



Section of Taxation

Suite 400
1050 Connecticut Avenue, NW
Washington, DC 20036
202-662-8670
FAX: 202-662-8682
E-mail: tax@americanbar.org

May 7, 2014

Mr. John Koskinen
Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20024

Re: Comments on 501(c)(4) Exempt Organizations

Dear Commissioner Koskinen:

Enclosed are comments addressing a proposed regulation set forth in the Notice of Proposed Rulemaking, "Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities," affecting the activities of organizations exempt under section 501(c)(4). These comments represent the view of the American Bar Association Section of Taxation. They have not been approved by the Board of Governors or the House of Delegates of the American Bar Association, and should not be construed as representing the policy of the American Bar Association.

Sincerely,

Michael Hirschfeld
Chair

Enclosure

cc: Mark J. Mazur, Assistant Secretary (Tax Policy), Department of the Treasury
Ruth Madrigal, Attorney Advisor, Tax Legislative Counsel, Department of the Treasury
William J. Wilkins, Chief Counsel, Internal Revenue Service
Victoria A. Judson, Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities), Internal Revenue Service
Sunita B. Lough, Commissioner, Tax Exempt and Government Entities Division, Internal Revenue Service
Tamera Ripperda, Director, Exempt Organizations, Internal Revenue Service

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**AMERICAN BAR ASSOCIATION
SECTION OF TAXATION**

**COMMENTS ON PROPOSED REGULATIONS REGARDING
GUIDANCE FOR TAX-EXEMPT SOCIAL WELFARE ORGANIZATIONS
ON CANDIDATE-RELATED POLITICAL ACTIVITIES**

These comments (“Comments”) are submitted on behalf of the American Bar Association Section of Taxation and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the position of the American Bar Association.

Principal responsibility for preparing these Comments was exercised by Rosemary Fei of the Exempt Organizations Committee of the Section of Taxation. Substantive contributions were made by Ellen Aprill, Miriam Galston, Nancy McGlamery, Jennifer Reynoso, Bridget Weiss, and Patricia Zweibel. These Comments were reviewed by Robert A. Wexler, Chair of the Exempt Organizations Committee, Michael A. Clark of the Section’s Committee on Government Submissions, and Stewart Weintraub, Council Director for the Exempt Organizations Committee.

Although the members of the Section of Taxation who participated in preparing these Comments have clients who might be affected by the federal tax principles addressed by these Comments, no such member or the firm or organization to which such member belongs has been engaged by a client to make a government submission with respect to, or otherwise to influence the development or outcome of, the specific subject matter of these Comments.

Contacts: Rosemary E. Fei
 (415) 421-7555
 rfei@adlercolvin.com

 Robert A. Wexler
 (415) 421-7555
 wexler@adlercolvin.com

Date: May 7, 2014

EXECUTIVE SUMMARY

On November 29, 2013, the Department of the Treasury (“Treasury”) and the Internal Revenue Service (“Service”) issued a Notice of Proposed Rulemaking (the “NPRM”)¹ containing a proposed regulation (the “Proposed Regulation”) affecting the activities of organizations exempt under section 501(c)(4).² The purpose of these Comments is to respond to the specific questions that Treasury and the Service posed in the Preamble to the Proposed Regulation and also to provide further feedback on the Proposed Regulation.

For decades, section 501(c) exempt organizations working in public policy or civic engagement, along with their counsel, have struggled with two questions:

- What activities are prohibited – or limited (depending on the exempt status of an organization) – as “participation or intervention in any political campaign of any candidate for public office” under the “facts and circumstances” test in place under existing guidance?
- If limited rather than prohibited, how much of such activity is permitted under the “primary purpose” test in place under existing guidance?

The Tax Section of the American Bar Association has sought clarification on both questions over the years, through requests to the Service for inclusion in its annual priority guidance plans and, in 2004, through the report of the Exempt Organizations Committee’s task force on section 501(c)(4) organizations and politics.³ On the first question, in 2007, the Service provided guidance with useful examples⁴; however, many questions remained. On the second

¹ Notice of Proposed Rulemaking, “Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities,” 78 Fed. Reg. 71535 (Nov. 29, 2013).

² References to a “section” are to a section of the Internal Revenue Code of 1986, as amended (the “Code”) unless otherwise indicated.

³ Greg Colvin and Miriam Galston, *Comments of the Individual Members of the Exempt Organizations Committee’s Task Force on Section 501(c)(4) and Politics* (ABA Tax Sec., May 25, 2004) [hereinafter *2004 ABA Task Force Report*], available at www.americanbar.org/content/dam/aba/migrated/tax/pubpolicy/2004/040525exo.authcheckdam.pdf.

⁴ See, e.g., Rev. Rul. 2007-41, 2007-1 C.B. 1421, Situations 1 and 2 (comparing scenarios in which no candidate or political party preference is displayed in voter registration, with one in which an issue screen is applied before proceeding with a “get-out-the vote” (“GOTV”) message). In 2008, individual members of the tax-exempt organizations bar initiated a project to draft proposed regulations clarifying the rules, evolving into what is now The Bright Lines Project (“Project”). The Project has developed a detailed set of rules aimed at a systematic, universal definition of political intervention under the Code. Its most recent draft Summary, from December 2013, available at www.brightlinesproject.org, continues to evolve. Key features of its approach, mirroring recommendations in these Comments, are:

- The definition of political speech must reach more than express advocacy if the principle of limited (or in the case of section 501(c)(3), prohibited) intervention by section 501(c) organizations in candidate campaigns is to have any integrity.
- The voices of section 501(c) exempt organizations are important to the functioning of our democracy, and they need clear avenues for nonpartisan civic engagement in elections and other forms of expression in matters of public policy.

question, in the absence of specific guidance, many organizations and practitioners have concluded that perhaps anything under one-half of an organization’s activities may further purposes other than those specified in section 501(c)(4), including political purposes, but how to measure the activities remained unclear.

These two key issues were brought to the forefront of public awareness after the Supreme Court’s 2010 decision in *Citizens United v. Federal Election Commission*⁵ (hereinafter “*Citizens United*”) and subsequent cases that permitted corporations to make unlimited independent expenditures in candidate electoral contests. Section 501(c)(4) organizations quickly became favored vehicles for such expenditures by donors seeking anonymity, since no disclosure of their sources is required, and an increasing number of section 501(c)(4) exemption applications were filed in the period that followed the decision in *Citizens United*.

The stated goal of the Proposed Regulation is to provide more “definitive” rules regarding a section 501(c)(4) organization’s political activities that would “provide greater certainty” and “reduce the need for detailed factual analysis” or “fact-intensive determinations.”⁶ The Proposed Regulation defines a new category of activity, “candidate-related political activity,” that would not be considered to promote “social welfare,” the exempt function of many section 501(c)(4) organizations. The Explanation of Provisions section of the preamble (the “Preamble”⁷) to the Proposed Regulation sought public comment on 12 specific issues:

- The advisability of adopting a similar approach to the Proposed Regulation for section 501(c)(3) organizations, either in lieu of facts and circumstances, or in adding presumptions or safe harbors, and what modifications would be needed in the section 501(c)(3) context.
- The advisability of adopting a similar approach to the Proposed Regulation to define section 527 exempt function activity, in lieu of facts and circumstances.
- The advisability of adopting the Proposed Regulation’s approach to defining activities that do not further the exempt purposes of section 501(c)(5) and (6) organizations.
- What proportion of an organization’s activities must promote social welfare to qualify for exemption under section 501(c)(4), and whether additional limits should be imposed on an organization’s non-social-welfare activities.
- How to measure the activities of a section 501(c)(4) organization for purposes of applying the proportion-of-activities test.

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- Political intervention should be comprehensively defined for federal tax purposes consistently across all sections of the Code that refer to political campaign activity, without tying it to federal election law in a way that imposes divergent standards upon state and local activities.
 - Complete avoidance of all examinations of the facts of an organization’s political intervention activities is futile; the result will be at the same time too lax and too harsh to be just or workable (as in the Proposed Regulation). At the same time, a test that looks to all the facts and circumstances is simply too vague. Good tax policy requires finding a balance.

⁵ *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

⁶ The terms and phrases in quotes, and similar terms and phrases, appear repeatedly throughout the NPRM.

⁷ By “Preamble” we mean all material in the NPRM that appears before the Proposed Regulation itself.

- Whether the length of the pre-election period during which certain public communications defined in the Proposed Regulation are automatically treated as candidate-related political activity should be shorter or longer, and whether there should be exceptions for certain communications during the window.
- Whether the pre-election-window approach in the Proposed Regulation should apply to the period before an appointment, confirmation, or other selection event other than an election.
- Whether transfers other than those defined in the Proposed Regulation, such as indirect contributions to political parties or candidates under section 276, should be treated as candidate-related political activity.
- Whether any exceptions to the definition of candidate-related political activities are needed for voter education activities.
- Whether and under what circumstances material posted by a third party on an interactive part of an organization's web site should be attributed to the organization.
- Whether an organization's responsibility for linking to a third party's web site should be the same for purposes of candidate-related political activity as for section 501(c)(3) organizations under existing guidance.
- Whether other activities should be included in, or excepted from, the definition of candidate-related political activity.

We are grateful to Treasury and the Service for giving us the opportunity to comment on the Proposed Regulation and the other issues described in the Preamble and for the attempt to bring much-needed clarity to this difficult area of tax law.

These comments respond to the questions above and include additional related recommendations based on the experience of practitioners advising exempt organizations in this area. Because questions have been raised, these comments also address the authority of Treasury and the Service to promulgate regulations of this type, and the constitutionality of such regulation. The following is a summary of our recommendations:

1. We suggest that the impact on the regulated community of regulations defining political intervention cannot be fairly assessed unless they are promulgated at the same time as regulations regarding the maximum quantity of political intervention activity permitted for section 501(c)(4) organizations: the two issues are inseparably intertwined and are best addressed at the same time.
2. It would be helpful if regulations were issued specifying the quantum of non-social-welfare (including political intervention) activity permitted for a section 501(c)(4) organization under the primary purpose test; we suggest that the amount be somewhere between insubstantial (but not zero) and 40%.
3. We recommend that regulations specify how activities are to be measured for purposes of the primary purpose test, and we suggest that activities be measured only with reference to expenditures (cash or in-kind), without taking into account time or efforts of volunteers.

4. We recommend that for purposes of clarity and consistency, the same definition of political intervention apply across all categories of section 501(c) organizations, not just section 501(c)(4) organizations, and taxable organizations, and to the extent possible section 527 organizations. Likewise, for those section 501(c) exempt organizations that are permitted to conduct some political intervention, the upper limit on such activity consistent with qualification under a primary exempt purpose test should be established in the same manner as for section 501(c)(4) organizations, described above.
5. The concept of the exempt function of a section 527 organization under existing guidance is not the ideal model for redefining political intervention outside of section 527. Therefore, we suggest that it not be used as the starting point for an improved Proposed Regulation. Instead of creating a new and different line, we recommend that the focus be on clarifying the existing rules that define political intervention, drawing the current line more clearly and reducing the need for a fact-intensive facts-and-circumstances analysis.
6. The pre-election-window approach to defining when a public communication constitutes candidate-related political activity will have the effect of being over-inclusive within the window and under-inclusive outside of the window. We recommend a less bright-line approach that allows some consideration of facts, with reasonable carve-outs for grassroots lobbying and other non-electoral activities.
7. The definition of “public communication” in the Proposed Regulation is overbroad. We recommend specifying a list of covered media channels and including a mechanism for regularly updating that list as political advertising evolves.
8. If a pre-election-window approach is retained, we suggest that the Proposed Regulation should not treat all material on an organization’s web site as continuously published, regardless of when or where on the web site it was posted; limits or exceptions are needed.
9. We suggest that for purposes of clarity, the definition of who is a candidate for political intervention purposes should not include those who are only “proposed by others” and should only include candidates for *elected, public* offices. We recommend that it explicitly include candidates in foreign countries. Clarification would also be helpful as to when a candidate has been “clearly identified” by reference to a distinguishing issue or characteristic.
10. We suggest that the definition of “express advocacy” in the Proposed Regulation, and its relationship to the meaning of that term under federal election law, be clarified, and political intervention encompass communications beyond express advocacy.
11. We recommend that volunteer time and indirect contributions should not be *per se* included in candidate-related political activity.

12. We suggest that, in practice, the treatment of transfers by a section 501(c)(4) organization to a section 501(c) organization that engages in candidate-related political activity, and the safe harbor for contributions if the transferor obtains certain certification and imposes certain prohibitions, will be very burdensome and probably unnecessary; we suggest that other approaches to prevent abusive churning should be adopted. At least the required certification should be time-limited.
13. Rather than defining all voter registration and get-out-the-vote (“GOTV”) drives, voter guides, and events where candidates appear as candidate-related political activity, we recommend that the Proposed Regulation extend and clarify existing guidance on how to conduct such activities in a nonpartisan manner, perhaps using safe harbors, and exclude such activities if conducted in a strictly nonpartisan manner.
14. We recommend that the distribution of materials prepared by or on behalf of a candidate should not automatically be candidate-related political activity; instead, we suggest that the Proposed Regulations exclude distribution of materials wholly unrelated to the individual’s candidacy, at least during periods when the individual is or was not a candidate.
15. It would be helpful if the Proposed Regulations could address under what circumstances material posted by unrelated third parties on an organization’s web site, or material posted at web sites to which an organization’s web site links, will be attributed to the organization.
16. Finally, we suggest that the Proposed Regulation, if finalized, have a delayed effective date, to give organizations time to put in place administrative systems needed for compliance; transition provisions would also be helpful to allow existing organizations to address conflicts between the Proposed Regulation and charitable trust laws affecting their donated assets.

We understand that several of our recommendations will result in a less-bright line than has been drawn in the Proposed Regulation, but we suggest that some consideration of the facts is both administrable, and necessary for just and rational outcomes under the Proposed Regulation.

COMMENTS

The Preamble to the Proposed Regulation does an excellent job of describing the statute, the current Regulations thereunder, and the Proposed Regulation. In the interests of brevity, we will not repeat that here.

1. Authority to Promulgate the Proposed Regulation

As a threshold issue, we are aware of numerous commentators questioning the authority of Treasury to promulgate the Proposed Regulation regarding campaign intervention, but in our view, the Supreme Court 2011 decision in *Mayo Foundation v. United States*⁸ makes clear that Treasury does have that authority. In *Mayo* the Court declared, of a Regulation promulgated with notice-and-comment under the general authority of section 7805, “We see no reason why our review of tax regulations should not be guided by agency expertise pursuant to *Chevron* to the same extent as our review of other regulations.”⁹ That is, *Chevron v. National Resource Defense Council*¹⁰ applies to regulations promulgated under the general authority of section 7805(a). *Chevron* explicitly stated, in what has become known as *Chevron* step 2, that “if the statute is *silent* or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a *permissible* construction of the statute.”¹¹

Except for sections 501(c)(3) and 501(c)(29), the provisions of section 501(c) are silent regarding campaign intervention.¹² Yet section 501(c)(4) and other section 501(c) organizations need to know what activities constitute campaign intervention and how such activities relate to their exempt purposes. Statutory silence about political activity creates ambiguity. Regulations promulgated to resolve this ambiguity are not only permissible, but also entitled to strong judicial deference under *Chevron*.

Recently, in *Loving v. IRS*,¹³ the Court of Appeals for the D.C. Circuit held that Treasury Regulations applicable to tax return preparers were invalid under *Chevron* step 1, which requires that an agency give effect to the clear intent of Congress, as inconsistent with the text, history, structure, and context of the applicable statute. *Loving* relied on *FDA v. Brown & Williamson*¹⁴

⁸ 131 S. Ct. 704 (2011).

⁹ *Id.* at 713.

¹⁰ 467 U.S. 837 (1984).

¹¹ *Id.* at 843 (emphasis added).

¹² We are keenly aware of semantic problems associated with various terms and phrases used to refer to section 501(c)(3)’s prohibition on participating or intervening in any political campaign of any candidate for public office, a concept which also appears in various other sections in the Code and Regulations including Reg. §1.501(c)(4)-1(a)(2)(ii) (relating to political activities of social welfare organizations); I.R.C. §527 and Reg. §1.527-1 *et seq.* (relating to section 527 political organizations); I.R.C. §162 and Treas. Reg. §1.162-20 (relating to trade or business expenses); I.R.C. §2055 and Treas. Reg. §20.2055-1 (relating to deductions from the estate tax); I.R.C. §2522 and Treas. Reg. §25.2522(a)-1 (relating to deductions from the gift tax); I.R.C. §7409 and Treas. Reg. §301.7409-1 (relating to actions to enjoin flagrant political expenditures of section 501(c)(3) organizations). This Comment tries to use “campaign” or “political” “intervention” for such activities, reserving “candidate-related political activity” for activities defined as such in the Proposed Regulation.

¹³ *Loving v. IRS*, 742 F.3d 1013 (D.C. Cir. 2014).

¹⁴ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

in asserting that courts should not presume congressional intent to “implicitly delegate decisions of major economic or political significance.”¹⁵ Here, however, Congress has assigned responsibility for interpreting and administering section 501(c)(4) and other provisions of section 501(c), as well as section 527,¹⁶ to the Service and Treasury by establishing these categories in the Code.

In *dicta*, *Loving* stated that the Service’s interpretation would also fail *Chevron* step 2 as unreasonable in light of the statute’s history, structure, and context. The court, however, acknowledged that “[t]he Service is surely free to change (or refine) its interpretation of a statute it administers.”¹⁷ As Justice Scalia observed in connection with *Chevron* step 2, “As *Chevron* itself held, the Environmental Protection Agency can interpret ‘stationary source’ to mean a single smokestack, can later replace that interpretation with the ‘bubble concept’ embracing an entire plant, and if that proves undesirable can return again to the original interpretation.”¹⁸

Here the Service and Treasury are changing and refining their own regulations, as authorized under *Chevron*. The current Regulations state, “[a]n organization is operated exclusively for the promotion of social welfare if it is primarily engaged in promoting in some way the common good and general welfare of the people of the community.”¹⁹ The Regulations further specify that “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.”²⁰ The Regulations, however, fail to define intervention in political campaigns or give guidance on what constitutes primary engagement. The Proposed Regulation is intended to fill that gap. In so doing, they carry out the recommendation of the Treasury Inspector General for Tax Administration and the National Taxpayer Advocate that Treasury develop guidance regarding social welfare activity.²¹

As noted above, *Chevron* deference also requires fidelity to Congressional intent. Under the language of the Code, section 501(c)(4) organizations must be operated “exclusively for the promotion of social welfare.” Yet while the current Regulations make clear that political intervention is not a social welfare activity, they also permit some level of it for section 501(c)(4) organizations, and the Preamble asks for comments on what degree of candidate-related political activity should be permitted for section 501(c)(4) organizations.

