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via the Federal eRulemaking Portal at
http://www.regulations.gov
(IRS REG–134417–13)

Mr. John Dalrymple
Deputy Commissioner for Services and Enforcement
CC:PA:LPD:PR (REG–134417–13),
Internal Revenue Service, Room 5205
P.O. Box 7604
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Washington, DC 20044

Re: Comments of the Free Speech Coalition, Inc. and
Free Speech Defense and Education Fund, Inc.
in Response to Department of the Treasury (IRS)
Notice of Proposed Rulemaking relating to "Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities"

Dear Mr. Dalrymple:

The Free Speech Coalition, Inc. ("FSC") and Free Speech Defense and Education Fund, Inc. ("FSDEF") appreciates the opportunity to comment on the proposed regulations set forth in the Notice of Proposed Rulemaking relating to "Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities" (hereinafter referred to as "NPRM"). 78 *Fed. Reg*. 71535 (Nov. 29, 2013).

NATURE OF COMMENTERS

FSC is a two-decade old alliance of conservative, libertarian, liberal, and non-ideological issue-activists who are particularly concerned with the preservation of the rights of nonprofit advocacy organizations. This diverse group, originally came together to present views to the IRS with respect to regulations defining lobbying and burdensome disclaimer requirements. FSC was pleased that many of its suggestions were adopted by the IRS at that time, and hopes that may be the case once again.

FSC itself is exempt from federal income taxation under IRC section 501(c)(4). FSC and its supporting IRC section 501(c)(4) organizations clearly would be impacted directly by the regulations. For the last 20 years, FSC members have banded together to defend the interests of Americans who want to participate fully in the formation of public policy in this country without undue governmental interference and restriction, and they do so again in opposition to the IRS proposed regulations.

FSDEF is exempt from federal income tax under IRC section 501(c)(3), and works in defense of a robust, deregulated marketplace of ideas.

OVERVIEW

The NPRM proposes significant changes that would adversely affect many thousands of tax-exempt organizations by imposing compliance costs, putting their tax exemption at risk, and banning or imposing stricter limitations on established activities. Despite these broad effects, the NPRM contains no discussion of the regulator's legal authority to effect such change in long established rules, which have been recognized, and implicitly approved by Congress over the years.

Moreover, the IRS posits the need for clarity for both the IRS and taxpayers, but until the recent IRS scandal involving the targeting of certain TEA Party and other organizations, all parties did quite well using existing regulations. In defending itself against investigations, the IRS has explained that its existing regulations are unclear — a view that FSC does not share. It would be ironic indeed that the occasion of a political scandal within the IRS itself would be used by the IRS as a rationale to assert greater governmental control over the operation of many thousands of private, nonprofit organizations.

The provision in the proposed regulations which would bar use of an incumbent's or challenger's name in the 60 days before a general election or 30 days before a primary election operates to protect incumbents from the rough and tumble of even issue advocacy. *See* § 1.501(c)(4)-1(a)(2)(iii)(*2*). For example, a nonprofit organization seeking to defeat a piece of legislation known by the name of its congressional sponsors (*e.g.*, McCain-Feingold Act) would be seriously impaired in their ability to conduct grassroots lobbying for three critical months every other year. Certain members of Congress would prefer to restrict political activity to incumbent politicians, leaving the practice of politics to the "professionals." However, the IRS should not do the bidding of those congressmen who would like to legislate without benefit of citizen involvement during election years.

The IRS approach (in the proposed regulations) to redefine permissible IRC section 501(c)(4) activity reveals an apparent strategy to "make new law," disregarding the current statutory language defining IRC section 501(c)(4) organizations and creating new regulations diametrically at odds with the longstanding current regulations. The IRS proposed regulatory action is being widely perceived — with ample justification — as an attempt by the IRS to

legislate matters that are beyond its authority. One of the reasons for that sentiment is the lack of any significant finding by the IRS — at least in the NPRM — providing a compelling or even justifiable basis for the proposals. Put another way, the NPRM provides insufficient data and reasons which would justify such significant measures curbing the activities of IRC section 501(c)(4) organizations. FSC's overarching recommendation is that the IRS reconsider its approach, which has the appearance at this stage as an attempt to create a brand-new type of tax-exempt organization — not one created by legislative enactment, but one which the regulator, the IRS, has determined would somehow be better suited to effect its own version of IRC section 501(c)(4).

