CENTER *for* COMPETITIVE POLITICS
Congress shall make no law...

December 5, 2013

Via Federal eRulemaking Portal

Daniel I. Werfel
Acting Commissioner of Internal Revenue
CC:PA:LPD:PR (REG-134417-13), Room 5205
Internal Revenue Service
P.O. Box 7604, Ben Franklin Station
Washington, DC 20044

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

Dear Mr. Werfel:

The Center for Competitive Politics ("CCP") respectfully submits these comments in response to the Notice of Proposed Rulemaking ("NPRM") issued by the Internal Revenue Service ("IRS" or "Service") on November 29, 2013. The NPRM, REG-134417-13, "contains 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, Internal Revenue Service REG-134417-13, 78 Fed. Reg. 71535 (Nov. 29, 2013).

As you wrote in a June report, the present "distinction between campaign intervention and social welfare activity, and the measurement of an organization's social welfare activities relative to its total activities, have created considerable confusion for both the public and the IRS in making appropriate 501(c)(4) determinations. Both the taxpayer and the IRS would benefit greatly from clear definitions of these concepts." DANIEL WERFEL, CHARTING A PATH FORWARD AT THE IRS: INITIAL ASSESSMENT AND PLAN OF ACTION, I.R.S. 28 (2013). We appreciate that the NPRM was issued with the intent to provide such clarity, which we agree is lacking under the present "facts and circumstances" analysis articulated by the Service.

Unfortunately, while arguably providing more clarity, the proposed rules suffer from significant flaws. While CCP intends to file additional

comments specifically addressing the various proposals and questions posed by the Service, as a general matter the proposal regulates far more speech than can be justified, under either administrative law or the First Amendment, given Supreme Court precedent over the past several decades.

As a threshold matter, CCP questions whether the IRS should be engaged in the minutiae of regulating political or politically-related speech at all. If an entity with a social welfare purpose is a political committee ("PAC") under federal or state law, it ought to be regulated as a 26 U.S.C. ("IRC") §527 organization. If it is not, it should be regulated under 26 U.S.C. §501(c)(4). This straightforward approach would harmonize the IRS's rules with those of the Federal Election Commission, the body entrusted by Congress with "exclusive jurisdiction" for civil enforcement of the nation's campaign finance laws. 2 U.S.C. §437c(b)(1). This approach would recognize that in 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. Finally, and most importantly, this straightforward approach offers real clarity without dragging the IRS further into the thicket of political regulation, a tangle from which it—and the Service's reputation for the neutral, nonpartisan collection of revenue—may never recover.

IRS National Taxpayer Advocate Nina Olson's report to Congress makes a similar recommendation. She wrote that "[t]he IRS, a tax agency, is assigned to make an inherently controversial determination about political activity that another agency may be more qualified to make." From her report:

> It may be advisable to separate political determinations from the function of revenue collection. Under several existing provisions that require non-tax expertise, the IRS relies on substantive determinations from an agency with programmatic knowledge.
>
> Potentially, legislation could authorize the IRS to rely on a determination of political activity from the Federal Election Commission (FEC) or other programmatic agency. Specifically, the FEC would have to determine that proposed activity would not or does not constitute excessive political campaign activity.

NINA OLSON, NATIONAL TAXPAYER ADVOCATE, SPECIAL REPORT TO CONGRESS: POLITICAL ACTIVITY AND THE RIGHTS OF APPLICANTS FOR TAX-EXEMPT STATUS 16 (2013) *available at* http://www.taxpayeradvocate.irs.gov/2014Objectives Report/Special-Report.

No legislation is needed to make this change. The IRS could, through this rulemaking, acknowledge that it will classify under §527 any organization the FEC considers a political committee. The FEC's regulations on this point already comply with Supreme Court rulings.

To the extent that the Service believes that this approach is insufficient, CCP suggests an alternative draft that provides greater clarity than either the proposed or current guidance. The attached language provides greater certainty to the regulated community, and does so with less chill to constitutionally protected issue speech and fewer administrative costs than the proposed rule announced in the NPRM. The CCP draft rule has the virtue of hewing tightly to the constitutional jurisprudence dealing with campaign finance, provides the clarity that the Service desires, and upholds the association and speech rights that are vital to the preservation of our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

For the reasons set forth below, CCP believes that its draft regulation is supported by the Internal Revenue Code and by substantial Supreme Court precedent.