¹⁵ *Loving*, 742 F.3d at 1021.

¹⁶ I.R.C. §527 addresses the taxability of political organizations, and classifies them as organizations exempt from income taxes.

¹⁷ *Id.*, slip opinion at 16.

¹⁸ *United States v. Mead Corp.*, 533 U.S. 218, 247 (2000) (Scalia, J., dissenting).

¹⁹ Reg. § 1.501(c)(4)-1(a)(2)(i) (emphasis added).

²⁰ Reg. § 1.501(c)(4)-1(a)(2)(ii).

²¹ Treasury Inspector General for Tax Administration, *Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review*, Highlights, available at <http://www.treasury.gov/tigta/auditreports/2013reports/201310053fr.pdf>. National Taxpayer Advocate, *Special Report to Congress: Political Activity and the Rights of Applicants for Tax-Exempt Status*, 14-15, available at <http://www.taxpayeradvocate.irs.gov/userfiles/file/FullReport/Special-Report.pdf>.

There is ample support that permitting some degree of political intervention activity by section 501(c)(4) organizations does not undermine Congressional intent. For example, the same word “exclusively” appears in section 501(c)(3), but in 1945 the Supreme Court wrote in *Better Business Bureau v. United States*²² that a “substantial” non-exempt purpose will destroy exemption under section 501(c)(3). The Court did not forbid *all* non-exempt purposes or activities; it did not interpret “exclusively” literally. Regulations promulgated in 1959 and retroactive to 1953 incorporated this interpretation, clarifying that “exclusively” means “primarily” for both section 501(c)(3) and section 501(c)(4) organizations.²³ The Regulations did so to carry out, not oppose, Congressional intent. One final example is the unrelated business income tax (“UBIT”) regime, enacted by Congress in 1950. The UBIT regime recognizes that exempt organizations may conduct activities that do not carry out their exempt purposes. In enacting the UBIT, Congress itself made a legislative change that required reinterpreting “exclusively.” Both *Better Business Bureau* and the UBIT regime demonstrate that “exclusively” is not to be understood literally,²⁴ thus leaving room for political activity by non-charitable exempt organizations. Accordingly, Treasury and the Service are not exceeding their authority in promulgating a rule that permits less-than-primary non-social welfare activities by section 501(c)(4) organizations.

2. Quantity and Measurement of Permitted Non-Social Welfare Activity

- a. *We recommend that Regulations regarding the maximum quantity of political intervention activity be promulgated at the same time as, and in connection with, Regulations defining political intervention activity*

Current Regulations effectively define the statutory phrase “operated exclusively for the promotion of social welfare” to mean “*primarily* engaged” in such promotion,²⁵ but the actual quantity of social welfare required in order to be “*primarily* engaged” in promoting social welfare, and how to measure it, are undefined in the Regulations and are not resolved in any other authorities.²⁶ While the Preamble requests comments on “what proportion of an organization’s activities must promote social welfare for an organization to qualify under section 501(c)(4),” and “how to measure the activities of organizations seeking to qualify as section 501(c)(4) social welfare organizations,”²⁷ neither issue is addressed by the Proposed Regulation. We suggest, that for purposes of clarity, Treasury and the Service promulgate regulations on the *quantity* of non-social welfare activity permitted for a section 501(c)(4) organization at the same time as regulations defining political intervention for purposes of section 501(c)(4).

²² 326 U.S. 279 (1945).

²³ Reg. § 1.501(c)(4)-1(a)(2)(i).

²⁴ See, e.g., *People’s Educational Camp Society v. Comm’r*, 331 F.2d 923, 931 (2d Cir. 1964).

²⁵ Reg. § 1.501(c)(4)-1(a)(2)(i) (emphasis added).

²⁶ Part 2(b) discusses various proposals for the level of permitted non-social welfare activity. It notes that the most common interpretation of “*primarily*” prior to recent attention on the issue was that it meant 51%, thus permitting up to 49% non-social welfare activity.

²⁷ 78 Fed. Reg. 71535, 71537.

For many long-standing section 501(c)(4) organizations, the practical workability of any changes to the definition of political intervention activities that fall outside social welfare purposes depends largely on how much of such activity will be permitted (that is, whether and by how much it will be reduced from 49%). Broader definitions that characterize more activities as political intervention will be more administrable the more room there is for such activities before exemption is lost, while the precise boundaries of narrower definitions become more critical the lower the limit. This reality makes it difficult for practitioners advising social welfare organizations to comment on the Proposed Regulation on behalf of clients, because the impact on the regulated community will be the product of the definitions and the limit, rather than the definitions alone.

Moreover, we believe it would increase compliance burdens on both the Service and the nonprofit community if new regulations were adopted on “candidate-related political activity” or any other forms of political intervention by section 501(c)(4) organizations, without at the same time clarifying *how much* non-social welfare activity such organizations may engage in and how it should be measured. The measurement would need to include not only political intervention, but other forms of activity that do not promote social welfare, such as private benefit activities, unrelated business, and purely social activities. The Proposed Regulation on candidate-related political activity would create a new and untested legal regime for only one specific category of non-social welfare activity, without more comprehensive guidance. This may become unworkable for the regulated community and the Service personnel who must enforce the new rules. We recommend that Treasury and the Service take this opportunity to resolve these longstanding uncertainties.

b. Regulations on the quantity of non-social welfare activity permitted would be very helpful

As noted above, the Preamble requests comments on “what proportion of an organization’s activities must promote social welfare for an organization to qualify under section 501(c)(4).”²⁸ Neither the Regulations nor other precedential or binding guidance defines exactly what “primary” (or its converse “less-than-primary”) means for section 501(c)(4) exemption purposes. We are aware of four main proposals as to what “primary” social welfare purposes or activities should mean.

Option 1: Zero non-social welfare activities permitted. Some commentators have taken the position that, despite the “primary purpose” language of the current section 501(c)(4) Regulations, the law requires that section 501(c)(4) organizations must operate *exclusively* in furtherance of valid social welfare purposes, with *zero* non-social welfare activities (i.e., zero participation in political campaigns)²⁹ allowed, because that is what section 501(c)(4) of the

²⁸ 78 Fed. Reg. 71535, 71537.

²⁹ It may be possible to read the existing section 501(c)(4) Regulations, as issued in 1959, as consistent with a complete prohibition on political intervention. Reg. § 1.501(c)(4)-1(a)(2)(ii) contains a cross-reference to the “action” organization regulations for section 501(c)(3) charities, stating that an organization not qualified as a charity due to substantial legislative lobbying described in Reg. § 1.501(c)-1(c)(3)(ii) or (iv) may still qualify to be a social welfare organization under section 501(c)(4). However, it makes no reference to subparagraph (iii) of § 1.501(c)-1(c)(3), which pertains to political intervention. So, there is no direct statement in the section 501(c)(4) Regulations that political activity may be permitted at any level, “less-than-primary” or otherwise. The Service did

Code literally says. For example, litigation filed in 2013 by U.S. Representative Chris Van Hollen and a coalition of advocacy organizations in the U.S. District Court for the District of Columbia took this position, arguing that the current “primary purpose” Regulations are an impermissible misconstruction of the statute and that “exclusively” in section 501(c)(4) means, in fact, “exclusively” for the promotion of social welfare.³⁰

Option 2: Only **insubstantial** non-social welfare activities permitted.³¹ Another reading of section 501(c)(4) would allow organizations to be exempt under that section only if “no substantial part” of their activities was not in furtherance of social welfare. This option would construe the phrase “operated *exclusively* for the promotion of social welfare” in section 501(c)(4) similarly to how Regulations construe the phrase “organized and operated *exclusively* for charitable purposes” in section 501(c)(3). As Treasury and the Service point out in the Preamble, the section 501(c)(3) Regulations have language construing “exclusively” in section 501(c)(3) to mean “engages *primarily* in accomplishing one or more [charitable] purposes” (similar to the “primarily” language in the section 501(c)(4) Regulations), but the section 501(c)(3) Regulations then state that a section 501(c)(3) organization may not devote “more than an insubstantial part of its activities” to non-charitable purposes. The section 501(c)(4) Regulations could be amended to include a similar “no-more-than-insubstantial” restriction on non-social welfare activities, and define substantiality for this purpose.

Option 3: **No more than 40%** non-social welfare activities permitted. Another possible implementation of the requirement that section 501(c)(4) organizations be operated “primarily” for social welfare purposes would be to limit their non-social welfare activities to some level clearly below half of total activities. A task force of the ABA Tax Section’s Exempt Organizations Committee recommended a 40% limit on political campaign expenditures as the bright-line or safe-harbor rule in a 2004 report on these issues.³² The Service also used 40% as the limit on non-social welfare monetary expenditures and time expenditures for organizations

not issue any formal interpretation allowing any section 501(c)(4) political campaign activity until 1981, in Rev. Rul. 1981-95, 1981-1 C.B. 332, when the upper limit was set at less-than-primary. By that time, Congress had enacted section 527, which implicitly recognized that a section 501(c)(4) organization may make some political expenditures subject to the section 527(f) tax on investment income.

³⁰ See *Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of the Treasury*, No. 13-CV-732 (D.D.C., complaint filed May 21, 2013). Citizens for Responsibility & Ethics in Washington (“CREW”) was the plaintiff in the consolidated complaint that included Van Hollen and Public Citizen, a nonprofit consumer advocacy group. On December 6, 2013, in response to the NPRM, Van Hollen and Public Citizen withdrew their complaints. On February 27, 2014, the U.S. District Court for the District of Columbia dismissed CREW’s complaint for lack of standing. See *Citizens for Responsibility and Ethics in Washington v. U.S. Dep’t of the Treasury*, 2014 U.S. Dist. LEXIS 24885 (D.D.C. Feb. 27, 2014) (mem.).

³¹ While the section 501(c)(4) regulations do not elaborate on the meaning of “primarily” even to the limited extent that the section 501(c)(3) regulations do, numerous courts, including five appellate courts, have nonetheless adopted the *Better Business Bureau* language and imported it into the section 501(c)(4) context. See, e.g., *Vision Serv. Plan v. United States*, 265 Fed. Appx. 650, 651 (9th Cir. Cal. 2008); *American Association of Christian Schools Voluntary Employees Beneficiary Ass’n Welfare Plan Trust v. United States*, 850 F.2d 1510, 1515-16 (11th Cir. 1988); *Police Benevolent Ass’n of Richmond, Va. v. United States*, 661 F. Supp. 765, 773 (E.D. Va.1987), *aff’d without opinion*, 836 F.2d 547 (4th Cir. 1987); *Mutual Aid Association of the Church of the Brethren v. United States*, 759 F.2d 792, 796 (10th Cir. 1985); *Contracting Plumbers Cooperative Restoration Corp. v. United States*, 488 F.2d 684, 686 (2d Cir. 1973), *cert. denied*, 419 U.S. 827 (1974).

³² 2004 ABA Task Force Report at 9.

that were eligible to elect expedited review of their backlogged Form 1024 applications for recognition of section 501(c)(4) exemption, under a temporary procedure initiated by the Service in September 2013.³³

Option 4: Less than half (up to 49%) non-social welfare activities permitted. A final option for construing the “primary” purpose requirement of the section 501(c)(4) Regulations is essentially a literal reading of “primary”: an organization is considered to be operated primarily in furtherance of social welfare purposes, and entitled to tax exemption, if *more than half* of its activities, based on whatever measurement is adopted, are in furtherance of social welfare. This “51/49” construction of the limit on non-social welfare activities and/or expenditures is probably the most common way that the “primary purpose” test currently is applied in practice. Service officials have sometimes used “49%” in internal training sessions as informal shorthand for the “less-than-primary” limit on non-social welfare activities, including political intervention, derived from interpreting “primary” as 51%.³⁴

We have not reached a consensus as to the quantity of non-social welfare activity that should be permitted under the “operated exclusively for the promotion of social welfare” statutory requirement, although we agree that the quantum of non-social welfare activity allowed should be at least the insubstantial level described in Option 2 above, which (as observed in the Preamble) would make the section 501(c)(4) test generally comparable to the test for charitable purposes and activities under the section 501(c)(3) Regulations.³⁵ We also believe there is value in the *2004 ABA Task Force Report* recommendation of a “bright line” 40% limit on political campaign activity, measured by monetary expenditures. Factors supporting a 40%-of-monetary-expenditures limit on all non-social welfare activity (including but not limited to political intervention) include relative ease of computation and administration, while at the same time ensuring social welfare purposes and activities would remain materially above one-half of total activities. Whatever quantity is permitted for section 501(c)(4) organizations, we believe the same rationale and limits should be applied to other categories of section 501(c) organizations (other than section 501(c)(3)), to the extent possible under existing statutes.

One can reasonably view political intervention as consistent with the promotion of social welfare in a way that private member benefit or commercial activities (the other examples of non-social welfare activity in Regulations section 1.501(c)(4)-1(a)(2)(ii)) are not. “Candidate-related political activity” and other types of political intervention have a strong public policy and public education component. That view would support allowing social welfare organizations to

³³ I.R.S. Letter 5528 “Optional Expedited Process for Certain Exemption Applications Under section 501(c)(4),” (2013), available at www.irs.gov/pub/irs-tege/letter5228.pdf.

³⁴ See *EO Materials Suggest 51 Percent Threshold for 501(c)(4) Groups*, TAX NOTES, (Jan. 27, 2014) at 394 (referring to Service training materials, released pursuant to a FOIA request, stating that “primary” is generally used to mean 51 percent); *Judy Kindell on 501(c)(4)-(6) Organizations and 527*, 11 PAUL STRECKFUS’S EO TAX J. 42,45 (2006).

³⁵ The *2004 ABA Task Force Report* suggesting that the line be drawn at 40% was issued at a time when nonprofit organization independent expenditures to influence candidate elections were almost completely prohibited at the federal level and in about one-half of the states. That all changed when *Citizens United v. FEC* declared the prohibition on such speech to be unconstitutional, and political spending by section 501(c)(4) organizations has mushroomed in subsequent campaign seasons. Recently, both of the principal authors of the *2004 ABA Task Force Report* have advocated limits lower than 40%.

conduct relatively more of such activity. On the other hand, there is ample precedent regarding attempts to assist or prevent individuals (or political parties) from acquiring elective positions of political power as private benefit.³⁶ Exploring the validity of these opposing views is beyond the scope of these Comments, but may be appropriate to consider in the context of promulgating regulations on the amount of such activity to be permitted under the primary purpose test.

We note that lowering the non-social-welfare-activity limit to zero as in Option 1 may in fact preclude section 501(c)(4) organizations from establishing a separate segregated fund treated as a political organization under section 527 (e.g., a PAC) through which to conduct political intervention activities, thus eliminating them as an alternate channel for charities' core political speech, which could raise constitutional issues. We believe this outcome would be inconsistent with the intent of section 527, which expressly contemplates that a section 501(c)(4) organization may create such a separate segregated fund. Moreover, the text of section 501(c)(4) does not contain the prohibition on participating or intervening in elections to public office found in section 501(c)(3), bolstering the statutory argument against identical treatment of both groups with respect to the quantum of political intervention permitted.

We are, as a group, concerned that the 49% limit in Option 4 requires a level of precision that is difficult to administer, allows no room for error by the organization or the Service, and may encourage abusive uses of section 501(c)(4) exempt status. Moreover, as discussed in Part 5(g) below, the higher the limit on less-than-primary activities, the more political intervention can be leveraged from an increment in social welfare activity. This multiplier effect presents an opportunity for manipulation that should certainly be addressed if a 49% limit is retained.

Further, we note that while setting a percentage limit somewhere between 49% (less-than-primary) and a percentage corresponding to the concept of "insubstantial," which has variously been interpreted in similar contexts between 5% and 20%, could be seen as an exercise in arbitrary line-drawing, such an intermediate limit may be justified in order to balance the competing values and address practical implications involved. Setting the limit very low may cause some section 501(c)(4) organizations to move large amounts of political intervention into affiliated section 527 PACs, but it may also cause some to move political intervention entirely out of the tax-exempt system into for-profit LLCs and other ostensibly client-based political consulting business entities.³⁷ As structuring such alternatives becomes increasingly burdensome for nonprofit organizations, the potential for a successful constitutional challenge on First Amendment grounds increases. Setting the upper limit at an "arbitrary" middle position, such as 33% or 25% could be a functional compromise.

There is one final concern to be noted in any discussion of the appropriate limit on less-than-primary non-social-welfare activity. That concern is the absence of any tax-exempt status for an organization all of whose activities would be exempt under either section 501(c)(4) or section 527, except that it engages in more than the permitted amount of political intervention

³⁶ See, e.g., *Nationalist Movement v. Comm'r*, 102 T.C. 558 (1994) (private benefit regarding the founder's political ambitions raised by the Service, but not supported by the record); and *American Campaign Academy v. Comm'r*, 92 T.C. 1053 (1989) (Exemption denied for educational organization which conferred more than incidental private benefit by conducting activities with the partisan objective of benefiting Republican candidates and entities).

³⁷ Whether encouraging such a migration would be good or bad policy is beyond the scope of this Comment.

under section 501(c)(4), but less than substantially all political intervention as required by section 527. This gap will be larger the lower the limit on political intervention by 501(c) organizations is set. Should the opportunity arise for remedying this gap—perhaps through legislative proposals—we recommend the minimum level of political intervention required for section 527 exemption be adjusted to approach or mirror the maximum under section 501(c)(4): we see no public policy justification for withholding tax-exempt status from nonprofit organizations that fall in the gap.

c. Regulations on how to measure activities for the primary purpose test would also be helpful

In addition to seeking comments on the quantity of non-social welfare activity that should be permitted for section 501(c)(4) organizations, the Preamble also requests input on “how to measure the activities of organizations seeking to qualify as section 501(c)(4) social welfare organizations.”³⁸ Aside from the lack of clarity and guidance about just what “primary” means in the Regulations as discussed above, even if we knew how much is permitted, it remains uncertain what financial and/or operational elements are taken into account in determining an organization’s “primary” purpose or activities. Knowledgeable Service personnel described the situation as follows nearly 20 years ago:

Whether an organization is “primarily engaged” in promoting social welfare is a “facts and circumstances” determination. Relevant factors include the amount of funds received from and devoted to particular activities; other resources used in conducting such activities, such as buildings and equipment; the time devoted to activities (by volunteers as well as employees); the manner in which the organization’s activities are conducted; and the purposes furthered by various activities.³⁹

Factors to be considered might include revenues, or expenditures, or property and assets, or personnel time (both volunteers and employees), or the manner of operation and the purposes furthered by particular activities – but with no reliable guidance on which of these factors might be considered in any given situation, or how to weigh the factors, or how to measure some of the factors. Ten years ago, the *2004 ABA Task Force Report* concisely summed up the definitional and measurement uncertainties in the section 501(c)(4) “primary purpose” test by noting that “there is no single method for measuring whether certain activities are primary or less-than-primary,” and “no percentage along any scale of measurement has been [authoritatively] set as the dividing line between primary and less-than-primary.”⁴⁰ The situation has become no clearer since then, and the burden of this uncertainty on social welfare organizations has increased as options for political intervention by section 501(c)(4) organizations have become broader and more complex, especially after *Citizens United*.⁴¹

³⁸ NPRM, “Explanation of Provisions,” § 1(d), 78 Fed. Reg. 71535, 71537 (Nov. 29, 2013).

