LAW OFFICES
WEINBERG, JACOBS & TOLANI, LLP
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
TELEPHONE (301) 468-5500
FAX (301) 468-5504
WEB SITE: WJLAW.COM

10411 MOTOR CITY DRIVE, SUITE 500
BETHESDA, MARYLAND 20817

BARNABY ZALL, DC MD
BZALL@BZALL.COM
DIRECT DIAL: 301-231-6943

January 16, 2014

Office of Management & Budget
ATTN: Desk Officer for the Dept. of
the Treasury
Office of Information and Regulatory Affairs
Washington, DC 20503

Cc: Internal Revenue Service
IRS Reports Clearance Officer
SE:W:CAR:MP:T:T:SP
Washington, DC 20224

Dr. Winslow Sergeant
Chief Counsel for Advocacy
U.S. Small Business Administration
409 3rd St, SW
Washington, DC 20416

RE: COMMENTS ON THE COLLECTION OF INFORMATION AND THE APPLICATION OF THE PAPERWORK REDUCTION ACT, THE REGULATORY FLEXIBILITY ACT, AND EXECUTIVE ORDERS 13563, 12866, 13258, AND 13422 UNDER PROPOSED REGULATIONS OF THE TREASURY AND INTERNAL REVENUE SERVICE REG-134417-13 CONCERNING "CANDIDATE-RELATED POLITICAL ACTIVITIES"

SUMMARY:

The Internal Revenue Service proposed regulations to restrict "candidate-related political activities" by IRC § 501(c)(4) "social welfare" organizations. In light of last year's scandal on treatment of certain applications for Section 501(c)(4) recognition, the IRS believes its employees need a simpler and easier to manage definition of political activities, so the proposed regulations would sweep many non-partisan and non-political activities into the restrictions on political campaign intervention. For purposes of the Paperwork Reduction and Regulations Flexibility Acts and related Executive Orders, however, the immediate concern is that the IRS did not explain that the proposed regulations would result in significant new and burdensome collections of information; instead, the IRS said that only one small section of the proposed regulations would require evaluation. In addition, the estimated paperwork burden was far too

small even for the one section the IRS admitted should be reviewed. These true burdens imposed by the proposed regulations violate Supreme Court guidance on the degree to which the tax regulations can limit speech of Section 501(c)(4) organizations.

The proposed regulations should be rejected and the agencies told to submit proper Paperwork Reduction Act and Regulatory Flexibility referrals. If the proposed regulations are allowed to proceed through the notice and comment period, the actual paperwork and regulatory flexibility burdens should be clarified as being generated by the much broader collections of information required under the proposed regulations, and the appropriate estimates should be recalculated under more realistic assumptions. Finally, a public hearing should be held on the paperwork and regulatory burdens.

COMMENTER:

These comments are submitted by Barnaby Zall, a private practitioner of tax-exempt organization and campaign finance law. These are my personal views, and I am neither representing nor being compensated by any person or organization for these comments. In particular, though I am the founder and co-Chair of Friends of White Flint, Inc., the Section 501(c)(4) organization described in the example below, these are my own views and **MAY NOT REPRESENT THE VIEWS OF THAT ORGANIZATION**.

I have been personally involved in the collection of information and the preparation and presentation of required reports to the federal government by tax-exempt organizations, including for organizations recognized as exempt from most federal taxation under Internal Revenue Code § 501(c)(4), the subject of the proposed regulations. Not only have I served as legal and tax counsel to organizations ranging from small start-ups to the Nation's largest foundations and exempt organizations, I have prepared and filed tax information returns and tax forms for many exempt organizations, including those that I have personally managed. I also help convene a monthly discussion group of legal practitioners from across the political spectrum to discuss, among other things, the collection of information and burdens of regulation, including the proposed regulations.

APPLICABLE LAW:

It is the declared policy of the federal government that:

> Each agency shall tailor its regulations and guidance documents to impose the least burden on society, including individuals, businesses of differing sizes, and other entities (including small communities and governmental entities), consistent with obtaining the regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations.

Executive Order 12866 of September 30, 1993, as amended by E.O. 13258 of February 26, 2002 and E.O. 13422 of January 18, 2007, § 1(b)(11). In addition, "[w]here relevant, feasible, and consistent with regulatory objectives, and to the extent permitted by law, each agency shall identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public." E.O. 13563, § 4.