I. The IRC establishes various types of nonprofit organizations that are regulated differently depending upon their missions and activities.

A. The three categories that currently exist under the IRC—§501(c)(3) charities, §501(c)(4) social welfare groups and §527 political organizations—reflect a coherent system for categorizing the varying activities that may be conducted by each type of organization.

Section 501 of the IRC provides tax exemptions for many types of organizations, including charities, civic leagues, social welfare organizations, labor organizations, business leagues, certain cemetery companies, and many others. *See* 26 U.S.C. §501(c). Since many of the organizations exempt from taxation under this section engage in narrow categories of activity and only tangentially discuss issues of public import, the most significant §501(c) organizations for purposes of this discussion and the attached draft rule are charities (IRC §501(c)(3)) and civic leagues/social welfare organizations (IRC §501(c)(4)). If an organization is established with the primary purpose of supporting or opposing political candidates, it is governed by IRC §527. *See* 26 U.S.C. §527; 26 C.F.R. §1.527-2(a)(1).

A brief exploration of the activities undertaken by each form of nonprofit organization is key to understanding the place each occupies within the IRC's present regulatory paradigm. It also demonstrates that a coherent system for regulating political activity is already implicit in the IRC and regulations. Thus, clarification and guidance may be achieved in a straightforward manner under the existing system.

1. **§501(c)(3) governs organizations with charitable, educational, scientific, religious, and various other purposes enumerated in the statute. These groups may educate the public concerning issues of public policy and conduct limited lobbying concerning legislation, but may not advocate the election or defeat of candidates for public office.**

Organizations exempt from taxation under §501(c)(3) may not engage in activity supporting or opposing a candidate. 26 U.S.C. §501(c)(3) (banning "participat[ion] in, or interven[tion] in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office"). "Public charity" §501(c)(3) organizations may engage in only limited lobbying activity. *Id.* ("no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation")[1]; 26 C.F.R 1.501(c)(3)-1(3). If a §501(c)(3) organization is a "private foundation,"[2] then it may not engage in lobbying activity at all.

The prohibition on political activity is of relatively recent vintage, having been added when then-Senator Lyndon B. Johnson introduced an amendment to the Revenue Act of 1954 which Congress adopted without comment, explanation, or legislative finding. Patrick L. O'Daniel, *More Honored in the Breach: A Historical Perspective of the Permeable IRS Prohibition on Campaigning by Churches*, 42 B.C. L. REV. 733, 740-741 (2001) (citing 100 CONG. REC. 9604 (1954)); *see* Revenue Act of 1954, Pub. L. No. 83-591 §501(c)(3); 68 Stat. 736, 899 (1954). General historical consensus is that the addition of the political activity prohibition was due to a protracted campaign in the senator's home state of Texas. *See, e.g.*, O'Daniel 42 B.C. L. REV. at 741-68 (detailing political situation at the time of the Revenue Act of 1954).

The prohibition of "substantial" lobbying, by contrast, can be traced back to the Revenue Act of 1934. *See* Pub. L. No. 73-216 §23(o), 48 Stat. 680, 690 (1934). In practice, the cutoff for how much lobbying constitutes

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[1] An organization may address some of this ambiguity by electing treatment under IRC §501(h), which allows a larger and defined percentage of its budget to be spent on lobbying.

[2] *See* 26 U.S.C. §509(a) (defining "private foundation" as opposed to "public charity").

"substantial" activity is unclear. The definition of "attempting[] to influence legislation" is rather expansive, covering communications to the general public as well as communications to legislators.[3] *See* 26 U.S.C. §4911(d).[4] Indeed, there is no bright-line test to determine what constitutes "substantial" activity on the part of a §501(c)(3) organization.[5]

To engage in more extensive lobbying on legislation, as opposed to general discussion or analysis of public-policy issues, than is permitted under the §501(h) election, organizations currently must organize a §501(c)(4) arm. Doing so has substantial consequences, as donors to §501(c)(4) organizations do not receive the charitable tax deduction enjoyed by those giving to §501(c)(3)s.