³⁹ Raymond Chick and Amy Henchey, *Political Organizations and IRC 501(c)(4)*, 1995 IRS EXEMPT ORG. CONTINUING PROF. EDUC. PGM., available at <http://irs.gov/pub/irs-tege/eotopicm95.pdf>.

⁴⁰ *2004 ABA Task Force Report* at 7.

⁴¹ *Citizens United v. FEC*, 558 U.S. 310 (2010).

We agree with the Task Force in the *2004 ABA Task Force Report*, which proposed that political intervention be measured only with reference to expenditures (cash or in-kind), and not take into account the time or efforts of an organization’s volunteers.⁴² While the Task Force only addressed section 501(c)(4), the same logic, and therefore the same measurement approach, should apply for all other categories of section 501(c) organizations, unless the statute indicates otherwise.

We suggest that Treasury and the Service consider publishing regulations on the quantity of non-social welfare activity allowed and how to measure it, at the same time as any new regulations on “candidate-related political activity” or any other form of political intervention.

3. Consistency in Definition of Political Intervention across All Tax-Exempt Statuses

a. Overarching concerns

Before we turn to detailed technical comments, we believe it may be helpful to step back and outline some of the larger issues that we, as practitioners, have encountered. Some of these issues are raised in our technical comments as well, often in several different places; the point of discussing them here is to draw out important themes that we suggest Treasury and the Service consider.

(1) Balancing clarity with simplicity, consistency, and rationality

As practitioners who advise clients of all sizes, including providing *pro bono* advice to tax-exempt organizations too small to afford legal counsel, and as teachers of the law of tax-exempt organizations to the nonprofit sector, we cannot emphasize enough the value of *simplicity, consistency, and rationality* in tax policy and compliance, particularly where the Service has insufficient resources to present a serious enforcement presence sector-wide and must therefore rely heavily on voluntary compliance. The current facts and circumstances standard for political intervention presents serious problems in *clarity*, but we respectfully suggest that the solution is not to create an entirely new standard that is different from all existing standards and will require separate additional compliance efforts. We are concerned that the new standard in the Proposed Regulation will exponentially increase the complexity of the legal framework under which the sector in general, and section 501(c)(4) organizations in particular, operate. The effort to achieve clarity in the Proposed Regulation is commendable, but the Proposed Regulation sacrifices too much in simplicity, consistency, and rationality. These competing values must be balanced.

(2) Practical problem with section-501(c)(4)-only approach

While it may seem logical to tackle perceived abuses among section 501(c)(4) organizations through a Proposed Regulation that addresses only section 501(c)(4), a basic problem with this approach is that political operatives (of both parties) using section 501(c)(4) have choices. We are concerned that adjusting only section 501(c)(4) will cause those who want to influence elections to use instead other categories of exempt organizations that may not be

⁴² A precedent for measurement of activities through expenditures only may be found in the lobbying expenditure test for public charities under section 501(h) and the accompanying Regulations at section 56.4911 *et seq.*

subject to the new Proposed Regulation. In fact, according to recent news coverage,⁴³ social welfare organizations may already be passé as the vehicle for such activities, and section 501(c)(6) trade associations are being used in a similar fashion now. Section 501(c)(7) social clubs could be used in the future. The common analogy is squeezing a balloon: press on it in one spot, and it just pops out in another. Any effort to stem the inappropriate use of section 501(c) tax-exempt organizations for excessive political intervention should, we believe, address all categories at the same time. Even then, a successful nonprofit-sector-wide approach may simply drive those seeking anonymity for their electoral activities into the business sector, but our hope is that a sector-wide approach that allows at least a moderate degree of political intervention to be conducted by non-charitable exempt organizations would avoid disrupting the existing functional balance among nonprofits and leave the nonprofit sector relatively undistorted.

(3) Relationship between charitable and social welfare activities

For many decades, practitioners and the nonprofit sector have understood that the essential difference between a section 501(c)(3) organization and a section 501(c)(4) social welfare organization is that the charity receives more favorable tax treatment in exchange for less freedom in its permitted activities. Conceptually, the universe of activities that qualify as charitable under section 501(c)(3) exemption is a subset of social welfare activities under section 501(c)(4). A section 501(c)(4) organization's political intervention can cross a line prohibited for section 501(c)(3) organizations, and it can engage in more lobbying activities. The logic of this relationship presumes that the same definitions of political intervention apply to both types of entities. The Proposed Regulation would change that fundamental relationship with respect to both types of activities. This is a much more significant change than would appear from considering the Proposed Regulation and its impact on section 501(c)(4) organizations in isolation. The potential for significant unintended consequences is substantial, and we respectfully suggest that Treasury and the Service proceed with extreme caution.

(4) Role of section 501(c)(4) organizations in nonprofit family structures

We are concerned that the Proposed Regulation does not reflect the role section 501(c)(4) organizations play in countless existing multiple-exempt-entity structures. Section 501(c)(4) social welfare organizations form the critical link and the essential buffer between section 501(c)(3) charitable organizations and section 527 political organizations. They allow the unique voice and perspectives of a charity to be heard in public debates, including the most important debate, about who will lead our country, while preserving the charity's section 501(c)(3) status.⁴⁴ These families of organizations of various tax-exempt classifications sharing a common nonprofit mission are vital to our society and our democracy, and provide an

⁴³ See, e.g., Michael Beckel, *Major U.S. Companies Quietly Funnel Dark Money to Politically Active Nonprofits*, HUFFINGTON POST (Jan. 16, 2014; accessed April 22, 2014) available at

http://www.huffingtonpost.com/2014/01/16/dark-money_n_4604839.html; Brendan Fischer, *Kochs Form "Business League," Will Keep Political Spending in the Shadows*, THE CENTER FOR MEDIA AND DEMOCRACY'S PRWATCH (May 2, 2013; accessed April 21, 2014) available at

<http://www.prwatch.org/news/2013/05/12093/kochs-form-business-league-will-keep-political-spending-shadows>.

⁴⁴ Parts 5(a) and 7 below discuss the constitutional problems raised by restricting or eliminating the ability of section 501(c)(4) organizations to serve this function. The Proposed Regulation would do just that.

important counterweight to private profit-seeking interests. Operating them requires close attention to boundaries, and the boundaries can be difficult and expensive to administer properly. In practice, structuring these families so they can function requires one standard for political intervention to apply across the family. We hope Treasury and the Service will carefully consider any new regulations on section 501(c)(4) organizations from this perspective.

We turn next to more technical and detailed arguments for a single consistent standard for political intervention in the tax-exempt sector, but not the standard in the Proposed Regulation.

- b. The candidate-related political activity standard in the Proposed Regulation should not apply to section 501(c)(3) organizations; nonetheless, having a different standard for political intervention for section 501(c)(3) and section 501(c)(4) organizations is unnecessary, confusing, and harmful*

Section 501(c)(3) organizations are subject to an absolute prohibition against “participat[ing] in, or interven[ing] in (including publishing or distributing of statements) any political campaign on behalf of (or in opposition to) any candidate for public office.”⁴⁵ Section 501(c)(3) organizations that violate this prohibition are subject to severe sanctions: in addition to potential excise taxes or injunctive action,⁴⁶ such organizations can lose their tax-exempt status for even insubstantial political activity.⁴⁷ These dire consequences cause many section 501(c)(3) organizations to be extremely cautious, steering wide of grey areas. This result is especially likely for charities too small to afford regular access to legal counsel.

Currently, the standards for political activity for section 501(c)(4) organizations are the same as for prohibited campaign intervention for section 501(c)(3) organizations. The Regulations governing section 501(c)(4) organizations provide that “[t]he 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”⁴⁸ – language that is substantially similar to the section 501(c)(3) prohibition quoted above. To date, the Service has relied on the same “facts and circumstances” analysis for determining political activity for both organization types, assuming that what constitutes prohibited political intervention for section 501(c)(3) organizations will also constitute political activity under section 501(c)(4). The Service articulated this position most clearly in Revenue Ruling 1981-95⁴⁹ and has continued to echo it

⁴⁵ I.R.C. § 501(c)(3).

⁴⁶ See I.R.C. §§ 4955 (excise tax on political expenditures), 6852 (termination assessment for flagrant political expenditures), 7409 (injunction provisions for flagrant political expenditures).

⁴⁷ See, e.g., *United States v. Dykema*, 666 F.2d, 1096, 1101 (7th Cir. 1981) (noting that exemption is lost by any political intervention, even where such activities are not “substantial.”). *But see* H.R. Rep. No. 100-391, 100th Cong., 1st Sess. 1623 (noting that the section 4955 excise tax alone may be appropriate where the “expenditure was unintentional and involved only a small amount and where the organization subsequently had adopted procedures to assure that similar expenditures would not be made in the future.”)

⁴⁸ Reg. § 1.501(c)(4)-1(a)(2)(ii).

⁴⁹ See Rev. Rul. 1981-95, 1981-1 C.B. 332 (citing section 501(c)(3) examples of prohibited political intervention for what constitutes section 501(c)(4) political intervention). Courts have agreed. See, e.g., *Ass’n of the Bar of the City of New York v. Comm’r*, 858 F.2d 876 (2d Cir. 1988).

in non-precedential Service positions throughout the intervening years.⁵⁰ The Preamble itself acknowledges that “the IRS generally applies the same facts and circumstances analysis under section 501(c)(4) [as under section 501(c)(3)].”⁵¹

Although to date the Service has not clearly articulated a standard to define political intervention in general, it has provided helpful and workable guidance with respect to particular factual scenarios, with the following applications of particular significance to the Proposed Regulation:

- *Voter guides* – an organization has not engaged in political intervention where it publishes voter guides based on candidate responses to questionnaires, or compiling legislators’ voting records, where such guides focus on a wide range of subjects and do not indicate organizational bias for or against any candidate based on either content or format;⁵²
- *Voter registration or GOTV drives* – organizations may encourage voter registration or engage in GOTV drives, provided that such activities do not indicate a preference for any candidate or political party, such as through the application of an “issue screen” likely to indicate candidate or political party preference;⁵³
- *Candidate forums and appearances* – organizations may hold candidate forums, provided that either all qualified candidates are invited, or reasonable, objective criteria are used to determine invitations, the questions are prepared by a nonpartisan panel and cover a wide range of subjects, every candidate has

⁵⁰ A series of private letter rulings in the late 1990s includes express statements by the Service that the activities considered political activity for a section 501(c)(3) organization are the same as activities that constitute political activity for section 501(c)(4) organizations. The rulings arose in the context of taxpayers seeking a determination that certain activities were exempt function activity under section 527 (discussed elsewhere in these Comments). However, because of the way the request was framed, it was easy to conclude that the proposed activities would be political intervention for a section 501(c)(3) organization. The first of these rulings looked at Rev. Rul. 1981-95 and made explicit what was implicit in its reasoning: that prohibited section 501(c)(3) political intervention is the same thing as political intervention under section 501(c)(4). *See, e.g.,* Priv. Ltr. Rul. 9552026 (Oct. 1, 1996); Judith E. Kindell & John Francis Reilly, *Election Year Issues*, 2002 EXEMPT ORG. CONTINUING PROF. EDUC. PGM. at 355, 433, available at <http://www.irs.gov/pub/irs-tege/eotpici02.pdf>.

⁵¹ *See* 78 Fed. Reg. at 71536 (noting similarity in section 501(c)(3) statutory prohibition against political intervention and section 501(c)(4) regulatory language that political intervention does not constitute promotion of social welfare).

⁵² *See, e.g.,* Rev. Rul. 1978-248, 1978-1 C.B. 154 (comparing several scenarios in which compilation of candidate voting records or positions is or is not political intervention, based on whether bias is shown); Rev. Rul. 1980-282 later permitted a somewhat narrower focus for legislative scorecards under certain conditions.

⁵³ *See* Rev. Rul. 2007-41, 2007-1 C.B. 1421, Situations 1 and 2 (comparing scenarios in which no candidate or political party preference is displayed in voter registration, with one in which an issue screen is applied before proceeding with GOTV message).

an equal opportunity to present, and the moderator or hosting organization does not indicate approval or disapproval for the candidates,⁵⁴ and

- *Issue advocacy not constituting political intervention* – a variety of factors are considered in determining whether an organization’s advocacy communication shows bias for or against any particular candidate or political party, such as whether the timing of the communication is based on a non-electoral event, whether the issue raised in the communication has been raised as a distinguishing factor in the election, and whether the communication is part of an ongoing series independent of the election.⁵⁵

These scenarios, most recently reiterated in Rev. Rul. 2007-41,⁵⁶ have given both section 501(c)(3) and 501(c)(4) organizations a better roadmap to help define activities that educate the voting public and enhance the functioning of our democracy without intervening in an election. We encourage Treasury and the Service to retain and build upon such guidance for both types of entities, as part of a comprehensive program of line-drawing that is sorely needed. In the meantime, however, it is hard to see how any of these educational activities, long engaged in by charities, would not also further “social welfare.”

While the lack of clear guidance for what constitutes political intervention outside of these specific scenarios presents challenges for the many organizations which engage in civic engagement activities, we suggest that the line drawn in the Proposed Regulation in defining candidate-related political activity is worse than the facts and circumstances approach that currently prevails throughout the Service’s treatment of political intervention cases. Imposing the standards in the Proposed Regulation on section 501(c)(3) organizations would be especially inappropriate, since these standards would treat many of the above-described section 501(c)(3)-permissible activities as “political” – thus outlawing their conduct by section 501(c)(3) organizations, and virtually eliminating many nonprofit voter education and civic engagement programs. Our concern about the rule is not that it is drawn in the wrong place, but that it is not clear. We recommend that Treasury and the Service develop clearer standards, extending existing guidance, perhaps with safe harbors, which would permit continued legitimate nonpartisan civic engagement programs – and further, for the reasons set forth below, apply these standards equally to section 501(c)(3) and section 501(c)(4) organizations.

Applying different standards for what constitutes political activity to section 501(c)(3) and section 501(c)(4) organizations will have unintended consequences in several areas.

- (1) Reduction in section 501(c)(3) conduct of nonpartisan civic engagement activities

⁵⁴ See *id.*, Situations 7-9; Rev. Rul. 1986-95, 1986-2 C.B. 73. Rev. Rul. 2007-41 may have loosened the criteria for candidate debates by describing various elements as “factors” rather than requirements, but by treating the standards as open-ended facts and circumstances, more uncertainty may result.

⁵⁵ See Rev. Rul. 2007-41 (applying these factors to section 501(c)(3) organizations); Rev. Rul. 2004-6, 2004-1 C.B. 328 (applying similar factors to section 527(f) tax that may be levied upon section 501(c)(4), section 501(c)(5), and section 501(c)(6) organizations, but not specifically to their qualification for exemption).

⁵⁶ Except voter guides, for which formal guidance has not been updated since 1980.

Having different standards for section 501(c)(4) organizations can be expected to discourage many section 501(c)(3) organizations from engaging in nonpartisan civic engagement activities (including voter education programs and voter registration or GOTV drives) even though such activities are clearly lawful for them. The Proposed Regulation would effectively label many such activities *per se* political, simply because they are being conducted by a section 501(c)(4) organization, rather than a section 501(c)(3) organization. Inevitably, some section 501(c)(3) organizations will avoid such lawful nonpartisan activities either because they mistakenly believe such activities are now deemed political intervention (a logical outgrowth of the longstanding Service guidance that the standard is the same for section 501(c)(3) and section 501(c)(4) organizations), or because they fear a misperception by donors or the general public that such activities are inherently political.

(2) Complication of section 501(c)(3)/(4) organizations' relationships

Having different standards may have adverse impacts on the operation of section 501(c)(3) organizations affiliated with, or engaging in coalition activities with, section 501(c)(4) organizations. As recognized by the Supreme Court, a section 501(c)(3) organization may be affiliated with a section 501(c)(4) organization, provided that the organizations respect corporate formalities and the section 501(c)(3) organization does not subsidize non-section-501(c)(3)-permissible activities conducted by the affiliated section 501(c)(4) organization.⁵⁷ Many such section 501(c)(3)/section 501(c)(4) tandems share staff, office space, equipment and other assets, with shared staff typically maintaining time records to ensure correct allocation of salaries and benefits between the two organization, as well as allocation of overhead and direct costs, to ensure that the section 501(c)(4) organization bears the full cost of its operations. If the standards for section 501(c)(3) and section 501(c)(4) political intervention are no longer congruent, then not only would the administration of such tandems become excessively burdensome, but it also may increase the likelihood of error in application of these rules by joint staff and management, potentially increasing audit risk or resulting in loss of the section 501(c)(3) organization's exemption.

Moreover, many section 501(c)(3) organizations join coalitions with section 501(c)(4) members to conduct section-501(c)(3)-permissible educational activities, nonpartisan civic engagement programs, and advocacy activities. Section 501(c)(3) organizations may make grants to section 501(c)(4) organizations, and vice versa, to conduct such activities. As with tandems, applying different standards to unrelated section 501(c)(3) and section 501(c)(4) organizations would make the operations of such coalitions difficult, if not impossible. Pooling of scarce charitable resources for civic engagement activities can be efficient and cost-effective, yet it appears this may be precluded under the Proposed Regulation. If a section 501(c)(3) organization makes a grant to a section 501(c)(4) organization to conduct a nonpartisan voter registration drive, has the section 501(c)(3) organization engaged in an activity that is prohibited for it? Even if not, this would lead to the strange result that while a section 501(c)(3)

⁵⁷ See *Regan v. Taxation With Representation*, 461 U.S. 540, 544 n.6 (1983) (discussing the permissibility of operating an section 501(c)(3) with an affiliated section 501(c)(4) organization, and noting that “[t]he Service apparently requires only that the two groups be separately incorporated and keep records adequate to show that tax deductible contributions are not used to pay for lobbying.”); see also *Agency for Int'l Dev. v. Alliance for Open Society Int'l, Inc.*, 133 S. Ct. 2321, 2329 (2013).

organization could conduct this activity directly in furtherance of charitable purposes, if it instead contributes to a section 501(c)(4) organization for this activity, it would not be in furtherance of the section 501(c)(4) organization's social welfare purposes. Conversely, how could a section 501(c)(4) organization's grant to a section 501(c)(3) organization for its charitable civic engagement activities be deemed candidate-related political activity?

