area attests, reasonable minds can differ as to the meaning of a communication. Moreover, as noted above, discussion of public issues inevitably overlaps with candidates and campaigns. Accordingly, bright-line rules are required, and any lines drawn in this area must error on the side of allowing speech, rather than limiting it.

Notably, the genesis of the phrase appearing in Subpart (a)(iii)(1)(ii), *WRTL II*, was an "as-applied" challenge (by a Section 501(c)(4) organization) to the Bipartisan Campaign Reform Act's (BCRA) ban on electioneering communications. As such, the Supreme Court was faced with a fact-specific inquiry, analyzing the specific communications at issue, and the context in which those communications occurred. Ultimately, the Court determined that "WRTL's ads may reasonably be interpreted as something other than as an appeal to vote for or against a specific candidate," holding that the ads were "not the functional equivalent of express advocacy…" *Id*. at 476.

If adopted in its current form, Subpart 1(a)(iii)(1)(ii) will require the IRS to perform a similar fact-specific inquiry to determine whether a communication constitutes "candidate-related political activity." Just like the "facts and circumstances" test that it would replace, such an inquiry would again cause uncertainty for Section 501(c)(4) organizations, which will be forced to "hedge and trim" their activities for fear that their issue-oriented communications might be deemed reportable "candidate-related political activity." Notably, the Federal Election Commission's definition of express advocacy, while itself not a model of clarity, provides a greater level of clarity than that proposed by the Service. *See* 11 C.F.R. § 100.22 (communications that "taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because -- (1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.").

In short, by defining express advocacy to include communications beyond the specified "magic words" enumerated in *Buckley*, the proposed definition of "candidate-related political activity" fails to achieve its stated goals of providing more "definitive rules," providing greater certainty to Section 501(c)(4) organizations, and reducing the need for "detailed factual analysis." In fact, the proposed definition would only exacerbate the IRS' existing concerns in this area.

Consistent with the IRS' stated goals, subpart (a)(iii)(1)(ii) of Section 1.501(c)(4)-1 should be removed from the proposed definition of "candidate-related political activity."

- **Public Communications In Close Proximity to Elections**

Under Subpart (a)(iii)(2) of Section 1.501(c)(4)-1, "candidate-related political activity" would also include "[a]ny public communication (defined in paragraph (a)(2)(iii)(B)(*5*) of this section) within 30 days of a primary election or 60 days of a general election that refers to one or more clearly identified candidates in that election or, in the case of a general election, refers to one or more political parties represented in that election." § 1.501(c)(4)-1(a)(2)(iii)(2). "Clearly defined" includes the candidates name, likeness, or description, or even a "reference to an issue or characteristic used to distinguish the candidate from other candidates." *Id*. at § 1.501(c)(4)-1(B)(2). Likewise, "public communication" includes not only broadcast and cable communications, but also material appearing on websites, in magazines, and even oral communications that reach, or are intended to reach, at least 500 persons. *Id*. at § 1.501(c)(4)-1(B)(5).

The sweep of this definition is staggering, and it encompasses a wide swath of pure "issue advocacy" – a core means by which Section 501(c)(4) organizations promote "social welfare." Notably, the ads at issue in *WRTL II*, which the Supreme Court determined were pure issue ads, would be deemed "candidate-related political activity" under the IRS' proposed definition. Incredibly, absent the identity of a candidate, the definition ignores all other content and context of such communications. Simply identifying a candidate is deemed to transpose a communication into a "candidate-related political activity."

Moreover, the various mediums to which the rule applies would effectively muzzle Section 501(c)(4) organizations of all sizes from engaging in such advocacy. For example, during the relevant "blackout periods," any communication, news release, document, or other item appearing on the *website* of a Section 501(c)(4) organization would have to be removed at risk that it would be counted as "candidate-related political activity." Communications merely mentioning the sponsor of relevant legislation, or letters written to officeholders and posted on an organization's website, would fall within this vast net. As such, Section 501(c)(4) organizations would be required to regularly monitor their websites to ensure that information identifying candidates is removed during relevant blackout periods to avoid risking the revocation of their tax-exempt status and taxes applicable to "candidate-related political activity."

The length of the blackout periods is also significant, particularly in the case of a presidential election. As a result of staggered primary elections in various states, and the blackout period leading up to the Republican and Democratic Conventions, a vast majority of presidential election years would constitute a blackout period. *See* http://www.fec.gov/info/charts_ec_dates_2012.shtml. Accordingly, during large segments of such years, Section 501(c)(4) organizations would be restricted from merely identifying the name of presidential candidates, even if such candidates are also current officeholders or government officials.