2. §501(c)(4) organizations generally work to advance social welfare in order to improve the common good. These groups may involve themselves in educational efforts, unlimited lobbying, and explicit support for or opposition to federal candidates, provided that political activity is not the primary activity used to advance social welfare.

In contrast to §501(c)(3), IRC §501(c)(4) defines social welfare organizations as:

> (A) Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.
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> (B) Subparagraph (A) shall not apply to an entity unless no part of the net earnings of such entity inures to the benefit of any private shareholder or individual.

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[3] There are exceptions to the general ban on communicating with legislators. *See* 26 U.S.C. §4911(d)(2). For example, if the public charity is called to testify before a legislative body to give technical advice, then that is not "lobbying" within the IRC. 26 U.S.C §4911(d)(2)(B).

[4] 26 U.S.C. §4911 only applies to the lobbying activity of organizations that have elected treatment under 26 U.S.C. §501(h). 26 U.S.C. §4911(2). But since neither IRC §501(c)(3) nor its supporting regulations contain a precise definition of "propaganda" or "influence legislation," default practice is to examine the activity under IRC §4911.

[5] Courts have used varying tests in fact-specific cases—providing little generally applicable guidance. *See, e.g.*, *Haswell v. United States*, 500 F.2d 1133 (Ct. Cl. 1974); *Christian Echoes Nat'l Ministry v. United States*, 470 F.2d 849 (10th Cir. 1972); *Seasongood v. Comm'n of Internal Revenue*, 227 F.2d 907 (6th Cir. 1955). IRC §501(h) creates an optional safe harbor and definition of substantial lobbying activity, but it is available only to §501(c)(3) organizations (not §501(c)(4) or other advocacy nonprofits). *See* 26 U.S.C. §501(h).

The Service has refined the definition of social welfare to govern organizations "*primarily* engaged in promoting in some way the common good and general welfare of the people of the community." 26 C.F.R. §1.501(c)(4)-1(a)(2)(i)(emphasis added). The IRS has also issued regulations stating that activity in support or opposition to a candidate is not "promotion of social welfare." 26 C.F.R. §1.501(c)(4)-1(a)(2)(ii) ("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").

This overall IRC framework is logical given the need for a practical distinction between the purely charitable or educational mission of a §501(c)(3) organization, and the social welfare advocacy of §501(c)(4) organizations. Indeed, some of the most respected §501(c)(4) organizations *advocate* for the homeless, the environment, civil liberties, economic freedom, fiscal responsibility, efficient government, gun rights, gun control, and historical preservation—to name just a few causes relating to social welfare. Unlike a §501(c)(3) organization, the §501(c)(4) organization is specifically conceptualized as a group advocating for certain public policies as a means to promote "social welfare." INTERNAL REVENUE SERVICE, *Social Welfare Organizations*, http://www.irs.gov/Charities-&-Non-Profits/Other-Non-Profits/Social-Welfare-Organizations (last accessed Aug. 8, 2013) ("Seeking legislation germane to the organization's programs is a permissible means of attaining social welfare purposes."). For example, the Sierra Club advocates for tougher pollution controls and for laws like the Safe Chemicals Act of 2011. SIERRA CLUB, *Toxics*, http://www.sierraclub.org/toxics/ (last accessed Aug. 8 2013). Likewise, the Brady Campaign to Prevent Gun Violence mobilizes the public to pressure legislators for stricter gun control laws. BRADY CAMPAIGN TO PREVENT GUN VIOLENCE, *Take Action*, http://www.bradycampaign.org /?q=take-action (last accessed Aug. 8 2013).

These activities do not cease to serve social welfare merely because an election—a frequent event in our democracy—is taking place. Indeed, citizens are more likely to consider these issues as public interest soars during the period surrounding elections. *See, e.g.*, Lundy R. Langston, *Affirmative Action, A Look at South Africa and the United States: A Question of Pigmentation or Leveling the Playing Field*? 13 AM. U. INT'L L. REV. 333, 340 (1997) ("During an election year divisive issues tend to come to the forefront because politicians know that these issues get excellent media attention that influences potential voters"); John Gastil, Justin Reedy, and Chris Wells, The Voice of the Crowd – Colorado's Initiative: When Good Voters Make Bad Policies: Assessing and Improving the Deliberative Quality of Initiative Elections, 78 U. COLO. L. REV. 1435, 1459 (2007) (noting in context of state initiative elections that "[m]ost voters pay some degree of attention to the[] issues during elections and receive some periodic contact from campaigns").