The Paperwork Reduction Act, 44 U.S.C. Chapter 35, requires that all agencies "minimize the paperwork burden for … educational and nonprofit institutions, … and other persons resulting from the collection of information by or for the Federal Government." 44 U.S.C. § 3501(1). "Information" is "any statement or estimate of fact or opinion, regardless of form or format." 5 C.F.R. § 1320.3(h). This category includes:

> (1) requests for information to be sent to the government, such as forms (e.g., the IRS 1040), written reports (e.g., grantee performance reports), and surveys (e.g., the Census);
> (2) recordkeeping requirements (e.g., OSHA requirements that employers maintain records of workplace accidents); and
> (3) third-party or public disclosures (e.g., nutrition labeling requirements for food).

Cass Sunstein, "Memorandum for the Heads of Executive Departments and Agencies and Independent Regulatory Agencies," April 7, 2010, P. 2.
http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/PRAPrimer_04072010.pdf.

Each agency must submit to the appropriate paperwork and regulatory burden review offices an accurate and complete assessment of each proposed significant action so that those offices can evaluate, independently from the promulgating agencies with programmatic responsibility, the regulatory burden imposed by the new rules. 44 U.S.C. § 3506(c). The Regulatory Flexibility Act also requires the promulgating agency to submit a report to the Small Business Administration's Office of Advocacy for any proposed rule that significantly affects more than ten small tax-exempt organizations. 5 U.S.C. § 605(a).

THE PROPOSED REGULATIONS:

On November 29, 2013, the Department of the Treasury and the Internal Revenue Service published a Notice of Proposed Rulemaking. 78 Fed. Reg. 71535. The NPRM proposed "guidance to tax-exempt social welfare organization on political activities related to candidates that will be considered to promote social welfare. These regulations will affect tax-exempt social welfare organizations and organizations seeking such status." *Id*. "Social welfare organizations" are generally exempt from most federal taxation under IRC § 501(c)(4).

Section 501(c)(4) organizations are generally entitled to conduct a certain amount of "electioneering" activities, including intervention in political campaigns, so long as the political activities are not the "primary" activity of the organization. "Under present law, certain tax-exempt organizations (such as sec. 501(c)(4) organizations) may engage in political campaign activities." S. Rep. No. 93-1358, 93d Cong., 2d Sess., 29 (1974), 1975-1 C.B. 517, 533. 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." Rev. Rul. 81–95, 1981–1 Cum. Bull. 332, 1981 WL 166125; *Fed. Election Comm'n v. Beaumont*, 539 U.S. 146, 150 n. 1 (2003).

Under current law, the Internal Revenue Service uses a "facts and circumstances" test to determine whether a particular activity is "political." "The key is to determine the character of the organization's primary activities by looking at all of the facts and circumstances." P.L.R. 201224034 (June 15, 2012). The Supreme Court limits this inquiry to "express advocacy" (*e.g.*, "magic words" such as "vote for," or "elect"), *Buckley v. Valeo*, 424 U.S. 1, 45 (1976), and the "functional equivalent of express advocacy," (*e.g.*, "Smith in 2014"), *Fed. Election Comm'n v. Wisconsin Right To Life, Inc.*, ("*WRTL*") 551 U.S. 449, 464-70 (2007). In order to qualify as the "functional equivalent of express advocacy," there can be no other objectively-reasonable interpretation of the activity than as express advocacy. "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." *WRTL*, 551 U.S. at 474.

The proposed regulations substitute new, more encompassing and inflexible standards for determining when an activity of a Section 501(c)(4) organization will be deemed impermissible "political candidate-related activity." In addition to express advocacy activities and their functional equivalent, the proposed regulations add other activities that have not previously been recognized as "political," including:

2. Grants and Contributions
    - Grants to section 527 political organizations and other tax-exempt organizations that conduct candidate-related political activities (note that a grantor can rely on a written certification from a grantee stating that it does not engage in, and will not use grant funds for, candidate-related political activity).
3. Activities Closely Related to Elections or Candidates
    - Voter registration drives and "get-out-the-vote" drives.
    - Distribution of any material prepared by or on behalf of a candidate or by a section 527 political organization.
    - Preparation or distribution of voter guides that refer to candidates (or, in a general election, to political parties).

- Holding an event within 60 days of a general election (or within 30 days of a primary election) at which a candidate appears as part of the program.