(3) Effect on donors to section 501(c)(3) organizations conducting civic engagement programs

Different standards for section 501(c)(3) and 501(c)(4) organizations would likely distort grantmaking and other donations from third parties to section 501(c)(3) organizations engaging in nonpartisan civic engagement programs. Just as having different standards could discourage section 501(c)(3) organizations from engaging in nonpartisan civic engagement activities out of an excess of caution, a similar effect could discourage private foundations and other charitably-motivated donors from making grants to section 501(c)(3) organizations engaging in activities which, though lawful, could be perceived as having a political taint. Conversely, and ironically, the different standards could cause donors who are no longer able to fund nonpartisan civic engagement programs in section 501(c)(4) organizations to turn to section 501(c)(3) organizations and pressure them to take aggressive or questionable legal stances in their civic engagement programs, putting their tax-exempt status at risk.

c. Similarly, a different standard for political intervention for section 501(c)(5) or (6) organizations from section 501(c)(4) organizations is inappropriate, but the standard in the Proposed Regulation should be much improved before it is extended to other exempt categories

Treasury and the Service have requested comments on whether the proposed definition of candidate-related political activity should be extended to section 501(c)(5) and (6) organizations.⁵⁸ We strongly support having the same rules regarding what constitutes political intervention for such organizations (as well as other categories of section 501(c)) as for section 501(c)(4) organizations. We do not, however, support applying the proposed candidate-related political activity definition to section 501(c)(4) organizations, or extending it to any other category of section 501(c) organization.

As discussed above, the current section 501(c)(4) Regulations specifically provide that participating or intervening in a political campaign does not qualify as the promotion of social welfare.⁵⁹ In contrast, the statutory language and Regulations governing section 501(c)(5) labor unions and section 501(c)(6) trade associations and business leagues do not mention political intervention and are silent as to the impact on tax-exempt status of such activities by those types of organizations. The relevant paragraphs of section 501(c) and the accompanying Regulations are similarly silent about the impact of political intervention on the tax-exempt status of other types of exempt organizations that could potentially be involved in election campaigns, such as section 501(c)(7) social clubs and section 501(c)(19) veterans organizations. Nonetheless, the IRS National Office has acknowledged in non-precedential memoranda that “[i]f...the primary

⁵⁸ See 78 Fed. Reg. 71535, 71537.

⁵⁹ See Reg. § 1.501(c)(4)-1(a)(2)(ii).

purpose and activities of an organization qualify [for exemption] under Code § 501(c)(5), then some participation in political activities in support of or opposition to candidates for nomination or election to public office will not disqualify the organization from exemption under that section.”⁶⁰ This formulation applies the language of the section 501(c)(4) Regulations to describe permissible political intervention activities of section 501(c)(5) labor unions. The Service has also recognized in general terms that the same standards for political intervention should apply to both section 501(c)(5) and section 501(c)(6) organizations,⁶¹ and there is no reason to believe it would not extend generally to other section 501(c) organizations, absent specific contrary authority.

These generally congruent standards for defining what is political intervention by different categories of exempt organizations, as well as the “less than primary” limit on the quantity of such activity generally understood to apply also across these categories, serve an important purpose in the realm of public policy advocacy. Section 501(c)(4) social welfare organizations, section 501(c)(5) labor unions, and section 501(c)(6) trade associations are all, consistent with their respective tax-exempt purposes, allowed to be advocates in the marketplace of ideas for policy positions in the interest of their respective missions and members. Social welfare organizations advocate publicly for policy positions in accordance with their stated social missions, often with a particular liberal or conservative bent. Labor unions have traditionally been vocal and active in favoring or opposing public policy positions based on what they see as their members’ interests. Trade associations have long done the same thing in furtherance of the perceived interests of the industry or other business group to which their members belong. In short, section 501(c)(4), section 501(c)(5) and section 501(c)(6) organizations are often prominent and competing players in the same advocacy space, often taking opposing positions on issues in the public debate.⁶² Under current law, within the limits allowed by tax-exemption requirements and other laws, and subject to potential tax liability under section 527(f), if such public policy advocacy involves *political intervention*, these types of exempt organizations understand that they are all subject to the same general rules for tax and tax-exemption purposes.

The Proposed Regulation would change this level “political” playing field for only one category of advocacy organizations – section 501(c)(4) social welfare organizations. Section 501(c)(4) organizations alone would have to follow the peculiar “candidate-related political activity” definition of the Proposed Regulation in determining whether their tax-exempt purposes remain primarily in furtherance of social welfare, while other types of 501(c) advocacy-oriented organizations such as labor unions and trade associations would remain subject to the current political intervention standards (with all their uncertainties). This outcome is particularly difficult to rationalize from a public policy perspective when the significant private benefits appropriate in section 501(c)(5) unions and section 501(c)(6) trade associations are compared to the more restricted private benefits and greater social benefits required of section 501(c)(4)

⁶⁰ G.C.M. 36286 (May 22, 1975).

⁶¹ See generally G.C.M. 34233 (Dec. 30, 1969).

⁶² Vigorous public advocacy on policy issues, specifically including active legislative lobbying, has long been recognized as fully consistent with the tax-exempt purposes of section 501(c)(4) social welfare organizations, see Rev. Rul. 1968-656, 1968-2 C.B. 216, section 501(c)(5) labor unions, see G.C.M. 34233 (Dec. 30, 1969), and section 501(c)(6) trade associations. See Rev. Rul. 1961-177, 1961-2 C.B. 117.

social welfare organizations. All three types of organizations engage the public, and often compete, on the same public policy issues, and therefore should be subject to the same rules, but not the rules in the Proposed Regulation.

Having different rules for different types of section 501(c) organizations would also open the door to potential gamesmanship, especially with respect to issue ads. Political operatives could use a section 501(c)(4) organization for aggressive issue ads before the 30/60 day pre-election window begins, when under the Proposed Regulation a message is not deemed candidate-related political activity unless it contains express advocacy. Once the window has opened on candidate-related political activity for the section 501(c)(4) organization, such issue ads could be moved to a section 501(c)(5), (6), (7), etc., organization, allowing operatives to argue they are not less-than-primary political intervention by using an aggressive interpretation of facts and circumstances under current law, as some section 501(c)(4) organizations are alleged to have done in recent election cycles.

While the contours of an appropriate definition of political intervention for all section 501(c) organizations are beyond the scope of the comments requested by the NPRM, we urge Treasury and the Service to re-examine the candidate-related political activity standard in the Proposed Regulation. We recommend development and implementation of a more rational and workable formulation that can be applied across multiple section 501(c) classifications, rather than creating a new and substantial inconsistency between the definitions of less-than-primary political intervention applicable to section 501(c)(4) organizations and other section 501(c) organizations.

d. The same standard for political intervention for section 501(c) organizations (but not the standard in the Proposed Regulation) should apply to non-exempt organizations under sections 162(e) and 6033

Federal tax law does not allow taxpayers to claim business deductions for amounts spent on lobbying or certain political activity.⁶³ “Political activity” for section 162(e)(1) purposes means “participation in, or intervention in, any political campaign on behalf of (or in opposition to) any candidate for public office,” using virtually identical language to that describing the section 501(c)(3) political intervention prohibition. To prevent taxpayers from circumventing the rule that disallows business deductions for lobbying and political intervention, section 6033 imposes a special set of tax rules on organizations that are exempt from federal income tax under sections 501(c)(4), 501(c)(5), and 501(c)(6), to prevent their members from obtaining tax-favored treatment for the portion of their dues spent by the 501(c) organization on lobbying or political intervention activities. The tax on a section 501(c) organization’s lobbying and political intervention activities is sometimes referred to as the “Proxy Tax,” since it recoups from the section 501(c) organization the tax revenue lost when dues payments allocable to political intervention and lobbying expenditures are deducted by the organizations’ members.⁶⁴

⁶³ I.R.C. § 162(e)(1).

⁶⁴ Broadly speaking, an organization that is exempt under section 501(c)(4) and subject to the Proxy Tax has two choices regarding its lobbying and political expenditures. First, the organization can notify each person paying dues how much of the dues payment will be spent on such activities. I.R.C. § 6033(e)(1)(A)(ii). If the exempt organization provides such a notice to its dues-paying members, the members cannot claim business deductions for

Since the Proxy Tax is designed to prevent taxpayers from circumventing section 162(e)(1), political intervention and lobbying expenses that count for Proxy Tax purposes are determined under the section 162(e)(1) rules for business deductions. A section 501(c)(4) organization that is subject to the Proxy Tax would thus have to track its expenditures for political activities under three different regimes: the Proposed Regulation’s candidate-related political activity definitions for the primary purpose test; section 527’s exempt function rules for calculation of the section 527(f) tax; and the definitions of political intervention under sections 162(e) and 6033. This substantial burden would be reduced if the Proposed Regulation adopted a consistent test for political intervention that could then be applied across all of section 501(c) and to businesses under section 162.

For reasons of fairness, and to limit opportunities for arbitrage, we strongly recommend that the same definition of political intervention should be applied to all section 501(c) exempt organizations and to non-exempt organizations, for all relevant purposes.

4. Section 527’s “Exempt Function” Is the Wrong Model for the Definition of Political Intervention for section 501(c) Organizations

- a. The Proposed Regulation’s definition of candidate-related political activity for section 501(c)(4) organizations inappropriately invokes section 527, which was enacted to serve an unrelated and different statutory purpose*

As acknowledged in the Preamble, the definition of “candidate-related political activity” draws “key concepts from the federal election campaign laws” and “existing definitions of political campaign activity, both in the Code and in federal election law.” Unfortunately, the Proposed Regulation demonstrates what practitioners in this area have long known: federal election and tax laws are uneasy fellow travelers. Congress has historically avoided interweaving these two regimes, which were wholly separate until the introduction of section 527 in 1975,⁶⁵ and aside from section 527 have remained so for nearly 40 years. Section 527 itself reflects Congressional restraint and compromise, minimally invoking election law even in defining the then-new category of “political organization.”⁶⁶ Treasury and the Service should be wary about proposing to increase their interconnectedness.

the portion of their dues payments which are allocable to those activities. I.R.C. § 162(e)(3). Second, if the organization fails to provide this notice to members, or chooses not to provide the notice, its members may claim an unlimited business deduction for the dues they pay (assuming the dues otherwise qualify as a business deduction), but the exempt organization itself must pay an income tax at the highest corporate rate on the amount it spends on those activities. I.R.C. § 6033(e)(2)(A).

⁶⁵ See 93 S. Rep. 1357, 93d Cong., 2d Sess. 27 (1974), 1975-1 C.B. 517 (enacting provision of *Act to Amend the Tariff Schedules to Permit the Importation of Upholstery Regulators, Upholsterer’s Regulating Needles, and Upholsterer’s Pins Free of Duty*, also known as “Pins and Needles Act of 1974,” Pub. L. No. 93-625, 1975-C.B. 510).

⁶⁶ “Political organizations” are commonly referred to as “527s” after this section of the Code, much like section 501(c)(4) social welfare organizations are commonly referred to as “(c)(4)s.” A section 527 organization must have its own bank account and Federal employer identification number, but no application to the Service for recognition of exemption is required, only notice to the Service of its creation by filing a Form 8871.

Section 527 codifies the exemption of political organizations from tax on their income from traditionally political sources (i.e., political contributions, dues, political fundraising events or sales, and similar revenue), provided the income is used only for the political organization’s “exempt function.”⁶⁷ Section 527(e)(2) defines the “exempt function” of a political organization as “influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any federal, state, or local public office or office in a political organization, or the election of Presidential or Vice Presidential electors, whether or not such individual or electors are selected, nominated, elected, or appointed.” The core definitions of Proposed Regulation section 1.501(c)(4)-1(a)(2)(iii)(A) borrow heavily from the section 527(e)(2) definition. The first category of candidate-related political activity described in Proposed Regulation section 1.501(c)(4)-1(a)(2)(iii)(A)(1) is “[a]ny communication (as defined in paragraph (a)(2)(iii)(B)(3) of this section) expressing a view on, whether for or against, the *selection, nomination, election, or appointment of one or more clearly identified candidates or of candidates of a political party*”⁶⁸ that is express advocacy or is susceptible of no other reasonable interpretation than a call to vote for or against a candidate. Proposed Regulation section 1.501(c)(4)-1(a)(2)(iii)(B)(1) defines “candidate” as “an individual who publicly offers himself, or is proposed by another, for *selection, nomination, election, or appointment to any federal, state, or local public office or office in a political organization, or to be a Presidential or Vice-Presidential elector, whether or not such individual is ultimately selected, nominated, elected, or appointed.*”⁶⁹

Congress’s broad definition of section 527’s exempt function was intentional; its breadth was necessary in order to track and accommodate the wide range of income and activities that had previously been characterized as non-taxable by the Service and that the Service was then threatening to tax through administrative action.⁷⁰ The challenge was to define tax-free political activity generally enough to accommodate then-existing law without inviting abuse. The resulting provision effectively (if imperfectly) protects First Amendment rights and avoids chilling political activity, which Congress acknowledged to be the “heart of the democratic process,”⁷¹ by encouraging candidates, political parties, and their supporters and opponents to pool resources in order to participate in the political process without entity-level taxation. However, under sections 527(b) and (c), if a political organization generates net income from sources other than its exempt function (such as investment or commercial activity), that net income will be taxable. Thus section 527 encourages political organizations’ contributions to the political process while dissuading them from accumulating investment assets tax-free. Notably, section 527(e)(2)’s broad exempt function definition applies narrowly: it defines activity that is tax-free only for political organizations without applying that definition to permitted or prohibited activity of any other type of entity.

⁶⁷ See I.R.C. § 527(c)(3).

⁶⁸ Emphasis added.

⁶⁹ Emphasis added.

⁷⁰ For an excellent summary of the statutory background, see Milton Cerny and Frances R. Hill, *The Tax Treatment of Political Organizations*, 71 TAX NOTES 651 (1996).

⁷¹ 93 S. Rep. 1357, 93d Cong., 2d Sess. 27 (1974), 1975-1 C.B. 517.

- b. *Congress's application of section 527 to section 501(c) organizations through the section 527(f) tax was narrowly constructed to avoid abuse and was not intended to define proscribed or less-than-primary purpose social welfare activity*

In addition to creating a tax status for political organizations, section 527, through subsection (f), reaches beyond section 527 organizations to tax section 501(c) organizations (including section 501(c)(4) social welfare organizations), and this tax is the basis cited by Treasury and the Service for looking to section 527 to define the scope of less-than-primary political intervention for a section 501(c)(4) organization. But this position misconstrues the purpose of the section 527(f) tax on section 501(c) organizations: the application of section 527(f) to section 501(c) organizations is a statutory stop-gap to prevent section 501(c) organizations from conducting section 527 exempt function activities while avoiding the tax on section 527 organizations.

Section 527(f) taxes the net investment income of section 501(c) organizations that may otherwise accumulate investment assets tax-free.⁷² To avoid the tax, section 501(c) organizations can isolate their section 527 exempt function activities by creating a section 527 separate segregated fund (as discussed in greater detail in Part 4(d) below). The point of section 527(f) is to encourage that separation as a matter of tax policy. It has nothing to do with prescribing (or proscribing) any level or type of political activity by section 501(c) organizations. By tracking the taxing provisions of section 527 (sections 527(b) and (c)), including their definition of “exempt function,” the role of section 527(f) is to prevent a section 501(c) organization from avoiding the section 527(b) tax, and nothing more. If a section 501(c) organization has 527-type expenditures in excess of its investment income, it will be taxed on all of its investment income (just as a section 527 organization is taxed on its investment income). In other words, section 527(f) uses the broad definition of exempt function because it tracks section 527(b), not because Congress was making a pronouncement about what is and is not appropriate section 501(c) behavior. Because section 527(f) was designed as an anti-abuse provision for section 527 (not section 501(c)(4)), it is fundamentally unsuited for the purpose of defining section 501(c) activity. We should look to section 501(c)(4) itself, not section 527,⁷³ to define what is proper social welfare activity.

Moreover, when the Preamble states that the “[P]roposed Regulation instead would apply a definition that reflects the broader scope of section 527 and that is already applied to a section 501(c)(4) organization engaged in section 527 exempt function activity through section 527(f),” Treasury and the Service greatly exaggerate the extent to which section 527 currently applies to a section 501(c)(4) organization. Section 527(f) is “already applied” only to section 501(c)(4) organizations to the extent, and only to the extent, that such organizations act like *taxable* political organizations (i.e., to the extent they both make 527-type exempt function expenditures, and have investment income in excess of those expenditures), and the application of

⁷² Exceptions, such as unrelated business income taxation of certain debt-financed income and the tax imposed on the net investment income of social clubs, are beyond the scope of these Comments.

⁷³ As stated in Part 4(c), while we do not support extending §527's definitions to §501(c)(4) organizations, we do support re-examining the purpose and functioning of §527 in light of current circumstances and legal developments since its enactment, to determine whether and how §527 should be amended to bring it into better congruity with the definitions applicable to political intervention activities of other tax-exempt organizations.

section 527(f) will at most result in additional tax on the section 501(c)(4) organization, not in the revocation of its exemption.

- c. Section 4955, and not section 527, is the most recent congressional pronouncement on political activity of exempt organizations and is a more suitable standard*

The Preamble accurately states that section 501(c)(4) has not been amended since 1959.⁷⁴ However, the Preamble erroneously suggests that section 527(f) was Congress's last attempt to define political activity for section 501(c) organizations;⁷⁵ in fact, section 4955, which imposes an excise tax on political expenditures by section 501(c)(3) organizations, was added to the Code in 1987, well after the section 501(c)(3) political intervention prohibition had been equated with the section 501(c) less-than-primary threshold. In section 4955 Congress intentionally defined "political expenditure" as "participation in, or intervention in (including the publication or distribution of statements), any political campaign on behalf of (or in opposition to) any candidate for public office." In other words, when Congress last considered the political intervention restriction on section 501(c)(3) organizations, at a time when that restriction also defined political intervention for other categories of section 501(c), Congress limited "political intervention" to the support of or opposition to candidates for *elected* office.

- d. Far from being "consistent with section 527," application of the Proposed Regulation to section 501(c)(4) organizations along with the section 527(f) tax will produce unintended inconsistent results under existing section 527 Regulations*

The Preamble suggests that the Proposed Regulation is "consistent with" section 527 and that the broader standard of candidate-related political activity set forth in the Proposed Regulation is "already applied" to section 501(c)(4) organizations through section 527(f),⁷⁶ but the Preamble fails to acknowledge or account for significant *inconsistencies* between the Proposed Regulation and existing Regulations implementing section 527(f).

