AJC Global Jewish Advocacy

Jacob Blaustein Building
165 East 56 Street
New York, NY 10022
T 212.751.4000
W ajc.org

February 26, 2014

CC:PA:LPD: RR (REG-134417-13)
Room 5205
IRS
Post Office Box 7604
Washington, DC 20044

www.regulations.gov (IRS REG 13417-13)

To Whom It May Concern:

On behalf of American Jewish Committee (AJC), we submit the following comments on proposed rulemaking "*Guidelines for the Exempt Social Welfare Organizations on Candidate-Related Political Activities*."

The proposed regulations as currently configured formally address only the political activities of 501(c)(4) organizations. AJC is not such an organization, and therefore does not feel it necessary (or believe itself to be particularly competent) to comment directly on the desirability, or impact, of those regulations on 501(c)(4) groups.

But we are comfortable responding to the question posed repeatedly in the Notice of Proposed Rulemaking (NPR): whether the black-letter rules the IRS proposes to apply to (c)(4)'s—mostly for the purpose of easing the IRS task of policing these rules—should be applied to (c)(3) organizations. The question is posed at several places in the NPR. Our answer to each question is the same: no. We believe that there is neither a showing of abuse under current rules nor any showing that the considerable body of accumulated IRS and judicial precedents is unworkable in practice. Our comments, though they will often be addressed to the substance of the proposed rules, should not be understood as addressing them in the context of (c)(4) organizations.

Despite the recent controversy over the IRS' handling of certain applications for recognition of (c)(4) status—about which we express no view—there is no factual basis for concern that existing IRS precedents applying a facts and circumstances approach cannot be applied even-handedly to 501(c)(3)

organizations, whether year-round or in the period before an election. Certainly, to the best of our knowledge, no court has ever set aside an IRS 501(c)(3) ruling deciding whether an agency has impermissibly endorsed a candidate on the ground that it misapplied the law or that it displayed political bias.[1]

What follows is an explanation of our views.

Conditioning eligibility for tax exemption on refraining from endorsing or opposing political candidates is, as a general matter, constitutional because the Government is free not to subsidize such speech through a deduction, *Regan v. Taxation With Representation*, 461 U.S. 540 (1983) (*TWR*). Nonetheless, it remains true that requiring that not-for-profits (= civil society) refrain from a given type of speech, however justified the restriction may be, diminishes the amount of speech in the society in general, and often speech of the highest importance. That cost should not be imposed lightly, for shutting down such speech comes at a high social cost. Often, it is not-for-profits that express unpopular or unconventional points of view, or resist yielding to popular enthusiasms. Election time, when not only candidacies but policy, is being debated is precisely when people are listening. It is precisely this time that the proposed regulations would impose a black-out on (c)(3) organizations.

The proposed rules would ban not only direct and unmistakable endorsement of a candidate—a rule with which we have no quibble—but substantial amounts of speech that does so indirectly, often quite indirectly by piling inference upon inference. Speech merely mentioning a candidate—even if a sitting official—or political parties within a fixed and substantial period of time immediately before an election would be forbidden to exempt 501(c)(3) organizations, even if the mention had nothing at all to do with the election.

While there have been frequent reports that some 501(c)(4)'s, which are allowed some endorsement of candidates so long as those activities are not substantial, have abused the privilege and used the cover of 501(c)(4) exemption to function as political action committees, we are aware of no evidence that 501(c)(3) organizations are abusing their exemptions in this way. Unlike (c)(4)'s, which can support or oppose candidates in some measure, (c)(3) organizations cannot do so at all without losing their tax exemption. The problem with regard

---

[1] For convenience sake (and the sake of brevity), we will sometimes refer just to a ban on endorsing candidates, even though both endorsing and opposing candidates are off-limits to 501(c)(3) organizations. Whenever these comments refer to endorsing candidates, we mean to include opposing candidates as well.

to (c)(4)'s is not what constitutes political activity, but how much of it is to be allowed. The proposed rules' focus on when activity takes place may well be the wrong question for (c)(4) organizations. It certainly addresses the wrong question for (c)(3)'s, and creates a ban on speech that is perfectly permissible under the statute for little more than administrative convenience of the IRS.

It is particularly odd to discourage the active participation of civil society on controversial issues when the United States Government is encouraging civil society around the world to take an active role in civil and political affairs. While a denial of exemption may not be in contemplation of the Constitution an illegal suppression of speech, in the real world of civil society, the threatened loss of tax exemption silences speech as effectively as formal restraints on speech. The proposed rules do so not only as to speech which does not merit exemption, but to speech far removed from it. Absent a more solid basis for doing so, the proposed notice of rulemaking does not come close to justifying such a rule.

