CENTER *for* COMPETITIVE POLITICS
Congress shall make no law...

January 23, 2014

Office of Management & Budget
ATTN: Desk Officer for the Dept. of the Treasury
Office of Information and Regulatory Affairs
Washington, DC 20503

RE: Supplemental Comments on IRS NPRM, REG-134417-13

To Whom It May Concern:

I write as a Senior Fellow with the Center for Competitive Politics ("CCP") and as an attorney specializing in political law. In the latter capacity, I advise several 501(c)(4) clients regarding compliance with, among other laws, the Internal Revenue Code and the treatment of educational, lobbying, and political activities by the Internal Revenue Service ("IRS" or "Service").

The following comments regarding the Service's November 29, 2013 Notice of Proposed Rulemaking ("the NPRM"), REG-134417-13, are submitted on behalf of CCP, which has a profound and longstanding commitment to protecting the non-profit community's First Amendment rights, and they reflect my experience as a practitioner with expertise in this particular area of the tax laws. These comments do not necessarily reflect the views of any of my clients.

Although CCP submitted initial comments to the IRS on December 5, 2013 regarding the general substance of the NPRM, the following additional comments to the Office of Information and Regulatory Affairs ("OIRA") and the Service address specifically the NPRM's required estimate of the proposed rules' recordkeeping burden under the Paperwork Reduction Act of 1995 (44 U.S.C. § 3507(d)) ("PRA") .

In short, for the following reasons, the Service's estimate that the proposed rules will impose an annual recordkeeping burden of only two (2) hours for the average entity that would be affected is excessively low and wildly off the mark:

- The estimate appears to derive from a patent misreading of the PRA.
- The estimate ignores the fact that the IRS already has provided a far greater estimate of the recordkeeping burden for the existing rules. Because the proposed rules will tend to increase the regulatory burden for affected organizations, they will consequently also increase the recordkeeping burden beyond the IRS's already far greater estimates for the existing rules.

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- Even if we looked only at the narrow portion of the NPRM on which the IRS impermissibly focuses, the IRS, again, already estimates a far greater recordkeeping burden for an analogous provision under the existing rules.

The IRS may not proceed to a final rulemaking under the PRA without addressing this fatal flaw in the NPRM's gross understatement of the recordkeeping burden. As the hundreds of other comments concerning this NPRM demonstrate, the substance of the proposed rules implicate serious problems for non-profit groups' First Amendment rights, compliance with existing law, administrative burdens, and many other issues. But for the purposes of this specific comment, the recordkeeping requirements of the Service's proposed rules, in and of themselves, also would impose substantial burdens on non-profits' ability to speak – burdens which the IRS must not be permitted to understate.

A) The Paperwork Reduction Act Requires Estimates of ALL Recordkeeping Burdens – Not Just the "Collection of Information" from Third Parties

As OIRA is well aware, a federal agency may not impose new recordkeeping requirements on private entities – specifically, those involving the "collection of information" – unless it first conducts the required review of the burden such requirements would impose. 44 U.S.C. § 3506(c). This review process requires comment by the public and the Office of Management and Budget, and no final rule may be adopted unless the promulgating agency has explained either how the final rule addresses the comments or the reasons it rejects such comments. 44 U.S.C. § 3507(d)(2).

The IRS apparently has taken an excessively and impermissibly narrow interpretation of what constitutes the "collection of information" for the purposes of the PRA by limiting its recordkeeping estimate in the NPRM to address only the new requirement at proposed 26 C.F.R. § 1.501(c)(4)-1(a)(2)(iii)(D). NPRM, Fed. Reg. 71535. That specific new provision requires that 501(c)(4) organizations that make contributions to other 501(c) organizations that engage in the NPRM's newly defined category of "candidate-related political activity" ("CRPA") must "obtain[] a written representation from . . . the recipient organization stating that the recipient organization does not engage in [CRPA]" and that "the contribution is subject to a written restriction that it not be used for [CRPA]." *Id.* at 71541-71542. If a 501(c)(4) does not obtain such a written representation, its contribution will be considered an expenditure for CRPA. *Id.*

However, the PRA does not cover merely those instances where regulated entities are required to affirmatively collect information from other parties, as is the case with the narrow and only provision of the Service's proposed rule discussed in its PRA estimate. Rather, the PRA also covers any and all "recordkeeping requirements imposed on, ten or more persons, other than agencies, instrumentalities, or employees of the United States." 44 U.S.C. § 3502(3)(A)(i). Even more explicitly, the Office of Management and Budget has interpreted "recordkeeping" to include, for example, "OSHA requirements that employees maintain records of workplace accidents." Memorandum from Cass R. Sunstein, Administrator, Office of Management and Budget, to Heads of Executive Departments and Agencies, and Independent Regulatory Agencies, Apr. 7, 2010,

available at
http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/PRAPrimer_04072010.pdf.

