CENTER *for* COMPETITIVE POLITICS

Congress shall make no law...

Testimony of Allen Dickerson
Legal Director, Center for Competitive Politics
February 27, 2014

Thank you for the opportunity to provide this written testimony, on behalf of the Center for Competitive Politics ("CCP"), to the Subcommittee on Economic Growth, Job Creation and Regulatory Affairs of the Committee on Oversight and Government Reform. I attach CCP's comments on the IRS's proposed regulation, "Guidance for Tax-Exempt Social Welfare Organizations on Candidate Related Political Activities." Those comments serve as the basis for, and further explain, the points made below.

Since this hearing involves a proposed regulation of the Internal Revenue Service, one might expect it to involve the collection of federal revenue. But it does not. There is no reason to believe this regulation will have any impact, one way or the other, on revenue collection.

The most obvious reason for this is that 501(c)(4) organizations do not receive a tax subsidy in the same way as charities, because their donors do not get a tax deduction. Doubtless this is because the role of a 501(c)(4) organization is also different from that of a charity. 501(c)(4) groups exist to *advocate* for social welfare as they see it. Such advocacy—on the full range of issues from gun control to environmental policy to tax reform—has always been understood to be a central pillar of American civil society and our right as citizens to discuss, and even criticize, our society and its government. These groups have been powerful agents of change, on both the left and the right, and have helped guide our collective conversation on complex topics. In short, 501(c)(4)s embody the very heart of the First Amendment's protections of speech, the press, and the right to associate with one another.

If revenue is not implicated, then why is the IRS involved in this area at all? Why is it revisiting rules that have been in place for more than half a century? And, in particular, is it not odd that something called "Candidate Related Political Activity" would be regulated by the tax collecting agency, and not by the Federal Election Commission?

The answer to all of these questions is simple and structural. The FEC has an equal number of members from each political party, which makes it is impossible to expand the scope of federal regulation without bipartisan agreement. The IRS, on the other hand, is headed by an appointee of the president.

These regulations, at their most basic, fail to understand the past forty years of campaign finance law, including a number of famous pronouncements by the Supreme Court. At the heart of its error is the decision to flip the presumption of the First Amendment: that speech is, as a constitutional matter, free from governmental regulation.

True, the Supreme Court has allowed for the regulation of speech directed at convincing citizens how to vote in elections. But the nexus of that narrow exception—an election—has been lost in these draft regulations. As a result, they ignore the essential distinction, articulated by the Supreme Court in *Buckley v. Valeo,* between the discussion of issues and exhortations to vote for a candidate. That is because the IRS appears to believe that advocating *for* a candidate, and talking *about* a candidate—who is, very often, an officeholder—are the same thing.

They are not, especially as the draft rules would consider *any* person being considered for an elected or appointed post—and it does not specify at what level—to be a "candidate" if "proposed" for the job.

In practice, discussing issues often means discussing the officeholders who make policy concerning those issues. The Supreme Court has noted that the discussion of issues and candidates "may often dissolve in practical application" since candidates, especially incumbents, are intimately connected to legislative and executive (and, indeed, judicial) action. In fact, in a representative republic with regular elections, such policy is *made* by candidates. To take a prominent example of how these types of speech can bleed into each other, the case of *FEC v. Wisconsin Right to Life* centered on ads discussing the filibuster of judicial nominees. Despite mentioning an incumbent senator running for reelection, the Supreme Court found that these ads were discussions of issues, not electoral advocacy.

The IRS's proposed regulations would chill the discussion of issues in a number of ways. Among its weaknesses are the following:

- An expansive definition of who a "candidate" is, such that commenting on virtually any federal officeholder or federal worker could become political speech. This would include individuals who have been mentioned as possible officeholder, including potential executive officers and judges. Worse, discussing legislation that bears the name of a candidate would be considered a discussion of the candidate him- or-herself. Examples such as McCain-Feingold or Dodd-Frank spring to mind, as do recent examples such as the Border Security, Economic Opportunity, and Immigration Modernization Act of 2013—sometimes referred to as "Schumer-Rubio." Again, this converts an enormous range of issue speech into "candidate related" political speech, without any connection to the actual election of a candidate.

- The proposed regulation appears to consider any discussion of an executive or judicial nominee to be "candidate related" if conducted within sixty days of that person's confirmation hearing. The opportunity to limit discussion of such an appointment through creative use of the legislative calendar does not seem to have been considered.

- The regulations would include volunteer activity, not only spending, as potentially "candidate related." There is no indication as to how this would be calculated, and the rule would create a practical nightmare for small organizations.

- The regulations attempt to cover charitable events such as informational conferences and galas, which are key to educating the public about public policy. If a candidate (as expansively defined) shows up at an event, a 501(c)(4) would reasonably fear that its event may be counted as political activity. Indeed, even sending an officer of the nonprofit to a gala may be counted as political activity if a candidate happens to appear (even unannounced).

- Candidate fora, which help educate the public concerning where candidates stand on the issues, and non-partisan voter guides would be counted as political activity. Yet, for decades 501(c)(3) charities have been able to conduct these activities so long as they are organized or written in a non-partisan manner. Nonetheless, the IRS appears to believe that these charitable purposes (which may receive tax-deductible support) do not "promote social welfare" if done by a 501(c)(4) organization.

The attached comments provide many more examples, but the thrust of the draft rules is clear: to convert a wide swath of discussion about *government* into political activity that the IRS may regulate.

When Congress established the Federal Election Commission it gave that agency "exclusive jurisdiction" over the nation's campaign finance laws. In keeping with this charter, the Commission was organized so that no one party could control it and use the policing of speech as a partisan weapon. Over the course of decades, the FEC has become expert in the area of political regulation—and, sometimes with the prodding of the courts, in the limits the First Amendment places on such regulation.

These rules would not only aggravate the danger of the IRS being used for partisan purposes, it would also subject the Service to costly and redundant litigation about what political speech can and cannot be regulated—a question that has already been litigated over many years by the FEC.

Perhaps the next famous case will be *Civil Society v. IRS.*

Thank you again for the opportunity to appear today and provide testimony concerning the IRS's proposed regulation.

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

February 20, 2014

Via Federal eRulemaking Portal

John Koskinen
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: Supplemental Comments on IRS NPRM, REG-134417-13

Dear Mr. Koskinen:

The Center for Competitive Politics ("CCP") respectfully submits these supplemental comments concerning the Notice of Proposed Rulemaking issued by the Internal Revenue Service ("IRS" or "Service") on November 29, 2013. 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) ("NPRM"). In its first comment, CCP promised further analysis of the NPRM, and the concerns the Service raised therein. Bradley A. Smith and Allen Dickerson, Center for Competitive Politics, Comment on IRS NPRM, REG-134417-13 at 1-2 (Dec. 5, 2013) ("CCP Comment I").[1] CCP also requests a public hearing concerning the NPRM, and the opportunity to speak at that hearing.

In drafting the NPRM, the Service expressed its desire to "promote tax compliance (as opposed to campaign finance regulation)." NPRM, 78 Fed. Reg. at 71538. In this, the NPRM fails. Its attempt to avoid the regulatory paradigm established by the Federal Election Commission ("FEC" or "Commission") is foiled by its casual adoption of campaign finance terms of art without the precision appropriate for such a complex and specialized body of law. Worse, by ignoring the FEC's existing framework and decades of associated constitutional jurisprudence,

[1] In addition, Eric Wang, CCP senior fellow, submitted comments addressing the record-keeping burden imposed by the NPRM's draft regulation, pursuant to the Paperwork Reduction Act of 1995, Pub. L. 104-13 § 3507(d), 109 Stat. 163, 177 (1995) (codified at 44 U.S.C. § 3507(d)). Eric Wang, Center for Competitive Politics, Supplemental Comments on IRS NPRM, REG-134417-13 at 1 (Jan. 23, 2014) ("CCP Comment II").

the IRS has written a rule rife with vague and overbroad terms. Constitutionally-questionable provisions aside, the NPRM also improperly rewrites and rearranges the statutory framework carefully considered and adopted by Congress.

I. The Federal Election Commission's existing regulatory and reporting framework provide the appropriate system for classifying political activity.

Throughout the NPRM, the Service seeks to avoid the fact-specific analysis that plagues its existing "facts and circumstances" test. *See, e.g.*, IRS Rev. Rul. 2004-6, 2004-4 I.R.B. 328, 330; IRS Rev. Rul. 2007-41, 2007-25 I.R.B. 1421. Indeed, the Service recognizes 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)." NPRM, 78 Fed. Reg. at 71536.

Fortunately, there is already an agency expert in defining the contours of regulable political activity. It is the Federal Election Commission, not the Internal Revenue Service.

Giving the Commission "exclusive jurisdiction of civil enforcement" of the Federal Election Campaign Act and its amendments, Congress created the FEC to administer, enforce, and formulate policy regarding federal elections, including disclosure of political activity. 2 USC § 437c(b)(1). Consistent with this mandate, the FEC has drafted regulations and provided guidance on regulating political activity for the past forty years. During that time, the FEC has regulated both political committees—organizations having the major purpose of supporting or opposing candidates—and also the activities of groups such as § 501(c)(4) and other advocacy nonprofit organizations. Even though such groups are not political committees under FECA, the FEC nonetheless regulates their political activities and administers reporting requirements for their candidate advocacy.

Of course, direct contributions to or communications coordinated with candidates are political activity. But "independent expenditures" are spending (usually for communications) that support a candidate but are not "contributions" under FECA. This activity is most similar to the majority of the "political activity" the NPRM seeks to regulate.

The FEC already has jurisdiction over the political activity of advocacy nonprofits. *See, e.g.*, 2 U.S.C. § 431(17) (defining independent expenditures); 2 U.S.C. § 434(c) (requiring nonpolitical committees to file independent expenditure reports). Pursuant to its authority to promulgate regulations, the FEC established

rules defining "independent expenditures." 11 C.F.R. § 100.16.[2] The FEC also governs the reporting requirements of organizations without the major purpose of candidate political activity—such as § 501(c)(4) organizations and other advocacy groups. 11 C.F.R. § 109.10 (independent expenditure reports for nonpolitical committees); *see also* 11 C.F.R. § 104.4 (describing forms for disclosure and reporting). Furthermore, the FEC participated in much of the campaign finance litigation over the last forty years—especially the major Supreme Court cases. *See, e.g., Buckley v. Valeo*, 424 U.S. 1 (1976); *FEC v. Mass. Citizens for Life*, 479 U.S. 238 (1986); *McConnell v. FEC*, 540 U.S. 93 (2003); *FEC v. Wisc. Right to Life*, 551 U.S. 449 (2007) ("*WRTL II*"); and *Citizens United v. FEC*, 558 U.S. 310 (2010).