While no precedential ruling articulates it as such, the general operating assumption is that the political activity that cannot be the *primary* activity of a §501(c)(4) organization is substantively similar to the activity that §501(c)(3) organizations cannot engage in at all. *See, e.g.*, I.R.S. Priv. Ltr. Rul. 1996-9652026 22 (Oct. 1, 1996) ("[i]t follows that any activities constituting prohibited political intervention by a section 501(c)(3) organization are activities that must be less than the primary activities of a section 501(c)(4) organization..."). In the context of direct political activity, however, Revenue Ruling 81-95 provides helpful guidance, noting that §501(c)(4) organizations *may* engage in political activity supporting candidates. IRS Rev. Rul. 81-95 1981-1 C.B. 332. This political activity can include "financial assistance and in-kind services" to candidates. *Id.* So long as political activity is not the *primary* activity of the §501(c)(4) organization, the Ruling reasons, the organization may keep its tax-exempt status. *Id.*

3. §527 organizations engage in political activity supporting or opposing candidates. These organizations may conduct only insubstantial educational or lobbying activities.

By its express terms, IRC §527 governs the taxation of "political" organizations "organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function." 26 U.S.C. §527(e)(1). Counterintuitively, "exempt function" for a §501(c) organization does not mean a function that is "tax exempt," but one that may not be its primary activity and may be taxed because it does not qualify as activity under the IRC §501(c) tax exemptions. In other words, "exempt" is double negation. 26 U.S.C. §527(f).[6] Under IRC §527, an "exempt function" is:

> [T]he function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice-Presidential electors, whether or not such individual or electors are selected, nominated, elected, or appointed.

26 U.S.C. §527(e)(2).

While a §527 organization may engage in activity that is not "political activity," such as hosting educational workshops, lobbying, or social activities, these activities must be an insubstantial portion of its program activities. 26 C.F.R. 1.527-2(a)(3).

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[6] By contrast, "exempt functions" *are* tax-exempt for §527 organizations. 26 U.S.C. §527(c)(3).

Thus, the IRC already conceptualizes three "buckets" of activity, imposing appropriate tax status on organizations based upon which category they fall into. §501(c)(3) organizations work to educate and engage in other charitable purposes, with limited lobbying and no political activity. Advocacy nonprofits work on behalf of a variety of interests, and include groups promoting the common good, labor organizations, farm groups, and trade associations. These may engage in a blend of activities encompassing education, lobbying, and politics, as long as political activity does not become their primary activity. And §527 organizations advocate for or against *political candidates*[7] based on the candidates' views on public policy or other criteria developed by the organization. Taken together, these provisions allow groups to organize appropriately in support of their mission, and provide for corresponding tax treatment.

CCP commends the Service for its recognition that, under the "facts and circumstances" approach, the method for determining what constitutes political activity—and by extension, applicable tax status—is unclear. *See, e.g.*, IRS Rev. Rul. 2004-6, 2004-4 I.R.B. 328, 330 *and* IRS Rev. Rul. 2007-41, 2007-25 I.R.B. 1421. But if the *eleven* factors considered in determining whether *each* communication is "political activity" needlessly complicate the analysis, the NPRM's expansive new definition of "candidate-related political activity" would, in some ways, make things even worse. IRS Rev. Rul. 2004-6, 2004-4 I.R.B. at 330. Instead, the Service should use the three categories the IRC already outlines.

II. The Supreme Court's *Buckley v. Valeo* decision describes the careful balancing needed to protect issue speech from the regulatory burdens that may be placed on political speech.

In *Buckley v. Valeo*, the Supreme Court noted that "a major purpose of...[the First] Amendment was to protect the free discussion of governmental affairs,...of course includ[ing] discussions of candidates." *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)).

