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February 27, 2014

CC:PA:LPD:PR (REG-134417-13)
Room 5205
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

Re: Notice of Proposed Rulemaking, "Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities," 78 Fed. Reg. 71535 (Nov. 29, 2013)

Dear Sir or Madam:

These comments are submitted in response to the above-referenced Notice of Proposed Rulemaking ("NPRM") on behalf of Alliance for Justice and Alliance for Justice Action Campaign.

Alliance for Justice ("AFJ") is a national association of over 100 organizations committed to progressive values and the creation of an equitable, just and free society. AFJ works to ensure that the federal judiciary advances core constitutional values, preserves human rights and unfettered access to the courts, and adheres to the even-handed administration of justice for all Americans. Through its Bolder Advocacy Initiative, AFJ is the leading resource for information on the legal framework for nonprofit advocacy, providing easily understood information, training, and technical assistance to encourage nonprofit organizations and their funding partners to exercise their right to participate actively in the democratic process. AFJ's IRC § 501(c)(4) arm, the Alliance for Justice Action Campaign (AFJAC"), provides resources, training and technical assistance to help nonprofit organizations and their donors advocate more effectively.

These comments are based on and reflect AFJ's more than thirty years of experience in assisting nonprofit organizations to conduct their advocacy activities within the strictures and requirements of the Internal Revenue Code ("IRC"), implementing regulations and other legal guidance. Based on this on-the-ground experience, AFJ strongly believes that the proposal in the NPRM to redefine the meaning of "social welfare" activity so as to exclude certain nonpartisan election-related activity goes beyond the statutory authority provided by Congress and will deter

a wide-array of legitimate activity which has long-been recognized as promoting the general welfare of the community. This radical departure from existing rules cannot be justified as necessary to achieve improved regulatory clarity because the NPRM begs the question of whether equal or even more clarity could be achieved without improperly limiting the scope of activities which may be conducted by IRC § 501(c)(4) organizations, and, moreover, the claim of clarity in the new rules is illusory at best. Treasury and the IRS should therefore withdraw the proposal from consideration. We encourage Treasury and the IRS to hold a public hearing about these issues, and Alliance for Justice requests an opportunity to testify.

I. Nonpartisan Election-Related Activities Have Long Been Recognized As Serving Social Welfare Purposes and the NPRM Fails To Articulate A Reasoned Basis Why They Should Now Be Restricted.

Under longstanding regulations, an organization will qualify for exemption under IRC § 501(c)(4) if it is operated "for the promotion of social welfare [by] promoting in some way the common good and general welfare of the people of the community." The nonpartisan activities that the NPRM would now restrict as "candidate-related political activity" ("CRPA") have long been recognized by the IRS as promoting the general welfare of the community, *see e.g.* Rev. Rul. 2007-06, 2007-1 C.B. 1421, and there can be little doubt that this long-standing determination was correct. It cannot be denied that promoting civic participation and engagement by citizens, improving democracy by educating voters, and educating candidates about the needs of the community all promote the common good and general welfare of the community. The Service has recognized the importance of nonpartisan election-related activities for more than fifty years. The NPRM makes no effort to explain why, after all of this time, these activities in general or specific nonpartisan activities in particular no longer should be deemed to serve the general welfare.[1]

[1] It is now firmly established that Treasury and the IRS are subject to the same administrative law principles that govern agency action for all other federal agencies. *See e.g. Mayo Foundation for Medical Education and Research v. United States,* 131 U.S. 704, 713 (2011) ("We are not inclined to carve out an approach to administrative review good for tax law only.") It is also clear that these principles include the specific provisions of the Administrative Procedure Act applicable to both the procedures and substance of administrative rulemaking. *Cohen v. United States,* 650 F.3d 717, 723 (D.C.Cir. 2011)(en banc) ("The IRS is not special in this regard; no exception exists shielding it – unlike the rest of the Federal Government – from suit under the APA.") One of the administrative law principles relevant in evaluating the policies adopted in the NPRM under consideration here is the requirement that an agency provide a reasoned explanation for adopting a rule. *See e.g. Motor Vehicles Mfrs. Ass'n of the United States v. State Farm Mut. Auto Ins. Co.,* 463 U.S. 29, 43 (1983) (APA requires that agency "articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made."); *Dominion Resources, Inc. v. United States,* 681 F.3d 1313, 1319 (Fed. Cir. 2012) (invalidating Treasury Regulation because the agency failed to "articulate a satisfactory or cogent explanation" for its decision.) The need for a reasoned

In treating nonpartisan election-related activities as if they were partisan political activities, the NPRM fails to recognize that nonpartisan activities do not raise the same tax policy considerations as partisan political activities. Making contributions to or endorsing candidates for office have not been treated as promoting tax exempt purposes because, in contrast to lobbying and other forms of policy advocacy, it is difficult, if not impossible, "to pinpoint the germaneness of support of candidates for office" to an organization's exempt purposes. *See* General Counsel Memorandum 34233 (Dec. 30, 1969), quoting General Counsel Memorandum 32184 (Jan. 8, 1962). "Support of a candidate for public office necessarily involves the organization in the total political attitudes and positions of the candidate... that involvement transcends the narrower ... interest of an organization." *Id*. In contrast, nonpartisan election-related activities are demonstrably germane and can be pinpointed to the exempt purposes of the organization that undertakes them to the same extent and in the same manner as an organization's other social welfare policies. Thus, while the IRS may seek to better define the types of nonpartisan election-related activities that serve social welfare purposes, the agency has no basis for arbitrarily treating all nonpartisan activities as if they were partisan, as the NPRM proposes to do.

II. The NPRM's Proposed Restriction of Nonpartisan Election-Related Activity Cannot Be Justified On Grounds of Clarity Alone.

The NPRM states that "both the public and the IRS would benefit from clearer definitions" of political campaign activity, and 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)." 78 Fed. Reg. at 71536. We will have more to say in subsequent sections of these comments about the extent to which the NPRM actually achieves the stated goal of establishing clear rules.[2] It is important to recognize at the outset, however, that achieving clarity cannot

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explanation is especially great where, as here, the agency has taken a different view over a long period of time. *See e.g. Loving v. Internal Revenue Service,* No. 13-5061 (D.C.Cir. February 11, 2014) (striking down IRS interpretation of the IRC which differed from the agency's longstanding position with respect to the scope of its statutory authority to regulate taxpayer "representatives" who "practice before" the IRS.) As we show throughout these comments, the NPRM does not articulate a satisfactory explanation for its specific proposals changing its longstanding position with respect to the meaning of "social welfare" in IRC § 501(c)(4).

[2] Whether the proposals in the NPRM are in fact based on seeking greater clarity for the regulated community is subject to question because the IRS itself has consistently avoided efforts to clarify the current definition of political campaign activity through the courts. There appears to have been a deliberate policy within the agency to "moot out" every judicial challenge brought by IRC § 501(c)(4) and IRC § 501(c)(3) organizations which might have resulted in greater clarity of the existing standards in this area. *See e.g. Christian Coalition of Florida, Inc. v. United States*, 662 F.3d 1182 (11th Cir. 2011) (IRC § 501(c)(4)); *Catholic Answers, Inc. v. United States*, 438 Fed. Appx. 640 (9th Cir. 2011) (*per curiam)* (IRC § 501(c)(3)); *The Christian*

alone justify the proposals in the NPRM. As the United States Court of Appeals for the District of Columbia Circuit recognized in a related context, the fact that an administrative rule provides a bright-line "provides *no independent basis* for the rule; a bright line can be drawn in the wrong place." *Shays v. Federal Election Commission,* 414 F.3d 76, 101 (D.C.Cir. 2005) (emphasis added). Under the Administrative Procedure Act, an agency must not only assert that a rule is more clear than existing rules, it must also explain why the new rules are reasonable.

In this regard, it is important to recognize that there are alternative definitions of covered IRC § 501(c)(4) political campaign activity that could achieve far greater clarity than the definition of CRPA proposed in the NPRM. A definition that includes *only* cash contributions and express advocacy communications, for example, would achieve far more from the standpoint of clarity than the complicated set of definitions proposed in the NPRM. Treasury and the IRS do not attempt to explain why the proposed definition of CRPA better serves the statutory purposes than this or other more clear alternatives; instead, the NPRM wrongly relies on the bright-line "bromide," *Shays v. Federal Election Commission, id*, as if it were an adequate substitute for reasoned decision-making.

Finally, in evaluating the NPRM's purported reliance on the need for regulatory clarity, it is significant that the NPRM does not even acknowledge, let alone address, the Service's reliance on the equally unclear "private benefit" doctrine to deny exemption to IRC § 501(c)(3) and (c)(4) organizations that have not otherwise engaged in impermissible political activities. *See, e.g., American Campaign Academy v. C.I.R.,* 92 T.C. 1053 (1989)*; Democratic Leadership Campaign v. United States,* 547 F. Supp. 2d 63 (D.D.C. 2008) (reversing on procedural grounds IRS revocation of exemption under IRC § 501(c)(4) organization). If, as stated in the NPRM, Treasury and the IRS wish to achieve greater clarity in the requirements pertaining to politically active IRC § 501(c)(4) organizations, then they should provide clear guidance on the extent to which the private benefit doctrine will be used to deny tax exemption where organizations are not otherwise engaged in impermissible partisan political activity. Without such clarification, the glass will remain half empty—at best.

III. The NPRM's Proposed Definition of Candidate-Related Political Activity Will Significantly Restrict Legitimate Social Welfare Advocacy Activity By IRC § 501(c)(4) Organizations, Without Any Reasonable Basis.

