February 27, 2014

Via Federal eRulemaking Portal

The Hon. John Koskinen
Commissioner of Internal Revenue
CC:PA:LPD:PR (REG-134417-13)
Room 5205
Internal Revenue Service
P.O. Box 7604, Ben Franklin Station
Washington, DC 20044

Re: Comments on Proposed Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities (REG-134417-13)

Dear Mr. Koskinen:

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"),[1] American Federation of State, County, and Municipal Employees ("AFSCME"),[2] American Federation of Teachers ("AFT")[3], International Association of Machinists and Aerospace Workers ("IAM"),[4] National Education Association ("NEA"),[5] Service Employees

[1] The AFL-CIO is a national labor federation comprised of 55 national and international union affiliates, tens of thousands of state and local union affiliates of those unions, and over 500 state, area and local central labor bodies, which together have more than 12 million members. The AFL-CIO was formed in 1955 by the merger of its predecessor labor federations, the AFL, which was founded in 1886, and the CIO, which was founded in 1935. The AFL-CIO and virtually all of its affiliates are § 501(c)(5) labor organizations.

[2] AFSCME, chartered in 1936, is a labor union whose 1.6 million members are predominantly public service workers employed as nurses, corrections officers, child care providers, EMTs, sanitation workers and more. AFSCME's affiliates, located in 46 states, the District of Columbia and Puerto Rico, include 3,400 local unions and 58 councils. AFSCME and virtually all of its affiliates are § 501(c)(5) labor organizations.

[3] The AFT, founded in 1916, today represents more than 1.5 million educators and school personnel, higher education faculty and professionals, state and local employees and healthcare and childcare providers. The AFT is committed to advancing, both on its own and through political activism, the principles of fairness, democracy in the workplace and the right for workers to be represented by a union of their choosing, as well as collective bargaining, community engagement and organizing. The majority of AFT's members are employed in the public sector and, consequentially, our members have a keen interest in the positions that political leaders take in supporting high quality public education, health care and public services. The AFT and virtually all of its affiliates are § 501(c)(5) labor organizations.

[4] The IAM, founded in 1888, is among the largest industrial trade unions in North America, representing nearly 600,000 active and retired members in the railroad, airline, aerospace, woodworking, shipbuilding and manufacturing sectors organized in over 1,000 local unions throughout the United States and Canada. The IAM and its affiliated local lodges are § 501(c)(5) labor organizations that have a long history of engagement in civic, legislative and political issues facing working people and their families.

International Union ("SEIU"),[6] and United Food and Commercial Workers International Union ("UFCW")[7] (collectively, "the Labor Organization Commenters") respectfully submit these comments concerning the above-referenced notice of proposed rulemaking ("NPRM"), both on their own behalf and on behalf of their members and affiliated labor organizations throughout the Nation.

The Labor Organization Commenters all actively engage in a wide array of partisan and nonpartisan political activity to advance the interests of their members and other workers throughout the nation. To that end, they participate in voter registration, get-out-the-vote and voter education activities among their members and their families. They also participate in similar civic engagement efforts with the general public either directly or through their support of the work of other organizations, including Internal Revenue Code ("Code" or "IRC") § 501(c)(4) organizations.

I. INTRODUCTION AND OVERVIEW

We have grave concerns about much of what the Internal Revenue Service ("the Service" or "IRS") now proposes and what it portends for labor organizations. Although the NPRM proposes now to revise only Treas. Reg. § 1.501(c)(4)-1, the NPRM also requests comment on "whether to amend the current regulations under section 501(c)(5)…to provide that exempt purposes under [that] regulation[]…do not include candidate-related political activity." IRS, Treasury, "Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities," 78 Fed. Reg. 71535, 71537 (Nov. 19, 2013). And, the NPRM seeks comment "on the advisability of adopting rules that are the same 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. 2006-4." *Id.*

Although the NPRM advises that any such changes "would be introduced in the form of proposed regulations to allow an additional opportunity for public comment," *id.*, it appears all too possible that changes first to Treas. Reg. § 1.501(c)(4)-1 could result in a *fait accompli* with

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[5] The NEA, founded in 1857, is a nationwide employee organization with three million members, the vast majority of whom are employed by public school districts, colleges, and universities. NEA has 51 state-level affiliates—one in each of the 50 states and one state-level affiliate that represents educational personnel overseas, mostly in Department of Defense schools. NEA also has more than 14,000 local affiliates. NEA is a § 501(c)(5) labor organization, as are the majority of its state- and local-level affiliates. Some of NEA's state- and local-level affiliates are professional leagues organized under § 501(c)(6).