Given its expertise in the area of independent political activity, which stems in part from forty years of interpreting and implementing the constitutional decisions of the Supreme Court in the area of speech regulation,[3] the FEC's rules and guidelines provide the IRS with clear guidance, and obviate the need for the IRS's facts and circumstances test. Likewise, the NPRM's proposed rule is simply an attempt by the IRS to recreate similar doctrines from whole cloth without the benefit of relevant experience. Consequently, the Service should seek to simply incorporate the FEC's existing rules into its tax regulations.[4]

Thus, to give one example, if an organization is already required to file an independent expenditure report with the FEC,[5] the activity reported thereon would be an exempt function under IRC § 527(e)(2) and, consequently, non-exempt activity if conducted by a § 501(c)(4) organization. Capitalizing upon the overlap between what the FEC already regulates and what the Service seeks information about will ease the burdens upon both advocacy nonprofits and the government alike. Such congruence has the added benefit of helping to fulfill Congress's mandate 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).

The NPRM provides no such consistency.

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[2] The courts have examined such "independent expenditures" already. *See, e.g., SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc).

[3] There have been a number of such decisions, as well as many challenges in the lower courts. Indeed, the FEC has defended the bulk of First Amendment challenges to federal regulation of independent political speech. If the NPRM, or something similar, is adopted, the Service can reasonably expect to be the defendant in future litigation of this type.

[4] Likewise, many states have adopted a similar policy of piggybacking off of the FEC. For example, some states exempt multiple filings of reports and instead rely on FEC filings to satisfy state disclosure requirements. *See, e.g.*, COLO. REV. STAT. § 1-45-108(3.5) (2013). The resulting decreased confusion and increased efficiency likely furthers the transparency intended by disclosure requirements.

[5] Or report analogous activity to a state agency. *See* CCP Comment I at 13.

II. The "close in time" public communication provision is not comparable to the federal electioneering communication statute.

The NPRM states that the Service has "draw[n] from provisions of federal election campaign laws that treat certain communications that are close in time to an election and that refer to a clearly identified candidate as electioneering communications, but make certain modifications." NPRM, 78 Fed. Reg. at 71539. While this description indicates that such "close in time" communications will be similar in scope to federal electioneering communications, this is not the case.

Admittedly, the two definitions are superficially similar. Both regulate activity clearly identifying a candidate that takes place 60 days before a general election or 30 days before a primary election. As the NPRM itself notes, "[t]hese timeframes are the same as those appearing in the Federal Election Campaign Act." *Id.* But the similarity ends there.

To take but one general and glaring example, the lack of a "news story" or "commentary" exemption is particularly troubling. Some news outlets are projects of § 501(c)(4) organizations—such as the *Washington Free Beacon*, an online newspaper administered by the Center for American Freedom[6] or *Think Progress,* a widely read blog that is a project of the Center for American Progress Action Fund.[7] Implementing the proposed rules contained in the NPRM—both in the time close to an election and more generally—would force the organization and the IRS to comb through every story of that outlet and calculate what is and what is not candidate related political activity—a challenging task, and no doubt a reason why the news story/commentary exemption has been kept in place by the Federal Election Commission for decades. This omission further demonstrates the superficial understanding of existing FEC rules found throughout the NPRM, and the inadvisability of IRS regulation in the area of political speech.

a. Scope of how communications are delivered

- A "close in time" communication is "any communication by whatever means" in news media, paid advertising, on "an Internet Web site," "broadcast, cable, or satellite," or otherwise intended to reach over 500 persons.

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[6] "About Us," WASHINGTON FREE BEACON (last accessed Feb. 11 2014), *available at* http://freebeacon.com/about/.

[7] "About ThinkProgress," THINKPROGRESS (last accessed February 19, 2014), *available at* http://thinkprogress.org/about; "About the Center for American Progress Action Fund" (last accessed February 19, 2014), *available at* http://www.americanprogressaction.org/about/capaf-mission/.

- The federal electioneering communication statute only covers "broadcast, cable, or satellite communication[s]" targeted to the relevant electorate, which is defined as actually reaching at least 50,000 voters in the relevant electorate. 11 C.F.R. § 100.29(b)(3)(5). That is, an advertisement is not an electioneering communication unless it can feasibly be received by 50,000 people in a congressional district (for a House candidate) or the entire state (for a Senate candidate).

Thus, the NPRM ignores the narrow specificity of the federal statute. By bringing in activities related to the Internet or merely supposed to reach over 500 persons, the NPRM offers a very shallow safe harbor for communications.

Additionally, the Federal Communications Commission has, as required by statute, 2 U.S.C. § 434(f)(3)(C), provided the metric for determining the feasibility of a communication being received by the requisite 50,000 persons. *See* 11 C.F.R. § 100.29(b)(7). The FCC provides this information through the agency's Electioneering Communications Database website.[8] No such metric exists for determining if a communication reaches 500 persons, let alone if it is merely "intended" to reach 500 persons.

The NPRM turns the existing, straightforward rule upside down. Instead, the proposed rules regulate speech that is "intended" to reach or "reaches" 500 persons or more. The much lower threshold, "intent," is not defined. If a video is posted on YouTube, for instance, it can receive (theoretically) millions of views, creating questions about the intent of the communicant even if the organization never intended the video to be shared by more than a few dozen people. The obvious end result is that, if the proposed rule were to take effect, the IRS, with no expertise in the field, will search for a test—likely, we suspect, one that will ultimately be a complex, indeterminate "facts and circumstances" test—to determine if the communication is covered. This is not progress in the quest for clarity, and it is not based upon the standards included in the Federal Election Campaign Act.

b. Scope of candidates covered

Perhaps the widest gap between the federal electioneering communication statute and the "close in time" communication provision rests in the breadth of "candidates" covered.

- The federal electioneering communication statute only covers candidates for federal office: President, Vice President, the Senate, the House, and Delegate or Resident Commissioner to the Congress. 2 U.S.C. §431(3).

[8] http://apps.fcc.gov/ecd/.

- Further, the federal law does not consider a person a candidate for office until after that individual, or somebody acting on that person's behalf, has spent or received $5,000 toward the candidate's election. 2 U.S.C. § 431(2).

The electioneering communication statute went to great pains to cabin the number of people who could be captured in such a communication. At bottom, a candidate had to be actively seeking federal office. But this is not the case in the NPRM.

The definition of "candidate" goes well beyond any common understanding of the word. Instead, virtually anyone who is proposed, which may include a mere mention in the media or blog, as suitable for virtually any position in government, party or political committee becomes a "candidate." Under the rule, the list of offices that appear to be covered is practically limitless. Whether an individual is running for a local party central committee seat or is mentioned by the judicial press as merely a potential nominee for a state supreme court or federal district court appointment—the rule appears to sweep in all speech about such "candidates." Worse, the rule is unprecedented in scope. It would define communications as political if they relate to offices where there is no election of any kind or even any requirement that the potential "candidate" be subject to even a legislative confirmation vote.

The lack of an expenditure/contribution trigger coupled with the expansive definition of "candidate" greatly expands the "close in time" provision. Under the federal law, candidates become candidates after at least $5,000 has been accepted or expended by a candidate or an authorized committee. 2 U.S.C. § 431(2). This provides a bright-line, objective trigger that is entirely within the control of the candidate. But the NPRM carries no such monetary trigger. The opportunities for gamesmanship—especially if the Service decides to go forward and issue further rules regulating "public communications identifying a candidate for a state or federal appointive office that are made within a specified number of days before a scheduled appointment, confirmation hearing or vote, or other selection event"—are obvious. NPRM, 78 Fed. Reg. at 71539.

c. *McConnell* would not protect this definition.

Presumably, the Service chose to adapt the federal electioneering communications statute because that provision has already withstood a facial constitutional challenge. *McConnell v. FEC*, 540 U.S. 93, 194 (2003). However, in that case the Court explicitly upheld the federal statute because of its precision. *McConnell* operates against the background rule of *Buckley v. Valeo* that only communications that include "express advocacy of election or defeat" may be subjected to the full array of political regulation, including compulsory disclosure. Broad, sweeping disclosure could not be dictated for organizations that did not have

a primary purpose of electing candidates to office. In *McConnell,* the Court upheld the electioneering communication provisions because, as with *Buckley's* definition of "express advocacy," "the components of [the electioneering communication definition were]...both easily understood and objectively determinable." *Id.* This is simply not the case here, thereby exposing the rule to constitutional challenge.

The scope of the "close in time" rules will cause other absurdities, which are discussed further *infra*.

III. Even when properly understood and circumscribed, the federal electioneering communication definition may not be considered political activity within the meaning of the IRC.

Proposed 26 C.F.R. 1.501(c)(4)-1(a)(2)(iii)(A)(3) attempts to define any electioneering communication as "candidate-related political activity" ("CRPA"). NPRM, 78 Fed. Reg. at 71541 ("any communication the expenditures for which are reported to the Federal Election Commission, including...electioneering communications").

This proposal violates the clear intention of Congress, which specifically stated that the electioneering communication definition ought not to be applied to the IRC:

> Nothing in this subsection [on electioneering communications] may be construed to establish, modify, or otherwise affect the definition of political activities or electioneering activities (including the definition of participating in, intervening in, or influencing or attempting to influence a political campaign on behalf of or in opposition to any candidate for public office) for purposes of the Internal Revenue Code...

2 U.S.C. § 434(f)(7). Congress understood and intended for electioneering communication regulation to be separate from internal revenue regulation. The NPRM ignores this clear statutory language.

Additionally, no temporal window is appropriate for limiting issue speech; it is issue speech regardless of when it is conducted. Any attempt to define as political activity a communication that mentions the name of a candidate within a certain number of days prior to an election, when that communication is clearly a discussion of issues, is contrary to the law, contrary to Supreme Court precedent and inherently inappropriate.

As we discussed extensively in our first comment, the *Buckley* Court carefully read the campaign finance laws to avoid sweeping in issue speech with regulation of candidate speech. CCP Comment I at 8-11 (discussing *Buckley v. Valeo*, 424 U.S. 1

(1976)). In the United States, our leaders are elected and their actions on policy issues necessitate mentioning these officeholders. This is why "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." *Buckley*, 424 U.S. at 42.