Should there be a genuine need for a modification of the critical elements defining IRC section 501(c)(4) organizations, and/or any new restrictions on currently legitimate IRC section 501(c)(4) activity, that is a matter for Congress to address. The IRS should confine its activity to the proper role of executive agencies in the federal system, and refrain from advancing proposed regulations that go beyond the IRS' authority to prescribe.

I. COMMENTS REGARDING THE SUBSTANCE OF THE PROPOSED REGULATIONS

A. The Proposed Regulations Are Ill-Conceived and Would Substantially and Adversely Affect Many Tax-Exempt Organizations

1. The Proposed Regulations Are Ill-Conceived.

The proposed regulations are not designed to tweak the current regulatory scheme. Instead, the proposals advance an agenda that would fundamentally change existing law and make impermissible currently permissible activities of IRC section 501(c)(4)organizations. If there is any design to the proposed regulations, it appears that it would fall generally under the rubric "making new law." FSC submits that the IRS lacks legal authority to effect such significant changes in long-established regulations. The Department of the Treasury/Internal Revenue Service (hereinafter "IRS") — the author and proponent of the proposed regulations — should rethink its regulatory approach, considering first its authority to act in this manner.[1]

There has been obvious political pressure brewing, particularly in the last two years, originating from at least three different sources: (i) a perception that more IRC section

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[1] A number of such comments have already been submitted, many of which have been widely circulated. *See, e.g.*, Comments of Center for Competitive Politics (12/5/13), http://www.campaignfreedom.org/wp-content/uploads/2013/12/IRS-Comments-and-Draft-Rule.pdf; Comments of The Heritage Foundation (12/19/13), http://www.campaignfreedom.org/wp-content/uploads/2014/01/THFIRS.pdf

501(c)(4) organizations have become involved in certain political activities, (ii) a campaign by ideologically motivated organizations against long-established IRS regulations,[2] and (iii) recent scandals precipitated by the IRS treating some 501(c)(4) applicants differently from others, depending upon the applicants' political persuasion.[3] The proposed regulations have all the earmarks of an agency's attempt to rid itself of an embarrassing and troublesome situation with a relatively simple, albeit radical, change.

According to the NPRM, the proposed regulations were prompted by a "recognition" by the Treasury Department and the IRS that "both the public and the IRS would benefit from clearer definitions of … concepts" (NPRM, 78 *Fed. Reg*. 71536) related to "the distinction between campaign intervention and social welfare activity, and the measurement of the organization's social welfare activities relative to its total activities." It is not clear from the NPRM exactly how, or to what extent, the public was supposedly confused on these issues. The regulations regarding social welfare organizations have remained virtually unchanged since 1959, and the public, the IRS, tax-exempt organizations, and the courts have been in harmony with respect to the meaning and operation of the regulations for many decades. Thus, the impetus for the current proposed regulations would appear to be political in nature, which is somewhat ironic given that the proposed regulatory changes — proposing a new definition of "candidate-related political activity" — would be imposed largely on the very segment of the tax-exempt community that the IRS has been accused of unfairly treating — namely, IRC section 501(c)(4) organizations.

Despite stating that measuring an organization's social welfare activities can be challenging, the proposed regulations add nothing to facilitate "measurement of the organization's social welfare activities relative to its total activities."

As to the distinction between campaign intervention and social welfare activity, the proposed regulations would simply eliminate the "facts and circumstances" approach to determine whether a particular activity would be considered "candidate-related political activity" — at least with respect to a number of specific activities. Thus, items often

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[2] The IRS determined that the statutory test for a social welfare organization was met if the organization "primarily" engaged in social welfare activities. *See* 26 CFR §1.501(c)(4)-1(a)(2)(ii). This has been the standard at least since 1959, when the current regulation was issued. Certain commentators and groups recently have begun to criticize the IRS for adopting "primarily" as the standard, when the statute (IRC section 501(c)(4)) uses the word "exclusively." Although the proposed regulations contain nothing that would change that standard, the IRS has asked the public to submit comments about whether the standard should be changed, and if so, how. *See* NPRM, 78 *Fed. Reg*. at 71538. *See* pages 12-13, *infra*.

