COMMENTS ON PROPOSED REGULATIONS SHOW EXEMPT ORGANIZATIONS' CONCERNS

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Comments to the proposed rules on political activity by 501(c)(4)s show the objections that Treasury and the IRS will have to meet.

On 11/29/13, the IRS issued what may have been the most widely-anticipated Notice of Proposed Rulemaking (NPRM) in the Service's history.[1] The NPRM contains proposed regulations on candidate-related political activities of tax-exempt social welfare organizations, and specifically requested comments from the public regarding the proposed definitions and their impact on other tax-exempt organizations. As of 2/27/14 (the deadline for public comment), over 140,000 comments were filed. More comments continue to pour in, bringing the number to over 170,000.

The discussion below does not attempt to provide responsive comments on the NPRM, in the vein of those already filed by such notable exempt organizations and tax-exempt advisors as the ABA Tax Section,[2] the ACLU,[3] the AICPA,[4] Public Citizen's Bright Lines Project,[5] the Council on Foundations,[6] Independent Sector,[7] the League of Women Voters,[8] and the NAACP.[9] Given the immense public response to the NPRM, the author thought it useful instead to survey a large sample of the group comments submitted and to distill common elements among them, while bringing to light salient points and differences, in order to illuminate how the concerns of the exempt organization community might shape the final rules.[10]

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Summary of the proposed regulations

To understand and evaluate the comments, one must be familiar with the content of the NPRM itself.

Candidate-related political activity. The most significant element of the NPRM is the proposal to amend the definition of political intervention. Unlike the formulation under Reg. 1.501(c)(4)-1(a)(2)(ii)—"direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office"—Prop. Reg. 1.501(c)(4)-1(a)(2)(ii) refers simply to "candidate-related political activity." The proffered definition of "candidate-related political activity" (hereafter, CRPA) is at the crux of the proposed regulations. The Treasury and the IRS explain that "[t]he proposed rule is intended to help organizations and the IRS more readily identify activities that constitute candidate-related political activity

and, therefore, do not promote social welfare within the meaning of section 501(c)(4)."[11]

The proposed regulations would significantly broaden the scope of CRPA as follows:

- *Candidate.* The term "candidate" would be expanded. It would include, not only individuals seeking elective public office, but also those seeking appointive positions in the executive and judicial branches, as well as party offices (aligning the meaning of the term with that under Section 527).
- *The 60/30-day election period.* In addition to "express advocacy communications" or their functional equivalent, CRPAs would include any public communication that (1) is made within 60 days before a general election or 30 days before a primary election and (2) either identifies a candidate or political party (whether or not it expresses a view) or features a candidate in any capacity.

The proffered definition of 'candidate-related political activity' (CRPA) is at the crux of the proposed regulations.

- *Political contributions.* Contributions would constitute CRPAs if they were made to any candidate, political action committee, political party, or Section 527 organization. They would also be CRPAs if they were made to a Section 501(c) organization engaged in CRPA *unless* the donor organization obtains a written representation from an authorized officer of the recipient organization stating that the recipient organization does not engage in CRPA, *and* the contribution is subject to a written restriction that it not be used for any such activity.
- *Attribution.* Individual activities and communications would be attributed to an organization as its own CRPAs in any of the following circumstances: (1) the activities were paid for by the organization or conducted by its officers, directors, or employees acting in that capacity, or volunteers acting under its supervision; (2) the communications were made (whether or not previously scheduled) as part of an official function, or in an official publication of the organization, including its Web site; or (3) were other types of communications (including ads) paid for by the organization.

The proposed regulations would simultaneously narrow the current set of activities constituting political campaign activity. Specifically, they would replacing the existing facts-and-circumstances analysis promulgated under Rev. Rul. 2004-6[12] (as applied to Section 501(c)(4), (c)(5), and (c)(6) organizations), Rev. Rul. 2007-41[13](as applied to Section 501(c)(3) organizations), and a smattering of older rulings with a more clear-cut definition based around either the 60/30 day election period or the presence of express advocacy or its functional equivalent.

Interaction with other exempt organizations. The proposed regulations do not address whether or how the changes they would make might affect other exempt organizations. However, the NPRM expressly

[1] REG-134417-13, 2013-52 IRB 856.

[2] "Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities," http://www.regulations.gov/#!documentDetail;D=IRS-2013-0038-143855.

[3] "Comment on FR Doc # 2013-28492," www.regulations.gov/#!documentDetail;D=IRS-2013-0038-21490.

[4] "Jeffrey A. Porter, chair of the AICPA Tax Executive Committee, letter to IRS Commissioner John Koskinen," www.aicpa.org/Advocacy/Tax/DownloadableDocuments/aicpa-501c-4-proposed-regs-reg-134417-13-comment-letter.pdf.

[5] "Comment from Emily Peterson-Cassin, The Bright Lines Project," www.regulations.gov/#!documentDetail;D=IRS-2013-0038-135554.

[6] "Comment from Sue Santa, Council on Foundations," regulations.gov/#!documentDetail;D=IRS-2013-0038-107200.

[7] "Comment from Diana Aviv, Independent Sector," www.regulations.gov/#!documentDetail;D=IRS-2013-0038-134088.

[8] "Comment from Elisabeth MacNamara," www.regulations.gov/#!documentDetail;D=IRS-2013-0038-55297.

[9] "Comment from Marcus Owens, NAACP," www.regulations.gov/#!documentDetail;D=IRS.

[10] The author reviewed over 60 of tho comments submitted. The choice was based on prominence, size, and expertise of the organization or the individual drafters. This process was necessarily somewhat arbitrary, and the author apologizes in advance to any groups whose comments may not be referenced in this article, but which are no less an integral part of the comment period and a necessary step toward better rules.

[11] REG-134417-13, 2013-52 IRB at 859.

[12] 2004-4 IRB 328.

[13] 2007-1 CB 1421.

[14] Reg. 1.501(c)(4)-1(a)(2)(i).

[15] REG-134417-13, 2013-52 IRB at 859.