When Congress passed the law providing for reporting of electioneering communications, it banned corporations from conducting such communications. *See* 2 U.S.C. § 441b(b)(2). That ban was later ruled unconstitutional in *FEC v. Wisc. Right to Life*, 551 U.S. 449, 481 (2007) ("*WRTL II*"). However *the same law* allowed certain qualified nonprofit § 501(c)(4) organizations to conduct electioneering communications. 2 U.S.C. § 441b(c)(2); *see also, generally,* 11 C.F.R. § 114.10; Electioneering Communications, Federal Election Commission 67 Fed. Reg. 65190, 65204 (Oct. 23, 2002) (discussing legislative history). When passing that law, Congress could have stated that such qualified nonprofit § 501(c)(4) groups would have to treat electioneering communications as § 527 exempt functions. It chose not to do so, and instead specifically directed that the definition not be used to define political activity "for purposes of the Internal Revenue Code." The year before considering the law that created electioneering communications, Congress substantially modified IRC § 527, but again, Congress did not define broadcast communications, or define communications based on their proximity to an election, as a § 527 exempt function. *Compare*, Pub. L. 106-230; 114 Stat. 477 (2000) (amending IRC § 527 to require disclosure) *with* BCRA, Pub. L. 107-155 §201(a); 116 Stat. 81, 89 (2002) (codified at 2 U.S.C. § 434(f)(3)) (defining electioneering communications). This inaction, combined with Congress's explicit command that electioneering communications *not* be used by the IRS, should be dispositive. Yet the NPRM offers no suggestion that the Service is even aware of this statutory history.

IV. The proposed rule's treatment of express advocacy is also incompatible with existing federal law and will cause enormous confusion concerning its reach.

While the federal regulations regarding express advocacy are not always easy to implement, they are straightforward. *See* AO 2012-11 (Free Speech); 11 C.F.R. § 100.22. Only "unmistakable, unambiguous" communications advocating for federal candidates constitute express advocacy. 11 C.F.R. § 100.22(b). The express advocacy rules that the Service has "draw[n] from [the] Federal Election Commission rules" go much further than any existing FEC guidance has countenanced. NPRM, 78 Fed. Reg. at 71539.

For example, express advocacy is tied in the federal rules to monetary triggers. As mentioned *supra*, a candidate is deemed a candidate once a specific

amount of money has been spent toward her election to specific federal office. There is no such trigger here.

Further, groups that are not PACs need not report their independent expenditures unless the cost of those expenditures exceeds "$250 with respect to a given election in a calendar year." 11 C.F.R. § 109.10(b). Again, there is no such trigger here.

Moreover, there are a significant number of "safe" expenditures that may be made under the federal rules. A few examples:

- News stories and commentary are explicitly protected. 2 U.S.C. § 431(9)(B)(i).
- "Nonpartisan activity designed to encourage individuals to vote or to register to vote." 2 U.S.C. § 431(9)(B)(ii).
- Certain communications by membership organizations and certain corporations "to its members, stockholders, or executive or administrative personnel." 2 U.S.C. § 431(9)(B)(iii).

Nowhere does the NPRM indicate any of these safe harbors would exist for entities engaging in such activities. The lack of a "news story" or "commentary" exemption has already been mentioned in the context of close-in-time communications. But the need to comb through every story of a § 501(c)(4) news outlet and calculate what is and what is not express advocacy remains burdensome and, likely, arbitrary.

Indeed, this substantial expansion of the scope of "express advocacy" to include all commentary appears intentional. The NPRM notes that while the "proposed regulations draw from Federal Election Commission rules in defining 'expressly advocate,'" they also

> expand the concept to include communications *expressing a view* on the selection, nomination, or appointment of individuals, or on the election or defeat of one or more candidates or of candidates of a political party. These proposed regulations make clear that *all communications*—including written, printed, electronic (including Internet), video, and oral communications—that express a view, whether for or against, on a clearly identified candidate (or on candidates of a political party) would constitute candidate-related political activity.

NPRM, 78 Fed. Reg. at 71538 (emphasis supplied).[9] That *any* communication that *expresses a view* might be considered similar to express advocacy shows a grave misunderstanding of the term. Indeed, it defines the word "express" out of existence, and uses the term "advocacy" in an unusually loose sense.

This broad understanding would also create needless confusion and ambiguity. It would generally, of course, also subject all 501(c)(4) organizations to two sets of rules, one to comply with the FECA, and one to maintain (c)(4) exempt status. This complicates rather than clarifies the law and the legal obligations of regulated parties, and illustrates why Congress imbued the FEC with "exclusive jurisdiction" over civil enforcement of political regulation. It is also contrary to 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).

The scope of the express advocacy rules will cause other absurdities, particularly related to the breadth of communications covered, which are discussed further *infra*.

V. The NPRM suffers from severe vagueness and overbreadth—chilling the speech of advocacy nonprofits and significantly burdening the right to free association.

The NPRM asserts that "[t]he Treasury Department and the IRS recognize that both the public and the IRS would benefit from clearer definitions" of political campaign intervention, as well as "'[t]he distinction between campaign intervention and social welfare activity, and the measurement of the organization's social welfare activities relative to its total activities." NPRM, 78 Fed. Reg. at 71536. As we have noted in previous comments, CCP appreciates that the IRS and Treasury have recognized this problem. But for all the underlying hope that the NPRM's draft rule will provide precise guidance to the regulated community, it in fact falls far short of the mark.

At its foundation, the NPRM conflates the role of the leadership of our Republic. Our president, senators, and representatives are elected, and are therefore candidates for office from time to time. But once in office, our representatives and executive officers make policy, and so talking about *policy*

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[9] This explanation also appears to conflict with the text of the proposed rule itself. The rule appears to restrict "expressing a view ... on ... candidates" to a communication "that ... Contains words that expressly advocate" or "is susceptible of no reasonable interpretation other than a call for or against" candidates. Enormous confusion will result from these three definitions: the text of the rule, the explanation for the rule, and the FEC's regulation at 11 C.F.R. § 100.22. This does not serve the IRS's stated goal of providing "both the public and the IRS ... clearer definitions of these concepts."

inevitably leads to mention of the leaders engaged in policymaking. In *Buckley*, the Supreme Court noted this difficulty: "the distinction between discussion of issues and candidates may often dissolve in practical application...Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest." *Buckley*, 424 U.S. at 42.

These distinctions are vital, because lobbying about issues of public policy often requires a discussion or mention of the policymaker. In the context of advocacy nonprofits—chief among them § 501(c)(4) organizations—grassroots lobbying involves telling others to contact, or directly contacting, these policymakers. Even discussing relevant legislation involves mentioning the leader—a group may mention "President Obama's Job Creation Plan" or the "King-Altmire gun bill" as part of their efforts to advocate for the homeless or seek gun control reform. *See* CCP Comment I at 6.

Certain elements of the NPRM's proposed rule blur this distinction by being either vague, overbroad, or both in defining and regulating "candidate-related political activity" ("CRPA"). In so doing, the NPRM functionally rearranges the statutory scheme set up by Congress and eliminates § 501(c)(4) as a viable form of organization for advocacy in the public interest. The IRS may not do so by mere regulation. *See Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-843 (1984) ("First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, *as well as the agency*, must give effect to the unambiguously expressed intent of Congress") (emphasis added).

a. The NPRM uses vague terms and definitions, making it difficult for covered organizations to know whether or not they may speak, and how to value that speech if they do.

As proposed, the new rule would "trap the innocent by not providing fair warning...foster arbitrary and discriminatory application...[and] also operate to inhibit protected expression by inducing citizens to steer far wider of the unlawful zone...than if the boundaries of the forbidden areas were clearly marked." *Buckley v. Valeo*, 424 U.S. at 41 (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972) (quotations omitted)).

The proposed rule attempts to resolve the vagueness of the "facts and circumstances" test—which is undisputedly problematic—with a new measure that would functionally serve to regulate many § 501(c)(4) organizations out of existence. The IRS may not invalidate a part of the IRC, duly enacted legislation, by administrative rule.

i. A real world example

Under the NPRM, "any public communication that is made within 60 days of a general election and clearly identifies a candidate for public office...would be considered candidate-related political activity." NPRM, 78 Fed. Reg. 71539. A candidate is considered "an individual...proposed by another for selection, nomination, election, or appointment to any public office...whether or not the individual is ultimately selected, nominated, elected, or appointed." *Id.* at 71538. A "public communication" includes Internet and broadcast communications. *Id.* at 71539. The NPRM "make[s] clear that *all* communications—including written, printed, electronic (including Internet), video, and oral communications—that express a view, whether for or against, on a clearly identified candidate (or on candidates of a political party) would constitute candidate-related political activity." *Id.* at 71538 (emphasis supplied).

On September 7, 2012, in her capacity as president of NARAL Pro-Choice America, a § 501(c)(4) organization, Nancy Keenan went on *The Rachel Maddow Show* on MSNBC to discuss Mitt Romney's position on abortion.[10] A copy of the interview was uploaded on NARAL's YouTube channel on September 12, 2012.[11]

At this juncture, the proposed rule already poses significant questions:

- NARAL Pro-Choice America posted this video on its YouTube channel. Does an organization's YouTube, Twitter, or Facebook page qualify as its "Web site"?
- If not, if NARAL merely posted a link to the YouTube page on its Web site, would that qualify as the organization's "Web site"?

But the significant questions do not end there. Throughout the segment, Keenan made favorable comments about President Barack Obama and the Democratic Party. Keenan claimed that people "cannot trust Mitt Romney" and that if Romney were elected President, he "could have...[an] opportunity" to functionally overturn *Roe v. Wade* through his appointment of Supreme Court justices. She also stated several times that women would play a vital role for President Obama in 2012. Finally, in response to whether she "fe[lt] like the articulation of the issues around the federal election, the presidential election, may have effects in the states," Keenan answered affirmatively.

The NPRM is unclear as to whether or not Ms. Keenan's comments, and NARAL's decision to post the message on the Internet right before the election,

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[10] Transcript *available at*: http://www.nbcnews.com/id/48972378/ns/msnbc-rachel_maddow_show/#.UvjfXT07uSo.

[11] *Available at*: https://www.youtube.com/watch?v=n9gWFgtbYOw.

constitute a "public communication." And if this segment does not qualify as a "public communication," the NPRM indicates that it could possibly qualify as an "express advocacy communication."