[3] *See, e.g.*, http://www.teaparty.org/tea-party-attack-new-irs-rules-33350/; http://www.wnd.com/2014/02/smoking-gun-in-irs-political-targeting/; http://www.cbsnews.com/news/republicans-say-new-proposed-irs-rules-attack-conservatives/.

conducted or spearheaded by an IRC section 501(c)(4) organization and treated as "social welfare activity — such as voter guides, candidate debates, issue advocacy, or other public statements referencing incumbents and candidates, and in fact any event (within 30 days of the primary or 60 days of a general election in which the name of a candidate running for office appears) — would be deemed a "candidate-related political activity" and excluded from "social welfare activity" of that 501(c)(4). For some organizations, that could constitute a large share of its exempt function activities, at least in an election year. The proposed regulations, if adopted, would require those organizations to re-invent themselves or to give up their tax-exempt status.

Thus, the IRS proposed regulations would change existing law with respect to social welfare organizations, making arbitrary determinations with respect to the nature of certain activities (*e.g.*, voter guides), and making those determinations conclusive by so defining them. Such an approach is wrong on a number of fronts. First, the IRS lacks the authority to make such legal pronouncements, as discussed further in part B, below. Second, although the approach of the proposed regulations is the antithesis of the "facts-and-circumstances" test that the IRS relies on when it wants room to argue that a particular activity is violative of the law (*see, e.g.*, Rev. Rul. 2004-6), that approach appears to be a politically-motivated effort to curb the activities of existing and future social welfare organizations despite purporting to offer guidance on regulatory questions. The public, including the exempt organization community, has no serious questions about what social welfare organizations are permitted to do "politically." Instead of offering guidance on questions that do arise, such as those concerning measurement of social welfare activities (or, conversely, measurement of activities that clearly are candidate-related political activities, such as independent expenditures supporting or opposing a candidate for office), the proposed regulations offer existing IRC section 501(c)(4) organizations a problematic future, in which they may have to transform their programs. They offer future IRC section 501(c)(4) organizations a new concept of social welfare where certain public education and assistance programs are no longer considered social welfare because they are too close in time to "election day," or because they are otherwise related to "politics" or "elections."

The proposed regulations would still leave the public in the dark about the IRC section 501(c)(4) organization's "primary purpose," or what kinds of activities would constitute social welfare activity in favor of isolating several types of activity under a new category — "candidate-related political activity." Such a virtual proscription on currently allowable important social welfare activities would have the effect of curbing issue advocacy on important public policy issues, as well as limiting important and valuable public education and outreach to the citizenry with respect to participating in local, state, and federal elections.

If the IRS is convinced that a regulation has caused confusion for the IRS, the proper approach would be to promulgate guidance with respect to the measurement of a social welfare organization's activities so as to meet the "primary" test. For example, what exactly does the IRS consider "primary" to mean (*e.g.*, would 50.1 percent suffice, for example?), and is the

"primary" test satisfied by an analysis of expenditures only, or some other yardstick? That type of focus would be a worthier enterprise for the IRS than the proposed promulgation of standards, as it has done here, that would radically and substantially change the foundation for many accepted exempt organizations' social welfare activities. Indeed, it appears, based upon the additional questions in the NPRM on which the IRS has solicited comment, that it is considering the possibility of issuing regulations on the "measurement" question. However, the proposed regulations at issue in this proceeding do not directly address that issue at all.

2. The Proposed Regulations Would Substantially and Adversely Affect Many Tax-Exempt Organizations.

The NPRM nowhere discusses the likely impact, or even the possible impact, upon tax-exempt organizations of the proposed regulations, if and when they were actually adopted. Clearly, however, in light of the fact that the proposed regulations would undo a regulatory system that has governed IRC section 501(c)(4) organizations for more than 50 years, and would effectively prohibit activities that have constituted integral parts of 501(c)(4) programs for decades, the impact would have to be profoundly significant. And damagingly so.