[16] See www.irs.gov/uac/Newsroom/Prepared-Remarks-of-Commissioner-of-Internal-Revenue-Service-John-Koskinen-before-the-National-Press-Club-2014.

[17] See "Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities (REG-134417-13)," www.regulations.gov/#!docketBrowser;rpp=25;po=0;s=tea%252Bparty;dct=PS;D=IRS-2013-0038refD=IRS-2013-0038-0001.

[18] The Urban Institute, "Research Area: Nonprofit Sector'" available at www.urban.org/nonprofits/more.cfm.

[19] "Dark Money Politics," The NY Times (6/12/13), available at http://opinionator.blogs.nytimes.com/2013/06/12/dark-money-politics/?_php=true&_type=blogs&_r=0.

[20] "Comments of the Individual Members of the Exempt Organizations Committee's Task Force on Section 501(c)(4) and Politics," www.americanbar.org/content/dam/aba/migrated/tax/pubpolicy/2004/040525exo.authcheckdam.pdf.

requests comments on the advisability of adopting similar approaches with respect to organizations described under Sections 501(c)(3), 527, 501(c)(5), and 501(c)(6). The specific requests for comment may be summarized as follows:

1. Whether to adopt the same approach with regards to Section 501(c)(3) organizations, either in lieu of the facts and circumstances approach under Rev. Rul. 2007-41 or in addition to it (for example, by creating a clearly defined presumption or safe harbor).
2. Whether any modifications or exceptions would be needed in the Section 501(c)(3) context and, if so, in what way.
3. Whether to adopt the same approach for purposes of defining Section 527 exempt function activity in lieu of the facts and circumstances approach under Rev. Rul. 2004-6.
4. Whether to adopt the same approach with regards to Section 501(c)(5) and (c)(6) organizations.

Defining 'primarily. The proposed regulations do not include any specific guidance with respect to the longstanding ambiguity behind the definition of "primarily" for purposes of the requirement that Section 501(c)(4) organizations be "primarily engaged in promoting in some way the common good and general welfare of the people of the community."[14] Instead, the NPRM invited comments "on what proportion of an organization's activities must promote social welfare for an organization to qualify under section 501(c)(4) and whether additional limits should be imposed on any or all activities that do not further social welfare." In addition, the NPRM requested comments "on how to measure the activities of organizations seeking to qualify as section 501(c)(4) social welfare organizations for these purposes."[15]

Overview of the comments submitted

As noted above, no other proposed rulemaking in the history of the IRS has elicited as robust a response from the public as this one. Speaking at the National Press Club on 4/2/14, IRS Commissioner John Koskinen explained:

> During the comment period, which ended in February, we received more than 150,000 comments. That's a record for an IRS rulemaking comment period. In fact, if you take all the comments on all Treasury and IRS draft proposals over the last seven years and double that number, you come close to the number of comments we are now beginning to review and analyze.[16]

There are several probable reasons for the overwhelming interest in these particular proposed regulations. The recent scandal involving revelations that IRS agents used improper criteria in evaluating exemption applications, combined with the upsurge in anti-big government (and, specifically, anti-IRS) political groups, is likely a substantial factor. For example, a word search for "tea party" among all comments submitted by the 2/27 deadline elicits over 25,000 results.[17]

Another explanation may very well be the rising role and visibility of exempt organizations in public life. Recent reports have shown that the growth rate of the nonprofit sector has surpassed that of both the business and government sectors.[18] In the political arena especially, after *Citizens United*, Americans are much more familiar with political action committees (PACs and so-called "super PACs") as major funding vehicles in every election. Social welfare organizations as well recently surfaced in the popular domain. As reported in *The New York Times,* the political "flow of cash" through Section 501(c)(4) organizations rose from $5.2 million in 2006 to $310.8 million in 2012.[19]

Interest may result as well from the fact that, for so long, exempt organization practitioners have sought guidance from the Treasury and the IRS on the ambiguous and often outdated laws and regulations surrounding political activity by exempt organizations in general, and Section 501(c)(4) organizations in particular. In 2004, the ABA Exempt Organizations Committee released a Task Force Report on 501(c)(4)s and political activity. The authors of that report noted:

> The timing of our comments could not be more propitious. As this work is being finalized, the nation is in the midst of the first Presidential election season after the enactment of the McCain-Feingold campaign finance reform legislation (the Bipartisan Campaign Reform Act of 2002). With new barriers to financing of traditional political parties, a great deal of money, energy, and popular interest is shifting to alternative vehicles for political activism, especially organizations tax-exempt under I.R.C. §527 and §501(c)(4).[20]

Ten years later, the IRS is now grappling with many of the issues raised in that report. For many practitioners, therefore, the topic is well beyond ripe. Attorneys, accountants, exempt organizations, and the IRS itself have had time to struggle with the rules in practice, and to formulate better options in theory. It is therefore perhaps also this long delay that ensured a public response as robust as the one spurred by the November 2013 NPRM.

Points of agreement—Where comments converge

Of the many comments submitted in response to the NPRM, representing viewpoints from across the political spectrum, many consistent themes emerge.

Improvement over abandonment. As one author wrote in comments submitted on behalf of three family foundations, "the proper course for the IRS is 'to mend it, not end it.'"[21] This sentiment headlines many of the comments submitted, which applaud the IRS for undertaking the effort even while recognizing the current unworkability of the vague "facts and circumstances" test to determine when a particular communication constitutes political campaign activity.

In March, the Bright Lines Project of Public Citizen analyzed 594 of the comments submitted, or signed on to, by organizations at the close of the comment period. It found that 67% of the organizational comments did not oppose, and either implicitly or explicitly favored, going ahead with the rulemaking.[22] These included comments submitted by both left- and right-wing organizations, by massive membership constituencies, and by small charities, churches, and foundations.

Without a doubt, the proposed regulations have spurred an unprecedented response, most of which overwhelmingly objects to the rules *as drafted*. It must also be said that a fair number of groups and individuals simply call for an abandonment of the process, which would leave us with rules long deplored as vague and unworkable. For most practitioners, however, the question is not whether change is needed, but what form such change should take. One comment submitted and signed on to by a group of 21 prominent tax-exempt organization attorneys emphasized this very point.