Ms. Keenan was unquestionably representing NARAL Pro-Choice America, as she was an "officer" of that organization when she was interviewed. NPRM, 78 Fed. Reg. 71540. Her discussion about Governor Romney's abortion position is certainly an oral communication—may it be counted against the organization as a "broadcast communication" as well?

- At the beginning of the segment, before Nancy Keenan begins speaking, a clip of her speech to the Democratic convention is played in which she states "I am proud to say that the Democratic Party believes that women have the right to choose a safe, legal abortion with dignity and with privacy." Does this convert the rest of the segment into CRPA, by framing the discussion around the Democratic position on abortion?
- At another point in the segment, Ms. Maddow discusses the strategic value of Ms. Keenan's primetime address at the convention. Keenan responds by discussing the effects of Republican victories in 2010, the issue of birth control, and that the "consciousness of people in this country" believed that the *status quo* on abortion was "at risk." Is this CRPA?
- Is it CRPA when Ms. Keenan states that "we understand the role that women are going to play in this election for Barack Obama?"
- Moreover, is discussion of the President's constitutional role in appointing U.S. Supreme Court justices constitute CRPA in this context?
- What about the effect of responding affirmatively that discussion of abortion and birth control on a national level will have effects in down-ballot races?

And even after determining the status of this YouTube posting, the Service would still have to determine precisely *how much* CRPA it constituted—a mind-boggling endeavor, to be sure, and certainly no easier or less fact-intensive an inquiry than the old facts and circumstances test.

The Proposed Rule's expansive understanding of a candidate also poses a problem for § 501(c)(4) organizations that wish to weigh in on executive or judicial appointments. After the President nominated Sonia Sotomayor to replace former-Justice David Souter, Nancy Keenan released a statement praising then-Judge Sotomayor's "distinguished record...impressive personal biography" and that NARAL Pro-Choice America was "encouraged by the strong support she receives from her peers and other legal scholars and the fact that the Senate has twice

confirmed her for federal judgeships." But the statement also stated that NARAL "look[ed] forward to learning more about Judge Sotomayor's views on the right to privacy and the landmark *Roe v. Wade* decision." The statement was posted, among other places, on the Web site NARAL Pro-Choice California (also a 501(c)(4) organization). *See* "About Us," NARAL Pro-Choice California (last accessed Feb. 11, 2014).[12]

- Is Ms. Keenan's statement express advocacy?
- Would it have been express advocacy if the more hesitant language regarding then-Judge Sotomayor's views on *Roe* and privacy had been excised?
- If so, whose express advocacy is it? NARAL Pro-Choice America's because Ms. Keenan spoke the words? NARAL Pro-Choice California's for posting it on the Web site? Both? In what combination? And how will its value be calculated and attributed?

ii. Specific vagueness concerns

1. Proposed Candidate

Under the proposed rule, a candidate is considered "an individual...proposed by another for selection, nomination, election, or appointment to any public office...whether or not the individual is ultimately selected, nominated, elected, or appointed." NPRM, 78 Fed. Reg. at 71538. On April 1, 2012, Van Jones, a senior fellow for the Center for American Progress, suggested that if Mitt Romney, then the presumptive Republican Presidential nominee, chose former Secretary of State Condoleezza Rice for the Vice Presidential nomination it would get "the tea party base excited" and make "the Obama campaign go crazy." *This Week*, ABC NEWS Apr. 1, 2012.[13] Although there is no real evidence that Ms. Rice was seriously considered by the Romney campaign, would Mr. Jones's comments have converted Ms. Rice into a "proposed candidate"?

Idle "Veepstakes" speculation is a regular part of Presidential election years. In 1992, the *McLaughlin Group* aired a segment discussing the pros and cons of several potential Vice Presidential choices, such as then-Senator Harris Wofford and then-Senator Jay Rockefeller. "McLaughlin Group 'Picks' (D) VP – 1992" YouTube Spring 1992. (last accessed Feb. 5, 2014).[14] The *McLaughlin* segment omitted one crucial name: the future 45th Vice President of the United States, Al Gore.

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[12] *Available at* http://www.prochoicecalifornia.org/about-us/.

[13] Transcript *available at* http://abcnews.go.com/Politics/week-transcript-rep-paul-ryan-rep-chris-van/story?id=16040853&singlePage=true.

[14] *Available at* https://www.youtube.com/watch?v=WjCuS2XDaOI.

It's also unclear how far back in time one has to go to become a "proposed candidate." On August 28, 2013, Scott Conroy of *RealClearPolitics* published an article suggesting that—if Hillary Clinton were to become the Democratic nominee—the mayor of San Antonio, Julian Castro, might be an excellent choice for Vice President. Scott Conroy, "Vice President Julian Castro?" REAL CLEAR POLITICS. Aug. 28, 2013.[15] Is it now impossible for a 501(c)(4) group to run advertisements within 30 days of any election that happens to mention the name of the mayor of San Antonio? What if Mayor Castro himself decides in early 2016 to appear in a 501(c)(4)'s nationwide advertising campaign about any issue at all? Is that communication now CRPA?

2. Clearly Identified Candidate

The NPRM's proposed definition of a clearly identified candidate poses significant problems for determining whether a communication constitutes CRPA under the rule. "A candidate can be 'clearly identified' in a communication by...a reference to a particular issue or characteristic distinguishing the candidate from others." NPRM, 78 Fed. Reg. at 71538.

By 2012, the Patient Protection and Affordable Care Act and its implementing regulations became widely referred to as "Obamacare." It is unclear under the rule whether or not a communication discussing "Obamacare" would have been considered express advocacy.[16] This is not a trivial question—the FEC had difficulty reaching consensus on this very question in 2012. AO 2012-11 (Free Speech). And given the scope of the proposed rule—reaching into local and state elections, where many § 501(c)(4) groups often took positions on the health exchanges or contraception mandates stemming from Obamacare—the vagueness of this definition has significant potential to chill free discussion.

BCRA—the Bipartisan Campaign Reform Act—is often referred to colloquially as "McCain-Feingold." During years when Senator McCain is a candidate for public office, or proposed as a candidate for public office, would the rule convert all discussion of that law (by that name) into candidate-related political activity? Capitol Hill's naming convention for legislation with bipartisan support renders the scope of this question extremely broad. Indeed, the Border Security, Economic Opportunity, and Immigration Modernization Act of 2013—sometimes referred to as "Schumer-Rubio"—provides another example, as it is far from hypothetical that Senators Marco Rubio and Chuck Schumer will again seek office in 2016.

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[15] *Available at* http://www.realclearpolitics.com/articles/2013/08/28/vice_president_julian_castro_119737.html.

[16] While the President is not constitutionally eligible for reelection, it stands to reason that future campaigns will feature the equivalents of "Obamacare" or "the Bush Tax Cuts."

And if the identification of a candidate in the context of express advocacy poses these critical difficulties, the problem will be still more acute in other areas, such as the close-in-time communications discussed *supra*.

3. Political Organization

Under the proposed rule, someone who seeks leadership in a "political organization" can also qualify as a candidate. The impact of this definition on the law is far from clear. Does this cover discussion of the appointment of the heads of political parties, of delegates to a national convention? Given the rule's scope—deep into localities—this vagueness could pose significant problems. Suppose that a § 501 (c)(4) organization posts a message on its website laudatory of an employee who happens to be aspiring to become the chairman of the local Young Democrats—has the § 501(c)(4) engaged in CRPA?

4. Volunteer Activities

The proposed rule does not explicitly define who a "volunteer" for an organization is, or what "acting under the organization's direction or supervision" consists of. If an individual emails a § 501(c)(4) organization asking for leaflets related to the death penalty, receives the leaflets from an officer of the organization with vague instructions on distribution, then distributes these leaflets door-to-door and advocates against an anti-death penalty candidate for state senate, has that organization conducted CRPA? Does the Service intend to review the training materials each § 501(c)(4) organization uses for volunteers as part of its analysis? How is that a superior approach to the current "facts and circumstances" test? And how would an organization or the Service value the time of a volunteer?

5. Hosting an Event

Under the proposed rule, "an organization that hosts an event on its premises or conducts an event off-site within 30 days of a primary election or 60 days of a general election at which one or more candidates in such election appear as part of a program (whether or not such appearance was previously scheduled) would be engaged in candidate-related political activity under the proposed definition." NPRM, 78 Fed. Reg. at 71540.

It is unclear what "hosting" or "conducting" an event is, under this definition. If a corporation helps sponsor an event, even at a *de minimis* level—such as by buying tickets for two officers of an organization to attend—has it engaged in CRPA? What if an organization co-sponsors an event, sends no personnel to the event, and a candidate unexpectedly joins the event?

Or, given the expansive definition of "candidate," what if a speaker who is not a candidate is suddenly proposed—however such a proposal might occur—as a candidate the day before? To revisit the Van Jones/Condoleezza Rice example, when Mr. Jones suggested Ms. Rice as a possible VP choice for Mr. Romney during the Republican primaries, would a § 501 (c)(4) hosting Ms. Rice to speak that night about her 2011 book *No Higher Honor: A Memoir of My Years in Washington*, suddenly be engaging in CRPA unless they canceled the event, or postponed it?

And postponed the event until when? After Mr. Romney selected Representative Paul Ryan as his Vice Presidential nominee on August 11, 2012? After their formal nomination at the Republican National Convention on August 30, 2012? After Election Day, November 6, 2012? After the Electoral College cast its votes on December 18, 2012? After the Senate certified the results of the Electoral College balloting on January 6, 2013?

b. The NPRM is overbroad—to the point of regulating many § 501(c)(4) organizations and many of their activities out of existence.

The NPRM's proposed definitions for regulating the new category of "candidate-related political activity" are overbroad. In defining regulable activity so broadly, the NPRM regulates many § 501(c)(4) organizations, and many of their common activities, out of existence. Doing so improperly invalidates existing statutes and consequently ignores the commands of Congress.

The IRS even identified the problem within the NPRM, noting, "[t]he Treasury Department and the IRS acknowledge that the approach taken in these proposed regulations, while clearer, may be both more restrictive and more permissive than the current approach." NPRM, 78 Fed. Reg. at 71538. CCP urges the IRS to pause and consider the serious problems this overbreadth presents.

i. The NPRM regulates a broad range of communications.