The complete absence in the NPRM of any treatment of the impact of the proposed regulations on the tax-exempt community is evidence that the IRS either has not studied the matter, or, if it has, that the IRS has made a determination not to publicize the results of such a study. FSC submits that the underpinning for regulations such as those being proposed by the IRS — which would substantially (and drastically) affect the programs and perhaps the tax-exempt status of numerous IRC section 501(c)(4) organizations must reasonably include an impact statement. In other words, the IRS should not be going forward with radically new regulations which clearly would impact the exempt organization community without exploring what effect such regulations would have on that community, measured against what such regulations would hope to accomplish. The NPRM has given the public very little to go on with respect to the hoped-for accomplishments of the proposed regulations, which, the IRS claims, have been mustered in an attempt to lessen the confusion about the distinction between social welfare activity and campaign intervention. *See* NPRM, 78 *Fed. Reg.* at 71536.

Since the IRS ignored the issue of the effect of its regulations, FSC submits that the following effects of the proposed regulations can be expected:

1. Currently, there are numerous IRC section 501(c)(4) organizations providing nonpartisan voter guides to the public to educate voters prior to local, state, and federal elections. The League of Women Voters[4] is a prominent (c)(4) that does so, itself and/or through state and local chapters throughout the United States. Another such organization is the Christian Coalition. Such voter-guide activity

[4] *See* http://www.lwv.org/content/money-matters

is considered within the ambit of social welfare activity under current law. Under the proposed regulations, such voter guides would be considered "candidate-related political activity."

2. The same result would follow with respect to get-out-the-vote activity, which often is conducted by IRC section 501(c)(4) organizations, like the League of Women Voters, which have chapters and divisions in various U.S. locales. It should be noted that many of the organizations conducting voter-guide and get-out-the-vote activities are IRC section 501(c)(3) organizations, which conduct such programs as part of their tax-exempt missions. The proposed regulations as they currently stand would thus effectively shut (c)(4)s out of activities that (c)(3)s would be allowed to conduct without limit.

3. Many of FSC's members, and literally thousands of IRC section 501(c)(4) organizations throughout the United States, lobby for legislation (involving contacts with legislators) on a variety of topics, and engage in issue advocacy (involving communications and contacts with individuals). They do so in numerous ways, including, but not limited to meetings, conferences, mail and e-mail communications with members, supporters, and the general public, publications, media buys, and website messages regarding subjects of importance to the organizations' tax-exempt missions. Often, such subjects concern public policy issues. And policy issues often involve legislation, both existing legislation and proposed legislation. The proposed regulations would severely limit the ability of many IRC section 501(c)(4) organizations to engage in such issue advocacy, often at critical times. Obviously, the proposed regulations are designed to curb possible "express advocacy" taking place within certain election-date windows, but the IRS has not provided any real justification for such measures. IRC section 501(c)(4) organizations are permitted, under current law, to engage in such advocacy, if not done substantially so as to interfere with accomplishment of the 501(c)(4)s' primary purpose, namely, social welfare activity. To the extent that such express advocacy takes place, the section 501(c)(4) organizations are required, under current law, to account for it and to pay taxes on it under IRC section 527(f). This is not a confusing system, but rather a well-ordered one. The proposed regulations would substantially and negatively change that system.

In brief, the proposed regulations are sorely lacking in both foundation and purpose. If they were adopted, even assuming they could survive a legal challenge, they would merely reduce the participation of valuable social welfare activity — public education on a wide variety of important issues — by numerous IRC section 501(c)(4) organizations throughout the country for no clearly articulated or persuasive reason.

B. The Proposed Regulations Propose Regulatory Standards that Would Be Contrary to Existing Law, Would Change Many Decades of Legal Authority and Practice Governing the Activities of Tax-Exempt Organizations, and Would Be Illegal.