[6] SEIU is one of the largest unions and § 501(c)(5) organizations in North America, representing over 2.1 million workers employed in service industries, healthcare in the public sector. Since its founding in 1921, SEIU has actively engaged in nonpartisan voter registration, get-out-the-vote and voter education activities among its members and their families. SEIU also participates in similar civic engagement efforts with members of the general public either directly or through its support of the work of other organizations, including § 501(c)(4) organizations.

[7] UFCW dates from 1890 and now represents more than 1.3 million workers, primarily in the retail, meatpacking, food processing and poultry industries. The UFCW protects the rights of workers and strengthens America's middle class by fighting on its own and through political activism for health care reform, living wages, retirement security, safe working conditions and the right to unionize so that working men and women and their families can realize the American Dream. UFCW and virtually all of its many local union and council affiliates are § 501(c)(5) labor organizations.

respect to the Service's subsequent treatment of the political activities of labor organizations (as well as of § 501(c)(3) charitable organizations and § 501(6) business leagues, which the NPRM similarly identifies as potentially subsequent subjects of similar regulation, *see id*.). And, because IRC § 527(f) by its terms directly regulates the political activities of all § 501(c) entities, including the application of the definition of "exempt function" in Code § 527(e), labor organizations have a considerable stake in any change in the Service's regulations implementing § 527. As we explain, the position advanced by the Service in the NPRM, if adopted and enforced, would have a significant and unwarranted adverse effect on the Labor Organization Commenters' ability to fulfill their missions.

The Service explains that it has issued this NPRM for one reason only: to "provide clearer definitions of [the] concepts" of "'the distinction between campaign intervention and social welfare activity, and the measurement of the organization's social welfare activities relative to its total activities,'" 78 Fed. Reg. at 71536, quoting Internal Revenue Service, "Charting a Clear Path Forward at the IRS: Initial Assessment and Plan of Action" 20 (June 24, 2013). But the NPRM fails to provide any suggestion whatsoever as to how the Service proposes to quantify what that crucial "measurement" should be, and why, and the "measurement" under § 501(c)(4) should not necessarily dictate the "measurement" under § 501(c)(5). Moreover, as we explain below, if this proposal were applied to § 501(c)(5) labor organizations, much of it would be highly disruptive and inappropriate.

Our criticisms of the NPRM—and, in particular, its suggestion that its proposed rule be applied to § 501(c)(5) labor organizations—can be summarized as follows:

- Labor organizations differ from § 501(c)(4) social welfare organizations, and from other § 501(c) entities, in significant ways. As a statutory matter, Congress has not placed on labor organizations the same limitations on political activity it has applied to § 501(c)(4) and § 501(c)(3) organizations. In addition, labor organizations have a long and established history of participating in political activities as part of their core mission of advancing the cause of workers. Many of the concerns that animate the current scrutiny of § 501(c)(4) entities are not present with § 501(c)(5) labor organizations, since they are democratically responsive to their members, subject to other statutory regimes that ensure their transparency, and generally cannot be used as conduits for undisclosed political spending.

- The NPRM's proposed definition of "campaign-related political activity" cannot be reasonably applied to the activities of labor organizations. Numerous aspects of the proposed rule would needlessly chill and penalize labor advocacy.

- The NPRM does not furnish an adequate basis for making modifications to the "primarily engaged" standard for § 501(c)(4) organizations. Without a clear proposal that articulates both the *quality* and *quantum* of political activity that would jeopardize an organization's exempt status under § 501(c), it is impossible for the regulated community to evaluate and comment on any proposed changes.

- The rule proposed in the NPRM would create significant regulatory gaps and disharmonies in the administration of both § 501(c) and § 527. The changes to § 527 that

would be needed to rectify those inconsistencies cannot be done by regulation and instead would require congressional action.

- The NPRM does not adequately account for the impact and burden of the proposed regulation. Its evaluation of both the costs of compliance and the rule's substantive effect on labor organizations and others in the nonprofit sector are insupportably low.

- There are numerous measures the Service can take now under its current authority short of the far-reaching proposal in the NPRM to address its stated concern of improving the administration and enforcement of the Code in the tax-exempt sector.