1. "Candidate" covers millions of people

Under proposed 26 C.F.R. § 1.501(c)(4)-1(a)(2(iii)(B)(1), a "candidate" is

> [A]n individual who publicly offers himself, or is proposed by another, for selection, nomination, election, or appointment to any federal, state, or local public office or office in a political organization, or to be a Presidential or Vice-Presidential elector, whether or not such individual is ultimately selected, nominated, elected, or appointed.

NPRM, 78 Fed. Reg. at 71541. The IRS acknowledges that this definition departs from historic precedent—even covering "executive branch officials and judicial nominees." *Id.* at 71538.

But in our Republic, not every leader is a candidate—there is no popular vote for Assistant Secretary of the Navy or for Secretary of Health and Human Services. There is no way to corrupt, via campaign contributions, the Commissioner of Internal Revenue. Yet such executive branch officials make very real policy—from setting standards for the acquisition for the next generation of naval ships to how to implement the Affordable Care Act to how to regulate nonprofit entities. It stands to reason that their names may come up in discussing such issues or lobbying for a particular cause. But they are not "candidates" in any common usage and insulated from the electoral pressures politicians face.

But, does this include non-senate-confirmed civil servants as well? They are, after all, "selected" for their job. The proposed rule has no facial limit to how far down the federal or state organizational chart an employee may be to be covered as a "candidate." The federal civilian workforce includes just under 2 million people. OFFICE OF PERSONNEL MANAGEMENT, SIZING UP THE EXECUTIVE BRANCH OF THE FEDERAL WORKFORCE 4 (Jan. 2013).[17] Under the NPRM, "candidate" includes millions of federal workers.

This limitless definition poses further complications beyond the appointments of correspondence analysts and assistant United States attorneys. Would the President's appointment of the Commander of the U.S. Pacific Fleet be covered under the NPRM?

Indeed, what about the President's appointments of U.S. ambassadors with the advice and consent of the Senate? U.S. CONST. art. II, § 2. President Obama recently nominated Senator Max Baucus to be the U.S. ambassador to China. Would all criticism or praise of Mr. Baucus's multidecade career in the Senate chamber suddenly be at risk of being transmuted into CRPA, even if it was about the Montanan's record on agricultural subsidies or tort reform?

Likewise, federal judges are specifically insulated from popular pressure by Article III of the Constitution. The whole purpose of lifetime appointment (more specifically, during "good behavior"), is that judges are to be free from worry about reelection, reappointment, removal, or similar political pressure. Indeed, the American Bar Association ("ABA") Model Code of Judicial Conduct Canon 4 specifically assumes that most judges are never candidates. *See* ABA Model C. of

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[17] *Available at* http://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/reports-publications/sizinguptheexecutivebranch.pdf.

Jud. Conduct Rule 4.1.[18] But the nomination process is a vital issue for many, including the ABA itself. The ABA rates judicial nominees as a service to help the Senate in advising and consenting to the president's choices.[19] The NPRM suggests that this service is CRPA.

2. In-person communications

Taken together, the definitions of "communication" and "public communication" cover a staggeringly wide range of activity. The NPRM defines "communication" as "any communication by whatever means, including written, printed, electronic (including Internet), video, or oral communications." NPRM, 78 Fed. Reg. at 71541 (proposed 26 C.F.R. § 1.501(c)(4)-1(a)(2)(iii)(B)(3)). Likewise, "public communication" is anything that "reaches, or is intended to reach, more than 500 persons." *Id.* ((proposed 26 C.F.R. § 1.501(c)(4)-1(a)(2)(iii)(B)(5)(v)).

This limit on *oral* communication—once thought to be absurd in campaign finance regulation—puts every speech, rally, or event in jeopardy. Most of the theaters in the Kennedy Center hold more than 500 seats. *See*, "Kennedy Center Seating Charts" *The Kennedy Center*. Web. Jan. 30, 2014.[20] Even a college group may reach more than 500 people on campus on any given day by sitting on the campus's central square or quad. Every rally on the National Mall, every speech in the local square, any place 500 or more may be gathered—the proposed regulation covers them all.

3. Mere mention of a candidate

Mere mention of a candidate triggers regulation under the NPRM. Under proposed §1.501(c)(4)-1(a)(2)(iii)(A)(2), candidate-related political activity takes place in the case of "any public communication...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." NPRM, 78 Fed. Reg. at 71541. Presumably, the IRS is aiming to regulate something similar to "electioneering communications," but the NRPM's proposed rule misses the mark. Regulation of communications is far more than the temporal component.

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[18] The ABA Model Rules also supply guidance for elected state and local judges. *See, e.g.* Rules 4.2 *et seq.* But the NPRM apparently covers federal judicial nominees as well.

[19] The ABA is a § 501(c)(6) organization. IRC § 501(c) works as a whole and the regulation of § 501(c)(4) will affect other § 501(c) organizations as well.

[20] *Available at* http://www.kennedy-center.org/tickets/seating.html.

Electioneering communications, created by BCRA § 201, are tightly defined to apply only to *broadcast* communications,[21] referring to clearly-identified candidate, made within 30 days of a primary or 60 days of a general election, targeted to the relevant electorate. 2 U.S.C. § 434(f)(3)(A). Furthermore, "targeted to the relevant electorate" only applies if the communication reaches 50,000 or more persons in the jurisdiction.[22] 2 U.S.C. § 434(f)(3)(C). The Supreme Court in *McConnell* approved of the electioneering communications sections of BCRA precisely because they were rigidly defined by these multiple factors. *McConnell*, 540 U.S. at 194.

ii. Volunteer hours

The NPRM proposes a definition of "contribution" that includes "anything of value." NPRM, 78 Fed. Reg. at 71541 (proposed 26 C.F.R. § 1.501(c)(4)-1(a)(2)(iii)(A)(4)(iii)). The "anything of value" language is not unusual among existing federal and state campaign finance laws, but what is unusual is the NPRM's inclusion of volunteer time within this definition: "the Treasury Department and the IRS intend that the term 'anything of value' would include both in-kind donations and other support (for example, *volunteer hours* and free or discounted rentals of facilities or mailing lists)." NPRM, 78 Fed. Reg. at 71539 (emphasis added).

Volunteering is good for the community. We encourage our children to volunteer. More importantly, nonprofits rely heavily on volunteers to get much of their work done, including mobilizing their neighbors to advocate for cleaner air or better teaching standards. Yet the NPRM not only proposes to burden volunteering with the possibility that it could be CRPA but also has the attendant burdens on trying to qualify the value of volunteer's hours.[23]

This difficulty is obvious and predictable. Perhaps that is why the FEC has long exempted volunteer activities from its definitions of "contributions" and "expenditures."[24]

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[21] In contrast to the proposed rule's expansive definition of "communications" and "public communications" discussed *supra*.

[22] In contrast to the proposed rule's mere 500. NPRM, 78 Fed. Reg. at 71541 (proposed 26 C.F.R. § 1.501(c)(4)-1(a)(2)(iii)(B)(5)(v)).

[23] Indeed, the Supreme Court has explicitly flagged the inclusion of volunteer efforts in calculation of campaign contributions as a danger sign of impermissible regulation of contributions. *Randall v. Sorrell*, 548 U.S. 230, 259 (2006) (Breyer, J., plurality opinion).

[24] *See* 11 C.F.R. §§ 100.74 and 116.6(a).

iii. Section 501(c)(3) organizations cannot engage in political activity. Yet the NPRM classifies activity § 501(c)(3) organizations have engaged in for decades—with the express blessing of the Internal Revenue Service—as explicitly candidate related if conducted by a § 501(c)(4).

Section 501(c)(3) organizations are explicitly banned from engaging in political activity. 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"). The NPRM's proposed paradigm presents many practical problems, chief among them the reclassification of a swath of activity that § 501(c)(3) organizations have engaged in for years, *with the explicit blessing of the IRC*, as regulable political activity if conducted by a § 501(c)(4) organization. *See, e.g.*, 26 U.S.C § 4911(d).

The NPRM defines CRPA to include "a voter registration drive or 'get-out-the-vote' drive" NPRM, 78 Fed. Reg. at 71541 (proposed 26 C.F.R. §1.501(c)(4)-1(a)(2)(iii)(A)(5)). But the Service found that such activity was explicitly not "political" if conducted in a nonpartisan way. *See* Rev. Rul. 2007-41, 2007-25 I.R.B. 1421, 1422.

Likewise, the NPRM—in an abrupt shift—classifies voter guides, a mainstay of § 501(c)(3) educational activities—as CRPA. NPRM, 78 Fed. Reg. at 71541 (proposed 26 C.F.R. § 1.501(c)(4)-1(a)(2)(iii)(A)(7) ("[p]reparation or distribution of a voter guide that refers to one or more clearly identified candidates or, in the case of a general election, to one or more political parties (including material accompanying the voter guide)"). Indeed, as early as 1978, the Service gave its explicit blessing to § 501(c)(3) organizations producing nonpartisan voter guides. Rev. Rul. 78-248 at 4-5 (1978) (discussing Organization B's voter guide); *see also* Rev. Rul. 80-282 (1980).

Moreover, even if candidate fora are conducted in the nonpartisan manner that § 501(c)(3) organizations have used for decades, under the NPRM candidate-related political activity takes place when "an organization that hosts an event on its premises or conducts an event off-site within 30 days of a primary election or 60 days of a general election at which one or more candidates in such election appear as part of the program (whether or not such appearance was previously scheduled)." NPRM, 78 Fed. Reg. at 71540; *cf id.* at 71541 (proposed 26 C.F.R. § 1.501(c)(4)-1(a)(2)(iii)(A)(8)). Section 501(c)(3) organizations are permitted to hold such fora, as the Service recognizes both educational and charitable aspects of these events.[25]

[25] Indeed galas, dinners, and other events provide both the opportunity to educate the public about the organization's cause and a chance to advocate for policies consistent with the organization's mission. Such events are common philanthropic pursuits in the District of Columbia and around the country.