The NPRM proposes to establish a new category of activity, Candidate-Related Political Activity ("CRPA"), that by definition would be treated as not promoting social welfare within the meaning of IRC § 501(c)(4). This new type of activity would replace the long-standing reference in the current regulations to "direct or indirect participation or intervention in political

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Coalition International v. United States, C.A. No. 2:01CV377 (E.D. Va.) (IRC § 501(c)(4)). While this policy does not prevent Treasury and the IRS from belatedly trying to clarify existing rules, it does make clear that greater regulatory clarity is not an end in itself and needs to be achieved within the contours of the statutory language and overriding tax policies.

campaigns on behalf of or in opposition to any candidate for public office." *See* Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii). The proposed definition of CRPA would include certain activities without regard to whether they are conducted on a partisan or nonpartisan basis and without regard to other factors that under current rules are used to determine whether political campaign activities qualify as social welfare activity. A large number of these proposals will significantly restrict the ability of IRC § 501(c)(4) organizations to engage in important social welfare activity, without any reasoned explanation for this change in policy, and in many cases without adding clarity to the rules governing IRC § 501(c)(4) election-related activity.

A. Candidate Appearances.

The NPRM includes in the definition of CRPA "[h]osting or conducting an event 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." Prop. Reg. § 1.501(c)(4)-1(a)(2)(iii)(A)(8). Candidate appearances at such an event would constitute restricted political activity whether or not the event is campaign-related in any way. The result will be to restrict the ability of IRC § 501(c)(4) organizations to sponsor candidate debates and forums that seek to educate the public concerning the candidates' views, and will also narrow the opportunities available to public officials to meet with their constituents.

Under current rules, a candidate may be invited to speak at an event in his or her capacity as a candidate, such as at candidate debates and candidate forums, as long as the sponsoring organization takes steps to ensure that there is no indication of support of or opposition to any candidate by the organization. As the Service stated in *See* Rev. Rul. 2007-41, 2007-1 C.B. 1421, "[t]he presentation of public forums or debates is a recognized method of educating the public ... Providing a forum for candidates is not, in and of itself, prohibited political activity."[3] Educational events of this kind have been sponsored for many years by IRC § 501(c)(4) organizations with the approval of the Federal Election Commission, *see* 11 C.F.R. §§ 110.13 and 114.4(f), and serve the general welfare of the community by educating the public regarding the positions of the candidates and their qualifications for office. The NPRM cites no instances in which the ability to hold such events has been abused, and it provides no other explanation for why these events should no longer be treated as serving the general welfare. Further, it does not explain why a rule that allows IRC § 501(c)(4) organizations to sponsor candidate debates and forums as long as the sponsor does not expressly advocate for or against one of the candidates would not provide as much regulatory clarity without constricting the ability of IRC § 501(c)(4) organizations to engage in these important social welfare activities.

The Service has also recognized under current rules that officials and other public figures

[3] Rev. Rul. 2007-41 addressed the facts and circumstances test for political activity in the context of the absolute prohibition on political campaign intervention in IRC § 501(c)(3). However, as stated in the NPRM, "[t]he IRS generally applies the same facts and circumstances analysis under section 501(c)(4)." 78 Fed. Reg. at 71536.

may be invited by IRC § 501(c)(4) organizations to speak at events in their capacity other than as candidates, without restricting when such events may take place. *See* Rev. Rul. 2007-41, 2007-1 C.B. 1421 (Situations 10-13). Non-campaign events provide an opportunity for officials to meet with their constituents in small gatherings or in large town-hall meetings and they provide an important vehicle through which citizens and organizations may express their concerns about legislation and other issues to their elected officials. The Federal Election Commission has long followed the same rule permitting corporations, unions and nonprofit organizations to sponsor non-campaign related events, *see e.g.* FEC Advisory Opinions 2004-14, 1999-2, 1996-11, 1994-15, 1992-6, 1992-5, and 1980-22, and the Commission's policy has been upheld as a reasonable interpretation of federal election law. *See Orloski v. FEC*, 795 F.2d 156 (D.C.Cir. 1986). Members of Congress regularly must distinguish between their "official" activities, which they must pay for with appropriated funds, and "campaign" activities, which they must pay for with private funds raised by their campaigns; the NPRM offers no contrary evidence that this line has been difficult to administer or subject to abuse.[4]

Not only will the proposed regulation restrict previously permissible IRC § 501(c)(4) activities that clearly serve the general welfare of the community, it also fails to provide the degree of clarity and administrative simplicity that Treasury and the IRS claim. Several examples illustrate this point:

-- Is there a distinction under the proposed regulation between a private "meeting" and a public "event"? If so, when does a "meeting" become an "event"?

– If a public official who is also a candidate for public office buys a ticket to a fundraising dinner and shows up unannounced, may the organization acknowledge the official's presence without making this announcement "part of the program" under the proposed regulation?

-- If a candidate attends a movie preview sponsored by an IRC § 501(c)(4) organization is this "part of the program"? Does it matter whether the candidate received a free ticket to the preview from the organization? What if the same candidate attends a VIP reception with the stars of the movie held after the preview and has his or her photograph taken with the stars at their request?

-- If an IRC § 501(c)(4) organization honors a state's entire Congressional delegation, some of whom are candidates in an election and some of whom are not candidates, does the event constitute CRPA?

[4] The proposal in the NPRM wrongly assumes that all candidates face serious opposition in their re-election bids; incumbents in particular frequently do not face any serious challenge. There is no reason to prohibit such officials from continuing to meet with their constituents during the periods prior to elections.

-- May a long-time legislative assistant for a Member of Congress who is running for re-election participate on a panel at an organization's annual meeting (held in October of a general election year) discussing legislation pending before Congress? Does a different rule apply to the bi-partisan Staff Director of a Congressional Committee that is chaired by the same Member of Congress?

-- Has an IRC § 501(c)(4) organization "hosted" an event sponsored by an unrelated organization in the same hotel as the (c)(4) organization's annual conference is being held if the unrelated organization's event, along with other events by unaffiliated organizations, is listed in the program for the convention? What if the IRC § 501(c)(4) organization made one of its reserved conference rooms available to the unrelated group to hold its event, but required the group to pay for the cost of the refreshments served at the event?

Each of these examples, which involve frequently occurring scenarios, make clear that even this "simple" rule is not clear and will require analysis of the relevant facts and circumstances before it can be applied.

B. Voter Registration and GOTV.

Encouraging eligible citizens to participate in the democratic process by registering to vote and then voting in elections undeniably promotes the common good. Since the efforts to register disenfranchised African-American voters in the 1950s and 1960s, to more recent efforts to engage women, young people and other minority citizens, such activities have been at the core of tax exempt election-related activity by both IRC § 501(c)(3) organizations and IRC § 501(c)(4) organizations alike. Yet, the NPRM treats all such activity as *per se* restricted CRPA, even where there is no possibility that the organization can serve partisan purposes.[5]

In proposing to treat nonpartisan voter registration and get-out-the-vote (GOTV) activities as CRPA, Treasury and the IRS have ignored the fact that under IRC § 4945(f)(2) "nonpartisan" voter registration activities are explicitly excluded from the excise tax on taxable expenditures by private foundations. In enacting this provision in 1969, Congress made clear that it did not wish to interfere with efforts to register voters on a nonpartisan basis. *See e.g.* H.Rep. No. 91-413 (Part 1), 91st Cong. 1st Sess. (1969), 1969-3 C.B. 200, 222. It is difficult to understand, therefore, how Treasury and the IRS can nevertheless propose that nonpartisan voter registration and GOTV activities may be restricted when carried out by IRC § 501(c)(4) organizations, whose exempt purposes are broader than those of private foundations.

The Service disregards this Congressional mandate in an illusory attempt to achieve regulatory simplicity, but the rule proposed in the NPRM is itself unclear in many significant

[5] For example, the definition of CRPA would include efforts to encourage citizens to participate in a referendum election even where no candidates are on the ballot.

respects. What kinds of activities, for example, are covered by the term "voter registration drive"? Does a "get-out-the-vote drive" include merely providing information on an organization's website about the location of polling places for particular precincts, or does the term refer only to more extensive activities such as providing transportation, day-care, or other services to enable voters to go to the polls? Use of the word "drive" appears to suggest something more than merely communicating information; regulations issued by the Federal Election Commission, for example, distinguish between "registration and get-out-the-vote *drives*," which "include providing transportation to the place of registration and to the polls," *see* 11 C.F.R. § 114.3(c)(4) (emphasis added), and "registration and voting *communications*." *See* 11 C.F.R. § 114.4(c)(2) (emphasis added). It is also unclear whether the definition of CRPA includes voter protection activities in which organizations provide assistance to voters who have been denied the opportunity to vote or need other help on Election Day. Since the NPRM does not make clear how these and many other definitional questions are to be answered, the regulated community and regulators alike will be left without clear guidance, notwithstanding the clarity supposedly achieved by treating nonpartisan as well as partisan voter engagement activities as part of CRPA.

C. Voter Guides.

The NPRM also proposes to include in the definition of CRPA "the preparation and 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)." Prop. Reg. § 1.501(c)(4)-1(a)(2)(iii)(A)(7). Again, the NPRM makes no attempt to explain why any publication that refers to a candidate or a political party, no matter when it is disseminated, should be treated as activity that does not promote social welfare. It should be obvious that educating the public about the views of public officials, including those who may be candidates, serves the public good in numerous ways, including making it possible for citizens to seek to change those views where they do not agree with them. All lobbying on matters of public policy must start with an understanding of the views of those who one seeks to influence. In this respect, the proposal in the NPRM to restrict such activity will have a significant deleterious effect on the very lobbying activities that the Service has long recognized as promoting social welfare. And, if the Service's view is that it is too difficult to determine whether a voter guide or similar publication is partisan or nonpartisan, this still begs the question whether, in order to achieve needed clarity, such useful activity should be restricted *per se* or whether it would be more beneficial to the community and consistent with the statutory purpose if such activity were permitted without limitation. The NPRM fails to address this crucial question.

The "voter guide" provision also falls short in achieving the goal of regulatory clarity. Since the term "voter guide" is not defined in the proposed regulation, is it intended to be a word of art with a definite meaning or is it a more generic term? Many persons in the regulated community use the term "voter guide" only to refer to communications that compare the views of at least two candidates for the same office; communications that describe the views, qualifications, or records of a single candidate would not generally be understood to fall within

this term, but it is not clear whether the NPRM intends a broader meaning of the term. Similarly, the term "voter guide" would not be used ordinarily to describe legislative voting records and scorecards that indicate how all of the members of a legislative body voted on measures of interest to the organization. Such records serve an invaluable aide to organizations' lobbying activities. Finally, does CRPA include the publication of candidates' responses to questionnaires, in the candidates' own words, another popular type of nonpartisan activity which is generally not included within the term "voter guide" and is an important way in which IRC § 501(c)(4) organizations educate the public about the candidates.

