June 27, 2013

Daniel Werfel
Principal Deputy Commissioner
Internal Revenue Service
1111 Constitution Ave NW
Washington, DC 20004

Dear Acting Commissioner Werfel:

We have reviewed your report titled "Charting a Path Forward at the IRS: Initial Assessment and Plan of Action" and are pleased that the IRS is implementing the recommendations contained in the recent Treasury Inspector General for Tax Administration report.

In your report, you write that "The distinction between campaign intervention and social welfare activity, and the measurement of an organization's social welfare activities relative to its total activities, have created considerable confusion for both the public and the IRS in making appropriate 501(c)(4) determinations. Both the taxpayer and the IRS would benefit greatly from clear definitions of these concepts." We agree.

The outrageous treatment of groups on the basis of their ideology came about because the rules are so vague. These rules created the flexibility allowing the IRS to delay tax-exempt applications that clearly should have been granted. We believe the rules are unconstitutional under the landmark *Buckley v. Valeo* decision. In that ruling, the Supreme Court cited an earlier opinion as follows:

> In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.
>
> Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.[1]

This is precisely the problem with the IRS rules and regulations today. Advocacy by groups under review or audit places the groups in "circumstances wholly at the mercy of the varied understanding of his hearers" – IRS agents!

The Court's solution to the deficiencies in the Federal Election Campaign Act was simple and elegant: "in order to preserve the provision against invalidation on vagueness grounds, [the law] must be construed to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office."

[1] *Buckley v. Valeo*, 424 U.S. 1, 43 (1976) (internal citations omitted).

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This is the rule that ought to have been adopted by the IRS following *Buckley* 37 years ago. Yet even after the exposure of recent abuses caused by the lack of bright line rules, instead of scrapping the vague, unconstitutional rules immediately, the IRS and Treasury have merely "agreed to include these items in the next Priority Guidance Plan."

This problem won't be solved until the IRS and Treasury write rules that follow the *Buckley* decision. These rules are not difficult to write. The IRS and Treasury should do so immediately.

Now we learn from the report that the IRS is providing a "Path 2" for "priority backlog" applicants for tax-exempt status under Section 501(c)(4). These applicants "have been previously identified as 'potential political cases' – i.e., the focus of the TIGTA audit – and that were submitted to the IRS for initial review more than 120 days prior to May 28, 2013 (the first week of new leadership at the IRS)." Path 2 "is not available to other applicants at this time."

These groups have already had to certify under penalty of perjury in their application for 501(c)(4) status that their activities are primarily not for political campaign intervention. It is unfair that they should be subjected to a new, and in some respects even more burdensome, set of requirements.

Path 2 purports to provide a streamlined option for approval of these applications and identifies a list of activities that would be considered by the IRS to constitute political campaign intervention.

While this option appears to provide additional clarity to such applicants, it unfortunately fails to do so. The cover letter notes that the group is still subject to the nebulous and likely unconstitutional "facts and circumstances" test. The certification binds the applicant into perpetuity unless a change is noted in a subsequent Form 990.

This portion of the letter is contradictory and may create a trap for those applicants who believe they can rely on the favorable determination only to discover that they may be subject once again to the facts and circumstances test as indicated below:

> Like all organizations receiving a favorable determination of exempt status, organizations participating in this optional expedited process may be subject to examination by the IRS and the organization's exempt status may be revoked if, and as of the tax year in which, the facts and circumstances indicate exempt status is no longer warranted. An organization that receives a determination letter under this expedited process may rely on its determination letter as long as its activities are consistent with its application for exemption and the representations, and the determination letter will expressly indicate that the letter was based on the representations.

The representations in Path 2 warn that "other activities may constitute direct or indirect participation or intervention in a political campaign." This catchall statement in the

representation appears to sweep in all the existing vague rules in a future audit, in addition to Path 2's new representations.

In a sense, it shows the IRS is still tone deaf on this subject. Why are these groups being asked to pledge to a stricter set of rules in order to get an exemption that has already been delayed for far too long?

