the BRIGHT LINES project

PUBLICCITIZEN

215 Pennsylvania Avenue SE, Washington, D.C. 20003 | (202) 546-4996

June 16, 2015

Ms. Stephanie Robbins, Esquire
Attorney, Department of the Treasury
Internal Revenue Service
1111 Constitution Avenue NW
Washington, DC 20224

VIA Federal Rulemaking Portal

RE: PROPOSED GUIDANCE FOR TAX-EXEMPT SOCIAL WELFARE ORGANIZATIONS ON CANDIDATE-RELATED POLITICAL ACTIVITIES, REG-134417-13, ID: IRS-2013-0038-0001

Dear Ms. Robbins:

With the publication of an updated regulatory agenda entry for the political activity rulemaking project, speculation has increased that release of a new Notice of Proposed Rulemaking is imminent.[1] The Bright Lines Project eagerly awaits a new and, we hope, improved draft of regulations to provide needed guidance in this area, but we write to urge that any such draft must define political activity for all tax-exempt organizations, including 501(c)(3) charities.

As we have explained at greater length in previous submissions, we are grateful that Treasury has undertaken this rulemaking, but we have significant concerns that the 2013 Notice of Proposed Rulemaking regarding 501(c)(4) political activity (2013 NPRM)[2] proposed an overly broad definition of "candidate-related political activity" that encompassed even nonpartisan voter

[1] Office of Management and Budget, Office of Information and Regulatory Affairs listing for Treasury/IRS regulation Guidance for Tax-Exempt Organizations on Political Campaign Intervention (RIN: 1545-BL81) at RegInfo.gov (http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201504&RIN=1545-BL81), showing planned release of Second NPRM in June, 2015.
[2] IRS Notice of Proposed Rulemaking, "Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities," 78 FR 71535-01 (Nov. 29, 2013).

registration and education activities. In light of the widespread criticism of the 2013 NPRM on this point, we are cautiously optimistic that a new NPRM will offer a more reasonable and measured definition.

We and others have also previously expressed concern that the 2013 NPRM sought to create a definition of political activity that would have only applied to 501(c)(4) organizations, and we have been particularly hopeful to see signals that the new draft will provide guidance for more 501(c)s than just the 501(c)(4)s.[3] However, we fear that a new NPRM might not provide guidance for 501(c)(3)s, the tax-exempt organizations that are most in need of a clear definition of what constitutes political activity. There are strong arguments for why any new definition of political activity should apply to 501(c)(3)s as well.

Certainly a bad proposed definition of political activity will face vehement and widespread criticism from 501(c)(3)s and other tax-exempt organizations. Even if a new NPRM offers a better definition of political activity, however, we fear that if it excludes 501(c)(3)s it will raise concerns as significant as those that forced reconsideration of the 2013 NPRM.

Even if they are excluded, 501(c)(3) charities will nonetheless rely on any definition of political activity for other exempt organizations, and therefore an overbroad definition will chill the speech of 501(c)(3) charitable organizations.

We understand that the 2013 NRPM proposed an overly broad definition of "candidate-related political activity" in part because 501(c)(4) organizations have been permitted to engage in substantial amounts political campaign activity without loss of exempt status. Therefore, a broad definition would not excessively burden or restrict their civic engagement. However, this rationale ignores the damaging impact on 501(c)(3)s, which will inevitably rely on any definition of political activity offered for other tax-exempt organizations, even if the regulation explicitly limits its application to organizations other than 501(c)(3)s.

Because there is so little precedential guidance for 501(c)(3) charities regarding political campaign activity, charities and their advisors will already look to precedents and regulations applicable to other types of exempt organizations to assess whether particular activities or communications might be construed as political campaign intervention.

The public reception of Revenue Ruling 2004-6 illustrates this point. By its explicit terms, that ruling only applies only to 501(c)(4), (5), and (6) organizations; yet exempt organizations and those who counsel them widely assumed that the similar principals would apply to issue advertising conducted by 501(c)(3) organizations, and advised 501(c)(3) charities to consider

[3] *See, e.g.*, Department of the Treasury, 2014-2015 Priority Guidance Plan, August 26, 2014, listing "Proposed regulations under §501(c) relating to political campaign intervention," in place of listing in 2013-2014 plan for guidance related to 501(c)(4) political activity.

Revenue Ruling 2004-6 when crafting grassroots issue advocacy campaigns.[4] (Indeed, this assumption proved correct; for when Revenue Ruling 2007-41 was published several years later, that ruling used a substantially similar test to determine when a 501(c)(3) charity's issue advocacy crosses the line into political campaign intervention.) Similarly, section 4911 of the Code only applies to public charities that have made 501(h) election and is explicit that non-electing charities may not rely upon its definitions. Yet in the absence of clear regulatory guidance, other public charities are widely advised to look at section 4911 regulations to determine what will and will not be considered lobbying.

The IRS itself has historically taken the view that "any activities constituting prohibited political intervention by a section 501(c)(3) organization are activities that must be less than the primary activities of a section 501(c)(4) organization…,"[5] implying a linkage between the standards used to determine whether a social welfare organization or a charity has engaged in political campaign intervention.