As these comments discuss more fully below, the NPRM covers far more activities by 501(c)(4) entities than simply making contributions to other 501(c) entities, and thus implicates far greater recordkeeping burdens that the IRS must address in the NPRM pursuant to the PRA.

B) The Proposed Rules Will Impose Greater Recordkeeping Burdens for Non-Profits Engaged in Political Activity Than Even the Service's Estimates for the Existing Regulations

As compared with the Service's existing rules for the political activities of 501(c)(4)s, the proposed rules will increase the regulatory burden for affected organizations, and consequently also their recordkeeping burden. Thus, given that the IRS estimates a recordkeeping burden of 22 hours for each entity simply for complying with the existing requirements pertaining to "political campaign and lobbying activities," the proposed rules should also require *at least* 22 hours of recordkeeping, if not much more. Dept. of the Treasury, Internal Revenue Service, "2013 Instructions for Form 990," Cat. No. 11283J at 50.[1]

Here, in order to fully understand the increased recordkeeping burden, we must briefly delve into the substance of the current law and the Service's proposed new regulations. Under the Internal Revenue Code, 501(c)(4) organizations must be "operated exclusively for the promotion of social welfare." 26 U.S.C. § 501(c)(4)(A). The Service's existing regulations provide that:

> 1) An 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. 26 C.F.R. § 1.501(c)(4)-1(a)(2)(i); and
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> 2) The promotion of social welfare does not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office. 26 C.F.R. § 1.501(c)(4)-1(a)(2)(ii).

As the NPRM explains, in lieu of the second part of the current regulation, the proposed rule would provide that "The promotion of social welfare does not include direct or indirect candidate-related political activity." NPRM, 78 Fed. Reg. at 71537. The IRS contends "that the approach taken in these proposed regulations . . . may be both

[1] The 22-hour estimate is solely for *recordkeeping* of "political campaign and lobbying activities"; the IRS estimates an additional 1 hour and 5 minutes for an entity to complete the required Schedule C on the annual Form 990 to report such activities, as well as yet another 42 minutes to "learn[] about the law or the form." *Id.*

more restrictive and more permissive than the current approach" in terms of which activities undertaken by 501(c)(4)s will be deemed CRPA and thus restricted. *Id.* at 71538.

In reality, the proposed CRPA standard will, on balance, sweep many more activities within the realm of what is restricted than the Service's current "facts and circumstances" standard for political intervention. In fact, according to one submitted comment, the only manner in which the proposed rules may be underinclusive compared to the current regulation and IRS revenue rulings is "communications short of express advocacy" broadcast 30 days before a primary election or 60 days before a general election that "conspicuously praise or criticize a candidate." Comments of the Bright Lines Project on REG-134417-13, Dec. 17, 2013 at unnumbered p.2.[2]

In all other respects, the proposed CRPA standard will result in more activities being categorized as political and restricted for 501(c)(4)s. For example, "All voter registration, get-out-the-vote drives, and voter guides referring to candidates or parties . . . even though they may be **completely nonpartisan,**" would constitute CRPA, but do not fall within the definition of political intervention under the Service's current regulations. *Id.* (emphasis in the original); *see also* Comments of the Bauman Family Foundation on REG-134417-13, Dec. 19, 2013 at 5-6 (noting the same).

Additionally, contrary to the existing rules, "**grass roots lobbying** unrelated to the upcoming election" would also be deemed political under the proposed rules if, within 30 days before a primary or 60 days before a general election, "any communication to 500 or more people [ ] mentions the name of a candidate or a party [or a candidate appears at] any event (including a debate)." *Id.*; *see also* Comments of the American Motorcyclist Association on REG-134417-13, Dec. 10, 2013 at 2 (providing several examples of the organization's communications that would be deemed CRPA).