> [T]he significant gap between our suggestions and the currently proposed regulations should not be seen as an insurmountable barrier to a good final rule. It is worth remembering (as many of us still practicing do) that comments on the initial draft regulations defining 501(c)(3) lobbying were nearly all negative. Yet after reviewing those comments and working closely with the regulated community, Treasury and the IRS produced the current regulations, widely and justifiably praised for their clarity and workability. We believe that a similar effort in this case can likewise succeed.[23]

Thus, while the media has drawn attention to public objections to the rules as drafted, the objection by no means extends to a uniform push to abandon the process. On the contrary, while the vast majority of public comments strongly criticize the particular approach taken, it appears that a strong majority nevertheless wants the process to continue, with revised rules and public hearings.

Consistency in defining political activity. Many dozens of organizations urged the Treasury and IRS to adopt definitions of political activity that apply more consistently across the Code. The reasoning behind consistency in the tax law is evident. The most compelling and oft-cited arguments for such consistency include the following.

Promoting compliance and confidence in government. Ease of compliance goes hand in hand with confidence in our public agencies. As pointed out

[21] "Comments by Ottinger Foundation, The Leonard and Sophie Davis Fund and The Woodbury Fund (February 26, 2014), available at www.regulations.gov/#!documentDetail;D=IRS-2013-0038-141137.

[22] "Most Organizations Support Changes to Rules Governing Nonprofits," Public Citizen (March 26, 2014), available at www.citizen.org/pressroom/pressroomredirect.cfm?ID=4124.

[23] "Comment from Various Exempt Org. Lawyers, Group of attorneys specializing in representing tax-exempt organizations," www.regulations.gov/#!documentDetail;D=IRS-2013-0038-123404.

[24] Jeffrey A. Porter, chair of the AICPA Tax Executive Committee, letter to IRS Commissioner John Koskinen, www.aicpa.org/Advocacy/Tax/DownloadableDocuments/aicpa-501c-4-proposed-regs-reg-134417-13-comment-letter.pdf.

[25] "Comment from Rich Thomas, www.regulations.gov/#!documentDetail;D=IRS-2013-0038-137374.

[26] "Comment from Marty Ford, The Arc," www.regulations.gov/#!documentDetail;D=IRS-2013-0038-105554.

[27] "Comment from Sheila Krumholz, Center for Responsive Politics (OpenSecrets.org)," www.regulations.gov/#!documentDetail;D=IRS-2013-0038-115413.

[28] "Comment from Rich Thomas," *supra* note 22.

[29] "Comment from Anonymous Anonymous, National Rifle Association of America," www.regulations.gov/#!documentDetail;D=IRS-2013-0038-71944.

[30] "Comment from Emily Peterson-Cassin, The Bright Lines Project," www.regulations.gov/#!documentDetail;D=IRS-2013-0038-135554.

[31] "Comment from Sheila Krumholz, Center for Responsive Politics (OpenSecrets.org)," *supra* note 24.

[32] "Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities," *supra* note 2.

[33] "Comment from Rachael Myers," www.regulations.gov/#!documentDetail;D=IRS-2013-0038-136951.

[34] "Comment from Benjamin Barr, Wyoming Liberty Group and Republic Free Choice," www.regulations.gov/#!documentDetail;D=IRS-2013-0038-128990.

[35] "Comment on FR Doc # 2013-28492," www.regulations.gov/#!documentDetail;D=IRS-2013-0038-25086.

[36] "Comment from Roger Clegg, Center for Equal Opportunity," www.regulations.gov/#!documentDetail;D=IRS-2013-0038-131095.

[37] "Comment from Marcus Owens, NAACP," www.regulations.gov/#!documentDetail;D=IRS-2013-0038-126091.

[38] "Comment from Michael Morley, National Defense Committee," www.regulations.gov/#!documentDetail;D=IRS-2013-0038-141985.

by the AICPA (which commented exclusively on the importance of a consistent tax law definition of the term "political activity"), "[t]he confidence of exempt organizations, tax preparers, and the public, in the enforcement of tax laws, is diminished when the application of these laws are unclear or difficult to understand."[24] Likewise, a group of large 501(c)(4)s noted that "[c]reating a clear path to compliance for exempt organizations would go a long way toward restoring the public trust in government oversight and in the regulated community's compliance."[25]

Promoting ease of enforcement. While consistency improves compliance, it would also no doubt ease the Service's job of enforcement, which hinges on clear and consistent boundaries. As one charity noted, "[w]e need clear definitions of political intervention that apply consistently across the tax code and that are comprehensible both to those inside the IRS who must enforce the law and to those in the nonprofit sector who must comply with the law."[26] Likewise, for many commenting groups, better rules would spare the IRS from further political fracas. On this point, the Center for Responsive Politics suggested that "[c]reating clear rules that apply to all relevant organizations, regardless of their political views, is one major step the IRS could take to assure that it is an unbiased arbiter in this increasingly fraught national debate."[27]

Comments submitted by the Human Rights Campaign, the League of Conservation Voters, Planned Parenthood Action Fund, and the Sierra Club echoed this sentiment, noting that adopting "consistent standards for identifying and treating political activities throughout the tax-exempt and taxable sectors would be far more equitable and could deter circumvention of the rules."[28] From the other side of the political fence, the National Rifle Association similarly argued that the lack of a consistent definition of "political campaign intervention" for all 501(c)s led to the 2013 IRS scandal, when it was revealed that the IRS was using inappropriate criteria to review 501(c)(4) exemption applications.[29]

More specifically, consistency in terminology may also prevent exempt organizations from merely shifting excessive political activity from one tax-exempt vehicle to another. Comments submitted by the Bright Lines Project,[30] the Center for Responsive Politics,[31] the ABA Tax Section,[32] and the Washington Low-Income Housing Alliance,[33] among others, all pointed to recent signs of such activity.

Protection of nonpartisan election activities. The comments submitted from both groups and individuals almost uniformly agreed that the proposed definition of CRPA would have a disastrous effect on nonpartisan voter education and civic engagement. The attempt by Treasury and the IRS to draw clearer lines defining candidate activity by covering *any* references to candidates within the 60/30 day election period was criticized as overinclusive at best, and "clumsy,"[34] "unacceptable,"[35] and "unconstitutional"[36] at worst.