The Secretary of the Treasury has the authority to prescribe regulations necessary to carry out the provisions of the Internal Revenue Code, but neither he, nor the IRS as his delegate, has the authority to enact regulations inconsistent with the law passed by Congress or to make new law. *See* IRC § 7805(a). Thus where, as here Congress has established "social welfare organizations" as entities entitled to exemption from federal income tax under IRC section 501(c)(4), the IRS has no authority to enact regulations limiting that legislative grant. The proposed regulations, however, would do exactly that, by excluding from "social welfare" activity certain items of activity which currently have been for many years and are now considered legitimate "social welfare" activity, but now would be arbitrarily determined by the IRS to be beyond the activities envisioned by Congress in establishing IRC section 501(c)(4), completely inconsistent with its prior regulations. When Congress makes no change in laws, administrative agencies cannot change implementing regulations by 180 degrees in this manner. Certainly no persuasive legal rationale has been articulated to allow such a regulatory earthquake.

IRC section 501(c)(4)(A) provides exempt status to, *inter alia*, "[c]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare …." The Treasury Regulations have long provided that such social welfare organizations are those "primarily engaged in promoting in some way the common good and general welfare of the people of the community." 26 CFR §1.501(c)(4)-1(a)(2)(ii).

Thus, although IRC section 501(c)(4) does not limit the grant of tax-exempt status to organizations which do not participate or intervene in political campaigns for or against candidates, the Treasury Regulations provide that such political activity does not constitute "social welfare" activity. *Id.* The government's authority for having excluded "political activity" from the definition of "social welfare activity" is by no means clear, particularly when one compares the language of section 501(c)(4) to IRC section 501(c)(3), where Congress expressly conditioned exemption under that section of the code to organizations which did not engage in such campaign intervention political activity.[5]

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[5] *See* Comments in Response to Notice of Proposed Rulemaking on "Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities," Heritage Foundation (Dec. 19, 2013). The Heritage Foundation makes a compelling case that there is no authority for the proscription against political activity contained in the Treasury Department regulation in question, 26 CPR §1.501(c)(4)-1(a)(2)(ii).

However, even assuming, *arguendo*, the legal validity excluding — from "social welfare activity" — participation or intervention in political campaigns, any such exclusion would be quite limited. While the exclusion applies to participation or intervention in political campaigns in support of or in opposition to candidates, it does not apply to politically related activity that does not rise to the level of such participation. Thus, the definition and concept of "social welfare" for more than 50 years has included certain types of political activity, including, but not limited to, publication of voter guides, the conduct of voter registration drives, the conduct of get-out-the-vote campaigns, and the conduct of candidate debates, that has been and could be conducted as part of the mission of social welfare organizations. All such activity would now be excluded from "social welfare" under the proposed regulations on the theory that such activity is "candidate-related political activity." This would constitute a significant change in the law, and a modification of many decades of practice among tax-exempt organizations.

The impact of any such changes on the exempt organization community would be enormous, and destructive. IRC section 501(c)(4) organizations throughout the United States conduct educational programs that involve nonpartisan political activity that is currently considered social welfare activity, but such currently authorized social welfare activity would undoubtedly need to be curtailed, if not stopped entirely, if the proposed regulations were adopted and the organizations desired to retain their tax-exempt status.

The proposed changes not only do not make a positive contribution to the regulatory scheme that now exists, they would be disruptive of that scheme. The only claimed rationale for the proposed regulations is the implication in the NPMR (78 *Fed. Reg.* at 71536) that such changes would help eliminate "confusion for both the public and the IRS" that has supposedly arisen regarding the "distinction between campaign intervention and social welfare activity, and the measurement of the organization's social welfare activities relative to its total activities...." But the NPRM makes no showing that such confusion exists, and it certainly offers nothing in the way of proposed regulations that would cure any confusion — if it existed at all — regarding the measurement issue. Indeed, as already pointed out above, although the NPRM solicits additional comments regarding the measurement issue, the proposed regulations offer no guidance whatsoever on this issue. Far from providing helpful guidance to the public, including tax-exempt organizations, the proposed regulations would change the law to limit, in arbitrary fashion, many activities that social welfare organizations are entitled to conduct under their 501(c)(4) missions.