Internal Revenue Service, "Treasury, IRS Will Issue Proposed Guidance for Tax-Exempt Social Welfare Organizations," IR-2013-92, Nov. 26, 2013, http://www.irs.gov/uac/Newsroom/Treasury,-IRS-Will-Issue-Proposed-Guidance-for-Tax-Exempt-Social-Welfare-Organizations.

The Internal Revenue Service is recovering from public disclosure of its prior practice of targeting Section 501(c)(4) organizations based on their perceived ideology and political activities. *See, e.g.*, Treasury Inspector General for Tax Administration, Dept. of the Treasury, "Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review," May 14, 2013, No. 2013-10-053, ("TIGTA Report"), www.treasury.gov/tigta/auditreports/2013reports/201310053fr.html; Internal Revenue Service, "Charting a Path Forward at the IRS: Initial Assessment and Plan of Action," June 24, 2013, ("Charting a Path Forward"), www.irs.gov/pub/newsroom/Initial%20Assessment%20and%20Plan%20of%20Action.pdf. The proposed regulations are intended to help the IRS and the public "benefit from clearer definitions of these concepts." 78 Fed. Reg. 71536.

> Although more definitive rules might fail to capture (or might sweep in) activities that would (or would not) be captured under the IRS' traditional facts and circumstances approach, adopting rules with sharper distinctions in this area would provide greater certainty and reduce the need for detailed factual analysis in determining whether an organization is described in section 501(c)(4). Accordingly, the Treasury Department and the IRS propose to amend Treas. Reg. § 1.501(c)(4)–1(a)(2) to identify specific political activities that would be considered candidate-related political activities that do not promote social welfare distinctions in this area.

Id. In other words, the IRS intends to "sweep in" activities that do not constitute political activities under current Section 501(c)(4) rules, so that trained IRS employees would not have to make difficult factual determinations.

But that was not the problem at the IRS. This is an inaccurate and misleading reading of the investigations of prior IRS "**management failures**", "Charting a Path Forward, P. 4, echoing the original false claims that it was only "low-level" "line" employees in IRS field offices who made mistakes. Josh Hicks, "IRS e-mails show IRS official fuming over Lois Lerner comments," *The Washington Post*, November 20, 2013, http://www.washingtonpost.com/blogs/federal-eye/wp/2013/11/20/irs-emails-show-cincinnati-official-fuming-lois-lerner-comments/. As the June 2013 report by the acting IRS Commissioner noted:

> Several key leaders, including some in the Commissioner's Office, **failed in multiple capacities to meet their managerial responsibilities** at various points during the course of these events. Most notably, there was insufficient action by these leaders to identify, prevent, address, and disclose the problematic situation that materialized with the review of applications for tax exempt status. The full extent of these **management failures** and any further inappropriate actions that may have taken place are the subject of various ongoing reviews and investigatory efforts.

Charting a Path Forward, P. 4 (emphasis added). And the Treasury Inspector General was even more clear about origin of the problems in assessing "political" activity on the basis of ideology or terminology:

> The IRS used inappropriate criteria that identified for review Tea Party and other organizations applying for tax-exempt status based upon their names or policy positions instead of indications of potential political campaign intervention. **Ineffective management**: 1) allowed inappropriate criteria to be developed and stay in place for more than 18 months, 2) resulted in substantial delays in processing certain applications, and 3) **allowed unnecessary information requests to be issued**.
>
> Although the processing of some applications with potential significant political campaign intervention was started soon after receipt, no work was completed on the majority of these applications for 13 months. **This was due to delays in receiving assistance from the Exempt Organizations function Headquarters office.**

TIGTA Report, What We Found, P. 1 (emphases added).

The proposed rules certainly did "sweep in" areas of speech that are traditionally not included in political activities, including non-partisan voter registration activities, non-partisan voter education activities such as candidate debates and voter guides, and all volunteer activities. *See, e.g.*, IR-2013-92. Consider an example from Revenue Ruling 2004-6, http://www.irs.gov/irb/2004-04_IRB/ar10.html, the IRS's most recent guidance on interpreting the activities of Section 501(c)(4) organizations:

> Situation 5. … Under the facts and circumstances in Situation 5, the advertisement is not for an exempt function under § 527(e)(2). S's advertisement identifies Governor F, appears shortly before an election in which Governor F is a candidate, targets voters in that election, and identifies Governor F's position as contrary to S's position. However, the advertisement is part of an ongoing series of substantially similar advocacy communications by S on the same issue and the advertisement identifies an event outside the control of the organization (the scheduled execution) that the organization hopes to influence. Further, the timing of the advertisement coincides with this specific event that the organization hopes to influence. The candidate identified is a government official

> who is in a position to take action on the public policy issue in connection with the specific event. Based on these facts and circumstances, the amount expended by S on the advertisements is not an exempt function expenditure under § 527(e)(2) and, therefore, is not subject to tax under § 527(f)(1).