The comments make evident that, should the IRS extend this broad definition of campaign activity to 501(c)(3) charities as well, then the primary function of such historic voting rights institutions as the League of Women Voters and the NAACP would be eviscerated. Comments submitted by these organizations foretold the grim consequences of silencing 501(c)(3) charities during election periods. As the NAACP noted, "much of the work that the NAACP did in the early years to combat racial discrimination in the administration of our nation's voting laws would be illegal under the proposed regulations."[37]

Other groups representing more unique voting interests raised similarly troubling consequences. The National Defense Committee, a 501(c)(4) that advocates the rights of veterans and members of the military, pointed to crucial voter education programs that it provides to military voters and their families, who "face unique hardships in both registering to vote and voting" due to constant uprooting and stationing overseas, where access to U.S. electoral information is scarce. The Committee explained that members of the military uniquely need information and resources to request absentee ballots and to understand their rights under federal laws enacted to protect their right to vote, much of which would be CRPA under the proposed definition.[38]

In addition to the obvious chilling effect of an expanded interpretation of political activity, compliance with the rule could well be insurmountable, for several reasons.

Application of the 60/30 day election period. Given the staggered timing of party primaries and general elections, the 60/30 day proposed "blackout period" could in practice extend well beyond 30 or 60 days. This point is exemplified in the ACLU's comments. Using the 2012 presidential election cycle as an example, the ACLU reviewed the dates on which the Democratic and Republican national conventions were held, lined them up

against the final general election, and calculated that a six-month period could fall within the definition of CRPA under the 60/30 day rule: "successive 30-day primary blackout windows would have applied to all communications from early December 2011 through June 5, 2012, for Democrats (the South Dakota primary) and June 26, 2012, for Republicans (the Utah primary)."[39]

The Citizens' Council for Health Freedom similarly estimated that many 501(c)s would be "shut down" for over 15% of the year: "There would likely be little or no Twitter, no Facebook, no website postings, no radio interviews, no events, no letters to the editor, no videos, no blogs, no emails, no fundraising. With state legislatures in session and Congress in full swing, suddenly policy experts in every state and in Washington, D.C. would ... be silenced out of fear of being caught in the IRS' new and sweeping interpretation of 'political activity.'"[40]

The nature of online content. In particular, many groups noted the extraordinary difficulty of regulating online speech in this context.

Third-party content proliferation and attribution. The NPRM requests comments on "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." While the NPRM identified one problem with online attribution, it barely scratched the surface with respect to content proliferation. As one public charity (The Arc) commented, "[m]odern communications, which include social networking that makes content permanently available and re-surfaces it as comments or 'likes' increase, would make compliance all but impossible."[41]

This fear was reiterated across the board. "Stop This Insanity, Inc." a 501(c)(4) organization operating under the name TheTeaParty.net, pointed to the virtual requirement that nonprofits maintain an online presence in modern society "in order to attract and interact with their members and the public":

> Groups would be forced to either curtail their social media presence, eliminate the interactivity that lies at the heart of social media, or rigorously scrutinize and censor their visitors' submissions. Overall, holding organizations indiscriminately responsible for any mentions of candidates on their web pages, in old files or archives on their websites, on social media (including in comments or other contributions by third parties), or on other sites to which those organizations link, will lead 501(c)(4) groups to drastically curtail their internet presence and engage in ongoing, rigorous, and very costly oversight of their (and others') websites, with no corresponding public benefit.[42]

The Alliance for Justice, another public charity with a stake in online advocacy, urged a "restrained regulatory approach" with respect to Internet communications, similar to the one taken by the Federal Elections Commission, whose 2006 amended rule on Internet communications[43] excluded most online content from its definition of "public communication," in recognition of "the Internet as a unique and evolving mode of mass communication and political speech that is distinct from other media in a manner that warrants a restrained regulatory approach."[44]

Nonpartisan databases and reference materials. Exempt organizations subject to the proposed regulation would be unwittingly conducting CRPA by virtue of any past or ongoing database, publication, or other reference material that appear on their Web sites during the blackout period—even those that are completely nonpartisan, historical, and educational in content. The ACLU's comments, again, illustrate what this would entail:

> [T]he ACLU's website includes literally hundreds of thousands of individual webpages, and the proposed blackout rules would cover vast amounts of content that has absolutely nothing to do even with issue advocacy, let alone partisan politicking. For instance, it could cover copies of publicly filed lawsuits with government defendants, requests under the Freedom of Information Act, any communication addressed to a candidate currently holding elective or appointed office or even 50-state legal surveys mentioning covered officials.

[39] "Comment on FR Doc # 2013-28492," www.regulations.gov/#!documentDetail;D=IRS-2013-0038-21490.

[40] "Comment from Twila Brase," www.regulations.gov/#!documentDetail;D=IRS-2013-0038-130580.

[41] "Comment from Marty Ford, The Arc," *supra* note 23.

[42] "Comment from Dan Backer, Stop This Insanity, Inc.," www.regulations.gov/#!documentDetail;D=IRS-2013-0038-140945.

[43] Final Rule, "Internet Communications," 71 Fed. Reg. 18,589 (2006), amending 11 C.F.R. section 100.26.

[44] "Comment from Nan Aron, Alliance for Justice," www.regulations.gov/#!documentDetail;D=IRS-2013-0038-124817 (quoting 71 Fed. Reg. 18589).

[45] "Comment from Steven Bloom, American Council on Education," www.regulations.gov/#!documentDetail;D=IRS-2013-0038-131145 (internal citations omitted).

[46] "Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities," *supra* note 2.

[47] 424 U.S. 1, 45 (1976).

[48] *Id*. at 19.

[49] *Id*. at 44.

[50] See *McConnell v. FEC*, 540 U.S. 93 (2003).

[51] *Buckley v. Valejo*, 424 U.S. at 44, fn. 52.