FSC submits that the proposed regulations which affix the label "candidate-related political activity" to long-acknowledged to be legitimate "social welfare activity," would effectively and illegally change the tax law without Congressional involvement.

II. COMMENTS REGARDING VARIOUS QUESTIONS RAISED IN THE NPRM BY THE IRS RELATED TO THE POSSIBLE PROMULGATION OF STILL OTHER ADDITIONAL REGULATIONS.

In addition to requesting comments regarding the substance of the proposed regulations with respect to so-called "candidate-related political activity," the IRS has raised several additional, specific, interrelated questions on which the NPRM also requested comments. These additional questions raised by the IRS deal with the "measurement" question mentioned above, as well as the notion of "political activity" vis-à-vis tax-exempt organizations other than IRC section 501(c)(4) organizations. The NPRM asks for comments addressing such matters, including whether the IRS should be considering regulations — similar to those being proposed for (c)(4)s — for other categories of tax-exempt organizations, and for the resolutions of certain issues which currently are resolved based upon consideration of all of the relevant facts and circumstances.

The specific questions posed by the NPRM with respect to the advisability of promulgating regulations regarding certain additional matters affecting tax-exempt organizations, followed by FSC's response, are listed below:

1. NPRM Question: "the advisability of adopting an approach to defining political campaign intervention under section 501(c)(3) similar to the approach set forth in these regulations, either in lieu of the facts and circumstances approach reflected in Rev. Rul. 2007-41 or in addition to that approach (for example, by creating a clearly defined presumption or safe harbor)." *See* NPRM, 78 *Fed. Reg.* at 71537.

FSC Comment: FSC is opposed to the proposed definition of "candidate-related political activity" suggested in the NPRM, so it would deem the suggested approach (of using a similar definition under section 501(c)(3)) inadvisable for the same reasons. But there is a further, strong reason for caution in fashioning a new regulatory approach under IRC section 501(c)(3). Political intervention for an IRC section 501(c)(3) organization can spell its doom as a tax-exempt organization, in light of the language of IRC section 501(c)(3) and the longstanding IRS position that no *de minimis* line exists, and that any amount of electioneering, whether intentional or not, by an IRC section 501(c)(3) organization can result in revocation of its tax-exempt status. Thus, as difficult as the current, very strict "political intervention" standard may be for many IRC section 501(c)(3) organizations, at least it is governed by a well-defined, bright-line test. Broadening that test in line with an expansive definition of "candidate-related political activity," as suggested in the NPRM, would appear to be a measure which would drastically affect the operations and increase substantially the regulatory risks for many IRC section 501(c)(3) organizations. Additionally, imposing a new "candidate-related political activity" standard on IRC section 501(c)(3) organizations would result in a prohibition of the longstanding and much acclaimed non-partisan election-related activities of many IRC section 501(c)(3) organizations, such as those which regularly publish voter guides and other

voter aids, as well as those which regularly conduct significant get-out-the-vote drives in states and cities throughout the country, to the detriment of an informed and involved electorate.

2. NPRM Question: "whether any modifications or exceptions would be needed in the section 501(c)(3) context and, if so, how to ensure that any such modifications or exceptions are clearly defined and administrable." *See* NPRM, 78 *Fed. Reg.* at 71537.

FSC Comment: Although FSC strongly opposes all of the proposed regulations, if the proposed regulations were adopted, the IRS would need to make clear that the regulations would be applicable to IRC section 501(c)(4) organizations only, and not to IRC section 501(c)(3) organizations. IRC section 501(c)(3) organizations are entitled to express assurance that their continued charitable and educational activities in support of certain election-related matters (*e.g.*, voter guides), for example, would continue to be considered related to their tax-exempt missions, and not suddenly be transformed into a proscribed activity.

3. NPRM Question: "the advisability of adopting rules that are the same as or similar to these proposed regulations for purposes of defining section 527 exempt function activity in lieu of the facts and circumstances approach reflected in Rev. Rul. 2004-6." *See* NPRM, 78 *Fed. Reg.* at 71537.