Rev. Rul. 2004-6, IRB 2004-4 (January 26, 2004), Example 5.

In other words, in this IRS guidance document example, this broadcast advertisement shortly before an election was not political, it was grassroots lobbying or even issue advocacy (depending on the applicable state law). But under the proposed regulations, the content of the message does not matter; under proposed regulation § 1.501(c)(4)-1(a)(2)(iii)(2), the advertisement is "candidate-related political activity," and information must be collected and reported on it. This is a significant new information collection and reporting mandate.

Critics across the political spectrum have noted numerous problems raised by the proposal to define non-partisan and previously-unrestricted activities under the new regulations. http://www.prwatch.org/news/2013/12/12336/bright-lines-project-reaction-proposed-irs-political-rules; http://www.freedomworks.org/blog/jborowski/proposed-irs-rules-would-stifle-free-speech.

> Of course, it is possible to embrace the Service's general approach—the emphasis on definitive rules and clarity—and not agree with some of the directions suggested in its first cut at proposed rules. Some of the proposals seem to sweep too widely, and others pull up short of addressing significant questions of campaign activity by (c)(4)s. The Service admits as much, but then it does not explain, or in the design of the rules reveal, how it wound up going too far in some respects and not far in enough in others. As a result, the proposed rules do not distinguish between partisan and nonpartisan activity, or between issues and campaign speech.

Bob Bauer, "The IRS Proposed Rules on (c)(4) Political Activity," *More Soft Money Hard Law*, December 2, 2013, http://www.moresoftmoneyhardlaw.com/2013/12/the-irs-proposed-rules-on-c4-political-activity/.

In addition to the redefinition of activities not considered "electioneering" or otherwise subject to considerations under applicable regulations, the proposed regulations will have a dramatic effort on organizations who use volunteers. The proposed regulations include a requirement that not only must the regulated organizations calculate the financial expenditures of their "political" activity, as newly-redefined by the proposed regulations, but they must also include volunteer activities. 78 Fed. Reg. 71539 ("In addition, the expansion of the types of communications covered in the proposed regulations reflects the fact that an organization's tax exempt status is determined based on all of its activities, even low cost and volunteer activities,

not just its large expenditures."). There is no guidance on how to calculate these volunteer activities or report them relative to the rest of the organization's activities.

Nor can affected organizations determine from other, related IRS collections of information how to calculate what might be the crucial information in determining whether they can remain tax-exempt. For example, the current Form 990 annual information return requires listing the number of volunteers assisting the organization, and if they engage in reportable electioneering (so that they have to file Schedule C to their Form 990) whether the volunteers are acting as part of a "political activity." The IRS Forms Instructions recognize that many organizations "do not keep track of this information in their books and records," and permits "any reasonable" estimate:

> Line 6. Enter the number of volunteers, full-time and part-time, including volunteer members of the organization's governing body, who provided volunteer services to the organization during the reporting year. **Organizations that do not keep track of this information in their books and records or report this information elsewhere (such as in annual reports or grant proposals) can provide a reasonable estimate, and can use any reasonable basis for determining this estimate.** Organizations can, but are not required to, provide an explanation on Schedule O (Form 990 or 990-EZ) of how this number was determined, the number of hours those volunteers served during the tax year, and the types of services or benefits provided by the organization's volunteers.

2013 Instructions for Form 990 Return of Organization Exempt From Income Tax, P. 10 (emphasis added), http://www.irs.gov/pub/irs-pdf/i990.pdf. Similarly, with the instructions for Schedule C: "Line 3. If the organization used volunteer labor for its political campaign activities or section 527 exempt function activities, provide the total number of hours. **Any reasonable method may be used to estimate this amount**." 2013 Instructions for Schedule C (Form 990 or 990-EZ), Political Campaign and Lobbying Activities, P. 3, (emphasis added) http://www.irs.gov/pub/irs-pdf/i990sc.pdf.