FECA and its subsequent amendments sought to regulate such First Amendment activity. In an effort to clarify the First Amendment boundaries of regulable political activity, *Buckley* set the standard for regulation of political speech and association. Consequently, *Buckley*'s examination of FECA provides an essential guide for the Service, so that it may avoid adopting any regulation that impermissibly impairs fundamental First

[7] I.R.S. Priv. Ltr. Rul. 1999-25051 (June 25, 1999) (noting that, generally, expenditures to support or oppose state ballot initiatives are not for an exempt function activity); *see also* I.R.S. Tech. Adv. Mem. 92-49-002 (June 30, 1992) (§527 organization seeking an IRS ruling that its ballot measure advocacy and lobbying would constitute electioneering for §527 purposes based on its particular facts).

Amendment rights,[8] as the NPRM does. *Buckley* focused on two problems of regulating political activity: chilling issue speech and undue disclosure of membership lists. *Buckley* balanced the competing interests at stake in a manner that preserved the purpose behind FECA while protecting the First Amendment.

A. Protecting issue speech from chill.

In *Buckley*, the Court expressed concern about the effects vague laws have upon the freedom of speech. Not only may a vague law be applied inconsistently or arbitrarily, but such a law might also "operate to inhibit protected expression by inducing citizens to steer far wider of the unlawful zone." *Id.* at 41 n. 8. Thus, a speaker may "hedge and trim" before speaking. *Id.* at 43. The First Amendment needs "'breathing space to survive, [and so] government may regulate in the area only with narrow specificity.'" *Id.* (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)). In the political arena, the specificity requirement is particularly important, because discussion of public policy issues frequently overlaps with discussion of political candidates:

> For 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.

Id. at 42. Of course, FECA attempted to divine this difficult distinction—but the *Buckley* Court found that it failed to avoid the vagueness problem.

FECA originally attempted to impose an expenditure cap: "[n]o person may make any expenditure... *relative to a clearly identified candidate* during a calendar year which ... exceeds $1,000." *Id.* at 39 (emphasis added). In addition to the constitutional problems with the $1,000 cap, the Court found that the phrase "relative to a clearly identified candidate" was vague. *Id.* at 44.

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[8] The Supreme Court has held that, in the context of a §501(c)(3) organization, tax-exempt status is a "subsidy" from the government and therefore the Service may place restrictions upon lobbying activities of the tax-exempt organization. *Regan v. Taxation with Representation*, 461 U.S. 540, 544-46 (1983). §501(c)(4) donations and §527 contributions, however, are "after tax."

The Court crafted an elegant solution. Because the phrase "relative to a clearly identified candidate" left speakers with no opportunity to know in advance whether their conduct was regulated political speech or unregulated issue speech, the Court was compelled to narrow the interpretation of the phrase. To avoid vagueness, FECA had to "be construed to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Id.* To provide clarity to this phrase, the Court dropped the highly influential footnote 52, which limited regulable speech to "express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' [and] 'reject.'" *Id.* at 44 n. 52.

The key, then, is recognizing that the line between discussion of issues and discussion of candidates is, at best, blurry. The harm of vague regulation is its potential to cause a would-be speaker to keep silent due to uncertainty about how the law will be applied. Thus, to remain within the bounds of the *Buckley* decision, regulation should err on the side of avoiding such chill, by providing objective rules that can be uniformly applied, and providing clarity in a manner that maximizes the free exchange of ideas guaranteed by the First Amendment. As Chief Justice Roberts has noted, in such cases "the tie goes to the speaker, not the censor." *FEC v. Wis. Right to Life, Inc.,* 551 U.S. 449, 474 (2007) ("*WRTL II*") (Roberts, C.J., concurring).

Instead of construing the IRC in a manner erring on the side of expression, however, the NPRM attempts to address unconstitutional vagueness in a way that further expands regulatory reach. This is the opposite of what the *Buckley* decision and the First Amendment require. Moreover, because the NPRM would subject even more activity and a broader range of organizations to regulation by the Service, it increases the potential for the very abuses it is intended to guard against.

B. Protecting the freedom to associate.

In addition to drawing a line between issue speech and political speech, the Supreme Court has also recognized the need to protect the freedom of association from undue and excessive disclosure. *See, e.g., Gibson v. Florida Legislative Comm.*, 372 U.S. 539 (1963); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Bates v. Little Rock*, 361 U.S. 516 (1960); *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449 (1958).

Indeed, *Buckley* also has much to say about protecting the freedom of association in the campaign finance context. Disclosure of information about individuals who seek to involve themselves with a group—or even with a politician—implicates the freedom of association protected by the First Amendment. *Buckley*, 424 U.S. at 75.