FSC Comment: Exempt function activity is defined by statute, of course, and regulations cannot transform that statutory definition into something more to the liking of the IRS. FSC respectfully submits that the facts and circumstances approach reflected in Revenue Ruling 2004-6 is a far-preferable approach in determining whether certain conduct is not only permissible, but should be considered in certain categories, such as "political campaign activity," or "exempt function activity." As Revenue Ruling 2004-6 itself states: "Section 1.527-2(c)(1) provides that the term "exempt function" includes all activities that are directly related to and support the process of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to public office or office in a political organization. Whether an expenditure is for an exempt function depends on all the facts and circumstances."

Absent statutory language to the contrary, facts and circumstances must be analyzed to determine the result in virtually all tax and campaign-finance related issues. Organizations that are tax exempt under IRC sections 501(c)(4), (c)(5), and (c)(6) — *i.e.*, social welfare organizations, unions, and business leagues and trade associations — under current law may engage, for example, in advocacy related to their exempt purposes, but may engage in only limited political campaign activity. Revenue Ruling 2004-6 was issued to clarify types of advocacy that would meet the IRS definition of political campaign activity under the facts and circumstances approach.

For example, Revenue Ruling 2004-6 expressly states: "[W]hen an advocacy communication relating to a public policy issue does not explicitly advocate the election or

defeat of a candidate, all the facts and circumstances need to be considered to determine whether the expenditure is for an exempt function under § 527(e)(2)." The proposed regulations would unfairly change that process, at least with respect to public communications made within certain proximity of elections.

As FSC has indicated above in its comments regarding the substantive regulatory changes proposed by the IRS, the definitional approach of those proposed changes is clearly misguided. If adopted, such regulations would undoubtedly be challenged in court — successfully, it is believed. The proposed regulations attempt to proscribe (or at least define as non-social-welfare activity) certain categories of conduct that traditionally have been considered to be social welfare activity, and thus would literally cause many tax-exempt organizations to transform their missions and/or their programs if they want to avoid revocation of their tax-exempt status (and/or substantial taxation). In so doing, the IRS would be (i) reneging on many tax-exempt organizations whose applications for exemption describing such mission-related activities were approved, and (ii) gainsaying years of its own advice to the nonprofit community.

4. NPRM Question: the advisability of adopting regulations under sections 501(c)(5) and 501(c)(6) that would amend the current regulations under those sections to expressly provide that exempt purposes under those regulations do not include candidate-related political activity (as defined in the proposed regulations). *See* NPRM, 78 *Fed. Reg.* at 71537.

FSC Comment: Logically and legally, it would seem that social welfare organizations, unions, and business leagues would be similarly situated as to such a definitional matter. Indeed, the IRS question about the application of these rules to those groups raises the question as to why they were not covered to begin with. It is more than curious that the IRS choose to exempt politically powerful unions and politically powerful business associations from the scope of the proposed regulations. It is probably true that IRC section 501(c)(4) organizations are a much "softer" political target, but that is no reason to impose on them limitations that do not apply to others similar types of organizations. In truth, the proposed regulation should be imposed on none of these organizations.

5. NPRM Questions: "[W]hat proportion of an organization's activities must promote social welfare for an organization to qualify under section 501(c)(4) and whether additional limits should be imposed on any or all activities that do not further social welfare. The Treasury Department and the IRS also request comments on how to measure the activities of organizations seeking to qualify as section 501(c)(4) social welfare organizations for these purposes." *See* NPRM, 78 *Fed. Reg.* at 71538.

FSC Comments:

(i) What proportion. Currently, the law provides that an organization's activities must primarily" promote social welfare. That is, and effectively has been for many decades, the law, as interpreted by the IRS in fulfillment of its interpretative role and as accepted by the courts. *See, e.g.*, 26 CFR §1.501(c)(4)-1(a)(2)(ii) (social welfare organizations are those "primarily engaged in promoting in some way the common good and general welfare of the people of the community"); Rev. Rul. 74-361, 1974-2 C.B. 159 (volunteer fire company providing recreational facilities for members is primarily engaged in promoting social welfare where providing facilities primarily furthers exempt purposes); Rev. Rul. 68-455, 1968-2 C.B. 215 (war veterans' association qualifies for exempt status under IRC section 501(c)(4) even though it operated a resort concession because it was primarily engaged in the promotion of social welfare).