The American Council on Education painted a particularly compelling portrait of the potential impact of the blackout period on online and other media-based educational content if applied to 501(c)(3)s:

> All colleges and universities regularly maintain websites and publish various periodicals. Increasingly, schools offer online education, often for several hundred students at a time. Many own and operate public television or radio stations, particularly in rural areas where they may be a primary source of news or public events coverage. Student organizations, student-run media and broadcast stations abound on our campuses. Faculty publish research in university-sponsored journals and books through university presses.
>
> During the specified time periods, colleges and universities would have to review and potentially remove any references across a plethora of communication media to any elected officer holders seeking re-election as well as to any other candidates, including those who are affiliated in some fashion with the institution.... This would even be true of references to the governor while acting in an official capacity as head of the state in which a public university is an arm of the government.... The provision could also apply to course-related materials distributed in classes enrolling more than 500 students. This prohibition also would seem to apply to news coverage referencing candidates by a university-owned public television or radio station. In short, complying with this regulation would be an enormous, time consuming, costly and difficult task for many colleges and universities.
>
> ... We strongly believe that this prohibition will rob the nation of a significant element of our civic life, as well as damage the invaluable civic learning and political engagement nurtured for generations by the higher education community.[45]

In this light, one wonders whether the Treasury and the IRS truly considered the potential impact of the proposed regulations on 501(c)(3) schools and educational institutions.

Retrieval of deleted content. In addition to the difficulty of regulating online communications is the concern that, once removed, such material becomes more difficult to retrieve, hampering significant educational content. The ABA Tax Section's lengthy and thorough comments addressed this very concern, noting:

> [I]t will be impractical and burdensome to restore such references after the pre-election window has passed. As a result, interesting and thoughtful conversations provoked by a months-old or even years-old post may be entirely lost through an organization's need to avoid or minimize its "candidate-related political activity."[46]

For all of these reasons, referring to the 60/30 day election period as a "blackout" period is all too apt. The prospect of a silent nonprofit arena for months before any federal election presents a serious stifling of democratic discussion, not to mention a logistical ordeal surrounding the prospect of proper compliance.

Points of difference—Where comments collide

There were, of course, issues on which comments diverged. In many cases, the divergence was not significant, and instead reflected varying approaches in pursuit of like-minded goals. In other cases, the differences reflected a fundamental disagreement over the extent of government regulation over exempt organizations, or the role that such organizations should be permitted to play in influencing elections.

The express advocacy dilemma. One issue that divided commenters—the definition of "express advocacy"—has its roots in a decision of the Supreme Court.

Background. The notion of "express advocacy" originated in 1976 with *Buckley v. Valeo.*[47] There, the Court ruled that, among other things, the limits of the Federal Election Campaign Act (FECA) on candidate contributions were constitutional, but that the limits on candidate expenditures were not, as they represented substantial "restraints on the quantity and diversity of political speech."[48] The Court noted that "in order to preserve the provision against invalidation on vagueness grounds, [the Act] must be construed to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office."[49] This explanation was footnoted with the following statement, later identified as the "magic words"[50] of express advocacy:

> This construction would restrict the application of [the Act] to communications containing express words of advocacy of election or defeat, such as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," "reject."[51]

Thus was born the notion that political content could be gauged by the presence of specified language.

The IRS partially adopted this approach in Rev. Rul. 2004-6 to determine what would constitute exempt function expenditures under Section 527, but expanded the determination to a facts-and-circumstances analysis for communications falling outside of express advocacy.

> All the facts and circumstances must be considered to determine whether an expenditure for an advocacy communication relating to a public policy issue is for an exempt function under §527(e)(2). When an advocacy communication explicitly advocates the election or defeat of an individual to public office, the expenditure clearly is for an exempt function under §527(e)(2). However, when an advocacy communication relating to a public policy issue does not explicitly advocate the election or defeat of a candidate, all the facts and circumstances need to be considered to determine whether the expenditure is for an exempt function under §527(e)(2).

The U.S. Supreme Court (and other federal courts) revisited the notion of express advocacy

in subsequent years. Most notably, in *McConnell v. FEC*[52] and again in *Citizens United v. FEC*,[53] the Court described certain "issue ads broadcast during the 30- and 60-day periods preceding federal primary and general elections [as] the *functional equivalent* of express advocacy."[54] In *FEC v. Wisconsin Right to Life*,[55] the Court defined "functional equivalent" as a communication that "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."[56]

Accordingly, for purposes of the FECA, communications will be deemed "political" if they include either express advocacy or its functional equivalent. The Service's facts-and-circumstances test to determine what communications beyond express advocacy might still be deemed political is generally viewed as much broader than the functional equivalent concept, although both terms seem intrinsically imprecise and unwieldy. Most practitioners regard the "functional equivalent" as a rather narrow margin beyond express advocacy.

Drawing a line at express advocacy. It must be said that the vast majority of comments submitted by organizations and practitioners urged the IRS to recognize political intervention as something more than simply express advocacy or its functional equivalent. However, because comments submitted by several prominent groups—the ACLU, the National Rifle Association,[57] and the Center for Competitive Politics[58]—elicited a substantial number of endorsements from individuals (the ACLU in particular), it is included here as a "point of difference."

The ACLU's principal argument for drawing a bright line at express advocacy (i.e., at the exclusion of even its "functional equivalent"), is that "magic words" alone create a line bright enough to avoid ambiguity and sustain First Amendment scrutiny:

> This uncertainty is compounded by the tendency of regulators to pile "prophylaxis-upon-prophylaxis" in an attempt to capture anything that could conceivably sway a vulnerable listener. That is, in effect, the rationale behind both the functional equivalence and current facts and circumstances tests. They encourage the government to burn down the house to roast the pig.

The Center for Competitive Politics, in promoting the express-advocacy-only approach, questioned "whether the IRS should be engaged in the minutiae of regulating political or politically-related speech at all," and relied heavily on *Buckley* in support of the assertion that "[t]he harm of vague regulation is its potential to cause a would-be speaker to keep silent due to uncertainty about how the law will be applied." The NRA likewise asserted that, because the functional equivalency test requires a "reasonable interpretation," it inappropriately puts the IRS "squarely in the business of making subjective judgments in the political arena." Each of these organizations thus urged the Treasury/IRS to err "on the side of expression"[59] by formulating a rule so narrow that only the use of specified words will trigger the CRPA classification.