For example, the Preamble is silent on the creation of separate segregated funds by section 501(c) organizations. As an alternative to paying the section 527(f) tax, a section 501(c) organization can form a separate segregated fund ("SSF") with as little formality as opening a bank account and notifying the Service and perhaps the Federal Election Commission ("FEC") or the applicable State agency, and make its 527-type expenditures strictly through the SSF. The SSF will be treated as a separate section 527 political organization and taxed accordingly, instead of taxing the affiliated section 501(c) organization.⁷⁷ Section 1.501(c)(4)-1(a)(2)(iii)(6) of the Proposed Regulation includes SSFs in the definition of "section 527 organization," but otherwise

⁷⁴ 78 Fed. Reg. 71535.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ See I.R.C. § 527(f)(3). However, note that any transfers from the section 501(c) organization to its SSF will themselves trigger the section 527(f) tax to the section 501(c) organization, except where the section 501(c) organization acts as a mere conduit for dues or contributions raised from its members or donors for section 527 purposes and passes them promptly through to its SSF.

does not address the impact of the Proposed Regulation on section 501(c) organizations with SSFs.

Perhaps more importantly, the Preamble and Proposed Regulation are also silent on the treatment under the Proposed Regulation of a section 501(c) organization's 527-type expenditures that are expressly excepted from the section 527(f) tax. Specifically, section 501(c) organizations are generally not taxable under section 527(f) for (1) payments of certain "indirect expenses" of a political organization⁷⁸ and (2) expenditures that are "allowable" under the Federal Election Campaign Act ("FECA")⁷⁹ or "similar state statute."⁸⁰

These categories of otherwise nontaxable expenditures *are* taxable under section 527(f) *only to the extent* provided by two other subsections of the Regulations. However, those two provisions, Regulations sections 1.527-6(b)(2) and (3) respectively, have been "reserved" by the Treasury since first promulgated in 1980 (and are therefore often called the "Reserved Regulations"). Because the Reserved Regulations are missing, the two exceptions to the section 527(f) tax are defined only by the language on the face of the Regulations, unconstrained by whatever limits final, not-yet-promulgated section 527(f) Regulations might impose.

Before the Supreme Court decided *Citizens United v. Federal Election Commission*⁸¹ in January 2010, and aside from a limited number of "qualified nonprofit organizations" under *Massachusetts Citizens for Life*,⁸² independent federal political expenditures by corporations were not "allowable under the FECA"; the fact that any such expenditures would be taxable under section 527(f) was practically irrelevant since they were prohibited by federal election law. After the *Citizens United* Court lifted the ban on corporate independent expenditures, it also (arguably, and certainly unintentionally) rendered such independent federal political expenditures non-taxable under section 527(f) by virtue of the "allowable under the FECA" exception. In other words, although the section 527(f) Regulations have long provided section 501(c) organizations with narrow categories of 527-type expenditures that are not taxable, the breadth of these exceptions expanded dramatically in January 2010.

⁷⁸ See Reg. § 1.527-6(b)(1)(i) (cross-referencing Regulations section 1.527-6(b)(2), which is "Reserved").

⁷⁹ 11 CFR § 100.29.

⁸⁰ See Reg. § 1.527-6(b)(1)(i) (cross-referencing Regulations section 1.527-6(b)(3), which is "Reserved").

⁸¹ 558 U.S. 310 (2010). Although ostensibly an election law decision, the significance of the *Citizens United* opinion to application of the Reserved Regulations has not gone unnoticed by the national tax bar; as part of its annual list of recommendations for the Treasury-IRS Guidance Priority List, the American Bar Association's Section of Taxation has specifically requested clarification of the decision's impact. See Amer. Bar Ass'n Sec. of Tax'n, Letter to Emily S. McMahon (Ass't Sec'y, Dept. of the Treas.) and William J. Wilkins (Chief Counsel, IRS) Regarding Recommendations for 2012-2013 Guidance Priority List (May 16, 2012), (February 16, 2014, 10:52 PM), http://meetings.abanet.org/webupload/commupload/TX319000/relatedresources/Recommendations_for_2012-2013_Guidance_Priority_List.pdf (requesting "[g]uidance concerning the application of [R]eserved Regulation [s]ection 1.527-6(b)(3), 'Expenditures allowed by Federal Election Campaign Act' in light of *Citizens United* decision, which broadens the scope of activity that must be constitutionally permitted under existing law"); Amer. Bar Ass'n Sec. of Tax'n, Letter to Internal Revenue Service Commissioner Shulman Regarding Recommendations for 2011-2012 Guidance Priority List (Doc 2011-16135, 2011 TNT 143-25 (July 26, 2011)) (same).

⁸² *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986).

The Proposed Regulation neither acknowledges nor accommodates the existing exceptions to the section 527(f) tax, and their silence is particularly glaring in light of the apparent breadth of the exceptions post-*Citizens United*. Adoption of the current Proposed Regulation in the absence of final section 527(f) Regulations would create unintended inconsistencies between what is defined as candidate-related political activity for a section 501(c)(4) organization and which income of a section 501(c)(4) is taxed by section 527(f). We encourage Treasury and the Service to reexamine the section 527(f) Regulations; in the meantime, the Proposed Regulation should take into account these exceptions to the section 527(f) tax, discussed in more detail below.

(1) Indirect expenses

Under the current section 527 Regulations, in determining which of their expenditures are nontaxable (i.e., are not 527-type “exempt function” activities) “indirect expenses,” section 501(c) organizations may rely upon the definition of “indirect expenses” applicable to section 527 organizations.⁸³ This definition includes any expenses “necessary to support the directly related activities of [a] political organization,” and activities that “must be engaged in to allow [a] political organization to carry out the activity of influencing or attempting to influence the selection process.” Specifically, section 501(c) organizations do not have to count as section 527(f) taxable expenditures any resources they expend for the benefit of a section 527 political organization’s overhead, recordkeeping, or fundraising.⁸⁴

By contrast, the Proposed Regulation would include as candidate-related political activity – and therefore as non-primary purpose activity – “a contribution (including a gift, grant, subscription, loan, advance, or deposit) [by a section 501(c)(4) organization] of money or anything of value to or the solicitation of contributions on behalf of” any section 527 political organization.⁸⁵ In other words, under the Proposed Regulation, if a section 501(c)(4) organization makes a payment on behalf of a section 527 organization for anything that falls within the definition of “indirect expenses” of a section 527 organization, those expenditures would not count as primary purpose activity of the section 501(c)(4) organization, *even though they would be exempt from section 527(f) tax*. For example, the Proposed Regulation calls out fundraising expenditures specifically (“the solicitation of contributions on behalf of...any [S]ection 527 organization”), even though the current section 527 Regulations expressly *exclude* such expenses from taxation under section 527(f) if paid by a section 501(c) organization on behalf of a section 527 political organization. Under the Proposed Regulation, a section 501(c)(4) organization could actually lose its exemption for making political activity expenditures that escape tax under section 527(f).

(2) Expenses allowable under FECA or similar state statute

In the absence of the Reserved Regulations, current Regulations permit a section 501(c) organization to carve out from section 527(f) taxation expenditures that “are otherwise allowable

⁸³ See Reg. § 1.527-6(b)(1)(i).

⁸⁴ See Reg. § 1.527-2(c)(2).

⁸⁵ Prop. Reg. § 1.501(c)(4)-1(a)(2)(iii)(A)(4)(ii).

under [FECA] or similar state statute.”⁸⁶ Setting aside for the moment the enormous difficulties of interpreting the terms “allowable” and “similar” in this context,⁸⁷ it is at least clear that communications by a section 501(c) organization with its members about candidates for public office are allowed by FECA and will not be taxable as a section 527(f) exempt function expenditure. By contrast, such communications fall squarely within the definition of candidate-related political activity in the Proposed Regulation. As with indirect expenses, a section 501(c)(4) organization’s member communications could cause it to fail the primary purpose test and lose its exempt status entirely for excessive candidate-related political activity, without the associated expenditures ever being taxable as political intervention under section 527(f).

While the incongruity of the treatment of expenditures for member communications under section 527(f) and the Proposed Regulation is clear, it is likely that many other categories of 501(c) expenditures allowable under the FECA or similar state statute (thanks to *Citizens United*) and therefore not taxable under section 527(f) as exempt function expenditures would fall within the scope of candidate-related political activity under the Proposed Regulation and thus could cost a section 501(c)(4) organization its exemption for excessive candidate-related political activity if they became primary. This anomalous result could be mitigated by promulgating appropriate Reserved Regulations, or by rethinking the definition of candidate-related political activity.

We certainly support the values of simplicity and consistency in tax policy. We believe, as we argue in Part 5(c), that section 527’s coverage of who is a candidate is a poor fit for purposes of section 501(c)(4) political intervention. Even if it were appropriate, however, the justification that the Proposed Regulation is consistent with section 527 in other ways does not hold up. The differences described above demonstrate that the Proposed Regulation’s relationship to section 527 is neither consistent, nor simple, and we recommend Treasury and the Service move away entirely from using section 527 as a reference or analogy for defining political intervention by section 501(c) entities. Instead, we suggest that Treasury and the Service sharpen and focus existing guidance defining political intervention which has heretofore applied across categories of section 501(c) organizations, to reduce the need for detailed factual analysis and fact-intensive determinations.

e. Section 527’s exempt function should be brought into line with the definition of political intervention for section 501(c) and non-exempt organizations

We strongly support using the same standard consistently to determine whether advocacy is treated as for (or against) a candidate rather than something else such as lobbying or policy advocacy, whether for all types of 501(c) organizations and non-exempt organizations, as discussed above in Part 3 above, or for section 527 political organizations and the section 527(f) tax, discussed above in this Part. We appreciate that, for a section 527 political organization, it would require a statutory change to allow the definition of the exempt function to conform, or at least dovetail, with the definition of political intervention for section 501(c) organizations and businesses under section 162(e) and section 6033, but we believe that developments since the

⁸⁶ See Reg. § 1.527-6(b)(1)(i).

⁸⁷ See Nancy E. McGlamery and Rosemary E. Fei, *Taxation with Reservations: Taxing Nonprofit Political Expenditures After Citizens United*, 10 ELECTION L.J. 449 (2011).

enactment of section 527 warrant such a re-examination now. This suggestion is well beyond the scope of the Proposed Regulation, but we recommend Treasury and Service support such legislative changes if the opportunity arises.

5. Comments and Recommendations on the Definition of Candidate-Related Political Activity in the Proposed Regulation

While, as discussed in Part 2(b) above, the drafters of these Comments did not reach a consensus on the specific amount of non-social welfare activity that section 501(c)(4) organizations should be allowed to undertake, for purposes of the following discussion in these Comments only, it is assumed that 40% non-social welfare activity would be permitted. If “primary” were defined at a lower level, the recommendations in this section of these Comments regarding the definition of candidate-related political activity would be affected. In particular, potential concerns about overbreadth of the definitions increase as the allowable amount of that activity is reduced.

- a. Using specified time periods prior to an election (and prior to an appointment event) creates an inflexible definition that is both over-inclusive and under-inclusive*

The Proposed Regulation creates an absolute rule that treats any “public communication” made within a stated pre-election window as “candidate-related political activity” if it 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. This rule applies to a communication in any medium whatsoever, including material previously posted on a web site that remains available during the pre-election period. It covers any communication that reaches or is intended to reach more than 500 people that refers to a clearly identified candidate. This Part 5(a) is limited to addressing problems created by using a time window bright line to define candidate-related political activity; our concerns with other aspects of the definition are covered in the remainder of this Part 5.

While this rule is highly problematic (as discussed below), we do support the decision to measure the time window to which it applies only by reference to an election, rather than also by reference to any other type of selection event. While the Proposed Regulation would treat advocacy with respect to appointive office as “candidate-related political activity,” applying a pre-decision blackout period to events related to appointive office would create a logistical nightmare. Whether the office is filled merely by appointment or by nomination and legislative confirmation, it will often be impossible for an organization to know in advance when the relevant action will occur and thus when the pre-decision time period applies to its communications. To treat pre-appointment or pre-confirmation communications as “candidate-related political activity” would create unmanageable uncertainty for organizations attempting to track and limit that activity.

More generally, the treatment of any public communication referring to a candidate made within the pre-election period as “candidate-related political activity” creates a rule that may provide clarity, but at the expense of capturing both far more and potentially far less activity than is appropriate. By capturing any mere reference to a candidate and not providing exceptions for

bona fide non-electoral advocacy, the Proposed Regulation would re-classify massive amounts of legitimate social welfare activity as “candidate-related political activity.” The breadth of this rule coupled with the lack of any exceptions means that it is likely that a section 501(c)(4) organization’s legitimate grassroots lobbying activity that has nothing to do with an election will be treated as candidate-related political activity. We question this outcome as a matter both of policy and of authority. Section 501(c)(4) organizations may engage in unlimited lobbying consistent with their tax-exempt status, yet under the Proposed Regulation an organization’s otherwise permitted lobbying may put the section 501(c)(4) organization’s exemption at risk. Given the lack of any evidence that Congress seeks to limit lobbying by section 501(c)(4) organizations, a rule such as the Proposed Regulation that would constrain substantial amounts of grassroots lobbying is arguably in excess of the Service’s authority to distinguish qualifying social welfare activity from section-501(c)(4)-disqualifying political intervention. Further, by constraining the ability of a section 501(c)(3) organization to carry out lobbying through an affiliated section 501(c)(4) organization using non-deductible funds, this over-broad definition raises constitutional concerns.⁸⁸

The absolute rule for candidate references in the pre-election window also creates pressure to use other vehicles for genuinely non-electoral communications during that window. An organization that wants to urge members of the public to communicate with “your Senators” regarding pending legislation has an additional incentive to send that message from a section 501(c)(3) organization (subject to the limited amount of lobbying it is permitted to engage in) rather than have the same message be treated as “candidate-related political activity” if sent by a section 501(c)(4) organization that as a policy matter is generally the preferred vehicle for lobbying. By applying a strict time-based test with no safe harbor for non-electoral lobbying messages, the Proposed Regulation encourages the use of section 501(c)(3) tax-deductible funds for lobbying close to an election. Under current rules, organizations often opt to use a section 501(c)(4) vehicle to convey these messages to avoid any possibility of the communication being deemed “campaign intervention” by the section 501(c)(3) organization. Yet, when a section 501(c)(3) organization can defend itself using a facts and circumstances argument and a section 501(c)(4) organization faces an absolute rule treating its communication as “candidate-related political activity,” it is inevitable that we would see more section 501(c)(3) charitable dollars being spent on lobbying messages during the section-501(c)(4)-only window of pre-election coverage.

Further, the absolute line for communications within a the pre-election window paradoxically creates a safe harbor for almost all activity outside that window. Up until the pre-election cutoff, only express advocacy for or against candidates or specific election-related activity would be considered “candidate-related political activity.” (The problems with treating all voter registration, GOTV, and voter guides as “candidate-related political activity” are discussed elsewhere in these Comments.) The absolute exemption for almost all communications about candidates outside the pre-election window creates a problem that is the converse of the strict treatment of communications referencing a candidate within that window.

⁸⁸ See generally *Regan v. Taxation With Representation*, 461 U.S. 540 (1983); *Agency for Int'l Dev. v. Alliance for Open Society Int'l, Inc.*, 133 S. Ct. 2321 (2013).

As advisors to political operatives know, it is easy to construct a communication that on its face is not a call to vote for or against a candidate, yet which by any measure of common sense would be understood as an effort to influence an election. Any non-electoral call to action will suffice, even if the attempt to influence an election is obvious. For example, directing an audience to ask an incumbent to disavow her or his signature legislative accomplishment can be made susceptible of *some* reasonable interpretation other than a call to vote against that candidate, even though the electoral intent will be transparent to everyone.

In other words, this approach leaves open a huge opportunity – it can hardly be called a loophole – for section 501(c)(4) organizations to spend massive amounts of funds on electoral messages up through day 31 (before a primary) or 61 (before a general election). For sophisticated organizations seeking to influence elections, a section 501(c)(4) organization will be the vehicle of choice for messages supporting or opposing (but not expressly) a candidate outside the time window, while another organization (section 501(c)(5), section 501(c)(6), non-exempt, etc.) would be used within the window.

Applying the same definitions to all exempt organizations, as we suggest elsewhere, would eliminate the ability to manipulate the system by using organizations with different section 501(c) classifications during different windows, but a bright time-based rule would still leave untouched broad swathes of campaign advocacy outside the window.

We appreciate that the Service sees the benefit of replacing the old approach that relied on review of all the “facts and circumstances” without any standard to apply to those facts. Creating a legal standard to employ in this analysis is commendable, and long overdue. However, in its move away from the standardless “facts and circumstances” approach, the Proposed Regulation goes too far in its aversion to any reference to facts. A fair rule cannot describe speech outside the pre-election window that should be captured as “candidate-related political activity” without any reference to facts, just as reasonable exceptions for speech within that window will necessarily require assessment of facts. This is not a novel situation; existing Regulations defining lobbying for purposes of sections 501(h) and 4911 have worked well for years. They set out rules that are to be applied to facts in clearly stated ways that organizations and their advisors have been able to apply, and the Service has been able to administer.

We submit that to draw a clear but fair rule defining political activity by exempt organizations, there must be a standard that is applied to the facts of a specific communication together with reasonable exceptions. There is room between the current wide-ranging, open-ended inquiry into all the facts and circumstances, and the Proposed Regulation, which draws a bright line that ignores relevant, even critical, facts. The choice is not between “we know it when we see it” and an absolute time cut-off that treats all speech in a pre-election window as political and almost all speech outside the window as not. We recommend that the definition of candidate-related political activity should not rely solely on a time period within which any mention of a candidate is treated as not social welfare (although we believe timing is relevant, and a time period could be a useful element of the definition). The final definition should be more finely tuned, with reasonable carve-outs for lobbying and otherwise non-electoral activity.

- b. *The definition of covered “public communications” is overbroad and, coupled with the strict time window approach, would create massive administrative problems for organizations seeking to comply with the Proposed Regulation*

In addition to problems created by application of a rule based strictly on timing, the scope of communications covered by the proposed definition of “candidate-related political activity” could create significant problems. Under the Proposed Regulation a covered “public communication” means any communication that is made through any of the following channels: broadcast on network television, cable, or satellite; on an Internet web site; in a newspaper, magazine, or other periodical; in the form of paid advertising; or any other channel that reaches, or is intended to reach, more than 500 persons. The Preamble notes that the Treasury and the Service intend that any content that refers to a clearly identified candidate that is on the section 501(c)(4) organization’s web site prior to the covered period will become a covered public communication if it remains on the web site during the applicable pre-election window.

The proposed rule uses the same pre-election timeframes as the definition of an “electioneering communication” under FECA. The Preamble notes that this rule is based on federal campaign finance laws regarding disclosure of certain “electioneering” communications, and modified in order to incorporate tax law. However, the types of communication covered are far broader than those covered by FECA. As a result, the approach taken in the Proposed Regulation extends too far and will impose significant burdens on covered organizations.