FSC submits that the standard itself — "primarily" — should not change. While the statutory term "exclusively" is different from "primarily," nonprofit tax practitioners are aware that "primarily" was adopted by the IRS as a reasonable way to interpret the statute and give effect to its purpose. This definition has been in place for many decades, and is in fact the acknowledged standard for virtually all existing social welfare organizations. Although some in Congress may want to change long established IRS practice, it would not be reasonable for the IRS to make this change. Despite IRS recitations about confusion, the current, longstanding standard is in fact working, and that "primarily" is a suitable general standard for imposing the minimum proportion of an organization's activities under IRC section 501(c)(4) that must be spent on social welfare activities.

(ii) Possible additional limits. It is not clear what kinds of "additional limits" the IRS has in mind when it asks whether such limits should be imposed on activities not furthering social welfare. Is the IRS suggesting that a list of activities be compiled — similar to the list in proposed regulation 1.501(c)(4)-1(a)(2)(iii) — and that the listed activities be excluded from consideration as social welfare activity? Or is the suggestion that the IRS develop a list of activities prohibited to (c)(4)s, similar to the prohibition against participation and intervention for or against candidates for public office as set forth in IRC section 501(c)(3)? FSC submits that either idea, or any list of "additional limits," would be contrary to wise regulatory administration and sure to encounter significant opposition.

If the question means whether the IRS should impose a list of activities that are prohibited to IRC section 501(c)(4) organizations, FSC would strongly oppose such a notion. Any such prohibitions — such as the prohibition against electioneering set forth in IRC section 501(c)(3) — would not be within the jurisdiction or authority of the IRS. Only Congress, it is submitted, might have that prerogative, subject, of course, to the Constitution. At this juncture, FSC believes that there should be no such additional limits on activities not furthering social welfare.

(iii) Measurement of proportions. Measurement of such proportions could be accomplished — as they often are now — by a calculation determining percentages of an organization's expenditures for social welfare activities versus non-social-welfare activities, and/or by comparing the time and effort spent by the officers, agents, and other representatives of the organization in accomplishing the organization's social welfare mission against such time and effort devoted to non-social welfare activities. *See, e.g.*, People's Educational Camp Society v. CIR, 331 F.2d 923 (2d Cir. 1964) (business activities and revenue too large in comparison to social welfare activity); Rev. Rul. 68-45, 1968-1 C.B . 259 (war veterans' association qualifies for exemption under 501(c)(4) even though proceeds from bingo constituted its principal source of income).

For most IRC section 501(c)(4) organizations, it is probably the case that the only non-social-welfare activities would be activities reported annually on IRS Form 1120-POL. There has been no indication from the IRS that the proposed regulations were precipitated in any way by concern about whether such self-reporting is not being carried out. The IRS simply appears to be attempting to curb what the proposed regulations define as "candidate-related political activity," not because there is any confusion or lack of reporting regarding such activity, but rather to eliminate or at least severely limit the role of IRC section 501(c)(4)s in carrying out such activity.

6. NPRM Question: "Whether there are other specific activities that should be included in, or excepted from, the definition of candidate-related political activity for purposes of IRC section 501(c)(4). Such comments should address how the proposed addition or exception is consistent with the goals of providing more definitive rules and reducing the need for fact-intensive analysis of the activity." *See* NPRM, 78 *Fed. Reg.* at 71538.

FSC Comment: FSC opposes any adoption of the "candidate-related political activity" test.

CONCLUSION

Should the IRS believe that the current laws do not provide adequate authority for their regulation of nonprofits, the IRS should present these concerns to Congress, with a request for a change in the law with respect to the politically-related activities of social welfare organizations, rather than distorting the existing (and longstanding) Code through adoption of regulations designed to substantially curtail legitimate social welfare activities.

Respectfully submitted,

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