February 24, 2014

The Honorable John A. Koskinen
Commissioner of Internal Revenue
CC:PA:LPD:PR (REG 134417-13), Room 5205
Internal Revenue Service
1111Constitution Avenue, NW
Washington, D.C. 20044

Re: Comments By First Amendment Advocates on Draft Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities, IRS NPRM, REG-134417-13

Dear Commissioner Koskinen:

The undersigned respectfully submit these comments in response to the Notice of Proposed Rulemaking (the "Notice" or "NPRM") issued by the Internal Revenue Service (the "Service" or "IRS") and the Treasury Department on November 29, 2013.

I. Introduction

We are a group of First Amendment advocates who have championed free speech in judicial proceedings, legislative chambers and in the court of public opinion. In our view the proposed IRS regulations providing guidance for tax-exempt non-profits with respect to "candidate-related political activity" ("CRPA") will impose serious burdens on free speech and hinder the democratic processes it serves. Our basic concern is that the new concept of "candidate-related political activity," which sweeps within its ambit some of the most important public information and social advocacy work of so many Section 501[c][4] organizations, will have a chilling effect on such organizations by either causing them to self-restrain from engaging in the most important work of informing the public on the critical public policy issues of the day or forcing them to adopt the ill-fitting garb of Section 527 political organizations and the deterring disclosure of contributors which would ensue.

It is no secret that the proposed new regulations come against the background of allegations that the Service has engaged in political favoritism in the enforcement of current guidelines for Section 501[c][4] organizations. That, of course, is one of the most serious assertions that can be made against the IRS which depends so heavily for its success upon the public's belief that its actions are scrupulously neutral and non-partisan. The NPRM indicates that the goal is to clarify the ground rules and to "provide greater certainty and reduce the need for detailed factual analysis in determining whether an organization" meets the Section 501[c][4] criteria. See 78 Fed. Reg. at 71537. Of course, that is a valid concern in an area of regulation which touches so directly on rights guaranteed by the First Amendment to the United States Constitution. Vague rules are particularly suspicious in the First Amendment area, because uncertainty about the meaning of the law is a handmaiden of a chilling effect and deterrence on political speech and association. See *Coates v. City of Cincinnati*, 402 U.S.611, 614-15(1971). Whether the proposed new guidance provides such clarity is one important question discussed below. But just as dangerous as vague laws in the First Amendment area are seriously

overbroad ones, i.e. laws which reach well beyond the valid area of government proscription and regulation. It is our submission that particularly in this regard the key elements of the proposed new regulation are deeply deficient and will cast a pall over the vital exercise of First Amendment rights by non-profit organizations, the key constituents of "civil society" which make our democracy so vibrant.

II. The First Amendment plays a vital role in assessing the validity and wisdom of the proposed regulations.

Tax and revenue measures normally do not implicate First Amendment concerns. But tax and revenue measures are certainly not immune from First Amendment scrutiny. Indeed, one of the Supreme Court's earliest cases applying the First Amendment's ban against political discrimination was a tax case, where a seemingly neutral revenue measure was apparently employed for purposes inimical to the First Amendment. In *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), the Court struck down a tax on newspapers of more than a certain circulation on the ground that the tax provision violated the First Amendment guarantee of freedom of the press and was "a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties." *Id.* at 250. Thirty years later, in another landmark and seminal decision limiting the tax powers where their exercise conflicted with First Amendment rights, the Court ruled that conditioning the receipt of a veterans tax exemption on the execution of a vague, uncertain and overbroad loyalty oath was a violation of those rights, notwithstanding the taxation context. See *Speiser v. Randall*, 357 U.S. 513 (1958). Indeed that case was a fountainhead of the critical modern First Amendment safeguards against vague or overbroad laws, with the Court's declaration that procedures and rules in the taxation area which relate to First Amendment rights cannot be such as to cause the speaker to "steer far wider of the unlawful zone" or "result in a deterrence of speech that the Constitution makes free." *Id.* at 526.

Just as the Supreme Court has declared that even tax measures must be measured against the First Amendment, it has also said the same about campaign finance regulations. Ever since the landmark ruling of *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court has applied close scrutiny to such regulatory measures to insure that they do not improperly restrain First Amendment rights. And one constant and pervasive theme has been consistently sounded for more than four decades: issue-oriented speech, even though relating to, identifying, criticizing or praising the actions and stands on issues of candidates for elective office, or incumbents in those offices, even during an election season, generally has to be free from restraint.