Defining and measuring volunteer labor are difficult tasks, and the International Labour Organization's internationally-recognized manual for doing so is 105 pages long. Int'l Labour Organization, *Manual on the Measurement of Volunteer Work*, Geneva, 2011, http://www.ilo.org/wcmsp5/groups/public/---dgreports/--stat/documents/publication/wcms_162119.pdf. The only regular and reliable method of measuring volunteer activity is a "carefully designed 'volunteer supplement'" to labor force surveys carried out on a "periodic basis." *Id*., at 9. The conversion of volunteer measurements into a mandatory element of maintaining exemption is a significant increase in information collection for many Section 501(c)(4) organizations.

THE NPRM VIOLATES THE STATUTORY AND REGULATORY REQUIREMENTS:

The statutory and regulatory requirements were not met with the proposed regulations at issue here.

The NPRM includes an unbelievable estimate of two hours annually per recordkeeper as the "Estimated average annual burden." 78 Fed. Reg. 71535. This estimate does not include most of the new collections of information required by the NPRM, nor is it an accurate assessment of the one small new collection of information which the IRS reported.

The low estimate was reported by IRS as being generated only by one small part of the new "political candidate-related activities:"

> The collection of information in these proposed regulations is in § 1.501(c)(4)–1(a)(2)(iii)(D), which provides a special rule for contributions by an organization described in section 501(c)(4) of the Internal Revenue Code (Code) to an organization described in section 501(c). Generally, a contribution by a section 501(c)(4) organization to a section 501(c) organization that engages in candidate-related political activity will be considered candidate-related political activity by the section 501(c)(4) organization. The special rule in § 1.501(c)(4)–1(a)(2)(iii)(D) provides that a contribution to a section 501(c) organization will not be treated as a contribution to an organization engaged in candidate-related political activity if the contributor organization obtains a written representation from an authorized officer of the recipient organization stating that the recipient organization does not engage in any such activity and the contribution is subject to a written restriction that it not be used for candidate-related political activity. This special provision would not apply if the contributor organization knows or has reason to know that the representation is inaccurate or unreliable. The expected recordkeepers are section 501(c)(4) organizations that choose to contribute to, and to seek a written representation from, a section 501(c) organization.

78 Fed. Reg. 71535. None of the several other significant collections of information in the NPRM, including major changes in definitions of activities to be included in mandatory reports and calculations of a Section 501(c)(4)'s "primary activity," were identified to the reviewing agencies as constituting a collection of information or a regulatory burden.

It is true that there will be an extra recordkeeping and reporting burden from the new grant letters issued and received by Section 501(c)(4) organizations. The proposed rule requires any grant or transfer to an organization exempt from taxation under Section 501(c) to be counted as political candidate-related political activities if the recipient organization engages or has engaged in any type of such behavior. 78 Fed. Reg. 71535. There is a "safe harbor" for organizations that make grants or contributions pursuant to binding grant letters that both require

recipients to certify that they have not engaged in the new "candidate-related political activities" and prohibit recipients from doing so. *Id*.

The NPRM significantly understates the burden imposed by this new collection of information on both covered and non-covered tax-exempt organizations. This new collection of information would, for example, apply to a grant from a covered Section 501(c)(4) organization to a Section 501(c)(3) charity that is not covered by the new regulations. If the charity were to engage in permissible nonpartisan voter registration, a contribution from the Section 501(c)(4) organization would be "political candidate-related activity" unless the charity sent a certification to the donor that it would not engage in "political candidate-related activity" and the donor Section 501(c)(4) organization sent a binding agreement prohibiting such activity by the charity. 78 Fed. Reg. 71535. This exchange would block the charity from performing what is recognizing as permissible non-political activity. In addition, the grant letter requirement would both force the charity to learn about the new Section 501(c)(4) rules, and collect and submit information related to the new requirements. None of this additional burden is reflected in the NPRM.

I and other tax-exempt law practitioners have extensive experience with drafting and reviewing similar grant letters between tax-exempt organizations, and they are usually drafted as signed legal contracts between the two organizations. *See, e.g.*, a sample grant agreement at http://wiki.creativecommons.org/images/f/fd/Grant_Agreement.pdf. Most organizations require such contracts to be reviewed and approved by legal counsel, often by both issuing and receiving organizations, and there are often negotiations over the wording and interpretation of such letters. The time increases dramatically in the cases of donors who are subject to specific regulations, such as state or local "pay-to-play" restrictions or those from the federal Municipal Securities Rulemaking Board or Securities and Exchange Commission. *See, e.g.,* MSRB Notice 2011-46, "MSRB Files Pay To Play Rule For Municipal Advisors And Changes To Dealer Pay To Play Rule," (August 19, 2011), http://www.msrb.org/Rules-and-Interpretations/Regulatory-Notices/2011/2011-46.aspx. A two-hour estimate for even one grant letter agreement that includes restrictions on political or lobbying activities either is unrealistically low, or represents an unsupported calculation that the vast majority of organizations will not engage in this negotiation process so the burdens are inappropriately minimized by including non-participatory and dissimilar organizations. In either case, the estimate given for the single small burden admitted to in the NPRM is inaccurate and misleading.