II. KEY DIFFERENCES BETWEEN § 501(c) LABOR ORGANIZATIONS AND OTHER § 501(c) ORGANIZATIONS

The history, characteristics and established legal framework of labor organizations counsel strongly against a crabbed view that "labor" purposes and activities are mutually exclusive with "political" activities broadly conceived, and against harnessing labor organizations to the notions of "exclusive" and "primary" purpose that Congress and the Service have formally applied only to some other § 501(c) organizations. Rather, the Service would have to take a more elastic approach to the definition of "labor" under § 501(c)(5) and either include within that term much of what it would classify as "political" or, if it adopted a regulatory "primary purpose" standard with respect to labor organizations for the first time in 105 years, and if it excluded "political" activities from them, apply a measure of that purpose that enables a considerable amount of such activity to characterize a qualifying § 501(c)(5) organization.

A. Statutory Treatment under the Internal Revenue Code

Congress first enacted the tax exemption for "labor" organizations in the Excise Tax Act of 1909 as an "unconditional exemption." G.C.M. 37035 (1977). Congress considered some "labor" organizations to be similar to "fraternal beneficiary organizations," but the distinct "labor" designation was adopted in order to ensure broader coverage. G.C.M. 38743 (1981); G.C.M. 37942 (1979). The exemption was subsequently "carried over verbatim" into the Tariff Act of 1913, which established the federal income tax, G.C.M. 37035 (1977), and its formulation of the exemption for "[l]abor, agriculture and horticulture organizations" survives to this day. *See* John Francis Reilly *et al.*, 2003 EO CPE Text, "IRC 501(c)(5) Organizations," p. J-3 ("2003 501(c)(5) CPE").

IRC § 501(c)(5) however, does not define any of these organizations further, and the implementing IRS regulation, adopted in 1960, does not distinguish among them in elaborating only that § 501(c)(5) organizations "[h]ave as their objects the betterment of the conditions of those engaged in such pursuits, the improvement of the grade of their products, and the development of a higher degree of efficiency in their respective occupations," and "[h]ave no net earnings inuring to the benefit of any member." Treas. Reg. §1.501(c)(5)-1(a). These regulations do not precisely or narrowly define what "labor" is. *See, e.g., Tupper v. United States*, 134 F. 3d 444, 447 (1st Cir. 1998) (the § 501(c)(5) regulations are "routinely applied so liberally as to render them virtually useless in the present case" (denying § 501(c)(5) status to

multiemployer pension and annuity plans)).

In contrast to IRC §§ 501(c)(3) and (4), § 501(c)(5) does not impose an "exclusive" or even a "primary" purpose requirement of any sort on recognition of exempt status. Nor does the Service's implementing regulation. *See* Treas. Reg. § 1.501(c)(5). As the Service explained when it concluded that the "commensurate test"—which is used to determine whether an organization qualifies under § 501(c)(3)—has no application to § 501(c)(5), that test "relies on the 'operates exclusively for exempt purposes' requirement for section 501(c)(3) organizations," but "[t]here is no similar exclusivity requirement under the Code or regulations under [§ 501(c)(5)] that would support application of the commensurate test to a labor organization." FSA 1993-527 (undated).

Nor, unlike these other § 501(c) organizations, is there any formal restraint on a § 501(c)(5)'s engagement in political activities. *Compare* IRC § 501(c)(5) and Treas. Reg. § 1.501(c)(5)-1 (silent concerning such activities) *with* IRC § 501(c)(3) (barring "participation in, or interven[tion] in…any political campaign on behalf (or in opposition to) any candidate for public office") and Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii) ("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.").

The first and still-leading judicial authority concerning the breadth of § 501(c)(5) is *Portland Co-Operative Labor Temple Association v. C.I.R.*, 39 B.T.A. 450 (1939), acq. 1939-1 C.B.28. The U.S. Board of Tax Appeals there recognized the "labor organization" exempt status of a corporation whose shareholders were unions "recognized by the Central Labor Council of Portland and Vicinity" (a local central labor body that coordinated the activities of its affiliated local unions, which in turn were affiliates of national labor unions chartered by the American Federation of Labor, one of the two predecessor organizations of the AFL-CIO). The corporation owned a "labor temple" building, which rented space to various unions and four state and local central labor bodies (similar to the Portland central body) for their offices, meetings, hiring halls and recreation. The court reasoned that the labor tenants "might themselves have owned and operated a labor temple building without forfeiting their own exemptions," so their "separate corporate agency" was also exempt "so long as it confines its circumstances and activities within such limits." *Id.* at 454. The court reached its conclusion from a capacious view of the statutory term "labor organization":