Other uncertainties abound in the proposal. As the Federal Election Commission has found, whether a communication "refers to a clearly identifiable candidate" may itself pose difficult questions of interpretation. *See e.g. The Hispanic Leadership Fund, Inc. v. FEC*, 897 F.Supp. 2d 407 (E.D.Va. 2012) (addressing references to "Obamacare" during the last election cycle.) Is a reference to a ballot measure sponsored by a particular candidate or a bill sponsored by a candidate included in the definition? Furthermore, stating that "a candidate may be 'clearly identified' by reference to an issue or characteristic used to distinguish the candidate from other candidates," Prop. Reg. § 1.501(c)(4)-1(a)(2)(iii)(B)(2) perpetuates one of the most unclear elements of the current rules and requires precisely the kind of factual inquiries that Treasury and the IRS state they are trying to eliminate.

Confusion may also be caused by the fact that a separate provision of the proposed CRPA definition includes any "public communication" that refers to a clearly identified candidate but only if the communication is made within 30 days of a primary or 60 days of a general election. *See* Prop. Reg. § 1.501(c)(4)-1(a)(2)(iii)(A)(2). Since "voter guides" are also "public communications," when is a communication a "public communication" that is subject to the 30/60 day windows and when is it a "voter guide" that is not subject to those windows? In fact, why should they be treated differently in the first place? Furthermore, since the timing of the distribution of a voter guide is not relevant under the proposal, how does one know whether a voting record, for example, has been distributed "in the case of a general election"? Further uncertainty is raised by the proposal's vague reference to "material accompanying the voter guide." If a voter guide is published on a website, is everything on the website "accompanying" material? If a voter guide is distributed by mail, does the proposed rule define as CRPA every other communication distributed in the same envelope, no matter on what subject? Finally, what does it mean for a communication to refer to "one or more political parties"? Does a reference to "progressive candidates" or "conservative candidates" fall within this restriction?

In sum, the proposal in the NPRM will give rise to far more uncertainty than the current rule which it seeks to replace.

D. Public Communications.

Under the NPRM, any public communication disseminated 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, will be treated *per* se as restricted CRPA. Prop. Reg. § 1.501(c)(4)-1(a)(2)(iii)(A)(2). As noted in the NPRM, this provision is derived from the definition of "electioneering communications" added to federal election law by the Bipartisan Campaign Reform Act of 2002 ("BCRA"). However, under federal election law the term "electioneering communication" no longer serves as a limitation on permissible election activity, as it does in the NPRM; it merely refers to certain reportable communications. *See Citizens United v. Federal Election Commission,* 558 U.S. 310 (2010); and, as discussed below, the proposal in the NPRM is broader than the federal election law provision in significant ways that are not acknowledged or justified in the proposal.

In Rev. Rul. 2004-06, 2004-1 C.B. 328, the Service considered the circumstances under which communications that fall within BCRA's definition of "electioneering communications" may or may not qualify as political campaign intervention by IRC § 501(c)(4), (c)(5) and (c)(6) organizations. The most significant aspect of this ruling for present purposes is that it recognized that not all public communications disseminated within FECA's 30/60 days windows will necessarily constitute political activity:

> "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 [IRC § 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 [IRC § 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 [IRC § 527(e)(2)]."

Specifically, while the fact that a communication refers to a candidate for public office is one of the factors that "tend to show" that an advocacy communication on behalf of a policy issue has a political purpose, such a communication still may not be political activity depending upon the presence of other specific factors listed in the Ruling. One of these factors is whether "the communication identifies the candidate solely as a government official who is in a position to act on the public policy issue...." In example 5 in the Ruling, television advertisements sponsored by an IRC § 501(c)(4) organization urged the public to call or write the incumbent Governor demanding that he stop a scheduled election. The Ruling holds that these ads did not constitute political activity in spite of the fact that the ads were disseminated shortly before an election in which the incumbent was running for re-election. In stark contrast, the proposal in the NPRM would treat a communication as political if it contains *any* reference to a candidate, no matter in what capacity, and could, therefore, restrict the ability of IRC § 501(c)(4) organizations to engage in the same kind of valuable policy advocacy as was previously approved.

The proposed definition of public communication in the NPRM would reach a far

broader array of communications than are covered under BCRA's definition of electioneering communications that was considered in Rev. Rul. 2004-06. Whereas BCRA only reaches broadcast ads, *see* 2 U.S.C. § 434(f)(3)(A)(i), the NPRM would also reach websites, newspapers, magazines, any form of paid advertising (such as billboards), and any other communication that reaches or is intended to reach more than 500 persons. *See* Prop. Reg. § 1.501(c)(4)-1(a)(2)(iii)(B)(5). Thus, IRC § 501(c)(4) organizations would be limited not only in sponsoring radio and television ads that refer to a candidate, but also would be limited within the 30/60 day windows in their ability to publish letters to the editor and op eds that refer to a candidate, to participate in panel discussions and give speeches, and to sponsor other public events if the organization expects that more than 500 persons may be in attendance or have electronic access to the events. Thus, the NPRM not only abandons the carefully reasoned distinctions adopted by the Service to avoid limiting legitimate policy advocacy by IRC § 501(c)(4) organizations, it expands the types of communications that would be covered by the broader restriction even beyond what Congress considered necessary when it enacted BCRA.

The NPRM takes this expansive position without providing any explanation of why these beneficial activities should no longer be treated as serving the general welfare of the community. Instead, like the other parts of the definition of CRPA, Treasury and the IRS state only that the proposed expansion of regulated public communications is made "in the interest of greater clarity," 78 Fed. Reg. at 71539, and "would avoid the need to consider potential mitigating or aggravating circumstances in particular cases (such as whether an issue-oriented communication is "neutral" or "biased" with respect to a candidate)." *Id*. Adopting a blanket *per se* rule that captures every public communication that "refers to" a candidate and is disseminated within 30 or 60 days of an election is not, however, the only option available in attempting to define regulated political communications. In *FEC v. Wisconsin Right To Life, Inc.,* 551 U.S. 449 (2007) ("*WRTL")*, the Supreme Court considered the application of BCRA's prohibition on corporate electioneering communications to radio ads sponsored by an IRC § 501(c)(4) organization as part of a grassroots lobbying campaign. Noting that BCRA's statutory definition of electioneering communications could, if taken literally, reach genuine issue ads, the Court fashioned a more narrow test to distinguish between "discussion of issues on the one hand and advocacy of election or defeat of candidates on the other," 551 U.S. at 467, the same task facing the IRS in the NPRM. "[A] court should find that an ad [is prohibited]," the Court said, "only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." 551 U.S. at 470.

The "no other reasonable interpretation" test fashioned by the Court in *WRTL* is "objective, focusing on the substance of the communication rather than amorphous considerations of intent and effect." 551 U.S. at 449. And, like the expressed goal of the IRS in the NPRM, it entails "minimal if any discovery, to allow parties to resolve disputes quickly without chilling speech through the threat of burdensome litigation." *Id.* Finally, just as the NPRM claims a need to avoid consideration of multiple factors, the Court's test "eschew[s] 'the open-ended rough-and-tumble of factors,' which 'invites complex argument in a trial court and a virtually inevitable appeal.'" *Id*., quoting *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock*

Co., 513 U.S. 527, 547 (1995). The NPRM already includes a "no other reasonable interpretation" test which is similar to the test adopted by the Supreme Court in *WRTL*. *See* Prop. Reg. § 1.501(c)(4)-1(a)(2)(iii)(A)(1)(ii). There is no valid reason to go beyond this test to include a blanket "refer to" test as proposed in the NPRM, and, because it would significantly restrict genuine issue-related advocacy, that proposal should be dropped entirely.

E. Grants And Other Transfers to IRC § 501(c) Organizations.

The NPRM proposes to treat as part of CRPA any gift, grant, subscription, loan, advance, or deposit of money or anything of value to any organization described in IRC § 501(c) that engages in CRPA as defined elsewhere in the proposed regulation. *See* Prop. Reg. § 1.501(c)(4)-1(a)(2)(iii)(A)(4)((iii). This rule would not apply, however, if (1) the contributor organization obtains a written representation from an authorized officer of the recipient organization stating that the recipient organization does not engage in CRPA activity and the contributor organization does not know or have reason to know that the representation is inaccurate or unreliable, *and* (2) the contribution is subject to a written restriction that it not be used for CRPA. *See* Prop. Reg. § 1.501(c)(4)-1(a)(2)(iii)(D). Although the NPRM states that the proposed regulation "is similar to" the definition of contribution that applies for purposes of IRC § 527, *see* 78 Fed. Reg. at 71539, the proposal in fact is far more restrictive than the current rule applicable under IRC § 527, and the proposal is unreasonable in other respects as well.

Under current law, while an expenditure by an IRC § 501(c) organization may be made for an exempt function directly or through another organization, such an organization "will not be absolutely liable under section 527(f)(1) for amounts transferred to an individual or organization" and it will not be subject to tax if it takes "reasonable steps to ensure that the transferor does not use such amounts for an exempt function." Treas. Reg. § 1.527-6(b)(1)(ii). It has generally been understood that an IRC § 501(c) organization will comply with this mandate if it includes a written condition on the transfer that prohibits the recipient from using transferred funds for exempt purposes.[6] Under the proposed regulation, in contrast, even if a contributor organization prohibits the use of its funds for CRPA activities, under the first prong of the proposal the contributor must also obtain a certification from the recipient that it does not engage in such activities *even with funds received from other sources.* Contrary to the suggestion in the NPRM, this requirement is far more restrictive than the existing rule under IRC § 527.