But the more important point is that by confining the referrals to the appropriate Paperwork Reduction Act or Regulatory Flexibility Act offices to this very cramped definition of collection of information, the IRS and Treasury Department are flouting not only the purpose of the Acts, but the requirements of the Executive Orders. Since they are, by definition, not subject

matter experts in the matters referred to them, the appropriate offices cannot engage in their statutory duties if they are not told which portions of the new regulations represent new collections of information.

That is the case here. The NPRM violates the statutory and regulatory requirements.

AN EXAMPLE OF NEW COLLECTIONS OF INFORMATION GENERATED BY THE PROPOSED REGULATIONS:

I am personally familiar with one small organization's recordkeeping efforts under current rules, and can easily anticipate significant additional burdens under the new rules. White Flint, centered on the White Flint Metro station, is a small part of North Bethesda, Maryland, just outside Washington, D.C. As part of its growth into a million-person, rapidly urbanizing area, Montgomery County has moved to redirect White Flint's growth into a walkable, environmentally-sustainable and transit-oriented development pattern set by an award-winning master plan established with substantial public input. www.montgomeryplanning.org/community/whiteflint/.

The largest and most effective non-governmental public participation organization involved in the White Flint Master Plan design is Friends of White Flint, Inc., a Maryland Section 501(c)(4) organization. www.whiteflint.org. Established in 2009, Friends of White Flint has a Board of Directors composed equally of representatives elected by members from the residential communities in White Flint, businesses in White Flint, and property owners and developers who are participating in the renewal of White Flint. Participants include the federal Nuclear Regulatory Commission (whose headquarters is next to the White Flint Metro station), and the largest employers and residential associations in the area. I am one of the founders and co-chairs of Friends of White Flint, and I have kept the books and records and filed the tax-exemption applications and tax returns for the organization since its founding. **THESE COMMENTS ARE SOLELY MY INDIVIDUAL VIEWS AND MAY NOT REFLECT THE VIEWS OF THE ORGANIZATION.**

Under current IRS interpretations, none of the organization's activities were considered "electioneering." Friends of White Flint engaged in an extensive program of public education, including live blogging and other coverage of public events which included elected officials who were also candidates for re-election. It hosted a non-partisan debate between all candidates for the Montgomery County Council, held in the County Office Building, publicized and open to all citizens, and all candidates running for those offices participated. It included lively blog posts on the relative merits of proposals by various elected officials who were also candidates (at this point, the Friends of White Flint blog was one of the most often-visited blogs in Maryland). The

organization held more than 200 public meetings on the Master Plan, and a "White Flint Town Hall" public forum, attended by hundreds of people, in the auditorium at the Nuclear Regulatory Commission was the largest and arguably most important public communication event during the four-year development of the White Flint Master Plan. All these activities were conducted by volunteers.

The focus was always on the issues, and not on the candidates or an election. As a co-chair, I was very aware of the organization's activities and its conformance with the current limits on electioneering, as explained in IRS guidance such as Rev. Rul. 2004-6. The organization did not need to file a Schedule C or report to any other agency its activities as electioneering.

If the proposed rules had been in effect throughout the development of the Master Plan, however, Friends of White Flint probably would not have been able to continue as a Section 501(c)(4) organization, because a substantial amount of its activities would have been disqualified as "social welfare." Under the proposed rules, it would not have been able to report on the activities or proposals of many elected officials; for example, the vast majority of County Council members who had worked on the White Flint Master Plan are reported as likely candidates for either appointed or elected offices. *See, e.g.,* Bill Turque, "Montgomery County Council Seat Applicant List Swells to 18," *The Washington Post*, Jan. 9, 2013, http://www.washingtonpost.com/local/md-politics/montgomery-county-council-seat-applicant-list-swells-to-18/2014/01/09/c8454d64-794b-11e3-b1c5-739e63e9c9a7_story.html. It could not have held public events at which the current officeholders explained the impact of particularly complex governmental decisions, such as the current rewrite of the county zoning regulations to promote "mixed-use" property design. It would even have to scrub past reports from its website.