> The term 'labor organization' is not easy to define either connotatively or denotatively. The word 'organization' appears in application to three classes—labor, agricultural and horticultural, and is therefore not a technical word, nor is it part of 'labor organization' as a term of art. It has no such specific limitations as would a statutory definition like that appearing in [§ 2(5)] of the National Labor Relations Act [, 29 U.S.C. § 152(5)]. It is freely used in common speech [citing Supreme Court labor decisions]. The term has been used continuously for 30 years to bestow tax exemption, and it never has been found desirable by Congress to qualify it or by the administrator to give it a narrowing interpretation. There is no occasion to attempt a definition now. It bespeaks a liberal construction to embrace the common acceptation of the term, including labor unions and councils and the groups which are ordinarily organized to protect and promote the interest

of labor.

39 B.T.A at 454-55.

The Service has long treated the Code definition of "labor" as somewhat tautological. "A labor organization is an entity that is organized 'to protect and promote the interests of labor.'" IRS, Treasury, Notice of Proposed Rulemaking, "Requirements for Tax Exempt Section 501(c)(5) Organizations," 60 Fed. Reg. 66228 (Dec. 21, 1995). And, the Service has looked to both labor history and the relatedness of an organization's activities to the interests of workers. So, the Service ordinarily examines whether an entity engages in "activities appropriate for an exempt labor organization," meaning "activities…commonly or historically recognized as characteristic of labor organizations, or…closely related and necessary to accomplishing the principal purposes of exempt labor organizations." Rev. Rul. 77-46. A § 501(c)(5) labor organization "must primarily serve the interests of labor…The term 'labor is commonly accepted as meaning the performance of service as employees." Rev. Rul. 76-420. *See also* Rev. Rul. 78-288. As one G.C.M. advised, "common usage is to be [the Service's] guide in matters concerning" "what the Portland case…means by labor; i.e. the interests which are served by labor organizations," so a dictionary definition of "labor" "in the sense most relevant to our discussion" appropriately defined the term as follows:

> [A]n economic group comprising those who do manual labor or work for wages…; workingmen as an economic *or political force*….workers employed in an establishment or available for employment: hired help…: Manpower….: the organizations or officials…representing groups of workers: organized labor….

G.C.M. 36264 (1975) (emphasis added).

In determining what functions characterize labor organizations, their history and the scope of conduct that is protected by federal labor law have been key considerations. For example, in concluding that a "strike newspaper" created as a non-profit corporation by its multi-union sponsors qualified under § 501(c)(5), G.C.M. 39698 (1988) applied an extended historical analysis of union activity since the 1860s and relied on the legal history of protection of strike newspapers under the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq*. *See also* G.C.M. 38981 (1983) (examining "the historical and judicial relationship between labor unions and the provision of legal services" in determining that the practice qualifies under § 501(c)(5)); G.C.M. 37942 (1979) (reviewing the history of union finances to determine that unions receive some income from non-member sources, stating that "neither the statute nor the regulations have ever provided any limitations," and noting the possible qualification of certain police and firemen's beneficiary organizations under § 501(c)(5)).

Accordingly, § 501(c)(5) includes, of course, traditional labor unions, because collective bargaining furthers the "object the betterment of conditions of those involved in labor." *See, e.g.,* Rev. Rul. 77-154 (nurses' union); Rev. Rul. 76-31 (city teachers' union). But, although the vast majority of § 501(c)(5) labor organizations undoubtedly are labor unions, consistently with *Portland Co-Operative Labor Temple Association v. C.I.R.* the Service has also long acknowledged that the "labor organization" exemption is *not* limited to them. "Labor unions are labor organizations, but not all labor organizations are labor unions. IRC 501(c)(5) labor

organizations do not need to be recognized labor unions." 2003 501(c)(5) CPE, p. J-4. "An organization that is engaged in activities appropriate to a labor union, even though technically not a labor union itself, may qualify for exemption under Section 501(c)(5)…if its activities are appropriate union activities and are conducted as part of the proper activities of the parent labor organization, so that it is not merely an independent undertaking." Rev. Rul. 75-473.[8] *See also Stichting Pensionfonds Voor de Gezondheid v. United States,* 129 F.3d 195, 199 (D.C. Cir. 1997); G.C.M. 39778 (1989). Indeed, a § 501(c)(5) organization need not even be wholly union-controlled; so long as its activities are "appropriate and traditional union activities," an entity may be jointly controlled by a union and an employer body. Rev. Rul. 75-743.[9]

B. Labor Organizations' Historical Involvement in Political Activity and the Service's Declination to Exclude Political Activity from the Code's "Labor" Exemption