Similarly, even website content that was posted prior to the 30/60-day blackout windows and was not CRPA would suddenly become CRPA if it remained live within the windows. NPRM, 78 Fed. Reg. at 71539; *see also* Comments of the American Motorcyclist Association at 3. Again, these activities would not trigger the definition of political intervention or any recordkeeping under the existing regulations. What's more, the proposed new rules also would add commentary on executive branch and judicial nominees to the realm of CRPA, as well as commentary on candidates for official positions within privately organized political organizations. NPRM, 78 Fed. Reg. at 71538; *see also* Comments of The Heritage Foundation on REG-134417-13, Dec. 19, 2013 at 8-9 (noting the same).

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[2] For the reasons discussed in our initial comments, contrary to the position of The Bright Lines Project, CCP does not believe such ads necessarily should be considered a restricted activity for 501(c)(4)s in the proposed rules, nor does CCP believe such ads necessarily should be treated as political intervention under the current regulations.

Expanding the regulatory reach even more, the proposed rules also would add into the calculus activities by volunteers that are conducted under an organization's "direction or supervision" in determining whether a 501(c)(4) has exceeded its limit on CRPA. NPRM, 78 Fed. Reg. at 71540. This is contrary to the current regulatory treatment of volunteer time, for which only an estimate is required to be reported on the Form 990, and which apparently has little legal significance in terms of determining whether a 501(c)(4) has exceeded its limit on political intervention. Dept. of the Treasury, Internal Revenue Service, "2013 Instructions for Form 990," at 10. Beyond the additional burden of merely recording volunteers' time, the difficulty of valuing such time – in order to determine whether a 501(c)(4) has exceeded its limit on political activities – would exacerbate the recordkeeping burden.

Thus, given that: (1) the Service's PRA-mandated estimated recordkeeping burden for the existing rules on political intervention and lobbying by non-profits is 22 hours; (2) the proposed rules would greatly expand the scope of CRPA beyond what is currently regarded as restricted political activities for 501(c)(4)s; and (3) much of what the Service currently considers to be "grassroots lobbying" – and which would fall within the 22 hour recordkeeping burden (particularly for 501(c)(3)s completing the Form 990 Schedule C)[3] – would now also be considered restricted CRPA; it stands to reason that the estimated recordkeeping burden in this NPRM should, at a minimum, also be 22 hours, and, in reality, should be much greater.

While these comments assume that, under the proposed rules, the IRS would continue to require annual reporting of CRPA (presumably, in lieu of political intervention) on some Form 990 schedule (an issue not addressed specifically in the NPRM), non-profits would still be subject to *de facto* recordkeeping requirements even if there were no reporting requirement at all. Under the existing rules, when 26 C.F.R. § 1.501(c)(4)-1(a)(2)(i) and (ii) are taken together, it is understood that 501(c)(4)s may participate in political intervention, so long as they are not "primarily engaged" in such activities. As the NPRM explains, the IRS is "considering whether the current section 501(c)(4) regulations should be modified in this regard and, if the 'primarily' standard is retained, whether the standard should be defined with more precision or revised to mirror the standard under the section 501(c)(3) regulations." NPRM, 78 Fed. Reg. at 71537.

Regardless of whether the IRS retains, revises, or further clarifies the current standard, the bar for the proposed CRPA standard must be set *somewhere* for 501(c)(4)s. And wherever the bar is set, 501(c)(4)s, in practice, will need to retain records so that: 1) an organization can track where it stands with respect to the CRPA it has undertaken thus far or plans to undertake in the relevant period, and in relation to its overall cap; and 2)

[3] The IRS uses the same Form 990 Schedule C for both 501(c)(3) and (c)(4) organizations, even though only the former are required to report their lobbying activities. It is thus unclear from the Service's PRA-mandated estimate of the 22-hour recordkeeping requirement on Schedule C whether it applies to both (c)(3) and (c)(4) organizations equally. Regardless, as explained above, because the proposed rule would shift much of the lobbying activity into the realm of restricted CRPA, the distinction does not really matter here for the purposes of estimating the recordkeeping burden, since 501(c)(4)s likely will have to treat both lobbying and other political activity the same way.

the Service can enforce the limits. *See* 26 U.S.C. § 6001; 26 C.F.R. § 1.6001-1. After all, if an administrative complaint were filed or an audit were conducted on an organization alleged to have exceeded the limit on CRPA, surely it would not be a viable defense simply to say that the entity failed to keep any relevant records.