The pattern was set early on. In 1972, when the ink was barely dry on the Federal Election Campaign Act of 1971, the basis for our modern federal campaign finance laws, the government attempted to use those laws to restrain groups that were engaged in advocacy on the critical issues of the day. In one case, the sponsors of a newspaper advertisement criticizing the incumbent President Richard M. Nixon on his conduct of the War in Vietnam and praising certain members of Congress who had opposed him were sought to be brought under the controls of the new law on the theory that it was an election year, the officials criticized or praised were up for election, the communication might have an effect on the outcome of the election and therefore the activity was election-related and subject to governmental control. The courts said

such an application of the laws would be "abhorrent" and would stifle issue-oriented advocacy in a wholly impermissible fashion. See *United States v. National Committee for Impeachment*, 469 F.2d 1135, 1142 (2d Cir. 1972), *American Civil Liberties Union, Inc. v. Jennings*, 366 F. Supp. 1041, (D.C. 1973), *vacated as moot sub.nom. Staats v. American Civil Liberties Union, Inc.*, 422 U.S. 1030 (1975). Those cases established two clear propositions of central importance to the proposed CRPA regulations: First, issue advocacy should not be subject to campaign finance law regulation. Second, only those groups controlled by candidates or the "major purpose" of which is the election of candidates can be subject to campaign finance registration, reporting and disclosure requirements.

A few years later, the Supreme Court in *Buckley* would incorporate these doctrines into its landmark First Amendment ruling. That case bears critically on the issues posed by the proposed regulations here in three essential ways.

First, the new law at issue in *Buckley*, the Federal Election Campaign Act Amendments of 1974, contained a provision specifically targeted on issue-advocacy groups like those which seek section Section 501[c][4] status. It subjected to reporting and contribution disclosure any organization, no matter how non-partisan, which published any information about candidates' stands on election issues and the voting records of members of Congress during an election year. This separate provision was challenged by the New York Civil Liberties Union and other similar issue advocacy groups. The *en banc* United States Court of Appeals for the District of Columbia Circuit, even though it upheld every other provision of the new law, struck this one down unanimously. See *Buckley v. Valeo*, 519 F.2d 821, 869-79 (D.C. Cir. 1975). The Court concluded that the First Amendment could not tolerate such an effort to regulate issue advocacy groups, through the regulatory mechanisms of registration and disclosure. Even though such candidate- specific issue advocacy might influence the outcome of elections, it was "vital and indispensable to a free society and an informed electorate" and could not be restrained through regulation and disclosure. 519 F. 2d at 873. Non-partisan groups could not be compelled to disclose their members and contributors as the price of engaging in that important issue advocacy. That ruling was never appealed, and the provision died.

Second, in its *Buckley* decision, the Supreme Court embedded these various protections of issue advocacy into its application of the First Amendment to campaign finance laws. It did so in two critical ways. One was the articulation of the express advocacy requirement. In order to give as much protection as possible to issue advocacy relating to candidates for elective office, the Court specifically ruled that only those communications which "in express terms" advocate the election or defeat of specific identified candidates could be subject to FECA regulation at all. 424 U.S. at 44, n. 52. That was a critical tool to separate vital issue advocacy involving candidates, which had to remain unrestrained, from electoral advocacy of those candidates, which could be subject to regulation.

Third, the other major limitation that the *Buckley* Court applied to protect groups engaged in issue advocacy was the "major purpose" requirement which had to be met before a group, not under the control of a party or candidate, could be subject to campaign finance controls. Only those groups whose "major purpose" was partisan could be regulated. 424 U.S. at 79.

The express advocacy requirement and the major purpose test would be critical tools to separate out issue advocacy, largely immune from regulation, from election-related advocacy which would be subject to regulation.

A decade later, the Court would reaffirm these two essential limitations on campaign finance regulation in *Federal Election Commission v. Massachusetts Committee for Life*, 479 U.S.238 (1986). There the Court ruled that the prohibition on corporate political expenditures only reached those that constituted express advocacy, and that even though the anti-abortion groups "Vote Pro Life" speech did constitute such advocacy, the group, nonetheless, could not be regulated as a political committee because electoral advocacy was not its major purpose.

It is our submission that these two doctrines are extremely pertinent to the proposed regulation because they limit campaign finance regulation to messages of express electoral advocacy, and groups whose major purpose is such electoral advocacy.

To be sure, subsequently, in *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003), the Court sustained a disclosure regulation of "electioneering communications," similar to one of the concepts in the proposed regulation. But thereafter in *Wisconsin Right to Life, Inc. v. Federal Election Commission.*, 551 U.S. 449 (2007), the Court reinstated the basic express advocacy requirement. Likewise, though the Court in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), did uphold a requirement of limited disclosure by groups that engaged in certain kinds of electioneering communications, the case itself involved what the Court ruled was narrowly defined express advocacy. Moreover, the scope and depth of the disclosure requirement upheld there was much less burdensome and sweeping than the proposed regulation's definition of "public communication" close to an election. Similarly, groups relegated to Section 527 status by the proposed regulation's new standards would be subject to much greater regulation than would have been the consequence in *Citizens United*.