In contrast to other § 501(c) exempt categories—including those that the Service says it may subject to similar rulemakings concerning their political activities—§ 501(c)(5) unions have a long and substantial history of direct engagement in political activity, and that activity has directly served their fundamental purpose of serving workers' interests. Ever since the labor movement took shape in the Nineteenth Century – so, since before the 1909 "labor" tax exemption was adopted – unions have been vitally involved in the political and legislative spheres and have given voice to millions of workers who otherwise could not hope to match the power of their employers and other powerful interests in influencing public policy, legislation and elections that directly affect their livelihoods. *See generally,* Gary N. Chaison, *Unions in America* (Sage Publications 2006); Nelson Lichtenstein, *State of the Union: A Century of American Labor* (Princeton Univ. Press 2002); Kevin Boyle, ed., *Organized Labor and American Politics, 1894-1994: The Labor-Liberal Alliance* (State Univ. of New York Press 1998); Robert H. Zieger, *The CIO 1935-1955* (Univ. of North Carolina Press 1995); Philip S. Foner, *History of the Labor Movement in the United States* (Vols. 1-10) (International Publishers1975); J. David Greenstone, *Labor in American Politics* (Univ. of Chicago Press 1969); Philip Taft, *The A.F. of L. in the Time of Gompers* (Harper & Brothers 1957).

The judiciary has also long taken notice of this history. "[U]nions have traditionally aligned themselves with a wide range of social, political and ideological viewpoints," *Lehnert v.*

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[8] *See*, *e.g.*, Rev. Rul. 62-17 (recognizing as exempt under § 501(c)(5) a union-operated, union member-financed fund for death, sick, accident and similar benefits for members,); Rev. Rul. 75-288 (same with regard to a union-financed fund for legal defense expenses for its members in actions brought against them arising from their performance of official duties); Rev. Rul. 74-596 (same with regard to an organization established by public employee unions to file *amicus curiae* briefs in important public employee litigation); Rev. Rul. 68-534 (same with regard to a non-profit corporation owned by several unions to publish a newspaper that reported on union activities, included other articles of interest to organized labor, and was distributed both to union members and the public); Rev. Rul. 67-7 (same with regard to an organization, formed and controlled by a union and funded by member dues, that paid strike and lockout benefits to members).

[9] *See also* Rev. Rul. 77-5 (trust established to finance union steward); *Tupper v. United States*, 134 F.3d at 448 n.4 (citing Rev. Ruls. 74-473 and 77-5 as reason to be "unpersuaded that current regulations *require* a taxpayer seeking a § 501(c)(5) labor organization exemption to be either a representational or union-controlled entity") (emphasis in original). *See generally* 2003 501(c)(5) CPE, pp. J-8 - J-24.

Ferris Faculty Ass'n, 500 U.S. 507, 516 (1991), and they have always played a vital role in the public arena as advocates for both their members and all workers. *See generally Ellis v. Bhd. of Railway and Airline Clerks,* 466 U.S. 435, 447 (1984) ("unions ha[ve] historically expended funds in the support of political candidates and issues"); *Eastex, Inc. v. NLRB,* 437 U.S. 556, 565-66 (1978); *Abood v. Detroit Bd. of Education,* 431 U.S. 209, 227-32 (1977); *Pipefitters v. United States,* 407 U.S. 385, 402-32 (1972); *Machinists v. Street,* 367 U.S. 740, 767 (1961); *id.* at 798, 800-03, 812-16 (Frankfurter, J. dissenting); *United States v. United Auto Workers,* 352 U.S. 567, 578-86 (1957); *United States v. CIO,* 335 U.S. 106, 115-21 (1948); *id.* at 142-46 (Rutledge, J. concurring).

As Justice Felix Frankfurter famously stated, "[t]o write the history of the [railroad] Brotherhoods, the United Mine Workers, the Steel Workers, the Amalgamated Clothing Workers, the International Ladies Garment Workers, the United Auto Workers, and leave out their so-called political activities and expenditures for them, would be sheer mutilation." *Machinists v. Street,* 367 U.S. at 800. And, as he further related that history:

> American labor's initial role in shaping legislation dates back 130 years. With the coming of the AFL in 1886, labor on a national scale was committed not to act as a class party but to maintain a program of political action in furtherance of its industrial standards. …When one runs down the detailed list of national and international problems on which the AFL-CIO speaks, [t]he notion that economic and political concerns are separable is pre-Victorian. Presidents of the United States and Committees of Congress invite views of labor on matters not immediately concerned with wages, hours, and conditions of employment. And this Court accepts briefs as *amici* from the AFL-CIO on issues that cannot be called industrial, in any circumscribed sense. It is not true in life that political protection is irrelevant to and insulated from economic interests. It is not true for industry or finance. Nor is it true for labor.