Not only does the proposal in the NPRM go well beyond existing requirements, it could significantly deter legitimate social welfare activities by IRC § 501(c)(4) organizations. At the time that an IRC § 501(c)(4) organization is considering whether to make a grant to another IRC § 501(c) organization, the grantor needs to know whether the grant may place in jeopardy its

[6] The regulations relating to grants by IRC § 501(c)(3) organizations to other IRC § 501(c) organizations that engage in lobbying take a similar approach. *See* Treas. Reg. §§ 56.4911-3(c)(3)(B) and -3(f)(3) (controlled grant by electing charity for nonlobbying purposes is not treated as lobbying by the charity).

own exemption. Yet, it may be uncertain at the time that the grant is made whether or to what extent the grantee will engage in CRPA activities during the remainder of the taxable year (or some future year) using funds received or to be received from other sources. Grantees who are uncertain about their future plans will, naturally, be reluctant to certify that they will never engage in CRPA activities and will therefore be unwilling to provide the safe harbor certification required to protect the grantor. The only way to avoid this conundrum is to provide, as under the current rule, that a grant made under terms that prohibit its use for CRPA will not be included in the grantor's CRPA.

The proposal in the NPRM is unduly expansive for another reason. If an IRC § 501(c)(4) organization does not obtain a safe harbor certification from the grantee, the full amount of the grant will be treated as CRPA regardless of the amount of CRPA actually conducted by the grantee organization. Conceivably, a grant of say $100,000, would be treated in its entirety as CRPA even though the grantee only spends $1000 or less on CRPA activity. No legitimate purpose can be served by such a result. If the safe harbor certification is not modified as suggested above, the proposal should at least be modified to provide that grants to other IRC § 501(c) organizations will be treated as CRPA only up to the lesser of the amount of the grant or the amount of CRPA engaged in by the grantee. Otherwise, IRC § 501(c)(4) organizations will be restrained in making grants to other organizations that plainly serve social welfare purposes.

The proposed regulation is unreasonable in other respects as well. First, the proposal could be interpreted to apply even when an IRC § 501(c) organization receives fair market value in return for the amount that it transfers to the other organization, including where the contributor pays dues to join another organization. Cf. Treas. Reg. § 56-4911-3(c)(3)(A) (transfers by electing charity to noncharities are not treated as lobbying by the charity if made for fair market value). Second, under the proposed regulation an IRC § 501(c)(4) organization must obtain a certification from every IRC § 501(c) organization to which it makes a transfer of funds, no matter how small an amount is transferred. To avoid the burden created by such a requirement, especially for small and mid-sized organizations, the proposal should be modified so that it does not apply with respect to grants of less than $100,000. Third, since the proposal applies to "advances," as well as actual transfers, an IRC § 501(c) organization would need to obtain a certification from a related organization for which it provides payroll and other administrative services, even where the other organization later reimburses the "contributing" organization for the amounts which it advanced. This is a common arrangement among related IRC § 501(c) organizations that would become unwieldy, if not unworkable, if the proposed regulation is adopted, and it should be revised to make clear that such arrangements are not intended to be covered. Fourth, since the proposal appears to apply to transfers made between affiliated organizations, such as between a national organization and its state and local chapters, it could be applied to dues, fees and other transfers made within a multi-level organization, although there is no evidence that such arrangements have led to abuse.[7] Finally, the proposal would prevent many

[7] Thus, if a national IRC § 501(c)(4) organization were to make a grant to an affiliated IRC § 501(c) organization that engages in any amount of CRPA, the full amount of the grant would

IRC § 501(c)(4) organizations from transferring funds to their related or other IRC § 501(c)(3) organizations, which are absolutely prohibited from engaging in partisan political activities, since the recipient organization must be able to certify that it does not engage in any CRPA activities at all, including nonpartisan activities that may be entirely permissible for IRC § 501(c)(3) organizations. The proposal should at least be modified to except transfers to IRC § 501(c)(3) organizations.

F. Judicial and Executive Branch Appointments.

The NPRM proposes to include within the definition of "candidate" any individual who publicly offers himself, or is proposed by another, for selection, nomination, election, or appointment to any federal, state, or local public office." Prop. Reg. § 1.501(c)(4)-1(a)(2)(iii)(B)(1). The NPRM explains that this definition "include[s] activities related to a broader range of offices (such as activities relating to the appointment or confirmation of executive branch officials and judicial nominees)." 78 Fed. Reg. at 71538. The NPRM wrongly states that this broader definition is already applied to IRC § 501(c)(4) organizations through IRC § 527(f), which taxes exempt function activity by such organizations. The inclusion of activities to influence executive and judicial branch nominees will also cause numerous administrative difficulties not addressed in the NPRM.

In GCM 39694 (Jan. 22, 1988), the Office of Chief Counsel considered the tax consequences to an organization described in IRC § 501(c)(3) if such organization seeks to influence the Senate confirmation of an individual nominated by the President to serve as a federal judge. Based on a detailed analysis of the applicable statutory and regulatory provisions and arguments made by outside commentators, Chief Counsel reached three conclusions, the second and third of which are relevant to the issues raised in the NPRM: (1) activities seeking to influence the Senate's confirmation vote constitute carrying on propaganda, or otherwise attempting to influence legislation, within the meaning of sections 501(c)(3), 501(h) and 4911; (2) activities seeking to influence the Senate's confirmation vote do *not* constitute participation in, or intervention in, any political campaign on behalf of any candidate for public office within the meaning of IRC § 501(c)(3); and (3) activities seeking to influence the Senate's confirmation vote constitute an exempt function expenditure for purposes of sections 527(e) and (f).

Consistent with the second holding in GCM 39694, the IRS issued guidance to the public stating that attempts to influence the Senate confirmation of a federal judicial nominee "do not constitute participation or intervention in a political campaign within the meaning of sections 501(c)(3) and 4955," and that this activity "is not influencing the outcome of a public election within the meaning of section 4945(d)(2)." Notice 88-76, 1988-27 I.R.B. 34. In treating as part

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be included in the national organization's calculation of CRPA. On the other hand, if the affiliate were operated as part of the national organization, only the actual amount spent by the affiliate would be included as CRPA, a difference which could force some organizations to restructure the way in which they operate at the state and local level.

of CRPA activities to influence the nomination or appointment of executive or judicial branch officials, the NPRM completely ignores the Service's longstanding position, formally stated in Notice 88-76, that such activities do not constitute participation or intervention in a political campaign. The NPRM does not acknowledge the apparent change of position in this regard nor does it provide any basis for its conclusion that such activities do not constitute social welfare activity within the meaning of IRC § 501(c)(4), which should be the determinative consideration with respect to this issue.

With respect to the third issue considered in GCM 39694, relating to the definition of "exempt function" activity for purposes of sections 527(e) and (f), the IRS took no final position and instead sought comments from the public concerning Chief Counsel's position. *See* Announcement 88-114, 1988-37 I.R.B. 26.[8] The IRS has never issued a final determination of the issues raised in the 1988 announcement with respect to the definition of "exempt function" activity. *See e.g.* Judith E. Kindell and John F. Reilly, *"Election Year Issues,"* in 1992 Exempt Organizations Continuing Professional Education Technical Instruction Program, 448 n.8 ("No final determination of this issue has been made."); Judith E. Kindell and John F. Reilly, *"Election Year Issues,"* in FY 2002 Exempt Organizations Continuing Professional Education Technical Instruction Program, 336, 397 n. 27 (same). Thus, the NPRM's proposal to include such activities as part of the definition of CRPA because they are already applicable to IRC § 501(c)(4) organizations through IRC § 527(f) is based on an assumption about the current state of the law which is simply incorrect.[9] The NPRM also fails to respond to the important issues raised by Alliance for Justice and other commentators[10] in 1988 in response to the suggestion that executive and judicial branch nominations might be considered exempt function activity. And, finally, even if the NPRM were correct respecting the current understanding of exempt function activity, it fails to explain why this limited element of the definition of "exempt function" under IRC § 527 should be incorporated into IRC § 501(c)(4) when the NPRM has reserved other aspects of that question for a subsequent rulemaking.

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[8] Alliance for Justice submitted detailed comments in response to Announcement 88-114, a copy of which is attached as Appendix A to these comments and incorporated by reference.

[9] Since IRC § 501(c)(4) organizations are not subject to tax under IRC § 527(f) if they have less than $100 in net investment income, *see* IRC § 527(f)(2), the definition of exempt function is not relevant for many small and mid-size IRC § 501(c)(4) and other IRC § 501(c) organizations that have little or no investment income. Thus, even if the explanation in the NPRM was not based on an incorrect assumption about current IRS policy, the proposed regulation would still apply a radically new and much broader definition of "candidate" to those IRC § 501(c)(4) and other IRC § 501(c) organizations, contrary to the suggestion in the NPRM that IRC § 501(c)(4) organizations already are subject to this definition.

[10] We are not aware of any comments submitted in response to Ann. 88-114 that supported the view that activities to influence executive and judicial branch nominations should be treated as exempt function activity under IRC § 527(e) and (f).

In addition to the erroneous legal position relied on in the NPRM, Treasury and the IRS do not explain how drastically expanding the types of restricted activities to include a wide range of activities that have nothing to do with elections and are, in essence, lobbying activities, will serve the stated goal of achieving regulatory clarity and simplicity in enforcement. In fact, the proposal will introduce a broad new area of uncertainty for the IRS and the regulated community alike. For example, will a communication that expresses a view on the qualities of a prospective nominee or appointee be treated as having "no reasonable interpretation" other than a call for or against the individual's nomination if it does not include a call to action or other clear statement urging members of the public to contact the nominating, appointing or confirming authority with respect to the individual? Does seeking to influence the nomination or appointment of executive branch officials only include positions that are subject to confirmation by the Senate or a comparable state or local legislative body, as was the case in GCM 39694, or does it include all positions in the Executive and Judicial branches? Does the proposed regulation include positions filled by the members of independent agencies and commissions, or just to those filled by the President, Governor or other chief executive? How does the provision relating to candidate participation in events held within 30/60 days of an election apply to individuals who are not participating in any election but have been nominated to office?[11] The proposed regulation provides no guidance on these and many other important questions raised by expanding the definition of "candidate" to include individuals nominated to judicial and executive branch positions.