The iteration of FECA considered by the *Buckley* Court required regular reporting and disclosure by "political committees"—organizations that made "contributions" and "expenditures." *Id.* at 79. The definition of "expenditures," however, was vague and implicated the confluence of spending money on issues and spending money to support candidates. *Id.* Fortunately, *Buckley* had already carefully crafted an interpretation of FECA to ensure that issue speech was not unnecessarily entangled with the regulation of political speech. *Id.* at 44.

To prevent the disclosure requirement from reaching groups that merely mentioned candidates in the context of issue speech, the *Buckley* Court construed the relevant provisions to apply only to "organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Id.* at 79. Expenditures by groups under the control of a candidate or with "the major purpose" of supporting or opposing a candidate "are, by definition, campaign related." *Id.* This language, now known as "the major purpose test," narrowed the reach of FECA's disclosure provisions to protect the associational freedoms of individuals.

As applied to individuals and groups that did not have "the major purpose" of political activity, the *Buckley* Court narrowed the definition of "expenditures" in the same way—"to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 80. To describe the term "expressly advocate," the Court simply incorporated the examples already listed in footnote 52. *Id.* at 80 n. 108 (incorporating *id.* at 44 n. 52).

In further expanding the body of First Amendment activity the IRS may regulate, the NPRM conflicts with this precedent. Instead, the Service should turn to *Buckley* for guidance in drafting a new, clearer rule that uses the framework contained within the IRC itself. Indeed, the separation of issue speech and political speech at the heart of *Buckley* is built into the three category framework of §501(c)(3) charities, advocacy nonprofits (including §501(c)(4) organizations), and §527 political organizations. The concurrent regulation and disclosure framework is also similar. Section 501(c)(3) organizations do not engage in political activity, and they may not even use a substantial portion of their funds to lobby on legislation. Advocacy nonprofits work to fulfill their mission through education, lobbying, advocacy and political activities, but, as provided in *Buckley*, may not permit support for or opposition to candidates to become their primary activity. Finally, organizations that primarily advocate for or against candidates, §527 organizations, are subject to the most regulation and disclosure because they are engaging, at least in part, in what *Buckley* called "candidate" speech.

III. A rule should respect Supreme Court precedent, comport with the Internal Revenue Code, provide clear guidance, be simple to understand and implement, and provide for equitable enforcement.

As demonstrated by recent events—and recognized by the Service itself[9]— the facts and circumstances test is inefficient to administer, and allows far too much discretion in its application. But in order to regain the public's trust, clarification via rulemaking must comport with *Buckley,* a unanimous Supreme Court decision that provides an elegant solution to the complex problem of regulating political speech and association. Moreover, instead of regulating yet more First Amendment activity, the new rule should be simple to follow and understand, and consistent with the IRC.

Therefore, 26 C.F.R. §1.501(c)(4)-1 should be amended to:

(1) clarify the definition of "political activity" under the IRC so that it comports with *Buckley*'s definition of political activity, and
(2) explicitly adopt *Buckley*'s "the major purpose" test for analyzing "primary purpose" under the IRC.

CCP is not alone in this view. The American Civil Liberties Union recommended to the House Ways and Means Committee that:

> Congress and/or the administration must formulate a qualitative definition of partisan political activity that is clear, easy to understand and easy to apply. To the extent the definition ranges beyond express advocacy for or against a candidate or party (and it should not range too far, if at all), covered activity must be clearly and narrowly delineated. The lodestar should be to limit IRS discretion, assuming tax exempt review remains at the IRS, to the greatest extent possible. These limits would provide greater clarity to tax exempt organizations, and would temper self-censorship and the chill on political speech currently created by vague and ill-defined rules and regulations.

Laura W. Murphy, et al., American Civil Liberties Union, Prepared Comments, before H. Comm. Ways and Means 5 (May 17, 2013) *available at*

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[9] *See*, Guidance for Tax-Exempt Social Welfare Organizations on Candidate Related Political Activities, REG-134417-13 at 9, 10 (Nov. 29, 2013) (Recognizing "that more definitive rules with respect to political activities related to candidates—rather than the existing, fact-intensive analysis—would be helpful in applying the rules regarding qualification for tax-exempt status under section 501(c)(4)," and noting the need to "distinguish the proposed rules under section 501(c)(4) from the section 501(c)(3) standard.").

https:// www.aclu.org/files/assets/5-17-13_-_testimony_for_ camp_wm_hearing_final.pdf.