Even worse, the Path 2 representations define as political campaign intervention activities those that are clearly permissible, even for 501(c)(3) organizations. Yet the law provides that 501(c)(3) groups may not "participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office."

Most specifically, Path 2 defines as political campaign intervention "Any public communication within 60 days prior to a general election or 30 days prior to a primary election that identifies a candidate in the election." Yet such communications could solely advance, and in fact long have solely advanced, activities that are clearly grassroots lobbying or educational activities that have always qualified as activities that advance social welfare.

For example, in the last Congress, during this 60-day period prior to the general election, many important floor votes were taken on controversial legislation, including votes on an alternative to sequestration, an omnibus appropriations bill, reauthorization of the Foreign Intelligence Surveillance Act, energy regulations and work requirements for welfare recipients. It is absurd to categorize ads on such legislation as per se political activity simply because an incumbent is mentioned in the communication. Many social welfare groups are active on a single issue and are at the mercy of the congressional schedule. To take another example, gun control groups hope to obtain a vote in this Congress on legislation they support. If they are able to force a vote in September 2014, this rule would force them to the sidelines or make their campaign much less effective. Other groups publish nonpartisan voter guides and pay for Internet advertising to get these online guides in front of as many voters as possible in the weeks leading up to the election; this activity would be strongly discouraged or effectively banned by this rule. The Path 2 rules as proposed would also count as political activity – banned for (c)(3) groups – long recognized activities such as quoting politicians speaking on issues of interest to the group, including even endorsements of the group's non-political work that might be used in fundraising appeals.

Such communications during this 60-day window are clearly permitted not only for 501(c)(4) groups, but also for 501(c)(3) groups. There is no basis for including such communications in any test of political activity.

The Path 2 representations also require both an expenditure test and a test of total time spent on activities by volunteer and paid staff combined. We strongly oppose instituting a test of time spent by volunteers, which is likely to be both burdensome and impractical. It is difficult to recruit and manage volunteers, especially among small grassroots groups, and it will become even more difficult if the volunteers must fill out time sheets. What volunteer would want to continue in that capacity, knowing his activity may be reported to the IRS?

Practically speaking, it is impossible to know, in advance, how many volunteers will do which activities. Placing these additional constraints and paperwork burdens on groups will greatly chill efforts to recruit volunteers, should a group conduct some political activities.

There is no tax impact from volunteer time, and therefore volunteer activity should not be subject to audit or made the basis of an application for tax exemption. We strongly recommend the IRS immediately discontinue any test that includes volunteer time.

If the IRS had confined its Path 2 option to only the following activity, as outlined in a portion of Path 2, then it would have been on the right track (though clearly the voter registration and get-out-the-vote guidance needs to be revised):

- Any written (printed or electronic) or oral statement supporting (or opposing) the election or nomination of a candidate;
- Financial or other support provided to (or the solicitation of such support on behalf of) any candidate, political party, political committee, or Section 527 organization;
- Conducting a voter registration drive that selects potential voters to assist on the basis of their preference for a particular candidate or party;
- Conducting a "get-out-the-vote" drive that selects potential voters to assist on the basis of their preference for a particular candidate or (in the case of general elections) a particular party;
- Distributing material prepared by a candidate, political party, political committee, or Section 527 organization

Unfortunately, this clear guidance is hopelessly obfuscated by the ridiculous catchall inclusion in the representations in Path 2 that "other activities may constitute direct or indirect participation or intervention in a political campaign," the radically new provision about communications near an election and the misguided inclusion of volunteer time.

The IRS is right to recognize that 501(c)(4) and certain other 501(c) groups can conduct political activities. Participation in our nation's elections is vitally important to efficient and effective government and advances the legitimate public policy goals of social welfare groups, labor unions and trade associations.

We look forward to working with you and the Treasury Department to come up with clear and workable rules to measure and allow for political activities by social welfare and other 501(c) groups.

Sincerely,

David Keating
President