It is also important to understand that any regulations interpreting political intervention under the Code must be workable not only for federal elections, but also state and local elections, where the campaign and election laws may differ greatly from the FEC rules. The time periods for enhanced donor disclosure, dollar reporting thresholds, the forms of media communications affected, and the recognition of exceptions, may vary widely and will be nonexistent in many jurisdictions.⁸⁹ Extending federal election law standards through federal tax law to political intervention in state and local jurisdictions will create confusing, divergent, and multiple compliance burdens on nonprofits operating at the state and local levels.

Under FECA, an electioneering communication is any broadcast, cable or satellite communication that fulfills each of the following conditions:

- The communication refers to a clearly identified candidate for federal office;
- the communication is publicly distributed shortly before an election for the office that the candidate is seeking (30 days before a primary, and 60 days before a general election); and
- the communication is targeted to the relevant electorate (U.S. House and Senate candidates only).

⁸⁹ For instance, the requirements for donor disclosure in the case of issue advocacy messages that name candidates in California involve a 45-day period in advance of all elections, a dollar threshold of \$50,000, and a set of communications media that varies from the FECA provisions. California Government Code § 85310.

Newspaper communications, Internet communications, direct mail, and email are among the categories of communications that are expressly exempt.⁹⁰ Moreover, editorials are generally exempt.⁹¹

The election law definition can be and has been criticized as overbroad because it treats as “electioneering” any reference to a candidate with no exception for genuine lobbying or other non-electoral speech. However, the term “electioneering communication” under federal election law is narrowly tailored by comparison to the Proposed Regulation. The “electioneering communication” definition stems from the Bi-Partisan Campaign Reform Act of 2002 (“BCRA”),⁹² which imposed a ban on all such communications funded by corporations or unions. The rationale behind the ban was to end the use of “sham issue advocacy” advertisements that were run close in time to an election and, while purporting to discuss an issue associated with a candidate, in fact operated in many cases as campaign advertisements promoting or opposing a specific candidate. An electioneering communication under federal election law is limited to communications in broadcast media that were deemed by the legislative drafters to be particularly susceptible to use for electoral advocacy. Further, an electioneering communication must be “targeted” to the relevant electorate.⁹³ In contrast, the Proposed Regulation would capture as “candidate-related political activity” a lobbying message sent, for example, only to residents of Maryland that referred to the “Smith-Jones bill” where Representative Jones is a candidate for re-election in California.⁹⁴

As discussed above in Part 5(a), we believe it is ill-advised to use a strict calendar-based cut-off for pre-election speech that will be automatically treated as “candidate-related political activity.” However, should this approach be retained, it should at a minimum be limited in its coverage of media and cover only messages for which the audience includes the relevant electorate.

A reasonable starting point for the definition of covered media may be found in the FEC’s definition of “public communication”:

Public communication means a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising. The term general public political advertising shall not include communications over the Internet, except for communications placed for a fee on another person’s Web site.⁹⁵

⁹⁰ 11 CFR 100.29(c); e.g., FEC Advisory Opinion 2011-19 (“GivingSphere”).

⁹¹ *Id.*

⁹² Pub.L. 107–155, 116 Stat. 81, enacted March 27, 2002, H.R. 2356.

⁹³ This use of the term “targeted” may seem counter-intuitive, as it lacks the element of selectively directing the message at an audience, but at least it will not capture a communication that is not viewable by the relevant electorate.

⁹⁴ Indeed, it would apparently cover communications directed to audiences composed solely of non-U.S. citizens, such as remarks made at a conference overseas.

⁹⁵ 11 CFR § 100.26.

By focusing on media generally availed of by political campaigns seeking to persuade voters, this definition leaves space for issue discussion and other activities not likely to affect electoral behavior. (Note that many of these terms, such as “mass mailing” and “telephone bank” are clearly defined elsewhere in the applicable election law regulations.) For the Proposed Regulation, we would suggest modifying the list of covered media by removing the reference to “any other form of general public political advertising” as it introduces a large element of uncertainty. Rather, the Proposed Regulation should specify covered media channels as of its promulgation date and then create a mechanism for adding new forms of media being used for political advertising to the list as practices and technology evolve.

Aside from questions of over-inclusion and under-inclusion, the Proposed Regulation would create administrative difficulties by treating all material on an organization’s web site as continuously published without regard to the time or location of posting. The Preamble makes explicit that the absolute rule treating pre-election communications as “candidate-related political activity” is affirmatively intended to cover material posted by an organization on its web site that is not taken down during the window. In effect, this requires organizations to constantly (as pre-election windows open) scrub all material archived deep in their web sites to ensure they have not inadvertently engaged in “candidate-related political activity.”⁹⁶ This requirement not only imposes significant burdens on these organizations, but also threatens to reduce the availability of information useful to the public. Archives of previous lobbying messages and policy discussions may disappear to avoid the risk of leaving a candidate reference available to public view during the pre-election window. An organization that is (or has been) involved in litigation that names a public official who later decides to run for elected office will be discouraged from making court filings available on its web site. The public interest in such an outcome is difficult to discern. We recommend that Treasury and the Service find an approach that balances the ease and clarity of a rule that all posted materials are treated as continuously published for as long as they remain somewhere on an organization’s web site, with the likely heavy administrative burden on organizations and the serious harm to public information and debate on the Internet that such a rule would generate.

The Proposed Regulation creates a further challenge by failing to indicate how organizations should account for the cost of previously-posted web content that remains online during the pre-election window. How far back must it look to capture the costs of creating content as “candidate-related political activity” which may not even have qualified as candidate related political activity at the time of posting? Or must it look back at all? Perhaps the intent is to capture only the costs of hosting the content during the covered period. The Proposed Regulation is silent, leaving organizations that must track and report “candidate-related political activity” expenditures in a difficult position.

⁹⁶ Of course, the Proposed Regulation does not prohibit a social welfare organization from engaging in “candidate-related political activity.” However, as noted in Part 2(b), the NPRM has opened the door to re-examining the amount of political intervention activity these organizations are permitted, with some advocates urging that no more than an insubstantial amount of political activity should be allowed. Were the limit to be reduced that dramatically, the overbreadth of this definition would have wider effect, and the concerns raised here about monitoring web site content in order to avoid “candidate-related political activity” would become more urgent.

Further complications arise from the Proposed Regulation’s coverage of communications posted without a fee on third-party web sites (or other communications channels). This covers comments added to a third-party blog as well as postings on social media such as Facebook or Twitter. In some cases, the organization may not have control of the message once posted, so it would not be able to prevent it appearing during the pre-election window. If the organization did not know at the time the comment was posted that a person mentioned would later become a candidate, it may find itself inadvertently and inescapably engaging in “candidate-related political activity.”

Similarly, while an organization’s presence on sites such as Facebook is not completely out of its control, it can be at the very least challenging to go back far into prior posts to delete references to persons who have become candidates. Further, once deleted it will be impractical and burdensome to restore such references after the pre-election window has passed. As a result, interesting and thoughtful conversations provoked by a months-old or even years-old post may be entirely lost through an organization’s need to avoid or minimize its “candidate-related political activity.” An organization faces a daunting, if not impossible task, if a third party has archived its communications so that they remain available to be viewed by the public during the pre-election window.⁹⁷

The FEC wisely decided not to treat all Internet communications as “public communications,” a term that triggers various regulatory rules. We urge the Treasury and Service to adopt a similar rule. Experience has demonstrated that excluding from coverage unpaid Internet communications or an organization’s own web site does not create loopholes that will be exploited to direct large sums of money to influence elections, but rather avoids creating a vast number of difficulties for organizations seeking to comply with these rules.

We recommend that, if a *per se* time rule defining political advocacy is retained, its reach should be limited to media likely to be used for campaigning. Treasury and the Service should follow the FEC’s lead in creating an exception for content other than express advocacy on an organization’s own web site, and for content on third-party sites other than that placed for a fee.

c. Problems with the proposed definition of “candidate”

The Proposed Regulation defines a “candidate” as follows:

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

⁹⁷ For instance, the Internet Archive at www.archive.org maintains snapshots of web sites through time. The Library of Congress is archiving all content from Twitter. See <http://archive.org/about/> (“The Internet Archive is a 501(c)(3) non-profit that was founded to build an Internet library. Its purposes include offering permanent access for researchers, historians, scholars, people with disabilities, and the general public to historical collections that exist in digital format.”); see also *Library of Congress Is Archiving All of America’s Tweets*, BUSINESS INSIDER (January 22, 2013; accessed March 2, 2014) available at <http://www.businessinsider.com/library-of-congress-is-archiving-all-of-americas-tweets-2013-1>.

nominated, elected, or appointed. Any officeholder who is the subject of a recall election shall be treated as a candidate in the recall election.⁹⁸

We see four issues here: (1) employing the “proposed by another” standard to define candidacy, (2) expanding the types of offices beyond elected public office, (3) including officeholders who are the subject of a recall election, and (4) an implicit focus on U.S. elections. We discuss these in turn.

(1) “Proposed by others” is neither a workable nor a necessary standard

The standard “is proposed by others” is based on the section 501(c)(3) “action organization” regulations defining disqualifying political activity.⁹⁹ It is problematic even in that context, because it puts a key factor in determining whether an organization’s communication is treated as prohibited campaign intervention in the hands of third parties, whose advocacy may not even be known to the organization. But in the section 501(c)(3) context this result is mitigated somewhat by the broad “facts and circumstances” approach employed in the analysis.¹⁰⁰ That is, the inquiry can consider whether the reference is to the person as a candidate, and whether speaker or audience are likely to be aware that “others” may be proposing her as a candidate.

The “proposed by others” standard makes little sense as applied in the Proposed Regulation. “Candidate-related political activity” would include any public communication that refers to a clearly identified candidate and is made within 30 days before a primary or 60 days before a general election. Within such a close time period before an election, anyone who is in any serious sense a candidate will have qualified for the ballot, and/or have registered a campaign committee with the relevant campaign finance authority. Outside that window, the Proposed Regulation would only capture as “candidate-related political activity” communications that constitute express advocacy or its functional equivalent,¹⁰¹ or for which the expenditures are reported to the FEC. Neither of these situations requires the “is proposed by others” standard. If the organization is expressly advocating for or against someone’s election, then proposals of “others” are not in question. Furthermore, expenditures for communications by a section 501(c)(4) exempt organization are only reported to the FEC if they meet that agency’s standard of referring to a candidate (among other criteria), which employs its own clear standards and is not triggered by what third parties may propose.¹⁰²

⁹⁸ Prop. Reg. § 501(c)(4)-1(a)(2)(iii)(B)(1).

⁹⁹ Reg. § 1.501(c)(3)-1(c)(3)(ii)(iii).

¹⁰⁰ This is not to suggest that we support a vague, standardless “facts and circumstances” rule to determine whether activity qualifies as campaign intervention in the section 501(c)(3) context or elsewhere.

¹⁰¹ This is a short-hand description. The problems with the Proposed Regulation’s modified version of express advocacy are addressed elsewhere in Part 5(d) below.

¹⁰² Specifically, a candidate is “an individual who seeks nomination for election, or election, to Federal office” 2 USC § 431(2). The statute further defines seeking election as having received contributions or made expenditures in furtherance of such candidacy in excess of \$5,000, or having given consent to another person to receive contributions or make expenditures in that amount. *Id.*

The “proposed by others” standard is also problematic with respect to the fact that the Proposed Regulation would treat any event at which a candidate appears (within the 30/60 day pre-election window) as “candidate-related political activity.” If a person is not actively campaigning and is not ballot-qualified, there is no basis for treating her appearance as political activity merely because someone, somewhere can be shown to have said that she should be elected to a specified public office – especially where this may plainly be a wishful and not a practical statement.

Thus, adopting the “proposed by others” definition of a candidate does not meaningfully define or circumscribe the applicability of the proposed definitions of “candidate-related political activity.” It does, however, add an element of uncertainty to the entire exercise by forcing an organization to examine its own speech in light of what third parties may or may not be saying. We believe that a better definition of “candidate” would include someone who has registered a campaign committee and is thus a “candidate” under applicable campaign finance law, someone who has qualified to appear on the ballot for the relevant election, someone who has expressly declared an intent to seek the office in question, or someone whose candidacy the organization expressly promotes or opposes. This approach would capture substantially all candidate advocacy, without being overbroad or unduly vague.

- (2) Expanding the definition of “candidate” to overlap with offices covered by section 527 exempt function creates needless complexity

The current Regulations for section 501(c)(4) organizations state that “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.”¹⁰³ This language tracks the prohibition on campaign intervention applicable to section 501(c)(3) organizations, which in turn applies only to elected and not appointed office.¹⁰⁴

The Proposed Regulation would broaden this definition to include not only candidates for elective office, but also nomination or appointments¹⁰⁵ to any federal, state or local office, or office in a political organization. These positions are not covered by the current rule defining campaign intervention to not qualify as social welfare activity. Rather, this definition echoes the statutory language defining the section 527 “exempt function.”

We recognize that there is a benefit to harmonizing the definitions of covered political activity applicable to section 501(c) and section 527 organizations. As a policy matter, it would be desirable to have one single rule that describes “political intervention” for purposes of section 527 qualification, section 501(c)(4)¹⁰⁶ disqualification, and application of the

¹⁰³ Reg. § 1.501(c)(4)(2)(ii).

¹⁰⁴ See Notice 1988-76, 1988-2 C.B. 392.

¹⁰⁵ The Service has never seriously tried to capture and tax section 501(c) organization spending to influence appointments to public office, despite the phrasing of section 527(e). Reg § 1.527-6(b)(4) allows an organization to appear before a legislative confirmation hearing on written request without incurring the section 527(f) tax. See also Announcement 1988-114, 1998-37 I.R.B. and GCM 36694 (Feb. 3, 1988), effectively suspending any application of the 527(f) tax on 501(c) expenditures influencing appointments.

¹⁰⁶ And, as discussed in Part 3 above, other subsections of section 501(c).

section 527(f) tax. However, the expanded definition in the Proposed Regulation does not accomplish this goal. It is a small and inappropriate step towards that harmonization that will still require the affected organizations to track “political” activity using multiple definitions.

This result stems from the limited applicability of the Proposed Regulation’s definition. The draft rule only puts forward a description of activities that will be considered not to constitute the promotion of social welfare for purposes of qualifying for exemption under section 501(c)(4). Its definitions and line-drawing do not apply to the application of the section 527(f) tax on investment income. Rather, that section, as well as the fundamental question of whether an organization is described in section 527 because it primarily engages in a section 527(e)(2) exempt function, will apparently continue to be determined by resort to the existing facts and circumstances analysis.¹⁰⁷ Thus, if the Proposed Regulation is adopted as written, a section 501(c)(4) organization will be required to analyze each of its activities under two standards: using facts and circumstances to determine whether the activity triggers the section 527(f) tax, and using the rule in the Proposed Regulation to determine whether the activity must be considered not in furtherance of social welfare.

Further, a section 501(c)(4) organization that is affiliated with a section 501(c)(3) organization that does very little lobbying could avoid taking such expenditures into account as candidate-related activity by having the activity performed by the section 501(c)(3) organization, leaving the section 501(c)(4) organization to engage in other candidate-related activities. This possibility would place section 501(c)(4) organizations that are affiliated with other entities on a different footing than those that are unaffiliated. We see no policy rationale for expanding the types of offices with respect to which advocacy is treated as not social welfare activity, especially when other section 501(c) organizations are free to advocate for or against candidates for appointed office (limited only by the restrictions on section 501(c)(3) organizations’ lobbying, where such offices are subject to legislative confirmation).

Section 527 seeks to give political organizations the greatest leeway in expenditures they could undertake without having to include in income amounts such as spending in connection with appointments or office in a political organization. The same rules should not be used to implicitly chill the legitimate activities of a section 501(c)(4) organization.

(3) “Subject of a recall election”

The Proposed Regulation would also treat as a candidate any officeholder who is the subject of a recall election. We believe this treatment makes sense as a policy matter; it is a reasonable position for the Proposed Regulation to adopt. Further, it is helpful to have a clear statement that such recalls are covered.

It begs the question, however, of how to determine when an officeholder is the “subject” of a recall election, and guidance on that point should be incorporated into the Proposed Regulation. As discussed above, we recommend replacing the “proposed by others” standard to define a candidate, and would argue at least as strongly that an officeholder whose recall is

¹⁰⁷ See Rev. Rul. 2004-6 (“Whether an expenditure is for an exempt function [under § 527(e)] depends on all the facts and circumstances.”).

proposed by some, or even one, disgruntled constituent should not be *ipso facto* treated as a candidate for purposes of the application of these rules.

If it is the case that every state which has the possibility for recall elections makes provision for them to be triggered by circulation of citizen petitions, then a reasonable line could be drawn similarly to that in the section 4911 Regulations with respect to ballot measures: when the petition is first circulated among voters for signature.¹⁰⁸ If there are other mechanisms to trigger a recall, then a rule of more general applicability could be that an officeholder is the subject of a recall only when the measure is certified for the ballot, whether by administrative or judicial action. Given the relative rarity of recall elections, drawing the line at this stage would not be opening the doors to significant amounts of mischief. Alternatively, policymakers could draw a bright line based on state law ballot qualification and also capture advocacy with respect to a person whose recall the organization explicitly supports or opposes.

(4) Implicit limitation to U.S. elections

By defining “candidate” to include one who seeks federal, state, or local public office, the Proposed Regulation creates an implication that their scope is limited to public office in the United States. This limitation is inconsistent with current practice, and there seems to be no policy reason to allow advocacy with respect to foreign elections to be treated differently from advocacy regarding domestic candidates. We recommend that the definition of candidate be amended to include a clear statement that it covers public office sought in the United States or any other country, and that the covered offices are national, federal, state, regional, local or any other public office, however designated by that country.¹⁰⁹

(5) “Clearly identified” candidate

The Proposed Regulation further defines a “clearly identified” candidate to mean that:

the name of the candidate involved appears, a photograph or drawing of the candidate appears, or the identity of the candidate is apparent by reference, such as by use of the candidate’s recorded voice or of terms such as “the Mayor,” “your Congressman,” “the incumbent,” “the Democratic nominee,” or “the Republican candidate for County Supervisor.” In addition, a candidate may be “clearly identified” by reference to an issue or characteristic used to distinguish the candidate from other candidates.¹¹⁰

The initial portion of the quoted text is a workable definition that organizations can reasonably be expected to apply. However, the last sentence is not clear. It greatly expands the idea of “clearly identified candidate.” While we find the meaning of this last sentence difficult to understand, presumably it would apply when the first part of the definition does not –

¹⁰⁸ Reg. § 56.4911-2(d)(1)(ii).

¹⁰⁹ This is not simply a theoretical problem. The Service has found occasions to revoke the section 501(c)(4) status of U.S. nonprofit organizations having the principal purpose of supporting candidates for election in other nations. *See, e.g.*, P.L.R. 201214035 (Apr. 6, 2012) (involving support of candidates in South Korea).