Writing a regulation in this fashion builds upon a large body of Court rulings and FEC regulations that are well understood, in contrast to the NPRM which, other than eliminating the facts and circumstances test, seems to do little more than expand the application of the existing (and failing) regime. Adopting the approach *Buckley* and the current IRC suggest will greatly reduce the risk of selective enforcement. Such a standard will also make compliance and auditing far simpler for both covered organizations and the IRS, since nearly all expenditures for political activities are already publicly reported to both the Federal Election Commission and equivalent state agencies.

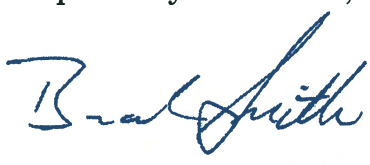
IV. With these considerations in mind, the Center for Competitive Politics submits a draft rule clarifying the scope and application of Section 501(c)(4).

Considering the above analysis, we propose a rule, which is attached as Annex 1. To the extent possible, the proposed rule uses existing law and FEC regulations to define express advocacy and support for candidates and political activities. We believe the rule is both precise in its definition and comprehensively captures all political activities regulated by the IRC.

Additionally, basing the regulation on existing FEC rules is in keeping with Congress's directive that "the [Federal Election] Commission and the Internal Revenue Service shall consult and work together to promulgate rules, regulations, and forms which are mutually consistent." 2 U.S.C. §438(f).

Thank you for considering these comments and our proposed alternative. We look forward to working with you, your staff, and the Department of the Treasury to develop a rule that provides clear guidance to social welfare organizations, respects vital First Amendment rights, and eases the Service's tax administration burdens.

Respectfully submitted,



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Cc: The Honorable Jacob J. Lew, Secretary of the Treasury
The Honorable Max Baucus, Chairman, Committee on Finance

The Honorable Orrin G. Hatch, Ranking Member,
Committee on Finance
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The Honorable Jim Jordan, Chairman, Subcommittee on Economic
Growth, Job Creation, and Regulatory Affairs
The Honorable Matt Cartwright, Ranking Member, Subcommittee on
Economic Growth, Job Creation, and Regulatory Affairs
Mark Mazur, Assistant Secretary for Tax Policy,
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Annex 1

New text appears in an *italics* font. Deleted text appears in a strikethrough font.

Add a new 26 CFR 1.501(a)-2:

26 CFR 1.501(a)-2 – Limited Activities.

(a) ***Limited Activities; Definition.*** *The following activities are "limited activities" for organizations qualifying for an exemption under §1.501(c)(4)-1:*

(i) Political activity as defined in §1.501(a)-2(b);
(ii) Operating a social club for the benefit, pleasure, or recreation of its members; and
(iii) Carrying on a business with the general public in a manner similar to organizations which are operated for profit. See, however, section 501(c)(6) and §1.501(c)(6)-1, relating to business leagues and similar organizations.

(b) Political activity; Definition. *As used in this section, political activity means:*

(i) Monetary or in-kind contributions to any organization that is exempt under Section 527, including, but not limited to any:

(1) political party,
(2) political committee,
(3) candidate committee,
(4) campaign committee that supports or opposes the recall of any elected state or local official, including efforts to bring about a recall election through the gathering of names on a petition or petitions, or
(5) campaign committee to support or oppose the retention of any elected state or local official or judge.

(ii) Expenditures for any public communication that expressly advocates the election, nomination, defeat, recall or retention of a clearly identified candidate or elected official, and that is required to be reported to the Federal Election Commission (FEC) or similar state or local authority in accordance with lawfully valid federal or state laws or regulations.

(iii) Expenditures for communications that in express terms call for the election or defeat of candidates affiliated with any federal, state or local political party such as "Vote Democratic," "Vote for Republicans", "Help Democrats Take Back the House" or "Say No to Republicans on [date of election]," or communications of party slogan(s) or individual word(s), which in the context of only the communication itself can have no other reasonable meaning than to urge the election or defeat of one or more candidate(s) affiliated with a federal, state or local political party.