In the other camp were those groups that endorsed a more nuanced approach in order to prevent tax-exempt organizations—particularly charities subsidized by deductible contributions—from engaging in practically unregulated political speech. Indeed, the U.S. Supreme Court all but abandoned *Buckley*'s express advocacy rule in *McConnell:* "the unmistakable lesson from the record in this litigation, as all three judges on the District Court agreed, is that *Buckley*'s magic-words requirement is functionally meaningless."[60]

Even functional equivalency leaves out a substantial number of political communications that are cleverly devised to fall outside the "no other reasonable interpretation" standard. To this point, the ABA Tax Section remarked:

[52] Note 45, *supra.*

[53] 558 U. S. 310 (2010).

[54] *McConnell v. FEC*, *supra* note 45 at 206.

[55] 551 U. S. 449 (2007).

[56] *Id.* at 469-470 (2007).

[57] "Comment from Anonymous Anonymous, National Rifle Association of America," *supra* note 26.

[58] "Comment on FR Doc # 2013-28492," www.regulations.gov/#!documentDetail;D=IRS-2013-0038-0011.

[59] *Id.*

[60] *McConnell*, *supra* note 45 at 94.

[61] "Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities," *supra* note 2.

[62] Holman and McLoughlin, "Buying Time 2000: Television Advertising in the 2000 Federal Elections," executive summary available at www.brennancenter.org/sites/default/files/publications/Buying%20Time%202000.pdf.

[63] "Comment from Allen Dickerson, Center for Competitive Politics," www.regulations.gov/#!documentDetail;D=IRS-2013-0038-0011.

[64] "Comment from Andrew Pincus, U.S. Chamber of Commerce," www.regulations.gov/#!documentDetail;D=IRS-2013-0038-133183.

[65] "Comment from FEC Commissioners Goodman, Petersen, Hunter," www.regulations.gov/#!documentDetail;D=IRS-2013-0038-134231.

[66] "Comment from Joseph McGuire" [Association of Home Appliance Manufacturers], www.regulations.gov/#!document Detail;D=IRS-2013-0038-135898; "Comment from Christopher Vest" [American Society for Association of Executives], www.regulations.gov/#!documentDetail;D=IRS-2013-0038-39418.

> Relying on the express-advocacy-or-its-functional-equivalent standard, the Proposed Regulation would draw a bright line that leaves out far too much speech favoring or opposing candidates for public office, thereby allowing section 501(c) organizations to be too easily used for political ends. For the health of the sector, a broader definition is needed, even if some brightness must be sacrificed.[61]

Indeed, a study published by the Brennan Center on television campaign advertising in the 2000 federal elections effectively confirmed the inefficacy of this regime.[62] According to the study, of all the major categories of campaign ads, none employed terms of express advocacy like "vote for" or "elect" with any frequency. Only 2% of campaign ads in the elections sponsored by party committees and outside groups used terms of express advocacy. Even candidates themselves rarely employed express advocacy, using such terms in only 10% of their ads.

In an attempt to capture a broader swath of political activity, without sacrificing too much "brightness," the Bright Lines Project suggested a series of rules that would substantially narrow the degree of ambiguity. In that group's comments, four types of express advocacy are identified as "per se intervention." In addition, only those statements that refer to and reflect a view on a candidate are deemed political intervention (a formulation that avoids capturing issue advocacy). Four safe harbors are further provided, permitting exempt organizations to (1) influence official actions, (2) provide nonpartisan voter education in which candidates are allowed an equal opportunity to speak, (3) defend themselves when attacked by a candidate, and (4) express personal opinions in meetings.

As the Bright Lines Project summarized its position:

> The IRS and Treasury in the NPRM seem bent on avoiding "fact-intensive" inquiries when detecting cases of political intervention. While that may be a worthy goal in theory, in practice perhaps the best that can be done is to narrow the field of uncertainty by identifying clear abuses to be stopped and clearly-defined avenues for uninhibited civic participation, while retaining a more fact-specific and nuanced approach for activity that falls between these poles.

To FEC or not to FEC. The proposed regulations both align themselves and draw distinctions from the Federal Election Commission (FEC) rules. Many commenters agreed that the rules should in some instances mirror those in place under the FECA, and in other instances not. Several groups urged complete deference to the FEC for political decisions, while others pointed to select instances in which FEC interpretations simply would not be effective within the IRC. Few took notice of the fact that "outside the Beltway" IRS rules must apply to a variety of state and local campaign regulation systems that may depart dramatically from the FEC patterns.

Align with, and defer to, the FEC. Several groups recommended greater alignment between the proposed regulations and the FEC rules, typically in deference to the FEC's traditional role as a campaign finance regulator. Thus, the Center for Competitive Politics called for a "straightforward approach [that] would harmonize the IRS's rules with those of the Federal Election Commission," largely to shift the regulation of political speech away from the IRS and into the hands of "the body entrusted by Congress with 'exclusive jurisdiction' for civil enforcement of the nation's campaign finance laws."[63] The U.S. Chamber of Commerce strongly agreed, noting that, unlike the FEC, Congress has not delegated discretionary authority to the IRS to regulate "campaign finance, disclosure requirements, and classes of political speech subject to governmental constraint."[64]

Comments submitted by three current FEC commissioners (all Republicans) also called for a more uniform approach that gives deference to the FEC. The commissioners remarked that Congress vested in the FEC "wide discretion in order to guarantee that it will be sensitive to the great trust imposed in it to not overstep its authority by interfering unduly in the conduct of elections," in contrast to the IRS's role in "administer[ing] the Internal Revenue Code and focus[ing] on tax revenue and fiscal policy":

> Because the IRS's mission has not been defined by First Amendment values or sensitivities, it would be prudent for the IRS to defer to FEC regulations and relevant court precedents when its rules venture into politically sensitive areas, absent a compelling relevant policy reason to diverge.[65]