And because the vast majority of its activities were conducted by volunteers, the burden of recordkeeping would have been enormous. The current bank account balance for Friends of White Flint is approximately $5,000, but the number of volunteers speaking, performing legal reviews, public communications, analysis and comment, and other highly-valued services ranges into the hundreds. Based on my experience both as a lawyer and with the finances and reporting of this small organization, I estimate that the recordkeeping burden would swell from approximately forty hours per year to approximately two hundred hours per year, including tracking, analyzing and reporting volunteer activity that previously had not been counted. Using our current figures for independent contractors we employ for administrative and management tasks at rates of between $30 and $140 per hour, I estimate that the costs solely to comply with the new collection of information required by the proposed regulations would be approximately $15,000, or about three times our entire current bank balance.

Thus, it is impossible to suggest, as the proposed regulations do, that these proposed regulations are "not a significant regulatory action as defined in Executive Order 13563" or "that this rule will not have a significant economic impact on a substantial number of small entities." 78 Fed. Reg. 71540. Those statements are directly contradicted by the May 2013 TIGTA report and the IRS's own statements in its June 24, 2013 "Charting the Way Forward" report. *See, e.g.*,

> More than 20 months after the initial case was identified, processing the cases began in earnest. Many organizations received requests for additional information from the IRS that included **unnecessary, burdensome questions** (e.g., lists of past and future donors). The IRS later informed some organizations that **they did not need to provide previously requested information**. IRS officials stated that any donor information received in response to a request from its Determinations Unit was later destroyed.

TIGTA Report, "What TIGTA Found," P. 1 (emphasis added).

UNUSUAL CONSTITUTIONAL DIMENSIONS OF THE "BURDEN" DEFINTION:

Congress has determined that paperwork and regulatory burdens are always important considerations for government regulators. *See, e.g.*, 44 U.S.C. § 3501. (''The purposes of this chapter are to— '(1) minimize the paperwork burden for … educational and nonprofit institutions, … and other persons resulting from the collection of information by or for the Federal Government.").

There is, however, an additional constitutional dimension involved in these regulations, which affect the First Amendment rights of thousands of organizations across the country. The Supreme Court has said explicitly since 1983 that the constitutionality of restrictions on tax-exempt organizations' speech depends in large part on whether the speech restrictions "burden" the First Amendment rights of the affected organizations, most notably, the IRC § 501(c)(4) social welfare organizations that are affected by the proposed regulations. *Regan v. Taxation With Representation*, 461 U.S. 540, 546 (1983); *Agency for Int'l Development v. Alliance for Open Society Int'l, Inc.*, __ U.S. __, 133 S.Ct. 2321, 2327-29 (June 20, 2013). The *Regan* decision rejected a challenge to the lobbying limitation on IRC § 501(c)(3) charities, saying that the constitutionality of the lobbying restriction rested on the easy access the affected charities had to another channel for speech – a Section 501(c)(4) organization. 461 U.S. at 546, n. 6.

> The constitutional defect that would inhere in § 501(c)(3) alone is avoided by § 501(c)(4). … TWR may use its present § 501(c)(3) organization for its nonlobbying activities and may create a § 501(c)(4) affiliate to pursue its charitable goals through lobbying.
>
> …
>
> Any significant restriction on this channel of communication, however, would negate the saving effect of § 501(c)(4). It must be remembered that § 501(c)(3)

> organizations retain their constitutional right to speak and to petition the Government. Should the IRS attempt to limit the control these organizations exercise over the lobbying of their § 501(c)(4) affiliates, the First Amendment problems would be insurmountable. It hardly answers one person's objection to a restriction on his speech that another person, outside his control, may speak for him. Similarly, an attempt to prevent § 501(c)(4) organizations from lobbying explicitly on behalf of their § 501(c)(3) affiliates would perpetuate § 501(c)(3) organizations' inability to make known their views on legislation without incurring the unconstitutional penalty. Such restrictions would extend far beyond Congress' mere refusal to subsidize lobbying. See *ante*, at 546, n. 6. In my view, any such restriction would render the statutory scheme unconstitutional.,

Regan, 461 at 552-554 (Justices Blackmun, Brennan and Marshall, concurring). The same principles apply to "candidate-related political activity."