In sum, the proposal to include activities seeking to influence nominations and appointments to executive and judicial branch positions has not been carefully considered and it should be dropped from any final regulation. In addition, without waiting for final regulations, the IRS should issue immediately a statement retracting its position in the NPRM that "exempt function" activity under IRC § 527(f) currently includes seeking to influence the nomination and appointment of individuals to executive and judicial branch positions. Otherwise, IRC § 501(c)(3) and other IRC § 501(c) organizations that are seeking to influence executive and judicial branch nominations will be misled into believing that they are currently subject to tax on

[11] The NPRM asks whether a provision similar to Prop. Reg. § 1.501(c)(4)-1(a)(2)(iii)(A)(2), relating to public communications that refer to a candidate within 30/60 days of an election, should be included with respect to communications referring to a candidate for state or federal appointive office. *See* 78 Fed. Reg. at 71539. As we have discussed, there is no basis for including such individuals in the definition of "candidate" at all. Furthermore, there is no clear point in time, comparable to an election, that could appropriately be used to limit such a requirement, in part because the names of individuals who are being considered for judicial and executive branch positions frequently are subject to speculation in the press and elsewhere and in part because the timing of events such as nominations, committee hearings, and confirmation votes cannot be predicted with certainty and frequently are changed. It is also unclear how such a requirement would apply to individuals who are being considered for appointment to judicial and executive branch positions that are not subject to legislative confirmation.

their expenditures for those activities. IRC § 501(c)(3) and other IRC § 501(c) organizations have relied on the Service's 1988 announcement, discussed above, that their lobbying activities relating to judicial and executive branch nominations are not currently subject to tax under IRC § 527(f). An oblique reference in an NPRM relating to an entirely separate issue is not the appropriate means to announce a change to this long-standing and far-reaching policy, nor does it address the many legitimate arguments which have previously been presented to the IRS against the application of IRC § 527 to such activities.

G. Definition of Candidate.

In addition to improperly including individuals nominated to serve in executive and judicial branch positions, the NPRM's proposed definition of candidate is unclear in a number of significant respects. For example, is an individual who has established an exploratory committee automatically to be deemed a "candidate," even if he or she is not yet deemed a candidate under federal election law and may ultimately decide not to run? Is an individual a "candidate" merely because he or she is included by a media outlet in its polling of public attitudes regarding potential candidates, no matter how long in advance of the election the polling takes place? What if the polling is conducted by a political organization, such as a political party, rather than a media outlet? Also, will an IRC § 501(c)(4) organization be held responsible if it did not have actual knowledge of the candidate's actions or those of third parties?

The definition will also require detailed factual inquiries, contrary to the goal asserted by Treasury and the IRS in the NPRM. Whether an individual has "publically offered" him or herself for public office cannot be resolved in many cases without a factual inquiry into the individual's communications with a wide variety of political actors. Similarly, whether an individual has been "proposed by another" may require investigation into the actions of news outlets, political party operatives, and members of the public, many of which are private. It would avoid these kinds of investigations if the proposed regulation were instead to treat as candidates only those individuals who have qualified as candidates under applicable federal, state or local law.

H. Internet and Web-based Communications.

The definitions of "communication" and "public communication" proposed in the NPRM include electronic communications such as those on the Internet and in emails. *See* Prop. Reg. § 1.501(c)(4)-1(a)(2)((iii)(B)(3) and (5). While the NPRM states that the proposed regulations draw generally on definitions of political campaign activity adopted by the Federal Election Commission (FEC), *see* 78 Fed. Reg. at 71537, it ignores the fact that the FEC has excluded most Internet communications from its definition of public communication. *See* Final Rule, "Internet Communications," 71 Fed. Reg. 18589 (April 12, 2006), amending 11 C.F.R. § 100.26. This decision, adopted after extensive public hearings, was made 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." *Id.* Many of the unique

factors of the Internet cited by the FEC similarly argue in favor of excluding most Internet communications from regulation by the IRS under IRC § 501(c)(4).

The low cost of Internet communications and its near universal accessibility, for example, create "the most accessible marketplace of ideas in history," 71 Fed. Reg. at 18590, and "provide for a free exchange of information and opinions," 71 Fed. Reg. at 18591, opportunities that can clearly be used to promote the general welfare as provided in IRC § 501(c)(4). The low cost of Internet communications also means that the resources devoted by IRC § 501(c)(4) organizations to political activity on the Internet will be inconsequential. At the same time, "the same unique characteristics of the Internet that make it so widely accessible to individuals and small groups also make[] it more likely that individuals and small groups ... might engage in activities that unintentionally trigger ... regulation." *Id.* And, as the FEC noted, small organizations that often resort to the Internet, rather than other forms of more expensive media, are unlikely to have legal counsel and accountants who can advise them regarding the permissible scope of Internet activities.

Inclusion of Internet communications in the definition of restricted political campaign activity will also create a significant administrative burden on covered organizations. Requiring covered organizations to monitor and edit blogs, chats, social media to eliminate partisan and, as proposed, nonpartisan communications by persons who are not even associated with the organization demands a significant commitment of resources. While the IRS has stated in the past that an organization is responsible for the content of websites to which it has established a link on its own website, *see* Rev. Rul. 2007-41, this rule has been difficult to follow in practice because the content of linked sites is constantly changing and it is unclear how far an organization must go to fulfil this requirement. Furthermore, unlike other forms of media, websites not only include new postings and content, but they may also include content posted in earlier periods of time. References to public officials as part of a lobbying effort, for example, may later become problematic if they remain on a website within the 30/60 day windows proposed in the NPRM for public communications.

For all of these reasons, the IRS, like the FEC, should adopt a "restrained regulatory approach" by excluding most Internet communications from the definition of CRPA.

I. Volunteer Activity.

The NPRM proposes an "attribution" provision under which the activities for which an organization may be held responsible not only include activities paid for by the organization itself, but also include activities "conducted by an officer, director, or employee acting in that capacity or by volunteers acting under the organization's direction or supervision." Prop. Reg. § 1.501(c)(4)-1(a)(2)(iii)(C). This proposal is unclear in a number of important respects.

First, the NPRM fails to make clear when an organization's officers, directors and employees will be deemed to be acting in their official, rather than individual, capacities. Rev.

Rul. 2007-41 provided a series of examples illustrating the facts and circumstances to be considered in determining whether political activity by organizational leaders will be attributed to an exempt organization. The Ruling explained that the regulation of political campaign activity by exempt organizations "is not intended to restrict free expression on political matters by leaders of organizations speaking for themselves, as individuals. Nor are leaders prohibited from speaking about important issues of public policy." Consistent with these policies, the Service found that the activities of organization leaders who endorsed candidates for public office would not be attributed to their organizations as long as organization resources were not used to support the endorsements, they did not appear in official organization publications, were not made at official organization functions, and did not state that the employees were acting as representatives of the organization. Rev. Rul. 2007-41, Situations 3 and 5. Since the NPRM claims to be replacing the facts and circumstances test applied in Rev. Rul. 2007-41 with more clear guidance, the proposed regulation needs to carefully define when the activities of officers, directors and employees will be regarded as having been made in their official capacities and when they will be treated as individual activity; ignoring this question in the proposed regulation, while eliminating the previous guidance in this area, is the worst of both possible worlds.

Second, the proposal in the NPRM is unclear as to whether political activities of officers, directors and employees will be attributed to an exempt organization merely because those individuals are subject to the "direction and supervision" of the organization, and, if so, how that determination will be made. Since officers and directors of nonprofit organizations frequently are unpaid, individuals holding these positions would apparently be "volunteers" under the second prong of this proposal. Similarly, organization employees who are acting in their individual capacities apparently could also be treated as volunteers. If this interpretation is correct, however, how will it be determined whether officers, directors, and senior management employees have been "directed" to engage in political activities or are being "supervised" by the organization when they engage in political activities, since it is the very same officers, directors and employees who would be the ones to give such direction and supervision on behalf of the organization? On the one hand, if it will be *presumed* that the political activities of officers, directors and senior management employees are by definition directed and/or supervised by the organization, the proposed regulation will create a *per se* rule which prohibits any personal political activity by organization officers, directors and senior employees. On the other hand, if the Service intends to conduct a factual investigation to determine whether officers, directors and senior management employees have been directed to engage in their personal activities or are being supervised in carrying them out, it is unclear what facts would be relevant in making such a determination.

Third, application of the NPRM's attribution rule to volunteer political activities by members or other supporters of an organization who are not directors, officers, or senior employees will similarly present interpretative uncertainty and require burdensome and time-consuming factual inquiries to determine whether the organization has exercised direction or supervision. Suppose an IRC § 501(c)(4) organization distributes a letter to its members shortly before an election supporting a particular candidate's position on an issue of concern to the

organization and indicating that the candidate needs the assistance and support of like-minded persons? While the expense of circulating such a communication would likely constitute CRPA under the proposed regulation, would the contributions and other support made by the organization's members to the candidate also be attributed to it under the proposed "attribution" rule? In making such a determination, would the IRS need to determine whether the members provided their contributions before or after receiving the organization's letter? Would the organization be exonerated if it could show that certain members did not even read the letter before making their contributions to the candidate? Would there be a different result if the organization's letter favorably mentioned the candidate's position on the issue, but did not expressly urge its members to make contributions to or volunteer to assist the candidate?

Finally, the NPRM provides no guidance to the regulated community and to IRS personnel for determining how volunteer political activity which is attributed to an organization under the proposed rule should be counted in determining whether an organization has exceeded applicable limits on political campaign activity, a major problem under the current facts and circumstances test which would be perpetuated under the NPRM. Is volunteer activity to be deemed excessive based on the number of volunteers involved, the time they spend, the value of the services provided, or all of the above? Many nonprofit organizations do not keep detailed records of volunteer activity,[12] and it is unclear how, if at all, volunteer activity can be valued with any degree of accuracy.

In sum, the proposed definition raises numerous questions of interpretation which without further clarification will only add to the uncertainty the Service states it wishes to avoid, and it will at a minimum lead to detailed factual inquiries that will both deter personal political activity by persons associated with an organization and complicate the Service's enforcement process.