Consistent with this deferential approach, a number of organizations, including several prominent 501(c)(6) trade associations, specifically suggested that the IRS look to the FEC to determine whether a 501(c)(4)'s political activity is "excessive" under FEC rules.[66]

Diverge from the FEC, as necessary. Representing an opposing position were comments submitted by two other current FEC commissioners (both Democrats). Unlike their Republican colleagues, the comments of Commissioners Ravel and Weintraub asserted that "the IRS should not feel obligated to defer to the FEC in determining how to apply section 501(c)(4)'s 'primary purpose' test or in determining what constitutes 'political activity.'" They further argued that deference to the FEC would be inappropriate given that the commis-

sioners themselves are divided as to the FEC's proper application of its own "primary purpose" test. In short they "encourage[d] the IRS to pursue clear guidance that represents the best of its independent judgment.[67]

Other groups agreed that alignment was not necessary or advisable on all fronts. The ABA Tax Section pointed out that while FEC rules apply strictly to federal elections, exempt organizations are subject to state and local election laws as well, and aligning the IRC with FEC rules could create a greater divergence between federal campaign laws as they apply to exempt organizations and state and local laws:

> The time periods for enhanced donor disclosure, dollar reporting thresholds, the forms of media communications affected, and the recognition of exceptions, may vary widely and will be nonexistent in many jurisdictions. Extending federal election law standards through federal tax law to political intervention in state and local jurisdictions will create confusing, divergent, and multiple compliance burdens on nonprofits operating at the state and local levels.[68]

In sum, neither blind deference nor blind rejection of FEC standards would seem an appropriate path to take. Indeed, multiple commenting groups noted that the IRS *should have* followed the FEC with respect to Internet communications. The ABA Tax Section noted that "[e]xperience has demonstrated that excluding from coverage unpaid Internet communications or an organization's own web site does not create loopholes that will be exploited to direct large sums of money to influence elections, but rather avoids creating a vast number of difficulties for organizations seeking to comply with these rules."[69]

Defining 'primarily.' Practitioners have long sought clarity from the IRS on what it means for a 501(c)(4) organization to engage "primarily" in social welfare. As mentioned above, the 2004 ABA Task Force Report on 501(c)(4)s and political activity examined this question in depth, and recommended that "primarily" be defined as no more than 40% of total annual program expenditures being spent on non-exempt activity.[70] The IRS recently provided some indication that this might be an appropriate line to draw when it initiated a process for applicants seeking recognition under Section 501(c)(4) to expedite processing by certifying that the organization has and will devote "60 percent or more of both spending and time to activities that promote social welfare," and "less than 40 percent of both spending and time to political campaign intervention."[71]

The ABA Tax Section's comments provided an excellent summary of the various positions taken on this question, breaking it down among the four main options as to what "primarily" social welfare purposes or activities should mean. These include (1) no non-social

[67] "Comment from Two FEC Commissioners," www.regulations.gov/#!documentDetail;D=IRS-2013-0038-129801.

[68] "Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities," *supra* note 2 (internal footnote omitted).

[69] *Id.*

[70] "Comments of the Individual Members of the Exempt Organizations Committee's Task Force on Section 501(c)(4) and Politics," *supra* note 17.

[71] "Optional Expedited Processing Expanded to All Eligible 501(c)(4) Applicants Beginning in December 2013,"available at www.irs.gov/Charities-&-Non-Profits/Other-Non-Profits/Expanded-Optional-Expedited-Approval-Process-for-501c4s.

[72] "Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities," *supra* note 2.

[73] "Comment from Donald Simon, Rep. Chris Van Hollen, Public Citizen, Democracy 21, Campaign Legal Center," www.regulations.gov/#!documentDetail;D=IRS-2013-0038-126088.

[74] See, e.g., "IRS Moves to Restrict Nonprofits' Politicking," Wall St. J, 11/26/13, available at http://online.wsj.com/news/articles/SB10001424052702304656045792221105981110 76 (quoting Bob Biersack, a former FEC official currently with the Center for Responsive Politics, as noting that new rules will "change the game," but perhaps only temporarily: "People have been shopping for the right vehicle for years, so this might just force people to go back to the shopping cart to see what you can find.").

[75] "Comment from David Earley, Brennan Center for Justice at NYU School of Law," www.regulations.gov/#!document Detail;D=IRS-2013-0038-141019 (15% offered as an example in these comments, not as a firm proposal).

[76] This approach was first suggested by attorney Greg Colvin in a 2012 article on the topic of 501(c)(4)s. See Colvin, "A Silver Bullet That Would End Secret Tax-Exempt Money in Elections," available at http://ourfuture.org/20120411/A_Silver_Bullet_That_Would_End_Secret_Tax-Exempt_Money_in_Elections.

[77] "Comment from Brian Galle," www.regulations.gov/#!documentDetail;D=IRS-2013-0038-70943.

[78] See McPherson, "EO Training Materials Suggest 51 Percent Threshold for 501(c)(4) Activity," Bond Case Briefs (1/28/14), available at http://bondcasebriefs.com/2014/01/28/finance-and-accounting/eo-training-materials-suggest-51-percent-threshold-for-social-welfare-activity (referring to Service training materials, released pursuant to a FOIA request, stating that "primary" is generally used to mean 51%); "Judy Kindell on 501(c)(4)-(6) Organizations and 527," 11 Paul Streckfus's EO Tax J. 42, 45 (2006).

[79] "Comment from Arturo Vargas," www.regulations.gov/#!documentDetail;D=IRS-2013-0038-134652.

[80] "Comment from Laurence Gold," www.regulations.gov/#!documentDetail;D=IRS-2013-0038-134558. These comments, representing the views of sever large labor organizations, particularly deplored the NPRM because it "declines to make any proposal whatsoever concerning the crucial 'primarily engaged' standard, it fails as a matter of law to adequately apprise interested parties of the Service's intentions with respect to that standard and impairs their ability to sufficiently comment on the subject."