Accordingly, to the extent the Service's estimated recordkeeping burden for its current rules pertaining to political campaign activities and lobbying only seems to relate to the Form 990 Schedule C reporting requirement, and not to an organization's overall compliance requirement,[4] the Service's existing estimate of 22 hours is likely too low, and thus even 22 hours would be too low of an estimate for the recordkeeping burden of the Service's proposed rules on CRPA.

D) The NPRM's Recordkeeping Burden Estimate Is Excessively Low Because Many More Organizations Will Have to Keep Records.

Under current guidance, many organizations have minimal or no recordkeeping burdens because they conduct few, if any, activities that are considered political. Since the current standard appears to allow organizations to spend up to 50% of program services on political activity,[5] many organizations have little need to keep detailed records because they know any such activities would be well below the 50% threshold. However, since the NPRM would define far more activities as possibly impacting their tax exemption, many more organizations would have to carefully keep additional records where little recordkeeping is currently required. The estimate lists only 2,000 organizations that would be affected by the NRPM, but it appears this estimate does not account for the increase in the number of groups that would have to keep records.

E) The NPRM's Recordkeeping Burden Estimate Cannot Be Computed Until a Second NPRM is Issued That Proposes "What Proportion of an Organization's Activities Must Promote Social Welfare for an Organization to Qualify Under Section 501(c)(4)."

The NPRM indicates that "the Treasury Department and the IRS invite comments from the public on what 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." NPRM, 78 Fed. Reg. at 71538.

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[4] The Service does not appear to have issued an estimated recordkeeping burden for non-profits' overall compliance with the limits on political intervention, presumably because the existing regulations were promulgated in 1959, long before the Paperwork Reduction Act requiring such estimates was promulgated in 1995.

[5] *See* Dept. of the Treasury, Internal Revenue Service, "Exempt Organizations Determinations Unit 2," Training 29450-002 (Rev 9-2009) at 7-19 (Bates No. IRS 00479), *available at* http://www.taxanalysts.com/www/freefiles.nsf/Files/EO%204.pdf/$file/EO%204.pdf ("[O]ther organizations described in IRC section 501(c) may generally make expenditures for political activities so long as such activities, in conjunction with any other non-qualifying activities, do not constitute the organization's primary activity (51%).").

The proportion of restricted activities would greatly impact the recordkeeping burden. For similar reasons as those discussed above, if a final rule proposes a proportion that is significantly lower than what is currently used by the IRS, this would require much greater precision in recordkeeping, forcing many organizations to abandon the use of time-saving estimates, which would produce a large increase in the recordkeeping burden.

Clearly the definition of political activity and the proportion of allowable activity would both have a large impact on the estimated paperwork burden. Until it is known what proportion is permissible in conjunction with any new definition of restricted political activities, it is impossible to accurately compute the estimated change in the recordkeeping burden.

Therefore we believe that if the Treasury Department and the IRS decide to propose a rule with a lower proportion of allowable political activities, a second NPRM must be issued that describes both the covered activities and the proposed allowable proportion. Only then can a reasonable estimate, in compliance with the PRA, be made of the burden under the proposed rules.

F) The NPRM's Recordkeeping Burden Estimate Is Excessively Low Even if the Only Relevant Activity Were Contributions to Other Entities

As discussed above, the NPRM's estimated recordkeeping burden of 2 hours for the proposed rule appears to result from an impermissible focus on the requirement contained within the proposed provision at 26 C.F.R. § 1.501(c)(4)-1(a)(2)(iii)(D). Even assuming *arguendo* this is the proper universe of activities to focus on for the purposes of the PRA, the NPRM's estimate is still too low by at least 250%.