Last June's *AID v. Open Society* opinion reiterated and strengthened the Court's warning to the IRS about restrictions on Section 501(c)(4) speech:

> In *Regan,* … the Court highlighted … the fact that the condition did not prohibit that organization from lobbying Congress altogether. By returning to a "dual structure" it had used in the past—separately incorporating as a § 501(c)(3) organization and § 501(c)(4) organization—the nonprofit could continue to claim § 501(c)(3) status for its nonlobbying activities, while attempting to influence legislation in its § 501(c)(4) capacity with separate funds. *Ibid.* **Maintaining such a structure, the Court noted, was not "unduly burdensome."** *Id.,* at 545, n. 6.

AID v. Open Society, 133 S. Ct. at 2328-29 (emphasis added).

So the government's identification of the "burden" imposed by restricting the speech of Section 501(c)(4) organizations may govern the inevitable constitutional challenges to the proposed regulations. Because the IRS and Treasury Department inappropriately limited their definition of the collection of information, the appropriate offices could not review this important portion of the regulatory process. The result will likely be successful challenges to the regulations.

The regulations should be rejected by the OIRA and other supervisory agencies for failure to comply with the statutory and administrative requirements. In the event that the regulations are not withdrawn, the estimates for regulatory burden should be revised to reflect both the correct extent of the new requirements for collection of information and their actual, real-world likely impact, as well as the statutorily-required consideration of alternatives.

RESPONSES TO SPECIFIC REQUESTS FOR COMMENTS:

As required by the statute and appropriate regulations, the NPRM asked a set of questions about the regulatory impact of the proposed regulations. 78 Fed. Reg. 71535.

1) *Whether the proposed collection of information is necessary for the proper performance of the functions of the IRS, including whether the information will have practical utility?*

The proposed collection of information is not necessary for the IRS to perform its functions. In fact, the proposed collection of information, as described in the NPRM will result in far fewer organizations operating as Section 501(c)(4) organizations, and thus, a concomitant loss of information to the government. In other words, as structured, the proposed regulations are counterproductive and have no practical utility.

An organization that loses its Section 501(c)(4) status because it cannot meet the new test for political candidate-related activity will not be able to operate under another section of the tax code. It cannot become a Section 527 political organization because those organizations must, by law, primarily operate as actual political organizations, conducting mostly candidate-related activities. Yet the vast majority of the activities which make up the new "political candidate-related activities" are not described in the definition of political activities ("exempt function activities") for Section 527 organizations. The Section 527 definition is not changed by the proposed regulations. So not only does the organization have to keep separate books using several different definitions of what constitutes political activities, it cannot continue as a tax-exempt organization. Thus, it would likely go out of business (which violates the Supreme Court's requirements for federal tax-related regulation of speech) or would become a for-profit entity, which does not require the same degree of reporting of activities, and does not use the new proposed political definitions (since it would be governed only by the non-deductibility rules of IRC § 162(e)).

The only articulated basis for the inclusion of the new activities in the proposed rule is to make it easier for the IRS to enforce the rules. Each investigation so far of the underlying problem with IRS misbehavior has identified better training and monitoring of IRS employees as the solution. Simply making certain activities, *per se*, prohibited activities is a simple, but not practical solution in an area as sensitive as restrictions on speech.

2) *The accuracy of the estimated burden associated with the proposed collection of information.*

As noted, the accuracy of the burden estimates is poor. The estimate does not include most sources of information collected, and, in the one area discussed, is widely off-the-mark.

3) *How the quality, utility, and clarity of the information to be collected may be enhanced.*

The best solution at this point is for the OIRA and other offices to simply reject the NPRM as unsupported and violative of the statutes. Otherwise, the estimates need to be improved both in coverage and in specific application.

4) *How the burden of complying with the proposed collection of information may be minimized, including through forms of information technology?*

The underlying concern with this proposed collection of information is that it is dramatically broader and more difficult than described. The estimate should be withdrawn and redrafted after consultation with those who have a better understanding of the nature of the activities being considered.

REQUEST FOR PUBLIC HEARINGS:

If these estimates are not withdrawn, I respectfully request that the OIRA and Office of Advocacy hold public hearings on the paperwork and regulatory burdens involved in these new proposed regulations.

I would be happy to provide more information or answer further questions. Thank you for your consideration.

Sincerely,

Barnaby W. Zall
301-231-6943
bzall@bzall.com