J. In-Kind Contributions.

The NPRM states that the term "anything of value" in the definition of "contribution" "would include both in-kind donations and other support (for example, volunteer hours and free or discounted rentals of facilities or mailing lists)." 78 Fed. Reg. at 71539. Unless this proposal is significantly narrowed, it would be wholly unworkable when applied to certain otherwise permissible expenditures by IRC § 501(c)(4) organizations.

Under the Federal Election Campaign Act and many state election laws, certain expenditures by IRC § 501(c)(4) organizations are treated as in-kind contributions to a candidate or a political party if the expenditures are coordinated with the candidate or party. The NPRM appears to incorporate these rules insofar as it states that a contribution is included in CRPA only "if the transfer is recognized under applicable federal, state, or local campaign finance law as a

[12] For this reason, the IRS permits organizations to estimate the number of volunteers for reporting purposes on Form 990, but such an approach is not satisfactory where volunteer activity could cause an organization to lose its exemption altogether.

reportable contribution to a candidate for elective office." Prop. Reg. § 1.501(c)(4)-1(a)(iii)(4)(i).[13] If this language is intended to incorporate federal and state rules in determining whether coordinated communications and other activities are to be included as in-kind contributions, the proposed regulation poses a number of difficulties, and could expand significantly the restrictions on social welfare activity otherwise contained in the NPRM's proposals. Thus, if an IRC § 501(c)(4) organization were to sponsor an advertisement that refers to a candidate but is disseminated outside of the 30/60 day windows provided in Prop. Reg. 1.501(c)(4)-1(a)(2)(iii)(2), it would not be included as CRPA. However, the same advertisement could be treated as an in-kind contribution and therefore included as CRPA, if under applicable election law it were treated as an in-kind contribution because the organization was encouraged to run the advertisement by the candidate to whom the ad refers. Application of such a coordination rule to convert expenditures into in-kind contributions in this manner would create severe difficulties for the Service and the regulated community.

First, in order to apply the proposed regulation the Service's agents would have to be knowledgeable in how federal and state laws treat such coordinated expenditures, a complex and easily misunderstood area of election law. In the election law context, "coordination" applies to a wide variety of conduct by an organization's employees and consultants. The FEC itself needed four separate rulemakings over a nearly ten-year period before it was able to settle on a specification of the kinds of conduct that will turn expenditures into coordinated communications.[14] *See* Final Rule, "Coordinated Communications," 75 Fed. Reg. 55947 (Sept.

[13] In addition to the issues discussed in text, this provision is problematic in other respects. For example, the thresholds for reporting contributions to candidates vary from state to state, with the result that a contribution in one state may be reportable whereas the same contribution in another state may not be reportable. Apart from requiring IRS agents to become familiar with these different rules, from the standpoint of tax equity it is unclear why the same contribution should or should not be treated as "social welfare" activity merely because of the state in which it is made. The proposed regulation is also overbroad and internally inconsistent insofar as it treats any contribution made to an IRC § 527 organization as CRPA regardless of the amount. Prop. Reg. § 1.501(c)(4)-1(a)(2)(iii)(4)(ii). Since all campaign committees established by candidates for public office are exempt under IRC § 527, this provision would treat as CRPA every contribution to a candidate committee, whereas under subparagraph (i) of the same regulation a contribution to a candidate would be included in CRPA only if it is reportable under federal, state or local campaign finance law. Furthermore, since IRC § 527 organization are not required to engage exclusively in exempt function activities, *see* Treas. Reg. § 1.527-2(a)(3), contributions to such organizations may not be used for political purposes and the regulation should not define them *per se* as CRPA. Rather, contributions to IRC § 527 organizations should be treated as CRPA only under the same limited circumstances as apply to contributions to other IRC § 501(c) organizations, as discussed earlier in these comments.

[14] When Congress enacted the Bipartisan Campaign Reform Act of 2002, it attempted to define a new definition of "coordinated activity" to replace the FEC's then existing regulation. *See e.g.* S. 27, 107th Cong., 1st Sess § 214(a)(1)(B) (as introduced on January 22, 2001); H.R.

15, 2010) (setting out regulatory history). Some states have adopted coordination rules for state elections which differ from the federal rule in significant ways, *see e.g.* R.I. Stat. § 17-25-23; Minn. Advisory Opinion 437 (Feb. 11, 2014), while other states have never indicated whether and, if so, how a coordination rule will be applied under their election laws. Expecting IRS agents to navigate these complex rules can only lead to arbitrary determinations and uncertainty in the regulated community.

Second, no matter how coordination is defined, whether it exists is an intensely fact-specific question that can involve extensive investigative resources and intrude significantly into the internal workings of organizations. *See Federal Election Commission v. Colorado Republican Federal Campaign Committee,* 533 U.S. 431, 471 n. 3 (2001) (Thomas, J. dissenting, quoting with approval from Brief for American Civil Liberties Union, *et al,* as *Amici Curiae,* 18) (enforcement of coordination rules "'inevitably ... involves an intrusive and constitutionally troubling investigation of the inner workings of political [actors].'") Determining whether coordination exists may involve uncovering, for example, whether a candidate's agent hinted that certain expenditures would be helpful to the candidate, whether an organization received non-public information from a candidate or the candidate's agent, or whether the organization relied on a consultant or employee who formally worked for the candidate or political party. *See* e.g., 11 C.F.R, § 109.21(d). It may also involve looking into whether an organization has implemented a wall between its employees (or consultants) who had contact with a candidate and those who were involved in making the expenditures subject to investigation. *See* 11 C.F.R. §109.21(h). FEC cases involving allegations of coordination have required the production of many thousands of pages of internal planning documents, *see e.g. AFL-CIO v Federal Election Commission,* 177 F.Supp. 2d 48 (D.D.C. 2001)*, aff'd*, 333 F.3d 168 (D.C.Cir, 2003), and taking sworn testimony from both high-ranking incumbent officials and leaders of an organization. *See e.g. Federal Election Commission v. Public Citizen, Inc.* 64 F. Supp. 2d 1327 (N.D.Ga. 1999), *rev'd on other grounds,* 268 F. 3d 1283 (11th Cir. 2001); *Federal Election Commission v. Christian Coalition, Inc.,* 52 F. Supp. 2d 45 (D.D.C. 1999). The IRS has been roundly criticized in recent months for the broad and intrusive information its agents have demanded from certain IRC § 501(c)(4) organizations; incorporating a broad coordination rule into the definition of CRPA will almost certainly exacerbate this problem rather than solve it.

Third, without a clear and easily understood definition of coordination, the proposed regulation will likely interfere with lobbying and other advocacy activities by IRC § 501(c)(4)

380, 107th Cong., 1st Sess. §§ 205, 206 (as introduced January 31, 2001). This proposal resulted in so much criticism from legislators and outside groups that the principal sponsors of the proposals were forced to withdraw them from consideration. *See e.g.* 147 Cong. Rec. S3184 (daily ed. March 30, 2001) (Statements of Senators McCain and Feingold); *see also* H.Rep. No. 107-131, part 1, 107th Cong., 1st Sess. 4 (July 10, 2001). Ultimately, Congress abandoned its effort to define coordination in the statute and simply added a provision invalidating the FEC's regulation and directing the agency to develop a new one. *See* Pub. L. No. 107-155, § 214(b)-(c), 116 Stat. 94-95 (2003).

organizations, since such social welfare activity often requires contact with incumbent legislators and other public officials. In order not to deter legitimate lobbying, the FEC coordination rule includes a separate *content* standard under which only limited types of communications of the kind most likely to be coordinated in connection with an election are subject to the *conduct* standards in the regulations. *See* 11 C.F.R. § 109.21(c). The content standard attempts to distinguish legitimate coordination concerning lobbying and other public policy advocacy, while also avoiding disruptive factual inquiries into organizational conduct alleged to have involved coordination. *See Shays v. Federal Election Commission,* 414 F.3d 76, 99-100 (D.C.Cir. 2005), although this has not been the case in actual practice. Many state election rules do not even include a similar limitation. The NPRM gives no indication that Treasury and the IRS have considered the serious consequences for non-political social welfare advocacy that would result from application of a broad coordination rule in determining whether an IRC § 501(c)(4) organization has engaged in CRPA.

In order to achieve regulatory clarity and avoid intrusive fact-finding investigations with respect to in-kind contributions the final regulations should include a single, simple definition of coordination for federal tax purposes that does not rely on the complex federal or state election law rules in this area and does not interfere with non-political advocacy such as lobbying and policy development. Alternatively, final regulations should provide that expenditures by IRC § 501(c)(4) organizations will not be treated as in-kind political contributions as the result of coordination with candidates or political parties until Treasury and the IRS address the issue of coordination in a future rulemaking. *Cf.* Treas. Reg. §§ 1.527-6(b)(2) and (b)(3) (reserving for further rulemaking application of IRC 527(f) to indirect expenses and expenditures allowed by federal election law).

IV. The Current Regulation Should Not Be Revised to Further Restrict the Amount of Political Activity That IRC § 501(c)(4) Organizations May Undertake.

Current tax regulations provide that an organization is operated exclusively for the promotion of social welfare, as required in IRC § 501(c)(4), "if it is primarily engaged in promoting in some way the common good and general welfare of the people of the community ... [and it is] operated primarily for the purpose of bringing about civic betterments and social improvements." Treas. Reg. § 1.501(c)(4)-1(a)(2) (emphasis added). Since the regulations further state that the promotion of social welfare "does not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office," Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii), the result is that IRC § 501(c)(4) organizations may not engage in political campaign intervention as their primary activity. See Rev. Rul. 81-95, 1981-1 C.B. 332. The NPRM states that Treasury and the IRS are considering whether the "primarily" standard in the current regulations should be changed and, if so, whether it should be redefined to incorporate an "insubstantial part" test, although it is not clear whether this change would be made for all activities that do not promote social welfare or would be limited to political campaign activities.15 See 78 Fed. Reg. at 71537-38. Since any proposal in this regard will require a separate formal rulemaking, we do not address this issue in full here.