III. Pursuant to these First Amendment principles, key portions of the proposed regulations should be reconsidered and withdrawn.

Our point in describing these vital doctrines of constitutional authority governing First Amendment restraints even on taxation measures and as well on campaign finance regulations is to urge that those principles help guide the analysis of the proposed new guidelines at issue here. It is our submission that the key elements of those regulations are in tension with these settled constitutional principles

First, the proposed 30 or 60 day "blackout" periods would impose a sweeping limitation on near-election speech by rendering almost any public commentary even mentioning any political candidate or political party during an election season to be "candidate-related political activity" which would potentially jeopardize a group's Section 501[c][4]status. Based on the FECA's "electioneering communications" concept, but enormously broader in scope than that statutory provision, this proposal would render almost any election season issue advocacy "political activity." It reaches commentary and discussion in almost any medium or forum of public communication, including the internet and even the contents of organizational websites. This will have a severe chilling effect on the ability of the thousands of non-profit issue

advocacy groups to engage in their vital commentary on the critical issues of the day. This proposal should be withdrawn.

Second, the proposed regulation includes a "functional equivalence" version of the express advocacy concept which would treat as "political activity" communications those "expressing a view" on a candidate or appointee, which contain words of express advocacy, or, apart from that, are "susceptible of no reasonable interpretation other than a call for or against the selection, nomination, election or appointment" of a candidate. This effort employs a concept from *Wisconsin Right to Life, Inc. v. Federal Election Commission, supra,* that was used to protect issue speech. But the original express advocacy doctrine articulated by the Supreme Court in *Buckley*, requiring express words of advocacy, and not employing a form of "totality of the circumstances" approach, is a much clearer and safer harbor for vital issue speech than a version of "functional equivalence." Since this provision applies year round, and not just near elections, it is especially important that its terms be as narrowly and clearly confined as possible.

Third, the treatment of non-partisan voter registration drives and get-out-the-vote activity as political activity is also very troubling, as is the coverage of voter education guides. Both are key staples of policy advocacy and key components of democracy. Countless numbers of proper c[4] groups engage in such activities as part of their advocacy. They should not be put to the choice between foreswearing such activity or jeopardizing their tax-exempt status. It should be recalled that one of the first concerns about overbroad campaign finance laws was their application to non-partisan issue discussion that took the form of "box scores" of the records of candidates on public issues of concern to the respective organizations. As shown above, the courts went out of their way to declare, either by statutory interpretation or constitutional mandate, that such activity cannot be restrained by regulation. See *United States v. National Committee for Impeachment, supra; American Civil Liberties Union v. Jennings, supra; Buckley v. Valeo, (D.C. Cir.), supra, Buckley v. Valeo (U.S.) supra.* Providing such information to the public during an election season is a critical benefit to the public and to the democratic process and should be treated as such by the non-profit rules.

The concerns we are suggesting, drawn from judicial limitations on campaign finance rules, are also in harmony with the pertinent structure of the Internal Revenue Code. *Buckley* and similar cases drew a careful and critical distinction between issue speech and electoral speech and took special precautions to protect the former. The IRC also recognizes the importance of this great divide by providing for charity work, Section 501[c][3], issue advocacy work, Section 501[c][4] and the work of political organizations, Section 527. Under the current regime, charitable groups are not allowed to engage in any political activity or any substantial lobbying activity. Advocacy groups are allowed to fulfill their mission through education, lobbying and even political activities, so long as, parallel to *Buckley,* support for or opposition to political candidates does not become their primary activity. Finally, groups who do have that as their primary activity are subject to the more significant regulation and disclosure provided by section 527.

IV. Conclusion

In our view, the best way to maintain those sensible divisions of labor is to employ the traditional express advocacy test as the measure of what constitutes political activity, and the equivalent of the major purpose test to determine whether such activity has become the group's primary function so that it can no longer validly claim that it is "primarily engaged in promoting in some way the common good and general welfare of the people of the community." Treas. Reg. Section 1-501[c][4]-[1][a][2][i].

Thank you for considering these comments and proposals for properly harmonizing tax rules and regulations with First Amendment rights.

Respectfully submitted,

Floyd Abrams, Partner, Cahill Gordon & Reindel LLC*

Arthur N. Eisenberg, Legal Director, New York Civil Liberties Union

Joel M. Gora, Professor of Law, Brooklyn Law School; former ACLU counsel

Michael Meyers, President, New York Civil Rights Coalition

Harvey Silverglate, civil liberties litigator, lecturer, writer

Nadine Strossen, Professor of Law, New York Law School; former President, American Civil Liberties Union (1991-2008)

William Van Alstyne, Lee Professor of Law emeritus, William & Mary Law School and

William R. and Thomas S. Perkins Professor of Law emeritus, Duke University

*Affiliations noted for identification purposes only