[81] See, e.g., "Comment from Diana Aviv, Independent Sector," www.regulations.gov/#!documentDetail;D=IRS-2013-0038-134088.

welfare activities permitted, (2) only insubstantial non-social welfare activities permitted, (3) no more than 40% non-social welfare activities permitted, and (4) no more than 49% non-social welfare activities permitted. The Tax Section ultimately recommended "that the amount be somewhere between insubstantial (but not zero) and 40%."[72]

The comments surveyed by the author of this article generally fell into two general groups—those that urged a strict prohibition on *any* non-social welfare activity (albeit the minority position) and those that urged something more than "insubstantial" but less than 50%.

Notably, the first camp included the League of Women Voters of the U.S., and joint comments submitted by Rep. Chris Van Hollen (D-Md.), Democracy 21, and the Campaign Legal Center.[73] The principal argument extended by these groups is that "exclusively" should be interpreted by its plain meaning as "solely," and not by judicial and later statutory interpretation as "primarily."

The other significant argument for this position is that non-charities wishing to engage in political advocacy may operate as 527s, and therefore still maintain tax-exemption while being subject to more rigorous disclosure requirements. Of course, this latter argument ignores the fact that many social welfare organizations engage in limited political activity that would be insufficient to qualify under Section 527, but too much to survive a complete prohibition under Section 501(c)(4). As many commenters noted, this leaves thousands of legitimate social welfare organizations "out in the rain" with no tax-exempt umbrella. Further, barring political activity completely for 501(c) entities may drive them, not to Section 527 status, but to some more ill-defined for-profit or taxable business form, outside of the tax-exempt system.[74]

Many other commenting groups declined to propose an exact percentage or dollar value, but nonetheless endorsed an approach that permitted something more than an insubstantial degree of political activity. The Brennan Center's comments, for example, somewhat uniquely proposed a hybrid dollar *or* percentage test, triggering potential loss of exemption under Section 501(c)(4) if an organization exceeds *either* 15% of expenditures *or* the dollar-amount threshold.[75] Two law school professors—Brian Galle and Donald Tobin—submitted joint comments that also proposed a low threshold, but one that bears some similarity to the Section 501(h) lobbying limits on public charities:

> [W]e propose a strong presumption that any group with candidate-related political activity of more than 10% of its budget, or of more than an overall cap of some amount, such as $1 million, whichever is lesser, should be recognized as a §527 political organization and not as a § 501(c)(4) social welfare organization.[76]

As a fall-back option, Professors Galle and Tobin suggested:

> In the event the Treasury concludes that a §501(h) model standing alone is insufficiently flexible, organizations that fail the expenditures test could also attempt to satisfy a "facts and circumstances" type of inquiry. But we recommend attaching conditions before the group can avail itself of that option.[77]

(This latter approach in some ways mimics the Section 509(a)(1) public support test for public charities, which provides either a 33-1/3% minimum public support threshold or, in the alternative, a 10% threshold, provided certain facts and circumstances can be met.)

The Center for Competitive Politics represented one faction in favor of maintaining and codifying what is currently understood to be the default threshold, 49%,[78] proposing (in its own draft rules) that "primarily" be defined as 50% or more of total program service expenses.

Despite these differences, the majority of those groups that addressed the question of the meaning of "primarily" urged, if nothing else, that the IRS adopt "a clear, reasonable dollar or percentage limit"[79] of *some* amount,[80] adjusted for inflation.[81]

Summary of the response / Moving forward

A review of the comments surveyed demonstrates at least six principal points that should play a key role in the anticipated revised draft of the proposed regulations expected from the Treasury and the IRS:

1. Exempt organizations should not be hindered in their ability to provide and publish truly nonpartisan voter education and election-related materials at all times, regardless of their proximity to an election.
2. Consistency in defining political activity should be sought where feasible. Applying different meanings to political activity fosters confusion and hampers compliance.
3. Any rule defining political activity must take into account other tax-exempt vehicles under Section 501(c) to ensure that current abuses of

tax-exemption are not merely shifted to a less regulated section of the Code.

4. Social welfare organizations should not be completely prohibited from engaging in political activity, as such activities are historically related to, if not within the meaning of, "social welfare."
5. The degree of permitted political activity by 501(c)(4)s and other non-charitable 501(c)s should be determined based on a stated dollar amount, adjusted for inflation, or based on a percentage of activities and/or expenditures.
6. Internet communications that are not paid advertising should be treated differently than print or oral communications, which are more easily within the dominion of the speaker/writer. More thoughtful delineations with regard to online speech are necessary to capture the modern realities of social media and content proliferation.

In addition, Treasury and the IRS should pay particular attention in any public hearings and deliberations to the following points, which elicited less of a uniform response from commenters, but which will require resolution in any final draft regulations:

1. Express advocacy and its functional equivalent likely will not be sufficient to cover a vast amount of speech that conveys clear political messages and should be subject to tax-exempt regulation. If the intent is to loosen such restrictions and permit greater amounts of political speech, the IRS should consider alternative mechanisms to curb abuse, which may entail

greater disclosure requirements for 501(c)s on political income and expenditures.

2. Any decisions to defer or not to defer to the FEC should take the following considerations in mind:

- Exempt organizations are subject not only to federal election laws, but also state and local election laws, which necessarily vary from those of the FEC. The approach taken must make compliance across levels of government as consistent as possible.
- The IRS could gain valuable insight from FEC rules that were already subject to rigorous debate in determining its own political rules. Notably, FEC scrutiny regarding Internet communications evidences a more thoughtful process than that undertaken by the IRS to date.
- The current FEC is itself divided on the level of deference the Treasury and the IRS should have with respect to federal election laws.

3. Whatever level of political activity may ultimately be permitted under Section 501(c)(4), such amount could be what is typically considered "insubstantial" or more, but well under half of an organization's total program expenses, or activities, however the IRS chooses to define it.

Conclusion

Reading through dozens of comments submitted by these groups and individuals inspires an ever-greater appreciation for the immense public response elicited by the NPRM. The thoroughness of arguments raised and the eloquence of specific examples brought to light by so many affected organizations have played a crucial role in amplifying the urgency of adopting a revised set of regulations for public comment. The tax-exempt world, and the general public, eagerly await this second round. ■