Rev. Rul. 86-95 (1986) ("The presentation of public forums or debates is a recognized method of educating the public") (citing Rev. Rul. 66-256). Likewise, if a § 501(c)(3) organization owns a broadcast station, it may provide air time to candidates. Rev. Rul. 74-574 (1974); *see also, e.g.*, 26 C.F.R. § 1.501(c)(3)-1(d)(3)(ii). Yet under the proposed rules, such activity explicitly cannot promote social welfare if carried out by an organization organized under § 501(c)(4) of the IRC.[26]

In sum, under the NPRM, activity that is explicitly acceptable for § 501(c)(3) organizations would be regulable political activity (which, according to the NPRM, under no circumstances furthers social welfare) when done by § 501(c)(4) organization. This is an absurd result given that *only* IRC § 501(c)(3) contains a ban on political activity, and such organizations have produced voter guides, held nonpartisan candidate fora, and participated in other activity the NPRM considers "political," and have done so with Congressional and IRS approval since the 1950s. *Compare* 26 U.S.C. § 501(c)(3) *with* 26 U.S.C. § 501(c)(4) *and* Rev. Rul. 81-95 1981-1 C.B. 332; *see also* CCP Comment I at 5-7.

The IRS acknowledged this inconsistency in the NPRM. NPRM, 78 Fed. Reg. at 71537 ("The proposed regulations do not address the definition of political campaign intervention under section 501(c)(3). The Treasury Department and the IRS recognize that, because such intervention is absolutely prohibited under section 501(c)(3), a more nuanced consideration of the totality of facts and circumstances may be appropriate in that context"). But IRC § 501 works as a unit, describing the range of nonprofit organizations and what they are permitted to do on the political activity spectrum. Upsetting this system—as deliberately framed by Congress—will have serious consequences. This is particularly so if such upset is effected with a single NPRM focused only on IRC § 501(c)(4).

Thus, the IRS asked for "comments on whether any modifications or exceptions would be needed in the section 501(c)(3) context...Any such change would be introduced in the form of proposed regulations to allow an additional opportunity for public comment." *Id.* The answer is yes. If the IRS seeks to upset the entire statutory framework, it will need more than this NPRM. Moreover, given the settled expectation that political activity prohibited in the § 501(c)(3) context is essentially identical to that regulated in the § 501(c)(4) context, the Service runs the risk of creating enormous confusion and casting much of its previous work over decades into question. It is not clear how doing so would assist with regulatory

[26] Likewise, the FEC has extensive regulations on exempting voter guides and other nonpartisan efforts. *See, e.g.*, 11 C.F.R. §§ 114.4 (voter guides), 100.233 (voter registration and get-out-the-vote activities exempted from "expenditures"), 100.89 (voter registration and get-out-the vote activities for Presidential candidates exempted from regulation as "contributions"), 100.149 (same activities exempted from regulation as "expenditures").

precision, assist the fair enforcement of the IRC and collection of the nation's revenue, or comply with Congress's intent.

iv. The NPRM leaves room for discretionary enforcement—the precise problem the IRS faces now.

Imprecise and overbroad drafting is also problematic in the context of the "safe harbor" proposed § 1.501(c)(4)-1(a)(2)(iii)(D)[27] creates. This provision ostensibly carves out an exception to the definition of political activity for contributions to § 501(c) organizations, where the recipient of such a contribution has represented to the donor that such funds will not be used for political activity. This carve-out will not apply, however, where the IRS finds that the contributing organization "[has] reason to know that the representation [that funds will not be used for political activity] is inaccurate or unreliable." NPRM, 78 Fed. Reg. at 71539.

This is an uncomfortably amorphous trigger for ousting a group from this safe harbor. How can one say with certainty whether there was "reason to know" that an ultimately unreliable representation was, in fact, unreliable? And what would the standard for "unreliability" even be—actual falsehood of the representation? Prior misrepresentations by the recipient organization? Something else? This nebulous threshold creates unwelcome incentives, particularly given the selective, even retaliatory, enforcement of tax law against charitable organizations witnessed recently. TREASURY INSPECTOR GENERAL FOR TAX ADMINISTRATION, No. 2013-10-053, INAPPROPRIATE CRITERIA WERE USED TO IDENTIFY TAX-EXEMPT APPLICATIONS FOR REVIEW 5 (May 14, 2013); CCP Comment I at 12-13 (discussing possibility of selective enforcement).

The apparent ease with which an organization might find itself ousted from this safe harbor is compounded further by the breadth of activity encompassed in the new definition of political activity. Indeed, a § 501(c) organization may in good faith represent that they will not engage in political activity, but find itself (and a § 501(c)(4) organization which has contributed to it) mired in IRS enforcement actions because of vagueness and overbreadth explored elsewhere in this Comment.

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[27] This carve-out would provide that "a contribution to an organization described in section 501(c) will not be treated as a contribution to an organization engaged in candidate-related political activity if [t]he contributor organization obtains a written representation from an authorized officer of the recipient organization stating that the recipient organization does not engage in such activity (and the contributor organization does not know or have reason to know that the representation is inaccurate or unreliable); and [t]he contribution is subject to a written restriction that it not be used for candidate-related political activity within the meaning of this paragraph (a)(2)(iii)." NPRM, 78 Fed. Reg. at 71541.

v. Even absent these problems with the NPRM, the proposed framework eviscerates Congress's duly enacted statutory paradigm for regulating § 501(c)(4) organizations.

The IRC, particularly § 501, works as a holistic system. The NPRM's proposed changes damage that system by blurring the types of nonprofit organizations and introducing vague and overbroad terms to the regulatory scheme.

Different types of organizations have different roles under the IRC, and are therefore subject to different rules regarding the *types* of activity they may engage in. As detailed in CCP's first comment, Congress set up a specific framework: § 501(c)(3) organizations educate, § 501(c)(4) organizations lobby (which may include some political activity so long as it is not the primary purpose of the organization), and § 527 organizations do politics, with limited engagement in anything else. CCP Comment I at 8. Lobbying—both direct and grassroots—are what § 501(c)(4) organizations do. Their advocacy is the heart of promoting social welfare.

The Supreme Court agrees. In *Regan v. Taxation with Representation*, the Supreme Court held that "Congress is not required by the First Amendment to subsidize lobbying." 461 U.S. 540, 546 (1983). But beyond this notable holding, the case examined the differences between IRC §§ 501(c)(3), 501(c)(4) and 501(c)(19).

In that case, an organization had both § 501(c)(3) and a § 501(c)(4) components. *Id.* at 543. The § 501(c)(3) arm focused on public education and litigation. *Id.* The § 501(c)(4) arm forced on influencing legislation. *Id.* The organization sought to use tax-deductible § 501(c)(3) monies to fund the lobbying activity. *Id.* Since a substantial part of the latter's activities was influencing legislation, it thus fell outside the purview of § 501(c)(3). *Id.* at 542.

The Supreme Court examined the statutory scheme governing tax exempt organizations, and noted the key distinction between tax-deductible donations to a § 501(c)(3) and the non-deductible donations to a § 501(c)(4):

> For purposes of our analysis, there are two principal differences between § 501(c)(3) organizations and § 501(c)(4) organizations. Taxpayers who contribute to § 501(c)(3) organizations, are permitted by § 170(c)(2) to deduct the amount of their contributions on their federal income tax returns, while contributions to § 501(c)(4) organizations are not deductible.

Id. This distinction results in the other "principal difference" between these types of organizations: § 501(c)(4) organizations may lobby, while § 501(c)(3) organizations may conduct only very limited lobbying. *Id.* at 543. Thus, the Court examined how

the different subsections of IRC § 501(c) work together to form a holistic system for regulating activity.

It is the statutory scheme constructed by *Congress* that was upheld by the Court in *Regan*. It was the fact each § 501(c) organization plays a particular role in the body politic that made the system work. Indeed, while the Court approved of the lobbying restriction on § 501(c)(3) organizations, it noted that § 501(c)(19) veteran's organizations *could* lobby. *Id.* at 548.

Justices Blackman wrote a concurrence, in which Justices Brennan and Marshall joined. Together, they took the logic of the majority's statutory analysis further: "If viewed in isolation, the lobbying restriction contained in § 501(c)(3) violates the principle...that the government may not deny a benefit to a person because he exercises a constitutional right". *Id.* at 552 (Blackmun, J. concurring). But § 501(c)(4) cured this defect: "A § 501(c)(3) organization's right to speak is not infringed, because it is free to make known its views on legislation through its § 501(c)(4) affiliate without losing tax benefits for its nonlobbying activities." *Id.* at 553.

The concurrence clarified: "As long as *the IRS goes no further than this*, we perhaps can safely say that [the] Code does not deny TWR the right to receive deductible contributions to support its nonlobbying activity, nor does it deny TWR any independent benefit on account of its intention to lobby." *Id.* at 553 (internal citations and quotation marks omitted) (emphasis supplied). For the justices, the blurring of regulation could create constitutional problems. *Id.* ("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"). Therefore, Justice Blackmun expressed cautious hope: "I must assume that the IRS will continue to administer §§ 501(c)(3) and 501(c)(4) in keeping with Congress' limited purpose and with the IRS's duty to respect and uphold the Constitution." *Id.* at 553.

The NPRM, however, does precisely what *Regan v. Taxation with Representation* feared: it conflates the distinct roles of § 501(c) organizations. In particular, it makes the §501(c)(4) option considered under *Regan* ephemeral in many circumstances. Many organizations concentrate their efforts on a single issue such as clean water, gun control, or abortion rights. A major legislative battle on that issue could occur within 60 days of a general election. In such a case, a § 501(c)(4) organization may find that essentially *all* of its necessary grassroots lobbying activity will be considered CRPA—even though the organization clearly does not control the legislative calendar. Since all grassroots lobbying would be

CRPA, the organization would have to self-silence in violation of its charter and *Regan*'s presumption of unlimited lobbying.[28]

The NPRM trades a vague, eleven-factor "facts and circumstances" test for a regulation that is both vague and overbroad. By radically redefining "political activity," the NPRM chills an organization's ability to engage in all activity within the spectrum of advocacy (education, lobbying, and politics). This is the very grave constitutional harm that both the majority and concurring opinions in *Regan* feared. Worse still, the NPRM upsets decades of statutory framework and precedent.

Finally, this failure to provide a statutorily and constitutionally defensible bright line will force the IRS to scrutinize every application for § 501(c)(4) status. Far from allowing the Service to avoid allegations of political favoritism and targeting, it will now have to evaluate websites, volunteer hours, the valuing of air-time and press efforts, and the timing of judicial nominations. Fairly or not, this intrusive and open-ended analysis cannot help but bring the fairness and impartiality of the Service into question, lead to extensive litigation, and serve as a distraction from the Service's core mission.

VI. The NPRM's treatment of transferred funds from one organization to another as *entirely* CRPA assessed against the contributing organization if the recipient does *any* CRPA is contrary to logic and finds no basis in the IRC.