As explained in the NPRM, the argument in support of narrowing the current regulation relies on the fact that IRC § 501(c)(3) and IRC § 501(c)(4) both require that an exempt organization be operated "exclusively" for exempt purposes and that the regulations under IRC § 501(c)(3) state that an organization will not be operated exclusively for exempt purposes "if more than an insubstantial part of its activities is not in furtherance of an exemption purpose," Treas. Reg. § 1.501(c)(3)-1(c)(1), a limitation which does not appear in the IRC § 501(c)(4) regulations adopted at the same time. A significant flaw in this argument is that it fails to recognize that certain activities that do not constitute exempt activities in themselves may nevertheless be "in furtherance of" exempt purposes and are not, even in the context of IRC § 501(c)(3) organizations, subject to an insubstantial test.

Under the IRC § 501(c)(3) regulations, for example, carrying on an unrelated trade or business is not an exempt activity. The regulations provide, however, that an organization may nevertheless be exempt under section 501(c)(3)

> although it operates a trade or business as a substantial part of its activities, if the operation of the such trade or business is in furtherance of the organization's exempt purpose or purposes and if the organization is not organized or operated for the *primary purpose* of carrying on an unrelated trade or business.

Treas. Reg. § 1.501(c)(3)-1(e) (emphasis added). If Treasury and the IRS revise the current regulations to allow only an insubstantial amount of non-social welfare activity, IRC § 501(c)(4) organizations that operate a trade or business would be treated differently than similar IRC § 501(c)(3) organizations under the quoted regulation, although there is no apparent basis in the IRC for such a distinction.

While the Service has determined that political activities do not constitute social welfare activities in themselves, such activities can be and frequently are "in furtherance of" an organization's social welfare purposes. Just as the primary purpose test applies in determining whether the trade or business activities of an IRC § 501(c)(3) organization are excessive, so too the same rule should continue to apply in determining whether the political activities of an IRC § 501(c)(4) organization are excessive. Cf. Rev. Rul. 74-361, 1974-2 C.B. 159 (volunteer fire company that provides recreational facilities for members is primarily engaged in promoting social welfare where providing facilities primarily furthers exempt purposes although recreational activities are not social welfare activities in themselves); Rev. Rul. 66-179, 1966-1 C.B. 139 (garden club that conducts substantial nonexempt social activities qualifies as social welfare organization under IRC § 501(c)(4) because it is operated primarily to bring about civic improvements).

The argument in support of applying an insubstantial part test to the political activities of IRC § 501(c)(4) organizations also ignores the fact that when Congress amended IRC §

501(c)(3) in 1954 expressly to prohibit any political campaign intervention,[16] no similar change was made to IRC § 501(c)(4) to limit the extent to which social welfare organizations could undertake political campaign activity. Congress could easily have adopted a similar restriction for IRC § 501(c)(4) organizations in 1954, but it chose not to do so.[17]

Congress has also left standing the policy in the current regulation even while legislating more generally in this area. Specifically, when Congress added IRC § 527 to the Code in 1975 to provide a tax exemption for political organizations, it recognized that many IRC § 501(c)(4), (c)(5) and (c)(6) organizations engage in more than an insubstantial amount of political activity but chose to address that situation by imposing a tax on the exempt function (political) activity of those organizations rather than denying exemption to them altogether. *See* IRC § 527(f). In describing new section 527(f), the House and Senate Committees both stated that under present law certain tax exempt organizations, such as IRC § 501(c)(4) organizations "may engage in political campaign activities," which under the IRC § 501(c)(4) regulations in effect at the time (and today) were permissible as long as they were not an organization's primary activity. *See* S.Rep. No. 93-1357, 93rd Cong., 2d sess. 533 (1974). If Congress disagreed with the regulations in effect at the time, it could have easily provided otherwise at the same time as it was dealing with other issues concerning taxation of IRC § 501(c) political activity. Its failure to do so lends

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[16] *See* Revenue Act of 1954, Pub. L. 83-591, § 501(c)(3), 68 Stat. 736, 899 (1954).

[17] The current regulation subjecting political activity by IRC § 501(c)(4) organizations to a "primary purpose" test was adopted immediately following enactment of the 1954 Revenue Act. As originally proposed, the regulation included *no* restriction on the amount of IRC § 501(c)(4) organization political activity. *See* Notice of Proposed Rulemaking, 21 Fed Reg. 460 (Jan. 21, 1956). This proposal was withdrawn and re-proposed in its current form several years later. *See* Notice of Proposed Rulemaking, 24 Fed. Reg. 142 (Feb. 26, 1959). It must be assumed that the drafters of this provision were aware that Congress did not intend to limit political activity of IRC § 501(c)(4) organizations when it took steps to limit such activity by IRC § 501(c)(3) organizations. *See e.g. Russello v. United States,* 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") In the more than fifty years since the primary purpose regulation was adopted, the Service has never questioned the validity of its original understanding with respect to political campaign activity of IRC § 501(c)(4) organizations. *See e.g.* Rev. Rul. 81-95, 1981-1 C.B. 332; Rev. Rul. 67-368, 1967-2 C.B. 194; *see also*, Raymond Chick and Amy Henchey, "*Political Organizations and IRC § 501c)(4),"* in FY 1995 Exempt Organizations Continuing Professional Education Technical Instruction Program Textbook, 191, 196-198; John Frances Reilly and Barbara A. Braig Allen, "*Political Campaign and Lobbying Activities of IRC § 501(c)(4), (c)(5),and (c)(6) Organizations,"* in FY 2003 Exempt Organizations Continuing Professional Education Technical Instruction Program Textbook, L-1, L-3.

strong support to the current IRC § 501(c)(4) regulations in this regard.[18]

Subsequent federal legislation further indicates that Congress does not believe that the rules restricting the amount of political campaign activity that may be undertaken by IRC § 501(c)(4) organizations need to be modified. In 1987, for example, Congress enacted IRC § 4955, which imposes an excise tax on the political expenditures of IRC § 501(c)(3) organizations, and IRC § 7409, which grants the Secretary authority to bring a civil action to enjoin any IRC § 501(c)(3) organization from further making political expenditures in violation of the Code. *See* Revenue Act of 1987, Pub. L. 100-203 (1987) Congress, however, explicitly chose not to apply these provisions to the political activities of IRC § 501(c)(4) organizations.

In sum, Congress has chosen over many years and on numerous occasions not to limit the amount of political campaign activity that may be undertaken by IRC § 501(c)(4), (c)(5) and (c)(6) organizations under the long-standing IRS regulation. Absent a clear direction from Congress, Treasury and the IRS should not therefore revise the primary purpose test for political activity in the current regulation.

V. The Narrow Definition of CRPA Proposed In the NPRM Should Not Apply To IRC § 501(c)(3) Organizations.

Although the IRS has long used the same definition of political campaign intervention for both IRC § 501(c)(3) and IRC § 501(c)(4) organizations, the NPRM "does not address the definition of political campaign intervention under section 501(c)(3)." 78 Fed. Reg. at 71537. Instead, the NPRM requests comments on the advisability of adopting an approach to defining political campaign intervention under IRC § 501(c)(3) similar to the approach set forth in the proposed regulations for IRC § 501(c)(4) organizations, or in addition to it. Since any new developments in this area will, as recognized in the NPRM, require a further rulemaking, we do not address this issue in full in these comments. As a general matter, however, we believe that the NPRM has it backwards—the appropriate question to be considered is why IRC § 501(c)(4) organizations should not continue to be subject to the same rules as IRC § 501(c)(3) organizations under which nonpartisan political campaign activities are recognized as furthering legitimate exempt purposes, not whether IRC § 501(c)(3) organizations should be subject to new more restrictive rules like those proposed to be applied to IRC § 501(c)(4) organizations. As we have explained, Treasury and the IRS have provided no reasonable explanation for this fundamental change in existing policy.

There is much to be gained in terms of regulatory clarity and efficient enforcement from the Service's longstanding practice of applying the same definition of political campaign activity

[18] The enactment of IRC § 527(f) is analogous to Congress' taxation of unrelated business activity by IRC § 501(c) organizations without limiting the amount of such activity that these organizations may undertake. *See* IRC § 511-513.

under IRC §§ 501(c)(3)[19] and 501(c)(4). Since these provisions are largely self-enforcing by exempt organizations themselves, there is a high premium on having rules that can be understood by the regulated community. For many years, Alliance for Justice has published written guidebooks and conducted in-person and on-line trainings to assist both IRC § 501(c)(3) and 501(c)(4) organizations to understand and implement the rules relating to permissible political campaign activity. Speaking from our experience, we can state unequivocally that having two different sets of definitions of political campaign activity would only lead to confusion and misunderstanding in the regulated community, especially among the many small and mid-sized organizations that cannot afford to retain legal counsel to assist them; indeed, the task of educating exempt organizations concerning the scope of permissible and impermissible activities, already a difficult one, would in our view become nearly impossible if different rules were applied to IRC § 501(c)(3) and IRC § 501(c)(4) organizations.

Based on its experience, Alliance for Justice strongly recommends that Treasury and the IRS adopt the same sets of rules for defining political campaign activity for IRC § 501(c)(3) and IRC § 501(c)(4) organizations. We wish to be clear, however, that this does *not* mean that we support any application of the new restrictive definition of CRPA proposed in the NPRM to IRC § 501(c)(3) organizations. Nonpartisan election-related activity has long-been recognized by the Service as serving educational and charitable purposes within the meaning of IRC § 501(c)(3). *See* e.g. Rev. Rul. 80-282, 1980-2 C.B. 178; Rev. Rul. 78- 248, 1978-1 C.B. 154. Many IRC § 501(c)(3) organizations conduct nonpartisan activities as an essential part of their exempt programs and should not suddenly be prohibited entirely from undertaking these activities without overwhelming evidence that the current rules are being abused. The administrative advantages of using a single definition for political campaign activity for IRC § 501(c)(3) and 501(c)(4) organizations are not sufficient to support applying the proposed CRPA definition to IRC § 501(c)(3) organizations; rather, these advantages provide yet another reason for rejecting the far-reaching definition of CRPA set forth in the NPRM with respect to IRC § 501(c)(4)

[19] The prohibition on political campaign intervention in IRC § 501(c)(3) is not the only provision applicable to such activities by charitable and educational organizations. IRC § 4955 imposes excise taxes on IRC § 501(c)(3) organizations and their managers with respect to the organizations' "political expenditures," and IRC §7409 gives authority to the Secretary to file a civil action to enjoin any IRC § 501(c)(3) organization from making "flagrant" political expenditures. If Treasury and the Service decide to undertake a further rulemaking with respect to political campaign intervention by IRC § 501(c)(3) organizations, the agencies should consider whether the application of a CRPA standard should be applied under these other provisions as well. In considering this question, furthermore, it should be noted that when Congress enacted IRC §§ 4955 and 7409 in 1987, it directed that the facts and circumstances test then in effect should be applied in defining the term "political expenditures." *See* S. Rep. No. 93-1357 at 534. Treasury and the IRS should also consider whether it is appropriate to apply a different definition of political campaign intervention to public charities than is applied to private foundations under IRC § 4945(f), which explicitly permits certain non-partisan voter registration activities.

organizations.