(iv) Expenditures for facilitating the making of contributions to a political committee as defined in 11 CFR §114.2(f) or successor regulations.

(v) Expenditures or the fair-market value for use of the assets of the organization for candidate or party appearances, voter registration, get-out-the-vote drives or distribution of voter guides, unless done in accordance with 11 CFR §114.3, 11 CFR §114.4 or 11 CFR §114.13.

(vi) The direct fund-raising expenditures in support of political activity as defined in subsections (i)-(v) of this section.

(vii) The direct fund-raising expenditures for a separate segregated fund established under 2 U.S.C. 441b(b)(2)(C) or similar state law.

(viii) Direct or indirect contributions or grants to any person or entity if it is earmarked for purposes as described in §1.501(a)-2(b)(i-vii).

§1.501(c)(4)-1
Civic organizations and local associations of employees.

(a) Civic organizations—

(1) In general. A civic league or organization may be exempt as an organization described in section 501(c)(4) if—

(i) It is not organized or operated for profit; and

(ii) It is operated exclusively for the promotion of social welfare.

(2) Promotion of social welfare—

(i) In general. 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. An organization embraced within this section is one which is operated primarily for the purpose of bringing about civic betterments and social improvements *through means that may include, but are not limited to, lobbying, the public discussion or advocacy of government policies and political activities.* A "social welfare" organization will qualify for exemption as a charitable organization if it falls within the definition of "charitable" set forth in paragraph (d)(2) of §1.501(c)(3)-1 and is not an "action" organization as set forth in paragraph (c)(3) of §1.501(c)(3)-1.

(ii) ***Action organizations.*** ~~**Political or social activities.** 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. Nor is an organization operated primarily for the promotion of social welfare if its primary activity is operating a social club for the benefit, pleasure, or recreation of its members, or is carrying on a business with the general public in a manner similar to organizations which~~

~~are operated for profit. See, however, section 501(c)(6) and §1.501(c)(6)-1, relating to business leagues and similar organizations.~~ A social welfare organization that is not, at any time after October 4, 1976, exempt from taxation as an organization described in section 501(c)(3) may qualify under section 501(c)(4) even though it is an "action" organization described in §1.501(c)(3)-1(c)(3)(ii) or (iv), if it otherwise qualifies under this section. For rules relating to an organization that is, after October 4, 1976, exempt from taxation as an organization described in section 501(c)(3), see section 504 and §1.504-1.

(iii) Primary purpose. *An organization shall not qualify for an exemption under this section for any taxable year in which its program service expenses for limited activities, as defined in §1.501(a)-2, equal or exceed 50% of total program service expenses.*

> ***(a) Volunteer time.*** *For the purpose of this paragraph (a)(2)(iii), program service expenses shall not include volunteer time.*
>
> ***(b) Grants and contributions.*** *For the purpose of the calculation in this paragraph (a)(2)(iii), grants and contributions shall be treated as follows:*
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> 1. *A grant or contribution made to an organization as described in section 501(c)(3) shall count as a program service expense and not as a limited activity for the exempt purpose of the organization.*
> 2. *A grant or contribution as described in §1.501(a)-2(b) shall count as a program service expense for political activity.*
> 3. *If the organization making a grant or contribution, consistent with §1.527-6(b)(1)(ii), takes reasonable steps to ensure that the transferee does not use such funds for limited activities, such grant or contribution shall count as a program service expense that is not a limited activity.*
> 4. *All other grants and contributions to any other organization in the United States exempt from taxation shall not be counted as a program service expense for the purpose of the calculation in this paragraph (a)(2)(iii).*

(b) Local associations of employees.

Local associations of employees described in section 501(c)(4) are expressly entitled to exemption under section 501(a). As conditions to exemption, it is required (1) that the membership of such an association be limited to the employees of a designated person or persons in a particular municipality, and (2) that the net earnings of the association be devoted exclusively to charitable, educational, or recreational purposes. The word "local" is defined in paragraph (b) of Sec.

1.501(c)(12)-1. See paragraph (d) (2) and (3) of Sec. 1.501(c)(3)-1 with reference to the meaning of "charitable" and "educational" as used in this section.