The NPRM's treatment of an *entire* contribution to from one § 501(c)(4) group to another, where the latter does *any* CRPA, as being *entirely* CRPA assessed against the contributing group makes little sense. *See*, NPRM, 78 Fed. Reg. at 71539. There is no basis in the IRC for such attribution. The relevant process, which requires *both* that the recipient conduct *no* CRPA and receive a letter to that effect, is burdensome. Moreover, given the scope of CRPA as documented throughout these comments, it would be difficult for an organization to make such a promise (unless, for instance, it were to disallow all comments on its YouTube videos, post security to prevent unannounced candidates from infiltrating its events, and pledge not to mention the name of anyone who might potentially be appointed Secretary of Agriculture at any point during an election year).

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[28] The situation would be far worse for a §501(c)(3) organization, which is limited in the small amount of lobbying it can do, and which is prohibited from organizing a §527 political organization. In such a situation, a single-issue organization would be essentially unable to comment upon the pending legislation. Doubtless legislators will quickly learn that controversial activity should be conducted 60 days before an election, when much of the nonprofit world will be unable to effectively respond.

At a minimum, the rule should allow for pro-rata consideration of a contribution as CRPA, and allow that determination at the conclusion of the recipient organization's tax year, when it will be clear how much of its budget has been spent on such activities.

VII. Answers to the Service's specific questions

Throughout the NPRM, the IRS sought comments on specific elements of the new rule and the underlying rationale supporting it. With all three sets of CCP comments in mind, we briefly answer each below.

a. On incorporating the proposed rule to IRC § 527

In the overview of Section 1 of the NPRM, the IRS sought advice on "whether the same or a similar approach [as the proposed rule] should be adopted in addressing political campaign activities of other section 501(c) organizations, as well... in defining section 527 exempt function activity." NPRM 78 Fed. Reg. at 71537.

Broadly speaking, this poses a risk of substantially upsetting how certain corporations and associations interact with the public. The proposed rule should not be expanded to other § 501(c) organizations. If the rule properly defines political activity, a uniform rule would be preferable and would not conflict with the purposes of other § 501(c) organizations. CCP offered such a solution in the first comment. CCP Comment I at 15 (Annex 1).

b. On applying similar rules to § 501(c)(3) organizations

Again, the Service requested comments on whether the rule should be imported to § 501(c)(3) regulation "either in lieu of the facts and circumstances approach reflected in Rev. Rul. 2007-41 or in addition to that approach (for example, by creating a clearly defined presumption or safe harbor)." NPRM 78 Fed. Reg. at 71537.

As discussed in our comments, the "facts and circumstances" approach is confusing and may allow for arbitrary enforcement. So, the regulation of § 501(c)(3) organizations likely also needs an overhaul. The proposed rule attempts to import certain terms of art that exist in the sphere of campaign finance regulation—but uses the terms improperly. Bringing this confusion into the realm of § 501(c)(3) activity is far more disconcerting, as § 501(c)(3)'s are not permitted to engage in *any*, as opposed to *some*, campaign activity.

The result will compound the problems that CCP identifies in this comment, as the subsequent chilling effect might prevent § 501(c)(3) organizations from *ever*

discussing issues. The Service seems to recognize this concern—the NPRM noted that "because [campaign]...intervention is absolutely prohibited under section 501(c)(3), a more nuanced consideration of the totality of facts and circumstances may be appropriate." NPRM, 78 Fed. Reg. at 71537. This is certainly true, but creating a scheme—where campaign activity means one thing for § 501(c)(3) groups and another for § 501(c)(4) groups—could easily become both inefficient and be perceived as an arbitrary distinction.

c. On integration with "exempt function" in § 527(e)

Similar to the question of importing the proposed rule to § 501(c)(3) organizations, the IRS also asked if it should "adopt[] rules that are the same as or similar to these proposed regulations for purposes of defining section 527 exempt function activity in lieu of the facts and circumstances approach reflected in Rev. Rul. 2004-6." NPRM, 78 Fed. Reg. at 71537.

As noted above, generally, the Service should seek to have uniform rules as applied to activity within the advocacy-political spectrum. Likewise, generally, the Service should eschew the rough factors of any "facts and circumstances" test. The IRS should seek to give clear guidance to organizations so that they know which IRC "box" is appropriate for them to use. However, the NPRM's current proposed rule conflates the distinct roles different types of organizations play within our system and muddies the regulatory waters by using terms of art inappropriately.

The better approach is for the Service to eschew the rough-and-tumble of political factors and instead harmonize its rules governing IRC § 527 with the FEC's rules governing political committees. All other groups should be governed by IRC § 501(c). CCP has already provided a road map as to how the Service might do so.

d. The effect on §§ 501(c)(5) and 501(c)(6)

Again, the IRS asked if it should use the proposed rule "in defining activities that do not further exempt purposes under sections 501(c)(5) and 501(c)(6)." NPRM 78 Fed. Reg. at 71537.

As discussed earlier, IRC § 501(c) is a system, wherein the activity of one section is defined in relation to the activity (or prohibited activity) of another. Thus, regulation of § 501(c)(4) organizations affect other § 501(c) organizations—including §§ 501(c)(5) and 501(c)(6). Once again, the proposed rule should not be expanded to other § 501(c) organizations due to its deficiencies. If a uniform rule is constructed, it needs to account for the differences between §§ 501(c)(4), 501(c)(5) and 501(c)(6). CCP offered such a solution in the first comment. CCP Comment I at 15 (Annex 1).

e. Use of "primarily" standard

The NPRM noted that "some have questioned the use of the 'primarily' standard in the section 501(c)(4) regulations and suggested that this standard should be changed." NPRM 78 Fed. Reg. at 71537. Therefore, the IRS sought guidance on whether the "primarily" standard should be modified or even limited to § 501(c)(3) standards. *Id.*

The premise of "some" is that political activity does not promote social welfare, but there is no statutory basis for that view. Indeed, the preamble to the Constitution states, in part, that "We the People of the United States, in Order to ... promote the general Welfare... do ordain and establish this Constitution for the United States of America." U.S. CONST. preamble. The artificial separation of political advocacy and advocacy in favor of social welfare posits a cynical view of representative democracy that finds no support in our laws or traditions. Instead, Congress has provided a range of organizational means for citizens to organize, lobby, and advocate for candidates who take positions supported by organizations. *All* of these activities improve the general welfare of the nation. § 501(c) reflects this belief.

Only § 501(c)(3) organizations are prohibited from participating in campaigns. 26 U.S.C. § 501(c)(3). Logically, this is sensible because if a § 501(c)(4) may not engage in political activity, including merely mentioning public officials, then what is the functional difference between §§ 501(c)(3) and 501(c)(4)? This point is sufficient to cast grave doubt on the view that political advocacy is not in furtherance of "social welfare" as a statutory matter.

On the other end of the spectrum, § 527 organizations must principally engage in candidate-focused activity. By implication, § 501(c)(4) organizations sit in the middle, able to do some political activity. If Congress wished to ban political activity by § 501(c)(4) organizations, it could attempt to do so, but for the last 60 years the legislature has not chosen that path.

Thus the real issue to what extent advocacy nonprofits may engage in such political activity. Since § 501(c)(3) bans political activity and § 527 requires mostly political activity, it stands to reason that between zero and half of the activity is the realm of § 501(c)(4). To read otherwise is to read a gap in the advocacy spectrum and render the IRC's statutory framework illogical under *Regan*. The only reliable, objective way to rate such activity is by expenditures. Therefore, the threshold for permissible activity should be up to 50% of the § 501(c)(4) organization's expenditures.

Imagine if it were otherwise, and the Service were to choose an arbitrary number—say 40%—as the permissible amount of CRPA by a § 501(c)(4)

organization. Leaving aside the problem, described above, that much of this activity may very well not be "political" in any real sense, such a rule would orphan a nonprofit organization that spends 45% of its budget on CRPA. Perhaps not a § 501(c)(3) organization (after all, CRPA includes activity *permitted* for such groups), out hypothetical organization would lose its § 501(c)(4) status. Moreover, because such activity is *below* half its budget, it does not fit comfortably into § 527. Unless the Service holds the unlikely belief that Congress intended a revenue windfall from advocacy organization spending more than 40%, but less than 50% of its budget in this manner, and the Service somehow missed that intention for several decades, the problem of statutory interpretation becomes obvious. The situation would be still worse if the "primarily" standard is simply removed. At that point, there would be little clear distinction between §§ 501(c)(3) and (4), which was obviously not Congress's intention when it adopted two separate, and sequentially-numbered, subsections.

f. On the size of the communications window

The NPRM asked if the 30/60 day window is appropriate for regulation, or "should [it] be longer (or shorter) and whether there are particular communications that (regardless of timing) should be excluded from the definition because they can be presumed to neither influence nor constitute an attempt to influence the outcome of an election." NPRM 78 Fed. Reg. at 71539.

As discussed earlier, the law does not permit the IRS to use the electioneering communications definition to "affect the definition of political activities ... for purposes of the Internal Revenue Code." Given this statutory command, it would be inappropriate for the Service to model its regulations on BCRA, including its 30/60 day window. This is especially true as electioneering communications are tightly defined, limited to broadcast communications, and do not include state and local elections.

Communications inside such a 30/60 day window could solely advance, and in fact long have solely advanced, activities that are clearly grassroots lobbying or educational activities that have always qualified as activities that advance social welfare. For example, in the last Congress, during the 60-day period prior to the general election, many important floor votes were taken on controversial legislation. These included votes on an alternative to sequestration, an omnibus appropriations bill, reauthorization of the Foreign Intelligence Surveillance Act, energy regulations, and work requirements for welfare recipients. Ads on such legislation cannot be considered CRPA simply because an incumbent is mentioned in the communication. Many social welfare groups are active on a single issue and are at the mercy of the Congressional schedule.

Worse, state primaries are all over the calendar, and so it is unclear how the IRS could choose an appropriate timeframe without making an arbitrary decision. For instance, in the state of Delaware, the state primaries are held in September, the general election in November. Some states, in certain years, have tiered primaries—in 2008, California had a presidential primary in February and a nonpresidential primary in June. Still other states, such as Virginia, sometimes use state-wide conventions for nominating candidates—conventions which any registered voter may attend. Others provide for primary and runoff elections, or both primaries and conventions.

g. On communications temporally near an appointment, confirmation, hearing, vote, or other selection event

The IRS asked if it should expand its attempted regulation of public communications temporally near executive and judicial appointments. NPRM 78 Fed. Reg. at 71539.