¹¹⁰ Prop. Reg. § 1.501(c)(4)-1(a)(2)(iii)(B)(2).

otherwise the sentence adds nothing. In other words, this applies to a communication that does not include the name, likeness, or title of a specific candidate, or any of the other stated mechanisms for referring to a specific person without stating her name.

We do not know when the Proposed Regulation contemplates that reference to an issue or characteristic would be used to distinguish a candidate from other candidates. Is this intended to capture general statements urging a vote for a candidate holding a position that is likely to distinguish candidates in many races, such as “vote pro-choice” or “vote for the pro-life candidate”? Would it be necessary to show that there is at least one race in which that issue does distinguish the candidates? Would such a race have to be occurring within the geographic reach of the communication in question? Or is the intention that the relevant communication in some way identifies the candidate that it seeks to distinguish, such as urging a vote for the pro-life or pro-choice candidate for governor? Without further clarification, the added standard in the Proposed Regulation reintroduces the very facts and circumstances approach that the Preamble claims the Proposed Regulation is designed to avoid.

Without better understanding the intent of this provision, we cannot suggest how the language might be modified to achieve that intent. If the intent is to capture references to issues and voting without more narrowly specifying the office in question, such as “vote pro-life,” it would be at best a very un-intuitive definition of “clearly identified candidate.”

We recommend deleting this entire sentence. Alternatively, it should be narrowed to apply only in situations where a specific race or office has been identified, and where the characteristic is a purely factual one that unquestionably distinguishes one candidate from all the others. “The woman who is running for governor,” or “the Presidential candidate who has served in the military,” may well clearly refer only to one specific candidate, just as “the Republican candidate for County Supervisor” may. But beyond that, organizations would quickly enter a quagmire trying to determine whether the positions of opposing candidates on an issue are clearly enough delineated that there can be no doubt who qualifies as the pro-issue X candidate.

d. Difficulties with importing a modified express advocacy standard from federal election law

The Preamble notes that the Proposed Regulation draws from the FEC regulations in defining what it means to “expressly advocate” for or against a candidate for federal elective office.¹¹¹ While it is widely agreed that communications that expressly advocate for or against a candidate’s election may be treated as political for both campaign finance and tax purposes, using this standard in the tax law context, as modified in the Proposed Regulation, generates additional confusion. It is deceptively similar to the standard applied under FECA, yet incorporates subtle differences that may lead to differing interpretations by the two agencies.

In construing FECA, the Supreme Court initially restricted its reach to communications only to the extent they used “words of express advocacy” such as “vote for [Name of candidate]”

¹¹¹ The standard is, of course, expanded to apply to communications advocating for or against the selection, nomination, or appointment of individuals to public office, or any state or local elective office.

(i.e., the “magic words” test).¹¹² The Court subsequently ruled that the definition of communications regulated under the campaign finance laws may also include, in addition to use of the “magic words,” certain communications that are the “functional equivalent” of express advocacy.¹¹³ Later again, it refined this to state that a communication is the functional equivalent of express advocacy “only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.”¹¹⁴ This standard has been incorporated in the FEC’s regulations as a communication that “could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s).”¹¹⁵

The Proposed Regulation, in contrast, sets out an initial definition that would capture “any communication . . . expressing a view on, whether for or against, the selection, nomination, election or appointment of one or more clearly identified candidates or of candidates of a political party.” However, it then narrows its reach to a communication that “(i) Contains words that expressly advocate, such as “vote,” “oppose,” “support,” “elect,” “defeat,” or “reject;” or (ii) Is susceptible of no reasonable interpretation other than a call for or against the selection, nomination, election, or appointment of one or more candidates or of candidates of a political party.”

By opening with the very broad “expressing a view” language, the Proposed Regulation invites misinterpretation. Further, by presenting the “magic words” portion of its definition differently from the corresponding FEC definition (11 CFR § 100.22(a)), the Proposed Regulation introduces uncertainty whether it should be applied consistently with the FECA understanding of express advocacy or not. For example, assuming an incumbent President is seeking reelection, “Oppose the President’s extremist agenda” would not be express advocacy against a clearly identified candidate under FECA, but apparently could meet the definition in the Proposed Regulation as drafted: it refers to a clearly identified candidate, and contains the word “oppose.”

Express advocacy has a long history of interpretation under FECA, and there continue to be disagreements over its meaning.¹¹⁶ The Proposed Regulation is unclear whether or to what extent FEC or case law interpretations of express advocacy will be persuasive or binding. It is not clear in the Preamble whether Treasury and the Service expect FEC case law and interpretations to control. While we support treating express advocacy communications as political for tax purposes, we worry about the implications of diverging interpretations under these two bodies of law.

¹¹² See *Buckley v. Valeo*, 424 U.S. 1 (1976). Strictly speaking, this limiting construction only applies to organizations whose major purpose is not supporting or opposing federal candidates.

¹¹³ See *McConnell v. FEC*, 540 U.S. at 193 (2003); *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) (hereinafter “*WRTL*”) 551 U.S. 449 (2007).

¹¹⁴ *WRTL*, 551 U.S. at 460-470.

¹¹⁵ 11 CFR 100.22.

¹¹⁶ For example, *Free Speech v. FEC*, Summary available at <http://www.fec.gov/law/litigation/FreeSpeech.shtml>.

We recommend:

- The definition in Proposed Regulation section 1.501(c)(4)-1(a)(2)(iii)(A)(I) should be revised to align better with the language employed in FEC regulations and corresponding case law.¹¹⁷
- The Proposed Regulation or at the very least the Preamble should clearly indicate the degree of deference to be given to agency determinations and case law interpreting express advocacy (and its functional equivalent) under FECA and corresponding state laws.
- Alternatively, rather than requiring Service staff to understand the entire scope of the nation's federal, state, and local campaign finance laws, the regulation could limit its coverage to express advocacy communications that are either (a) coordinated activity with a federal or state or local candidate that is reported as a contribution by either or both the donor or donee under a campaign finance law or, in the case of a section 527 organization that is not registered as a political committee, on a Form 8872; or (b) independent expenditures that are reported to the Federal Elections Commission (as already reflected in the Proposed Regulation), or any state election commission.¹¹⁸

Finally, while we certainly agree that express advocacy or its functional equivalent should be treated as candidate-related political activity, we believe the scope of political intervention for section 501(c) organizations should reach further. Long-standing guidance issued by the Service in training materials and Revenue Rulings has captured a far wider range of messages. We believe this more expansive approach is crucial to protect section 501(c) organizations from becoming embroiled in political campaigns, to their detriment and the detriment of the myriad other purposes for which our society looks to the nonprofit sector. Relying on the express-advocacy-or-its-functional-equivalent standard, the Proposed Regulation would draw a bright line that leaves out far too much speech favoring or opposing candidates for public office, thereby allowing section 501(c) organizations to be too easily used for political ends. For the health of the sector, a broader definition is needed, even if some brightness must be sacrificed.

¹¹⁷ We recognize it might make sense to eliminate the increasingly dated references to 40-year old campaign slogans, but the major portion of the FEC regulation defining express advocacy, 11 CFR § 100.22(a), could be imported into a revised tax regulation.

¹¹⁸ An anti-abuse rule could be included to ensure that a section 501(c)(4) organization that violates applicable law and does not report contributions or independent expenditures (or gives to a committee that violates the law) would not get the benefit of such violation in the calculation of candidate-related political activity. This rule would have the drawback of requiring Service staff to determine when an entity should have reported an expenditure under applicable campaign finance law, but at least this problem will arise far less often than if those same staff are required to make independent determinations whether a communication expressly advocates in all instances.

e. Difficulties with importing the concept of contributions from federal election law

The Proposed Regulation includes in the definition of candidate-related political activity “a contribution . . . of money or anything of value” if the transfer would be a reportable contribution to a candidate for public office under applicable campaign finance laws, or is made to a section 527 organization. The Preamble states that Treasury and the Service intend that “anything of value” would include in-kind donations and other support, “for example, volunteer hours and free or discounted rentals of facilities or mailing lists.” Unfortunately, this intent is incompatible with harmonizing the definition of a contribution for tax law purposes with applicable campaign finance laws, under which treating volunteer time as a reportable contribution is without precedent. Under all campaign finance laws, an individual’s volunteer work on behalf of a political organization or a campaign is never treated as a political contribution except to the extent (1) the volunteer incurs expenses in the course of providing the volunteer services, or (2) the volunteer provides the services during paid working hours or uses his or her employer’s resources, either of which will cause the employer to make an inadvertent in-kind contribution. How does an individual volunteer’s time become something that the organization can give away to another organization or a political committee? An individual may volunteer with multiple organizations: how will the IRS decide to which one the volunteer’s time should be imputed? How would a volunteer’s time be valued? An employee’s time that causes the employer to make an in-kind contribution is valued based on the salary paid to the employee for work the employer will not receive to the extent the employer directs the employee to spend that time working for a political campaign, but a section 501(c)(4) organization does not, by definition, pay its volunteers.

Moreover, given that a volunteer is free to donate hours to one section 501(c)(4) organization as easily as to another, it is not clear what type of activity Treasury and the Service hope to capture by this rule. Even if a section 501(c)(4) organization were to ask one of its volunteers to help a section 527 organization, it is still the volunteer’s choice to do so (assuming the relationship between the section 501(c)(4) organization and the volunteer is truly voluntary), and the section 501(c)(4) organization’s only activity was to make the request. We concur that costs incurred by a section 501(c)(4) organization to make such a request of its volunteers, and the opportunity cost to the section 501(c)(4) organization of requiring its employees to work for another person where a share of the employees’ salary would be deemed a reportable contribution under applicable campaign finance laws, should be considered candidate-related political activity, but otherwise, treating the value of individual volunteers’ hours worked for a candidate campaign or political committee as candidate-related political activity of a section 501(c)(4) organization, as the Preamble contemplates, is inappropriate.

The Preamble requests comments on whether “indirect contributions” for which a business expense deduction is denied by section 276, which would include for example payments for advertising in a political party convention brochure, political party or candidate fundraising dinners or programs, or payments to attend an inaugural parade or ball, should be treated as candidate-related political activity. The Preamble does not elucidate, but perhaps the hypothesis is that since a business is specifically disallowed a deduction for such indirect contributions, a nonprofit organization exempt under section 501(c)(4) should also be disadvantaged vis á vis its exemption.

We do not believe it is necessary for this type of payment to be specifically enumerated as candidate-related political activity. A section 501(c)(4) organization that advertises in a party convention brochure will not get a deduction, and so will get no advantage over a business in this respect. Moreover, the section 501(c)(4) organization will have to treat the payment as a contribution to the party in any event if it is reportable under campaign finance laws as a contribution, as is likely. The same rationale holds for payments for fundraising dinners or events, most of which are reportable under campaign finance laws as contributions. Lastly, inaugural payments have nothing to do with influencing an election, appointment or other activity that is covered activity under section 527. The Service has issued non-precedential guidance stating that inaugural expenses are not exempt function expenses under section 527 because they are not related to and do not support the process of influencing or attempting to influence the selection, nomination, election or appointment of any individual to public office.¹¹⁹

f. Problems with the proposed treatment of contributions to section 501(c) organizations as candidate-related political activity

Section 1.501(c)(4)-1(a)(2)(iii)(A)(4)(iii) of the Proposed Regulation characterizes as candidate-related political activity contributions of money or anything of value to a section 501(c) organization that itself engages in candidate-related political activity. However, the Proposed Regulation then carves out from candidate-related political activity a contribution that meets the requirements in section 1.501(c)(4)-1(a)(2)(iii)(D). That safe harbor requires the contributing section 501(c)(4) organization to (1) obtain a “written representation from an authorized officer of the recipient organization stating that the recipient organization does not engage in [candidate-related political] activity (and the contributor organization does not know or have reason to know that the representation is inaccurate or unreliable),” and (2) impose on the contribution “a written restriction that [the contribution] not be used for candidate-related political activity.”

The Preamble does not discuss what necessitates the strong presumption that a contribution to a section 501(c) organization that engages in any candidate-related political activity will be used for that activity, given that such activity cannot be the section 501(c) organization’s primary activity. The Proposed Regulation applies this presumption even where the recipient organization’s expenditures for candidate-related activity have been funded from other sources, or are less than the amount of the contribution. For example, the approach taken in the Proposed Regulation would mean that if a section 501(c)(4) organization wished to contribute to a section 501(c)(3) organization that had conducted a nonpartisan voter registration drive, the safe harbor would be unavailable, even if the recipient were prohibited from using the contribution to register voters. The section 501(c)(4) organization would still have to count the grant as candidate-related political activity. Such a draconian result is unwarranted in a situation with low potential for abuse.

Nonetheless, we are concerned by allegations in the press that some putative section 501(c)(4) organizations have used multiple series of grants to other section 501(c)(4) organizations to artificially inflate their social welfare activities in order to increase the levels of

¹¹⁹ TAM 9320002 (Jan. 14, 1993).

political intervention activity permitted under the primary purpose test.¹²⁰ This “multiplier effect” can occur when one section 501(c)(4) organization makes a grant to another, treated by both as primary purpose activity, but effectively raising their combined ability to engage in non-primary purpose political activity. We support having provisions in the Proposed Regulation to address that abuse. However, we believe the presumption in the Proposed Regulation as currently drafted goes too far, and the abuse can be addressed using approaches common in the grantmaking context that are less onerous than the safe harbor.

One model, from the private foundation grantmaking world, is expenditure responsibility as required for grants to non-charities,¹²¹ which has already been extended to certain grants by public charities from donor-advised funds,¹²² where abuse was also a concern. While the details would need to be adapted for a section 501(c)(4) grantor, the protective measures required seem appropriate without being excessive. Another model is the approach taken with controlled grants in the charitable lobbying context,¹²³ yet another situation where abuse was anticipated. A final alternative would be to exclude such amounts from being counted as primary social welfare activity, either entirely or until they are eventually spent by the ultimate grantee on social welfare activities, something like the imposition of the out-of-corporus rules on treating grants by one private foundation to another as qualifying distributions for purposes of meeting the minimum payout requirement.¹²⁴

If the current grantee certification approach in the safe harbor is retained, it should be clarified. As currently drafted, the Proposed Regulation casts far too wide a net, disqualifying far too many legitimate grantees from the safe harbor. The phrase “engages in candidate-related political activity” is not defined with reference to a time period, nor tied to the specific contribution, so that, on the face of the Proposed Regulation, a section 501(c)(4) organization’s grant to a section 501(c) organization could be treated as candidate-related political activity if the recipient organization had ever engaged in candidate-related political activity in the past, or were ever to do so in the future.

The lack of any timeframe creates difficulties not only for grantor section 501(c)(4) organizations, but for grantees who must provide the required certification to obtain a grant. Must a grantee certify that it “does not engage” in candidate-related political activity in the current tax year? That it has never done so? Never done so since these rules took effect? The problem is even worse when the Proposed Regulation’s approach to web sites is taken into account. To certify that it does not engage in candidate-related political activity, a potential grantee would have to examine every element of its web site, including its deepest archives, to consider whether any mention ever existed anywhere on it during any pre-election window of any person who was ever a candidate.

¹²⁰ See Julie Patel, *Transfers allow nonprofits to spend more money on campaigns, experts say*, THE CENTER FOR PUBLIC INTEGRITY (Feb. 27, 2014), available at <http://www.publicintegrity.org/2014/02/27/14294/transfers-allow-nonprofits-spend-more-money-campaigns-experts-say>.

¹²¹ Reg. § 53.4945-5(b).

¹²² I.R.C. § 4966(c).

¹²³ Reg. § 53.4945-2(a)(6).

¹²⁴ I.R.C. § 4942(g)(3).

If the safe harbor’s certification approach is retained, Treasury and the Service should specify the relevant timeframe. We suggest a limited look-back period of no more than two years (the current and prior tax year) would be reasonable.

The safe harbor requires a contributor to obtain both a written representation from the grantee, and, separately, a written grant agreement. The estimate in the Preamble of the burden this places on grantor and grantee, as required by the Paperwork Reduction Act, is unrealistically low, based on our experience as practitioners who work regularly with grantors and grantees to document their relationships. Moreover the two pieces of paperwork are largely duplicative. If the safe harbor certification approach is continued, we at least recommend that the two prongs be disjunctive (i.e., (D)(1) “or” (D)(2)) instead of the currently-proposed conjunctive (“and”) test.

g. Concerns with redefining specific election-related activities as candidate-related political activity

The Proposed Regulation’s automatic classification of the following activities as candidate-related political activity is particularly troubling:

- (1) Conduct of a voter registration drive or “get-out-the vote” drive;
- (2) Preparation or distribution of a voter guide that refers to one or more clearly identified candidates or, in the case of a general election, to one or more political parties (including material accompanying the voter guide); and
- (3) Hosting 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.

Decades-old precedential guidance (discussed in more detail in Part 3(b) above) explains how each of these activities can be conducted in a strictly nonpartisan manner, and each of these activities may be conducted for legitimate public education, rather than political, purposes. When properly conducted, these activities are currently permissible for section 501(c)(3) organizations, and may even be funded by private foundations.¹²⁵ It is difficult to see why these activities would be considered legitimate educational activities for section 501(c)(3) charitable purposes, but not legitimate educational activities for section 501(c)(4) social welfare purposes. Including these activities as *per se* candidate-related political activities for purposes of section 501(c)(4) will likely have a chilling effect on section 501(c)(3) organizations’ conduct of these activities and private foundation funding of such activity. It would certainly discourage section 501(c)(3) organizations from funding section 501(c)(4) organizations to conduct them, even where there may be substantial public educational benefits or advantages to the charity from pooling its funds with others through a social welfare organization. While there are certainly abusive scenarios that need to be addressed, the Proposed Regulation will seriously distort and destroy longstanding legitimate activities and relationships among charities and social

¹²⁵ Section 4945(f) expressly allows private foundations to fund certain voter registration drives conducted by section 501(c)(3) organizations.

welfare organizations. We urge Treasury and the IRS to develop an alternative to the Proposed Regulation that extends and focuses existing guidance on these activities and that, even if less bright, can be defended as reasonable. In particular, strictly nonpartisan voter education and enfranchisement activities and genuine grass roots lobbying however defined, should continue to be encompassed as social welfare activities.

h. Clarification needed regarding distribution of candidate materials

The Proposed Regulation also automatically classifies as candidate-related political activity the “[d]istribution of any material prepared by or on behalf of a candidate.” We certainly concur that disseminating a candidate’s materials should be treated as a political activity. Our concern is with the phrasing “prepared by or on behalf of a candidate,” since candidates may also be incumbents in public office or experts in any number of fields relevant to public policy and public debate, either at the same time as they are candidates, or before or after their candidacies. We recommend revising the Proposed Regulation either to clarify that distributing materials prepared by or on behalf of someone in a capacity other than as a candidate for public office is not candidate-related political activity, or at least to impose a time limit, such as stating that only distributions that occur while the individual is a candidate are covered.