VI. The Narrow Definition of Political Activity In The NPRM Should Not Be Used To Determine Taxable "Exempt Function" Activity Under IRC § 527(f).

The NPRM also requests comments on the advisability of adopting rules that are the same as or similar to the regulations proposed in the NPRM for IRC § 501(c)(4) organizations for purposes of defining section 527 exempt function activity in lieu of a facts and circumstances approach reflected in Rev. Rul. 2004-06. 78 Fed. Reg. at 71537. Since further rulemaking would be necessary to implement such a proposal, we do not address it in full in these comments. It is clear, however, that the application of the CRPA definition to IRC § 527 would present serious difficulties.

First, treating nonpartisan political activity as "exempt function" activity under IRC § 527 cannot be reconciled with the statutory language, which defines "exempt function" as "the function of influencing or attempting to influence" the selection, etc. of any individual to public office.[20] *See* IRC § 527(e)(2). Nonpartisan election-related activities do not by definition seek to "influence" elections. Consistent with this language, the original regulations issued by the IRS after enactment of IRC § 527 expressly exclude "nonpartisan activities" from the definition of exempt function expenditures for purposes of IRC § 527(f). *See* Treas. Reg. § 1.527-6(b)(5). Treasury and the IRS cannot change this long-standing policy without ignoring the clear language of the statute.

Second, insofar as IRC § 527(f) imposes a tax on amounts "expended" by IRC § 501(c) organizations, exempt function activities by members, volunteers and other individuals may not be taxed to the extent that they do not entail expenditures by the organization itself, even if they would be included in the organization's CRPA under certain circumstances, as discussed in point III. Not only would imposing a tax on such activities contradict the statutory language, it would be virtually impossible in most cases to determine the value of the expenditures subject to tax.

Third, applying the proposed definition of CRPA to IRC § 527(f) would result in taxation of certain activities by IRC § 501(c)(4) and other IRC § 501(c) organizations that have long been recognized as exempt from tax, including partisan communications with an organization's members and payment of the administrative and fundraising expenses of an organization's affiliated political action committee. When the current regulations under IRC § 527(f) were adopted, Treasury and the Service expressly reserved the issue raised by commentators whether certain political activities typically carried on by labor organizations and trade associations, among others, should not be subject to tax because they are permissible under Federal and state election law. *See* T.D. 7744, Final Regulations, "Income Tax: Taxation of Political

[20] In contrast, IRC § 501(c)(3) uses the broader phrase "participate in, or intervene in" a political campaign and, as we have noted, the restriction on IRC § 501(c)(4) political activity derives not from any statutory language but on the meaning of the general term "social welfare."

Organizations," 45 Fed. Reg. 85730 (Dec. 30, 1980). If Treasury and the Service propose to revisit this policy after more than thirty years, they must explain why the long-standing policy needs to be changed at this time.

Finally, if Treasury and the Service ultimately propose to apply the definition of CRPA so as to expand the activities subject to tax under IRC § 527(f), they should also consider whether to apply the definition of CRPA in determining whether political campaign intervention by for-profit corporations and individuals is deductible for income tax purposes as ordinary and necessary business expenses under IRC § 162(e)(1). There currently are *no* regulations defining "political campaign intervention" for purposes of this provision. *See* Treas. Reg. § 1.162-20. Not only does the absence of guidance increase the likelihood that corporations and individuals are improperly deducting their political expenditures as business expenses, this gap also interferes with effective enforcement of the notice and proxy tax provisions in IRC § 6033(e) for membership dues paid to trade associations and business leagues. Failure to consider these issues while proposing to expand the taxable political activities of IRC § 501(c)(4) organizations would raise fundamental questions of tax fairness.

VII. Treasury and the IRS Should Not Attempt Through This Rulemaking To Increase Disclosure of Political Donors By Making It More Difficult For IRS § 501(c)(4) Organizations To Engage In Political Campaign Activities.

It has been suggested that the proposals in the NPRM should be adopted in order to force certain political activities out of IRC § 501(c)(4) social welfare organizations into IRC § 527 political organizations which are subject to greater disclosure requirements, particularly with respect to the identity of donors. If this is in fact the policy underlying the NPRM it should be acknowledged openly by Treasury and the IRS, so that the proposal can be evaluated for what it is.

At the outset, it should be recognized that the authority of Treasury and IRS to require disclosure of donors to IRC § 501(c)(4) organizations is constrained by specific statutory provisions that protect such information from public disclosure. *See* IRC §§ 6104(b) and 6104(d)(3). Treasury and the IRS do not have authority to evade these statutory protections by narrowing the kinds of social welfare activities that may be undertaken by covered organizations. Legal authority to increase disclosure of contributions to IRC § 501(c)(4) organizations is also constrained by the fact that Congress itself has to date rejected attempts to require expanded disclosure by IRC § 501(c)(4) and other IRC § 501(c) organizations when provided an opportunity to do so. For example, when Congress amended IRC § 527 in 2000 to add the current registration and reporting requirements for some political organizations, *see* IRC §§ 527(i) and (j), it rejected proposals that would also have increased disclosure requirements for IRC § 501(c)(4) and other IRC § 501(c) organizations.[21] Congress also considered the disclosure

[21] On June 22, 2000, the House Ways and Means Committee reported H.R. 4717 which would have required increased disclosure of donors by IRC § 501(c)(4), (c)(5) and (c)(6)

requirements for many types of nonprofit political activity and adopted provisions that are more narrow than the requirements under IRC § 527 when it enacted the Bipartisan Campaign Reform Act of 2002. Finally, numerous proposals to increase disclosure by politically active nonprofits have been considered by Congress in recent years, although none has been enacted. *See e.g.* H.R. 148, 113th Cong., 1st Sess. (2013); H.R. 4010, 112th Cong.. 2d Sess. (2012); S. 3369, 112th Cong., 2d Sess. (2012). Given the statutory protection afforded to contributions to IRC § 501(c)(4) organizations and Congress' failure directly to require greater disclosure by politically active nonprofit organizations, it is doubtful that Treasury and the IRS may seek to achieve the same result through a back-door rulemaking that does not even directly address the question of disclosure at all.

Apart from questions about the Service's legal authority in this area, the proposals in the NPRM do not address the need for enhanced disclosure in the area where it is needed most. Thus, one of the major concerns raised about the current rules under IRC § 501(c)(4) is that donors may contribute unlimited amounts of "dark money" to support political campaign activity by IRC § 501(c)(4) organizations without having their identities disclosed to the public. However, it is far from clear that large contributions of "dark money" are being used to support the kinds of nonpartisan activity that would be restricted for the first time under the NPRM, as distinct from partisan political activity such as express advocacy, which is already included in the current definition of political campaign activity. Based on media reports, "dark money" from large donors is used largely to support partisan political campaign activity; including nonpartisan activities in the definition of restricted activity will likely add very little to existing rules from the standpoint of disclosure of dark money.

Another issue that is not addressed squarely in the NPRM is whether there is a need for disclosure of donors by *all* IRC § 501(c)(4) organizations, rather than a subset of such organizations that receive very large contributions from a small number of corporate and individual donors. Focusing increased disclosure on such organizations would provide information to the public where it is needed most, without imposing the burden and cost of the IRC § 527 registration and reporting requirements on those organizations that are funded through small contributions from large numbers of donors. Congress is far better suited than Treasury or the IRS to address the question of "dark money" by focusing enhanced disclosure where it is needed most. Any attempt to address increased disclosure in this area should also consider whether changes are necessary in the existing disclosure rules that have become outdated and

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organizations, as well as IRC § 527 organizations. This bill was met by significant opposition from the nonprofit community, however, and in an effort to gain bipartisan support for some legislation, a substitute that applied only to IRC § 527 organizations was crafted and ultimately adopted as H.R. 4762. *See* 146 Cong. Rec. H5284 (daily ed. June 27, 2000) (statement of Rep. Houghton), H5286 (Statement of Rep. McDermott), H5288 (statement of Rep. Meehan), *id.* (statement of Rep. Houghton). Similar efforts to adopt enhanced disclosure of political activities by IRC § 501(c) organizations were rejected in the Senate. *See* 146 Cong. Rec. S5995 (daily ed. June 28, 2000) (statement of Sen. Lieberman), S5999 (statement of Sen. McConnell).

burdensome, such as the requirement to report every donor who makes contributions aggregating as little as $200 annually. *See* IRC § 527(j)(3)(B). In seeking to respond to the need for greater disclosure, the Service, as distinct from Congress, cannot address these necessary improvements in the current requirements, nor can the agency fashion more nuanced solutions than simply applying the existing outdated rules to all organizations alike.

Conclusion

The NPRM fails to provide any reasoned justification for no longer treating non-partisan election-related activity as unrestricted social welfare activity for purposes of IRC § 501(c)(4). While additional clarity is desirable, it does not explain why the nonpartisan activities included in the proposed definition of CRPA should be restricted, rather than unrestricted as under current policy, since limiting the scope of the restriction to certain types of partisan activity would provide as much, if not more, clarity. Furthermore, the proposal does not provide anything like the degree of clarity which the NPRM indicates it wants to achieve, and in many instances it will lead to more, not less, detailed factual investigations than under the current rules. Treasury and the IRS should therefore withdraw the proposed regulation.

Respectfully submitted,

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