When Congress decides that it does not want to subsidize a particular kind of speech, *TWR* stands for the proposition that the Government usually can withhold exemptions accordingly. The rigid and arbitrary nature of the proposed black-letter rules, with black-out dates substituting for the currently applied, and, as far as we can tell, reasonable and workable, "intense fact-based determinations" is overkill. It is no doubt true that such rules may appear easier for the IRS to administer than the currently applied—and for some reason denigrated—fact intensive standard. They are no doubt attractive to the IRS because they are more likely to foreclose controversy about any particular decision. But the IRS is using a blunt instrument when far more precise tools are available—and work well. When speech is suppressed, precision of regulation is desirable. In most contexts it is constitutionally required. Sheer administrative convenience is simply not an adequate reason to ban speech far beyond what Congress mandated.

Administrative concerns would also be more weighty if there were a track record of abuse by §501(c)(3) not-for-profit organizations which has not been addressed, or if drawing lines between the permissible and impermissible activity was impossible to enforce or inevitably politicized. There is no such record. The IRS notice of proposed rule-making suggests none as to 501(c)(3) organizations. There has been no groundswell of objection to the IRS handling of (c)(3) cases; no body of judicial, scholarly or journalistic literature criticizing it, and, as far as we are aware, no groundswell of criticism either from the not-for-profit

community or candidates. There have been challenges to the ban on candidate endorsements, but Congress has not seen fit to change the law. Nothing in the proposed notice of rule-making suggests that the current "fact-intensive" approach has not been faithful to congressional intent. There is therefore nothing in the notice that would justify a major shift in regulatory regime.

If most 501(c)(3) enforcement were dependent on the IRS, the interest in avoiding controversy might carry somewhat more weight. The fact is, however, that most enforcement of § 501(c)(3) restrictions on endorsing (or opposing) candidates is self-enforcement. In our own experience, and our experience in advising and observing other 501(c)(3) organizations, the rules against endorsement are vigilantly self-enforced. The organizations with which we are familiar have no desire to break the trust inherent in 501(c)(3) exemption, and, equally, little desire to become embroiled in partisan electoral politics. They know the rules applicable to them as published in IRS guidelines and revenue rulings; abide by them, and instruct their employees and lay leaders to abide by them. They are not tempted to engage in on-the-sly endorsement of candidates. Self-enforcement is largely apolitical; it equally affects groups across the spectrum.

Finally, the notice of proposed rule-making suggests that it "may be beneficial to have a more uniform set of rules relating to political campaign activities for tax exempt organizations, exempt pursuant to § 501(c)(3), § 501(c)(4) and § 527 ...." Congress, however, thought that different rules should be applied to each category of organizations. In keeping with that legislative decision, it would seem appropriate to have different rules for each of the categories. To equate the three groups is to fundamentally alter the legislative scheme.

We now turn to our substantive comments on specific proposals. We see no basis for the expansion to the 501(c)(3) context of the broad definition of 'candidate' included in Section 527, a section designed to be applied to partisan political entities. Congress, of course, could have amended Section 501(c)(3) when it passed Section 527, but it did not. Why the IRS would think it could so amend its regulations to elide statutory differences is not explained in the notice of rulemaking, nor can we think of any reason why it should be authorized to do so.

Second, the proposed definition of a candidate is extraordinarily broad, including anyone who is "proposed" by another for election. If someone's parent suggests that their child would make an excellent president, governor or mayor,

this expression of parental pride would place that person off limits for 501(c)(3) groups during the entire blackout period. This without regard to whether the person has any interest in running or whether that person has any chance at all of being a serious candidate and without regard to whether what the exempt organization intends to say would impact the putative candidacy.

It's one thing but to include such people within the compass of Section 527 which focuses on organizations dedicated to advancing political careers. It is something quite different with regard to section 501(c)(3) where the current facts and circumstances test would allow an agency in good faith to conclude that the candidacy is stillborn and therefore to be disregarded for anything other than purposes of express advocacy, or that the comment would have no effect on the putative candidate.

Third, it is existing law that an agency which is dedicated to a particular cause can comment on that cause even with regard to candidates during an election season so long as it makes clear that it is not commenting on the candidacy. In our own work, for example, we will comment on racist, anti-Semitic or homophobic comments made during an election season by a candidate, accompanied always by a disclaimer of any intent to influence an election. This is in keeping with a long standing agency commitment to combatting hate in public life. The IRS has explicitly sanctioned this activity. There is again no showing in the notice of proposed rulemaking justifying a massive change in the existing regulatory framework—a framework no doubt known to Congress, which has done nothing to change it.

We note as well that the definition of a public communications includes any posting on an Internet web site. As a practical matter, all exempt organizations today communicate with their members on the organizational website and post most of their activities there. Thus, unless an agency deliberately withholds information from its members by not posting an action on the website, its activities would be a forbidden public communication during the black-out period.