As with the definition of "express advocacy" addressed above, the proposed expansion of "candidate-related political activity" to include *any* public communication identifying a candidate near the time of an election fails to respect fundamental First Amendment principles. Notably, in considering the far narrower definition of "electioneering communications" set out in BCRA, the Supreme Court noted the definition reached far beyond "sham issue ads" to restrict "genuine issue ads." *WRTL II*, 551 U.S. at 474. In its Notice, the IRS requests comments regarding whether "particular communications (regardless of timing") should be excluded" from the definition of "candidate-related political activity," and states that the "comments should specifically address how the proposed exclusion is consistent with the goal of providing clear rules that avoid fact-intensive determinations." We would respectfully request that § 1.501(c)(4)-1(a)(2)(iii)(2) be removed from the definition of "candidate-related campaign activity" in its entirety, as it is in no way tailored or limited to the very subject is defined to mean: "candidate-related political activity." As the Supreme Court has succinctly stated, "[d]iscussion of issues cannot be suppressed simply because the issues may also be pertinent in an election." *WRTL II*, 551 U.S. at 474.

- **<u>Non-Partisan Election Activities</u>**

Finally, the proposed definition of "candidate-related political activity also includes voter registration drives, get-out-the-vote (GOTV) drives, and the "[p]reparation or distribution of a voter guide that refers to one or more clearly identified candidates…." § 1.501(c)(4)-1(a)(2)(iii)(5), (7). As stated in the Notice, under the current "facts and circumstances test," "these election related activities may not be considered political campaign intervention if conducted in a non-partisan and unbiased manner." Nonetheless, under the proposed definition of "candidate-related political activity," Section 501(c)(4) organizations engaging in such activities would risk losing their tax-exempt status and be forced to pay a tax on any expenditures related to such activities.

The Notice suggests that characterizing all such activities as "candidate-related political activity", regardless of whether performed in a non-partisan and neutral manner, will "avoid a fact-intensive analysis." But the desire for bright-line rules provides no justification for restricting such activities. The IRS should encourage, not discourage, efforts to engage voters and increase voter turnout. Likewise, IRS policies should encourage informed voting. Voter registration drives, GOTV drives, and voter guides are valuable tools in achieving these goals, and are inextricably tied to the promotion of "social welfare." Though such activities may be *election*-related, they are not *candidate*-related when conducted in a non-partisan, unbiased manner. Notably, as the IRS acknowledges, even Section 501(c)(3) entities are permitted to engage in such activities in furtherance of their charitable mission. Similarly, labor organizations (§ 501(c)(5)) and chambers of commerce (§ 501(c)(6)) remain free to engage in such activities with no adverse tax consequences. Yet, the IRS proposes to restrict all such activities performed by Section 501(c)(4) organizations. This unequal treatment is both counterintuitive and counterproductive.

A more sensible approach is simply to eliminate Subpart (a)(2)(iii)(5) and (7) altogether. In the event that such election-related activities include express advocacy for or against a candidate (as defined in *Buckley*), the activities will be considered "candidate-related political activity" under § 1.501(c)(4)-1(a)(2)(iii)(1)(i). This approach (a) eliminates the need for any "fact-intensive" analysis, (b) provides a bright-line rule for Section 501(c)(4) organizations, and (c) respects First Amendment rights at issue.

- **<u>Conclusion</u>**

In summary, we agree that the current "facts and circumstances" approach fails to provide bright-line rules by which Section 501(c)(4) organizations can guide their conduct, and it encourages selective and discriminatory enforcement. Unfortunately, the proposed definition of "candidate-related political activity" suffers from the same defects. The proposed definition encompasses a wide swath of non-partisan, issue-based activities at the very heart of the purpose for which Section 501(c)(4) organizations exist. By taxing such entities for these activities, and putting them at risk of losing their Section 501(c)(4) tax-exempt status, the IRS is undermining the promotion of "social welfare," and is delving into a body of law beyond the scope of the IRS' intended purpose. Candidate-related expenditures are already regulated by both federal and state campaign finance laws, and any

Graves Garrett LLC

regulations promulgated by the IRS should be compatible with such laws, which have been formulated within the context of the Supreme Court's First Amendment jurisprudence. The IRS' proposed definition of "candidate-related political activity," however, extends far beyond *campaign* activities, and limits the ability of Section 501(c)(4) organizations to engage in *issue-oriented* activities in furtherance of their mission.

Thank you for considering our comments. It is our hope that, in considering these and other comments submitted by the public, the IRS may promulgate regulations providing greater clarity to Section 501(c)(4) organizations, but do so in a manner that does not unnecessarily burden and limit the activities of such organizations. The current, proposed regulations do not meet this objective.

Sincerely,

Edward D. Greim

Clayton J. Callen

cc: Internal Revenue Service

1100 Main Street, Suite 2700 Kansas City, MO 64105
ph 816.256.3181 www.gravesgarrett.com

1700 Pacific Avenue, Suite 3600 Dallas, TX 75201
ph 214.453.2003 www.gravesgarrett.com