6. Comments on Proposed Regulation Aside from Candidate-Related Political Activity Definitions

a. Attribution rules

The Proposed Regulation helpfully set out what activities and communications will be attributed to a section 501(c)(4) organization, based on who conducts the activity or makes the communication (officers, directors, and employees of the organization acting in those capacities, and volunteers or authorized representatives acting under the organization’s direction or supervision), whether it is paid for by the organization, and whether it occurs at an official function or in an official publication of the organization. The Proposed Regulation specifies that statements or material posted by an organization on its web site, which is considered an official publication of the organization, will be attributed to the organization. Our concern relates to clarifying how the Proposed Regulation may be applied to an organization’s web site.

We certainly agree that posts made by an organization should be attributed to it. However, the Proposed Regulation does not address whether or under what circumstances statements or materials posted by unrelated third parties on an organization’s web site in response to an organization’s invitation for public comment, may be attributed to the organization. In such cases, the organization is paying for the speaker’s platform, and the statement or materials will appear in the organization’s official publication, yet it is generally understood that such statements or materials are not necessarily attributable to a web site and its owner. We ask that Treasury and the Service take this opportunity to provide some precedential guidance on how an organization may foster public comment and debate in the public interest, without having the politics of every member of the public who chooses to contribute attributed to it. Would some sort of disclaimer notice suffice? May the organization exercise some control over the content of public comment posted, such as to avoid copyright violations, defamation,

obscenity, or hate speech, without exposing itself to attribution? Must the organization screen for and refuse to allow posting of express advocacy or its equivalent?

The Proposed Regulation also does not address hyperlinks allowing a user to move from an organization's web site to unrelated third-party information or resources available outside the organization's control elsewhere on the Internet. Such links can be extremely valuable, even essential, to furthering an organization's social welfare purposes, and have become an expected part of any educational resource on the Internet. Certainly an organization has the power to decide what links will be included on its web site, so some responsibility for those decisions is appropriate, but it would be helpful for Treasury and the Service to address the limits of that responsibility, such as where valuable educational materials may co-exist on a linked web site with express advocacy, or the linked web site may in turn link to numerous other web sites, and where the content at the linked web site may be extensive and constantly changing.

b. Effective date and transition provisions

As drafted, the Proposed Regulation's definition of candidate-related political activity would take effect immediately on publication of final regulations. We suggest that Treasury and the Service reconsider this effective date. Immediate effectiveness would work an undue hardship on affected organizations by implementing a radical change in the definition of activities that could disqualify them from continued exemption in the middle of their tax year. Since there is no requirement for advance notice before a final regulation is published, effectiveness could happen without warning. At a minimum, final rules should apply only to tax years beginning after their publication. Ideally since publication could occur just days or weeks before an organization's next tax year will begin, we believe it would be appropriate to include provisions that would ensure that all organizations will have at least several months before a final regulation applies to them, regardless of when their next tax year begins relative to the publication of the final regulation. Otherwise, affected organizations simply will not have the capacity to implement the necessary changes to their administrative systems to monitor compliance.

We are also concerned that fundamental changes in the nature of activities appropriate to exemption under section 501(c)(4) will defeat long-standing and reasonable expectations of donors to such organizations, effectively prohibiting or seriously restricting use of donated assets for the purposes for which they were given. This change could create irreconcilable problems under state charitable trust laws that would force some organizations to either breach their charitable trust obligations or give up their exempt status entirely. While many section 501(c)(4) organizations raise and spend money in the same year and have largely unrestricted funds, some may be holding substantial restricted funds earmarked for activities that would no longer be consistent with their tax-exempt status. Some section 501(c)(4) organizations are even endowed, and could have purpose restrictions on their endowment funds requiring them to spend the funds on activities that no longer qualify for tax exemption. In fairness to them and their donors, we recommend that Treasury and the Service include transition provisions in any final regulation, under which such organizations would be able to continue operating for some period under the existing activity rules as to funds raised prior to the effective date (or perhaps prior to the date on which the Proposed Regulation was published), and would be allowed to transfer restricted funds

to organizations that could carry out the required activities without having to count the transfers against their less-than-primary limit.

7. Constitutional Concerns

Numerous commentators on the Proposed Regulation have questioned its constitutionality.¹²⁶ While we have many serious concerns with the content and approach taken by the Proposed Regulation, we believe the endeavor by the government is constitutional. Neither excluding candidate-related political activity from the category of activities that further the exempt purposes of section 501(c)(4) organizations and other non-charitable tax-exempt entities, nor limiting the amount of candidate-related political activity these organizations can undertake, violates the First Amendment. As the Supreme Court explained in *Regan v. Taxation with Representation*,¹²⁷ and reiterated last term in *Agency for International Development v. Alliance for Open Society International* (hereinafter, “AID”),¹²⁸ Congress has no obligation to subsidize First Amendment activity. Tax-exempt status, the Court has explained, “has much the same effect as a cash grant to the organization.”¹²⁹ By limiting section 501(c)(3) status to organizations that did not attempt to influence legislation, as the Court stated in *Regan*, Congress had merely “chose[n] not to subsidize lobbying,”¹³⁰ which is clearly one type of activity protected by the First Amendment.

For constitutional purposes, exemption of contributions to non-charitable section 501(c) organizations represents a subsidy permitting restriction on First Amendment activity. The Supreme Court in *Regan* treated tax exemption for a section 501(c)(3) organization as a subsidy without asking whether the organization had any investment income or whether, in the absence of tax exemption, contributions would be treated as gifts excluded from income. That is, in both *Regan* and *AID*, the Court appeared to assume that section 501(c)(3) organizations would have taxable income in the absence of the exemption. Such an understanding is all the more compelling in the case of contributions to non-charitable section 501(c) organizations, since it is far more doubtful that, in the absence of exemption, such transfers would be motivated by the “detached and disinterested generosity” required for gifts to be excluded from income, on one hand, and whether expenses would be deductible, on the other. Moreover, Congress surely has the power to tax such amounts, should it choose to do so. Thus, under *Regan* and *AID*, the decision not to tax contributions to these groups under a blanket income tax exemption represents a subsidy.

Income tax exemption also protects any investment income from taxation. As noted above in Part 4, however, to the extent that noncharitable section 501(c) organizations engage directly in candidate-related political activity, they are subject to tax under section 527(f) on the

¹²⁶ See e.g. letter from South Carolinians for Responsible Government to Commissioner Koskinen, dated February 24, 2014; letter from Webster, Chamberlain & Bean, LLP on behalf of Tradition, Family, Property, Inc., (and other clients) dated February 27, 2014.

¹²⁷ 461 U.S. at 544.

¹²⁸ 133 S. Ct. at 2329.

¹²⁹ 461 U.S. at 544.

¹³⁰ *Id.*

lesser of the amount of the organization’s net investment income or the amount spent on such activity. While the definition of candidate-related political activity and “exempt function” under section 527 are not identical, they overlap considerably.¹³¹ For constitutional purposes, the possibility of tax under section 527(f) tax, however, does not eliminate the subsidy of tax exemption for investment income. An organization’s net investment income may well be less than the amount spent on candidate-related political activity, and, as discussed above, *Regan* and *AID* find the mere possibility of subsidy from tax exemption sufficient. *Regan* looked to the availability of tax subsidies to the organization Taxation with Representation, not to whether they in fact benefitted the organization. That is, neither case called for demonstration of an actual subsidy.

Ysursa v. Pocatello Educational Association,¹³² moreover, holds that the government need not facilitate First Amendment activity even when the cost to the government is negligible. The case involved the decision by the State of Idaho not to permit payroll deductions for local-government-employees’-union political activities of local government employees, although it did permit payroll deductions for union dues and for charitable contributions. A group of unions argued that this limitation violated their First Amendment rights. The Supreme Court disagreed. Chief Justice Roberts observed that government is “not required to assist others in funding the expression of particular ideas, including political ones.”¹³³ He then, by quoting *Regan*, equated the decision not to supply such assistance, however little the burden or cost,¹³⁴ with a decision not to subsidize. Next, he reasoned that because a decision not to subsidize a right does not infringe it under the Court’s opinion in *Regan*, the State need demonstrate only a rational basis for its decision.¹³⁵ Justice Roberts found the State’s asserted rationale, “avoiding in reality or appearance of government favoritism or entanglement with partisan politics,”¹³⁶ sufficient to pass the rational basis test. There was no need to compare benefit and burden. Moreover, the case permitted the government to refuse to assist – that is, to burden – political speech that is at the heart of the First Amendment, even when it was assisting other kinds of speech, such as that conducted by charitable organizations by permitting payroll deductions for charitable contributions. In the case of section 501(c)(4) and other section 501(c) organizations, the government may similarly limit its entanglement with partisan politics.

In the recent *AID* case, the Court made note of the so-called “alternative channel” argument of *Regan*: “In rejecting the nonprofit’s First Amendment claim, the Court highlighted . . . the fact that the condition did not prohibit that organization from lobbying Congress

¹³¹ As discussed above in Parts 4 and 5, there are significant and problematic differences between the definitions. Nonetheless, to avoid complexity that is immaterial to questions of constitutionality, we treat “exempt function” activities, as defined under section 527(e), as functionally equivalent for purposes of this Part to “candidate-related political activity” as defined in the Proposed Regulation.

¹³² 555 U.S. 353 (2009).

¹³³ *Id.* at 358.

¹³⁴ Both the District Court and the Court of Appeals found that “there is no subsidy by the State of Idaho for the payroll deduction systems of local governments.” *Id.* at 357. The Chief Justice’s opinion found that immaterial because the question “is whether the State must affirmatively assist political speech by allowing public employers to administer payroll deductions for political activities.” *Id.* at 364.

¹³⁵ *Id.* at 353.

¹³⁶ *Id.*

altogether. By returning to a ‘dual structure’ it had used in the past – separately incorporating as a section 501(c)(3) organization and section 501(c)(4) organization – the nonprofit could continue to claim *section 501(c)(3)* status for its nonlobbying activities, while attempting to influence legislation in its section 501(c)(4) capacity with separate funds.”¹³⁷ *AID* also quoted from *Regan* that a dual section 501(c)(3)/(4) structure was not “unduly burdensome.”¹³⁸ A dual structure is available as well to noncharitable section 501(c) organizations that wish to engage in candidate-related political activity. They can form an affiliated political organization, such as a PAC, under section 527. Section 527, which requires no more than setting up an SSF, exempts from income tax amounts contributed for political intervention activities.¹³⁹ Thus, should the dual structure aspect of *Regan*, on which Justice Blackmun’s concurrence turned, be deemed essential to the understanding of the case, limits on candidate-related political activity also pass constitutional muster.

Yet *Citizens United*, which held certain prohibitions on political donations from the general treasury funds of corporations unconstitutional on First Amendment grounds, decreed that “[n]o sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations “ and admonished that “[e]ven if a PAC could somehow allow a corporation to speak – and it does not – the option to form PACs does not alleviate the First Amendment problems PACS are burdensome alternatives; they are expensive to administer and subject to extensive regulations.”¹⁴⁰ These assertions seem difficult to reconcile with the statements not only in *Regan*, which predated *Citizens United*, but also with the Court’s very recent endorsement of *Regan* in *AID* regarding dual tax structures.

The quotation from *Citizens United*, however, must be understood to mean that the government in the case had not supplied an interest sufficient to meet the strict scrutiny test that the Court applied there, as it has in other campaign finance cases.¹⁴¹ A government interest insufficiently compelling to justify limits on the political speech of corporations in *Citizens United* could nevertheless easily suffice to justify a tax provision under the rational relation test employed in *Regan* and other tax cases. Tax law and campaign finance jurisprudence embody distinct and generally inconsistent principles regarding the form of judicial scrutiny required to test the constitutionality of restrictions on speech. In the First Amendment tax cases, the courts gravitate toward the rational relation test because of the presumption of constitutionality,¹⁴² and heightened scrutiny is the exception. In contrast, in campaign finance cases, the presumption is that strict scrutiny applies, and a lesser form of heightened scrutiny is the exception. In the tax cases, it is permissible to discriminate on the basis of the identity of the speaker, whereas in campaign finance law it is not. *Citizens United* did not involve Congressional requirements to qualify for a beneficial tax status, but an absolute prohibition.

¹³⁷ *AID*, 133 S.Ct. at 2329.

¹³⁸ *Id.*, quoting 461 U.S. at 545, n.6.

¹³⁹ See part 4(d), *supra*.

¹⁴⁰ *Citizens United*, 558 U.S. 310, 365 and 337.

¹⁴¹ See, e.g., *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986); *WRTL*, 551 U.S. 449 (2007), *Buckley v. Valeo*, 424 U.S. 1 (1976).

¹⁴² See *Madden v. Kentucky*, 309 U.S. 83, 88 (1940). *Madden* stated that tax classifications have a “presumption of constitutionality” that is particularly strong *Id.* at 87-88.

Tellingly, in describing the burdens of operating a PAC under the campaign finance laws, *Citizens United* quoted from *Massachusetts Citizens for Life* (“MCFL”),¹⁴³ and that case helps to answer these questions. *MCFL* involved some of provisions at issue in *Citizens United*, in particular the provisions in the FECA prohibiting corporations from using treasury funds to expressly advocate for candidates in a federal election and requiring that any expenditures for such purpose be financed by voluntary contributions to a separate segregated fund. The Court in *MCFL* held that the provision could not apply constitutionally to an organization, such as MCFL, that 1) is formed for the express purpose of promoting political ideas and prohibited from engaging in business activities; 2) has no shareholders or others with a claim to its assets or earnings; and 3) was not established by a business corporation or labor union and does not accept contributions from such entities.¹⁴⁴ According to the *MCFL* Court, the concerns that prompted the statutory prohibition, such as potential for corruption and protecting minority interests, were not present in regard to such organizations.¹⁴⁵

Nonetheless, for the *MCFL* Court, the practical effect of the burden of speaking through a PAC even if organized as no more than a SSF, made “engaging in protected speech a severely demanding task.”¹⁴⁶ The government in *MCFL* looked to *TWR* to argue that the requirement that independent spending be conducted through a SSF did not burden MCFL’s First Amendment rights.¹⁴⁷ The Court’s opinion in *MCFL* rejected the government’s argument and distinguished *TWR*.¹⁴⁸ A result such as the one in *TWR*, it explained, “would infringe no protected activity, for there is no right to have speech subsidized by the Government. By contrast, the activity that may be discouraged in this case, independent spending, is core political speech under the First Amendment.”¹⁴⁹ Thus, the alternate channel available under section 527 for noncharitable section 501(c) organizations continues to pass muster after *Citizens United* not only because of recent language in *AID*, but also because of *Citizens United*’s endorsement of *MCFL*. *MCFL* expressed First Amendment concerns like those in *Citizens United*, but nonetheless confirmed the continuing viability of *TWR*.

The Supreme Court has also distinguished between constitutional and unconstitutional conditions on government benefits. In *AID*, the Court stated that “the relevant distinction that has emerged from our cases is between conditions that define the limits of the government spending program—those that specify the activities Congress wants to subsidize—and conditions that seek to leverage funding to regulate speech outside the contours off the program itself.”¹⁵⁰ The *AID* Court’s post-*Citizens United* endorsement of *Regan* makes clear that restrictions on political activity tied to tax exemption fall on the permissible side of this line.

¹⁴³ *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986).

¹⁴⁴ *Id.* at 264.

¹⁴⁵ *Id.* at 262.

¹⁴⁶ *Id.* at 256.

¹⁴⁷ *Id.* at 256 n. 9.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 256 n. 9 (citation omitted).

¹⁵⁰ *AID*, 133 S. Ct. at 2328.

Tax-based restrictions on candidate-related political activity for section 501(c)(4) and other section 501(c) organizations do not entail a direct restriction on First Amendment protected speech because the groups affected are free to engage in campaign activities to whatever extent they desire by locating that activity in a taxable entity or a different exempt entity for which campaign activity is permitted. As noted earlier, section 527 provides a tax-favored entity specifically created to house campaign activities and ensure their uniform treatment. Moreover, restrictions on candidate-related political activity applicable to section 501(c) organizations are not designed to suppress or discriminate on the basis of the content of First Amendment protected speech. The Supreme Court made this distinction explicit in *Cammarano v. U.S.*, when it rejected plaintiffs' claim that the Code's denial of business expense deductions for the cost of campaign speech was "aimed at the suppression of ideas."¹⁵¹

The Court in *Citizens United*, however, also objected to the FEC's attempt to give guidance regarding prohibited speech. To the Court, these efforts to provide guidance, which included a two-part 11-factor balancing test, represented "onerous restrictions" that "function[ed] as the equivalent of prior restraint by giving the FEC power analogous to licensing laws implemented in 16th- and 17th-century England, laws and governmental practices of the sort that the First Amendment was drawn to prohibit."¹⁵² Instead of eschewing "the open-ended rough-and-tumble of factors," the opinion continued, the FEC had embraced them, creating "an unprecedented governmental intervention into the realm of speech."¹⁵³

While, as explained above in this Part, the analysis of *Citizens United* does not apply to tax-based restrictions, this language reminds us that current Service guidance regarding political intervention embraces facts and circumstances¹⁵⁴ and that vague tests, such as a set of facts and circumstances test, have at times been held unconstitutional for chilling First Amendment speech.¹⁵⁵

Promulgating regulations with clear rules regarding political intervention or candidate-related political activity could help the government to avoid constitutional attacks on the grounds of vagueness. Thus, again, while we have suggestions intended to improve the Proposed Regulation, in part based on the First Amendment values that they implicate, we support the government's effort to establish a set of rules promulgated as regulations. Such regulations are not unconstitutional. Quite the contrary, they help remove doubts as to the constitutionality of Service guidance in this important area.

¹⁵¹ 358 U.S. 498, 512-513 (1959) (quoting *Speiser v. Randall*, 357 U.S. 513, 519 (1958)).

¹⁵² 558 U.S. at 335.

¹⁵³ *Id.*

¹⁵⁴ See *United Cancer Council, Inc. v. Comm'r*, 165 F.3d 1173, 1179 (7th Cir. 1999), regarding the definition of political intervention for section 501(c)(3), which is currently the same as political intervention for section 501(c)(4) (noting that "'facts and circumstances' ... is no standard at all, and makes the tax status of charitable organizations and their donors a matter of the whim of the IRS").

¹⁵⁵ See *Big Mama Rag v. United States*, 631 F.2d 1030 (D.C. Cir. 1980); Miriam Galston, *When Statutory Regimes Collide: Will Citizens United and Wisconsin Right to Life Make Federal Tax Regulation of Campaign Activity Unconstitutional?*, 13 U. PA. J. CONST. L. 867, 918-928 (2011).