Fourth, AJC has no objection to the proposed definition of express communications. These seem to us to simply be a restatement of existing law. We find, however, particularly objectionable the changes with regard to "public communications close in time to election." As to these, the IRS proposes to abandon the facts and circumstances approach that it has "traditionally applied" and replace it with a blackout period. Specifically, "any public communication that is made within 60 days before a general election with 30 days before primary election and that clearly identifies a candidate for public office or, in

the case of the general election, a political party represented in an election would be considered a candidate related activity."

In an age of seemingly permanent election cycles, the fixed period could be much too little. An agency with impunity could criticize a candidate on day 61 (or 31) before an election without any express advocacy, and remove its statement from its website. That statement would nevertheless likely be available on elsewhere on the web during the blackout period. A facts and circumstances test might catch this practice, but a blackout period virtually invites it. Again, if there were not a long track record of successfully applying 'facts and circumstances', this might be an acceptable regulatory decision. In light of the existence of a history of the facts and circumstances test working without difficulty, the change is unsustainable.

The proposed rule makes no exception for communications to a currently sitting public official who is also a candidate for election as the existing regulatory approach does. Thus, not-for-profits could not in any way communicate to (or about) the official conduct of a sitting public official who is a candidate for public office during this black-out period. The IRS has until now specifically ruled that such communications (including appearances at exempt organizations) was permissible so long as the purpose was not to advance a candidacy, the 501(c)(3) made clear its neutrality on the election, and the communication with a public official related to that official's public duties and the organization's exempt activities. Taken literally, the proposed rule might also ban even handed candidate nights or debates heretofore sanctioned by the IRS. Again, nothing in the notice of rulemaking remotely justifies this radical reordering of current law.

Even more radically, the notice of proposed rulemaking notes that the rule makers intend that content previously posted by an organization on its web site that clearly identifies the candidate and remains on the website during the specified pre-election period would be treated as candidate-related political activity. Again, nothing said in the rule-making notice justifies this onerous search and destroy requirement.

Equally without published justification is the potential extension to 501(c)(3) organizations of a proposed ban on the voter registration drives and the publication of voter guides.

Civic organizations as innocuous as the League of Women Voters have been conducting voter registration drives for as long as we can remember. The IRS

has sanctioned such drives. We know of no case in which the IRS has determined that a voter registration drive was designed in such a partisan fashion as to amount to an endorsement of the candidate.

Of course, these drives are often held in communities where voter registration is low, but that is simple efficiency, not an attempt to influence the outcome of an election. And of course it also makes sense to recruit voters to do so when an election is looming, and interest is high, not when elections seem distant and abstract. Again, existing IRS guidelines offer plenty of guidance to conducting wholly licit voter registration drives consistent with 501(c)(3) limits. Once again, the IRS offers no showing that there is any substantial reason for change.

AJC does not publish voter guides. Still it is perplexing that despite existing IRS guidance on how to prepare a licit voting guide and without any evidence that these rules are impossible for organizations to self-enforce or for the IRS to police, the IRS proposes a wholesale change. Congress, composed entirely of elected officials subject to voter guides, is surely aware of them. Equally certainly it could have amended existing law to ban them. It has not.

Finally, we wish to address the IRS' inquiry regarding the links to third party web sites. We believe that if the IRS is prepared to regulate in this area, it should propose a tentative rule and subject it to a full round of public comment.

Some preliminary observations are nonetheless in order. We recognize that the use of links can be a subtle way of endorsing candidates. Surely, if a link is to a specific editorial or column endorsing or opposing a candidate, posting the link would appear to be an endorsement or opposition to a candidate. But if the link is to the general website of another organization which is not explicitly partisan, treating the link as an endorsement if anywhere on the linked website there is stated support for, or opposition to, a candidate is overkill. We see no reason to treat the link as ratifying the endorsement or statement of opposition, particularly if there is a freestanding organizational reason for posting the link (e.g., to point to a specific report on some subject)

Moreover, it is not always easy (or even possible) to know what is on another website, at least without an investment of an inordinate amount of time. Websites are not always easy to navigate, and it's not always easy to know what is on another website. And what about open forums on web sites? What if the offending material is posted after the link it is established? And what if the

501(c)(3) organization links to the websites of all the candidates on a particular issue so that their members can educate themselves on what the candidates are saying? We note in this regard that currently it is not regarded as a violation of the ban on endorsing or opposing candidates to host a candidate's night to which all candidates are invited. We see no reason why evenhanded linking to other web sites should be treated any differently.

These are tentative views on this subject. We recognize the difficulty of the problem, and urge only that a rule dealing with links be dealt with on its own merits.

Sincerely,

Marc D. Stern
General Counsel and
Director of Legal Advocacy

/drs