Because of this historic linkage between 501(c)(3) and 501(c)(4) political intervention, and the dearth of other precedential guidance for 501(c)(3) charities, an overbroad definition of "campaign-related political activity" (or whatever other term is adopted) for social welfare organizations would cause fear and uncertainty in the charitable sector about engaging in nonpartisan legislative advocacy or voter engagement activities that were characterized as "political" under such rules. With their tax-exempt status at stake, many 501(c)(3) organizations would be deterred from engaging in any activities that were deemed to be "candidate-related political activity, resulting in a chilling effect on the civic engagement of 501(c)(3) organizations.

Consequently, 501(c)(3) organizations will inevitably (and justifiably) oppose any overbroad regulation defining candidate-related political activity for social welfare organizations.

Guidance on political campaign intervention is most urgently needed for Section 501(c)(3) organizations.

Section 501(c)(3) organizations need clear and comprehensive guidance on political campaign activity more than any other type of exempt organization. They are the most numerous; they have the most assets; and they, alone, risk revocation of their tax-exempt status as a result of any level of political activity.

The paucity of precedential guidance for 501(c)(3) charities has perverse results. Many 501(c)(3) organizations shy away from entirely proper nonpartisan voter education and

[4] *See, e.g.*, Marcus S. Owens and Thomas J. Schenkelberg, "Touching the Live Wire: Tax-Exempt Organizations and Politics," American Health Lawyers Association Seminar on Tax Issues for Health Care Organizations, Sept. 18, 2006 (available on Westlaw as AHLA-PAPERS P09180616).
[5] Private Letter Ruling 9652026 (Dec. 27, 1996).

engagement activities, while more brazen 501(c)(3) organizations use tax-deductible gifts in fairly overt efforts to influence election outcomes with little fear of enforcement action.

Establishing inconsistent definitions of political intervention for 501(c)(3) and 501(c)(4) organizations would excessively burden affiliates with shared staff.

A significant number of social welfare organizations are affiliated with 501(c)(3) educational organizations, and these "tandem" nonprofits often share staff and have overlapping leadership.[6] In many such cases, the 501(c)(4) organization maintains one or more separate segregated funds that are treated as 527 organizations for tax purposes. Employees who split their time must understand which activities may permissibly conducted by each organization, and they must also track the time they spend working for each organization in a manner that enables the 501(c)(3) and the 501(c)(4) (and any 527 funds) to comply with the requirements of their tax-exempt status, disclose their activities as required on Form 990 information returns, and comply with any applicable campaign finance or lobbying disclosure laws.

For these tandem organizations, training employees and tracking their time would become significantly more burdensome if the 501(c)(4) organizations were subject a broad definition of "candidate-related political activity" that did not apply their 501(c)(3) sibling organizations. For example, staff would have to be trained to record time and expenses spent on nonpartisan voter registration activity as a 501(c)(3) program activity if conducted for the educational organization, or as "candidate-related political activity" if conducted for the 501(c)(4). It would be extremely difficult to train staff to understand that they must apply two different definitions of "political" when completing their time sheets, depending on which entity the work is coded to.

An overly-broad definition of political activity applicable only to social welfare organizations would create an incentive to move questionable voter engagement activities over to 501(c)(3)s

If activities that may be permissible for 501(c)(3) organizations are treated as "candidate-related political activity" for social welfare organizations, it will create an incentive for partisan interests to shift questionable voter registration, get-out-the-vote, and issue advocacy campaigns into 501(c)(3)s. Since there is only scattershot guidance regarding political campaign intervention for 501(c)(3) organizations, the IRS will continue to face difficulty in enforcing the prohibition on political campaign intervention for charitable and educational organizations; and consequently, partisans who now abuse the tax-exempt status of social welfare organizations to advance the interest of favored candidates will soon shift their undisclosed money to 501(c)(3)s. The incentive this would create to politicize 501(c)(3) organizations is contrary to the clear intent of Congress.

[6] Ward L. Thomas and Judith E. Kindell, *Affiliations Among Political, Lobbying, and Educational Organizations*, EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM FOR FY 2000.

Conclusion

Be assured that 501(c)(3) organizations are watching this rulemaking closely and with a mix of great hope and wariness. You need look no further than the list of organizations that were among the record number of commenters on the 2013 NPRM. A great number of them were 501(c)(3)s. Like the Bright Lines Project, these organizations understand the impact that a new definition of political activity will inevitably have on 501(c)(3) charities.

We hope that a new NPRM will offer a clear definition of political activity that creates safe harbors for activities long recognized as legitimate, nonpartisan voter engagement and education. Failure to do so will likely cause the proposed regulation to fall under the weight of criticism from all sides.

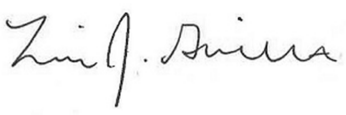
But attempting to exclude 501(c)(3)s from this rule will also trigger widespread criticism because doing so would fail to provide guidance to those most in need and create additional burdens for 501(c)(3)s and other organizations.

We again urge you to propose a rule that will win the approval of the entire tax-exempt sector by not only proposing a fair and workable definition of political activity but by applying it universally to include 501(c)(3)s as well.

Very truly yours,

John Pomeranz

Drafting Committee of the Bright Lines Project, with contributions from the committee and staff of the Project



Lisa Gilbert

Director, Congress Watch and Bright Lines Project, Public Citizen