The Service's existing Form 990 Schedule I requires non-profits to report all grants of more than $5,000 made to other entities. Department of the Treasury, Internal Revenue Service, 2013 Form 990 Schedule I, OMB No. 1545-0047.[6] The Service's estimated recordkeeping burden for that requirement alone is 5 hours and 15 minutes. *Id.*[7]

In terms of the recordkeeping burden, this is functionally equivalent to the proposed new recordkeeping requirement at 26 C.F.R. § 1.501(c)(4)-1(a)(2)(iii)(D) which, as discussed above, would require 501(c)(4)s making contributions to other 501(c) organizations to keep records of such grants if they do not wish them to be counted as

[6] For the purposes of estimating the recordkeeping burden, the $5,000 disclosure threshold for Schedule I is irrelevant since, in practice, a non-profit will need to keep records of all grants so that they can determine whether, in the aggregate, any recipient has received more than $5,000. Accordingly, the $5,000 disclosure threshold also is irrelevant when comparing the recordkeeping burden for the current Form 990 Schedule I against the estimated recordkeeping burden provided in the NPRM for the proposed new rules.

[7] Again, this is only the recordkeeping burden. The estimated regulatory burden for preparing the Form 990 Schedule I is an additional 23 minutes, while the estimated burden for learning about the law or form is yet an additional 18 minutes. *Id.*

CRPA. Moreover, the proposed new recordkeeping requirement for 501(c)(4)s is more extensive, in that it requires the grantors to receive attestations back from the grantees about the grantees' use of the grants. Thus, the NPRM's estimated recordkeeping burden for the new requirement at 26 C.F.R. § 1.501(c)(4)-1(a)(2)(iii)(D) should be at least greater than 5 hours and 15 minutes – not the two hours it has set forth.

G) The Proposed Collection of Information is Unnecessary for the Proper Performance of the Functions of the IRS.

Comments were specifically requested "Whether the proposed collection of information is necessary for the proper performance of the functions of the IRS, including whether the information will have practical utility." We believe the proposed collection of information is wholly unnecessary.

As noted in earlier CCP comments:

> As a threshold matter, CCP questions whether the IRS should be engaged in the minutiae of regulating political or politically-related speech at all. If an entity with a social welfare purpose is a political committee ("PAC") under federal or state law, it ought to be regulated as a 26 U.S.C. ("IRC") §527 organization. If it is not, it should be regulated under 26 U.S.C. §501(c)(4). This straightforward approach would harmonize the IRS's rules with those of the Federal Election Commission, the body entrusted by Congress with "exclusive jurisdiction" for civil enforcement of the nation's campaign finance laws. 2 U.S.C. §437c(b)(1). This approach would recognize that in a democracy, political education not only should but must fall within the definition of "social welfare" and "educational" activities that constitute exempt activities under §501(c)(4). Nothing in the statute requires exclusion of these functions from the definition of social welfare. Finally, and most importantly, this straightforward approach offers real clarity without dragging the IRS further into the thicket of political regulation, a tangle from which it—and the Service's reputation for the neutral, nonpartisan collection of revenue—may never recover.

IRS National Taxpayer Advocate Nina Olson's report to Congress makes a similar recommendation. Nina Olson, National Taxpayer Advocate, "Special Report to Congress: Political Activity and the Rights of Applicants for Tax-Exempt Status" at 16 (2013), *available at* http://www.taxpayeradvocate.irs.gov/2014Objectives Report/Special-Report.

Such an approach would minimize the recordkeeping burden and comply with both the requirements and the spirit of the Paperwork Reduction Act.

CCP'S previously submitted comments proposed an alternative draft regulation for how to define political activity and the proportion of allowable political activity in support of non-profits' social welfare mission. This proposal would impose far fewer

administrative costs than the proposed rule announced in the NPRM. It also would provide greater certainty to the regulated community and with less infringement to constitutionally protected issue speech. The CCP draft rule has the additional virtue of hewing tightly to the constitutional jurisprudence dealing with campaign finance, provides the clarity that the Service desires, and upholds the associational and speech rights that are vital to the preservation of our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

H) Conclusion

Congress enacted the Paperwork Reduction Act "to have Federal agencies become more responsible and publicly accountable for reducing the burden of Federal paperwork on the public." Pub. L. No. 104-13. The Service's severe underestimation of the recordkeeping burden that proposed REG-134417-13 would impose on the non-profit community contravenes the law, and the rulemaking may not proceed unless this fundamental error is corrected.

The Center for Competitive Politics appreciates the opportunity to submit these additional comments on the Service's NPRM. Please do not hesitate to contact me if you have any questions about any of the points made above.

Respectfully submitted,

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