As discussed earlier, the concept of covering discussion of non-candidate officials is overbroad, and wholly abhorrent to the freedom of speech. Adding to this is the inherent vagueness of when such officials may be up for appointment or confirmation. The IRS knows even less about the appointment schemes of the various states. It is hard to imagine that the IRS has the authority to grant unknown time frames for when groups may use the names of individuals in their communications, regardless of how the organization is using that name.

Take the case of an official appointed to office this year. The first primary for 2014 is the Texas primary, which will take place the first week of March. From the first week of February, then, through election day in November, there will essentially always be a primary (or general) election within 30 (or 60) days of any particular date. For appointees to national office—that is, national candidates (a distinction without a difference given that communications need not be targeted to a relevant electorate under the proposed rules) this entire nine-month period will arguably be covered, and any communication mentioning them would be considered CRPA. The NPRM's failure to address this eventuality, as well as its puzzling treatment of activities concerning unelected appointees with respect to unrelated elections, suggests again that the Service is poorly positioned to regulate in this area.

Furthermore, this places an extraordinary amount of power in the hands of committee chairmen or executives making appointments at all levels of government. It is not difficult to imagine how such a system may be abused by savvy political actors. For example, a Senate chairman might schedule a vote for a controversial nominee during a period that would limit advocacy by covered entities.

h. On indirect contributions

The NPRM sought comments on "indirect contributions described in section 276 to political parties or political candidates, should be treated as candidate-related political activity." NPRM 78 Fed. Reg. at 71539

Already it is illegal to contribute in the name of another. 2 U.S.C. § 441f. What the NPRM apparently seeks is to artificially attribute money to another organization. The more the IRS seeks to regulate indirect or inadvertent transfers to other groups, the more the Service's ability to enforce bright-line, clear rules is harmed. Such regulation will provide ample ground for inappropriate use of IRS scrutiny against organizations, similar to the problems exposed in recent events. The IRS should eschew the temptation to artificially assign attribution to contributions.

i. On possible exemptions from CRPA

The IRS asked if there should be any exceptions from the definition of CRPA that is "voter education activity... conducted in a non-partisan and unbiased manner [that] avoid[s] a fact-intensive analysis." NPRM 78 Fed. Reg. at 71540.

As discussed throughout our comments, CRPA is defined vaguely and overbroadly. Rather than look for "exceptions" the Service should narrow the rule to already-known regulations. At the very least, the activity already excepted for § 501(c)(3) organizations should be excepted for other § 501(c) organizations as well. Reference to FEC regulations will provide clarity and consistency to all organizations covered by the campaign finance and tax laws. *See, e.g., supra* at 2; CCP Comment I at 2, 13.

j. On the Facebook problem: links, comments, and other connections to third party activity

Further, the IRS wants to know "whether, and under what circumstances, material posted by a third party on an interactive part of the organization's Web site should be attributed to the organization for purposes of this rule." NPRM 78 Fed. Reg. at 71540. Currently, this attribution scheme applies to § 501(c)(3) organization websites. *Id.* (citing Rev. Rul. 2007-41).

Adopting any rule which expands the amount of responsibility an organization has over third-party material posted on its website—or other pages, such as Facebook pages or YouTube channels—will only force 501(c) entities to spend more time monitoring those pages and scrubbing interactivity—or suspending such interactivity altogether. The rule would be burdensome and contrary to common understanding of how the Internet works. Few people believe

that on public or semipublic fora the comments of a third party must necessarily be the express endorsement of the page's owner. The comments posted to a *New York Times* article likely do not reflect the views of the paper's publisher.

Furthermore, the attribution requirement would run counter to any cognizable Service interest in ensuring that the entity itself engages in acceptable amounts of social welfare activity. It is also unclear that the Service could promulgate non-arbitrary rules to enforce the standard. For example, if a CRPA comment stays up for five seconds or five hours, does that change the calculation of *how much* activity has occurred?

k. On applicability of the Administrative Procedure Act's Notice and Comment requirements

Finally, the NPRM claims that it "has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations." NPRM 78 Fed. Reg. at 71540. The NPRM does not state on what grounds the Service has made this determination, but it is plainly incorrect.

As discussed throughout all of our comments, the NPRM radically changes the Congressionally-designed framework of IRC § 501(c) and actually burdens every covered organization with vague and overbroad rules to apply. Therefore, the NPRM is no mere interpretative rule clarifying the law, but substantive changes to the regulatory framework.[29] The reach of the proposed rule covers *all* of IRC §§ 501(c) and 527. Further, it is the stated purpose of the rules to create new substantive responsibilities—the NPRM acknowledges that the proposed rules "might sweep in activities that would...not be captured under the IRS' traditional facts and circumstances approach." *Id.* at 71536. The rules have been fashioned by the Service itself not as "interpretative" or a "policy statement," but as a "Notice of Proposed Rulemaking," and throughout the Notice uses language consistent with an invocation of its rulemaking authority. *Syncor International Corp. v. Shalala,* 127 F.3d 90 (D.C. Cir. 1997). The regulations do not interpret existing regulations or the agency's enforcement posture, but rather purport—indeed claim as their purpose—to outline new substantive requirements that may be both more inclusive or less inclusive than the Agency's prior standards. NPRM 78 Fed. Reg. at 71536-37. The proposed rule specifically amends prior rules, and is to be published in the Federal Register. In *American Mining Congress v. Mine Safety & Health Admin.,* 995 F.2d

[29] We presume that the Service is not claiming an exemption under Section 553 (a)(1) (military and foreign affairs) or (a)(2) (agency management or personnel, or public property, loans, grants, benefits, or contracts). We further presume that the Service is not claiming an exemption on the grounds of 553 (b)(3)(B) (notice and public procedure impracticable, unnecessary, or contrary to the public interest), since the Service, by seeking comment, has clearly shown that not to be the case. Therefore we presume that the Service argues that this is an "interpretative rule" or "general statement of policy, or rules of agency... procedure, or practice," under 5 U.S.C. § 553 (b)(3)(B).

1106 (D.C. Cir. 1993) the court outlined four key elements distinguishing a legislative rule from an interpretive rule or policy statement: 1) absent a rule, could the agency enforce the statute; 2) was the rule published in the Code of Federal Regulations; 3) whether the agency has explicitly invoked its general legislative authority, and 4) whether the rule amends a prior legislative rule. The Court concluded, "[i]f the answer to any of these questions is affirmative, we have a legislative, not an interpretative rule." *Id.* at 1112. In this case, the answer to all four questions is yes.

Therefore the NPRM proposes legislative rules and are subject to the Administrative Procedure Act's notice and comment requirement in 5 U.S.C. § 553(b). *See, e.g., Sierra Club v. EPA*, 699 F.3d 530, 535 (D.C. Cir. 2012); *U.S. Telecom Ass'n v. FCC*, 400 F.3d 29, 34 (D.C. Cir. 2005). Indeed, the exceptions to 5 U.S.C. § 553(b) are narrow. *American Hospital Asso. v. Bowen*, 834 F.2d 1037, 1044 (D.C. Cir. 1987) ("In light of the obvious importance of these policy goals of maximum participation and full information, we have consistently declined to allow the exceptions itemized in § 553 to swallow the APA's well-intentioned directive"). The IRS is mistaken: the APA's "notice and comment" rulemaking procedures apply.

The IRS further assumes that the regulatory burden of the proposed rule will be low and "[t]herefore, a regulatory flexibility analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required." NPRM, 78 Fed. Reg. at 71540. This again is incorrect. An initial regulatory flexibility analysis is required no matter if the IRS counts the NPRM as a substantive rule or interpretive rule:

> Whenever an agency is required by [5 U.S.C. § 553], or any other law, to publish general notice of proposed rulemaking for any proposed rule, *or publishes a notice of proposed rulemaking for an interpretative rule involving the internal revenue laws of the United States*, the agency shall prepare and make available for public comment an initial regulatory flexibility analysis.

5 U.S.C. § 603(a) (emphasis added). Likewise, the IRS must do a final analysis in promulgating the final rule, addressing the issues raised by comments on the initial analysis. 5 U.S.C. § 604; *Aeronautical Repair Station Ass'n v. FAA*, 494 F.3d 161, 175 (D.C. Cir. 2007) (describing when an agency must respond to Regulatory Flexibility Act comments and concerns). There is an exception to §§ 603 and 604 "if the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." 5 U.S.C. § 605(b). Presumably, the IRS believes the NPRM to fall into this category, but it has provided no support for this belief. *Nat'l Mining Ass'n v. MSHA*, 512 F.3d 696, 701 (D.C. Cir. 2008) (noting that "[w]hen promulgating a rule, an agency must perform an analysis of the impact of the rule on small businesses, or certify, *with support*,

that the regulation will not have a significant economic impact on them") (emphasis added).

As we discussed in this comment, *supra*, the proposed rule significantly impacts the fundraising and other activities of *all* § 501(c) organizations.[30] For example, nonprofit organizations depend on fundraising activities, such as galas, and the proposed changes will significantly impact such activity. The proposed rule is particularly pernicious to small organizations without the legal counsel to avoid the vague and overbroad terms. *See also* CCP Comment II (discussing the IRS's misestimation of the paperwork burden of the proposed rule).

VIII. The proposed effective date in the NPRM is chilling speech now.

The NPRM states that the proposal would "apply on and after the date of publication of the Treasury decision adopting these rules as final regulations in the Federal Register." NPRM, 78 Fed. Reg. at 71542. Since these rules could be adopted as final regulations as early as February 28, 2014, the uncertainty about the effective date of the rule and the definition of political activity it will adopt is affecting speech right now during the current tax year. Tax regulations are typically prospective in nature. These regulations, if adopted during the middle of any tax year, would reclassify speech already made earlier in the year as political activity and would be highly disruptive to advocacy and political activity.

The Treasury should immediately issue a statement of policy indicating that any final rule will be effective only for tax years beginning after the date of publication.

* * *

Thank you for considering these and CCP's other comments. 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.

[30] Nonprofit organizations are specifically protected by Regulatory Flexibility Act, 5 U.S.C. § 601(4), and the proposed rule will directly affect their activities.

Respectfully Submitted,

Bradley A. Smith
Chairman

Allen Dickerson
Legal Director