Id. at 814-15 (footnote omitted).

Citing Justice Frankfurter's observations, the Supreme Court has since held that the NLRA protects workers when they engage in concerted *political* activity to protect their employment interests. "Congress knew well enough that labor's cause often is advanced on fronts other than collective bargaining and grievance settlement within the immediate employment context," and "employees' appeals to legislators to protect their interests as employees" are among the forms of "mutual aid and protection" workers engage in through their unions under the protective mantle of the NLRA. *Eastex, Inc. v. NLRB*, *supra.* The *Eastex* doctrine affords protection under national labor law for many political activities that employees undertake in direct connection with workplace concerns. *See generally* NLRB General Counsel, Memorandum GC 08-10, "Guideline Memorandum Concerning Unfair Labor Practice Charges Involving Political Advocacy" (July 22, 2008).

As this history demonstrates, unions have traditionally exercised considerable efforts to participate in public elections involving candidates and ballot measures, which determine lawmaking and public policy, just as they have engaged in collective bargaining, worker representation on the job, and the legislative process. Unions make substantial efforts to familiarize union households with public issues, the performances of officeholders in addressing

them, and the positions candidates for public office have taken on them. And, unions regularly pursue efforts to register and encourage their members to vote, including substantial non-partisan programs. Over the years, the labor movement has led legislative and political efforts for enactment of the minimum wage and the forty-hour work week, and for laws protecting occupational safety and health, assuring the security of pensions, and prohibiting invidious discrimination in employment. Union's continue to advance the interests of working families by leading the effort to preserve and strengthen employee-protective laws; to protect the system of social insurance on which workers and older Americans depend; to put a human face on globalization by promoting fair conditions on international trade; and to stand against proposals that would mute or intimidate the voices of working Americans. In all these activities, the labor movement has deployed every means of communication, including membership meetings, workplace contacts, newsletters, mail, phones, the Internet and both paid and "free" media, to articulate issues of concern to working families. And, unions routinely seek to build coalitions with allied organizations for their advocacy on behalf of workers.

Again, this history sets labor organization distinctly apart as a matter of degree, and in some cases kind, from other § 501(c) organizations in the electoral sphere.[10] Accordingly, we submit that it would be inappropriate (and, as we explain below, unlawful) for the Service to redefine a host of union activity as "campaign-related political activity" ("CRPA"); impose, for the very first time, a "primary purpose" standard on labor organizations; and then declare that CRPA falls *outside* of that purpose.[11]

And, against this backdrop, it is instructive that the Service has never in any precedential ruling or other binding action adopted the position that "labor" activities exclude political activities, however defined, for purposes of qualification under § 501(c)(5). Rather, a series of G.C.M.s reflect the Service's resistance to doing so, and they counsel against the kind of belated and sweeping shrinking of the exempt "labor" category now that the Service states that it is

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[10] We note that we are *not* saying that the NPRM, if realized in a regulation, would be appropriate for § 501(c)(4) or other tax-exempt organizations. For example, much of our critique below concerning the elements of the proposed political activity definitionplainly could be applied with equal force to other organizations. But the features of labor organizations uniquely make application of the NPRM to them a manifestly poor fit.

[11] If the NPRM's unforgiving approach to political activities and primary purpose were applied to labor organizations, it would exert a general chill throughout the labor movement and pose especially significant risks for the over 500 § 501(c)(5) labor organizations that, like the multi-union bodies in *Portland Co-Operative Labor Temple Association v. C.I.R., supra,* operate as central labor bodies within the AFL-CIO at the state, municipal and other levels of every state in the nation. The same risk would be posed to innumerable other such coordinating labor organizations, as well as state- and regional-affiliate labor organizations, that operate within the Labor Organization Commenters and other unions. Although these central labor and similar bodies are comprised of labor unions and their members and are democratically structured, they are not labor unions because they do not represent workers in collective bargaining. Yet central labor and similar bodies are fully recognized as labor organizations for purposes of campaign finance regulation at the federal level, *see, e.g.,* 11 C.F.R. § 100.134(h) & (i), and in every state. The principal functions of these bodies are to coordinate the activities of their affiliated in-state union bodies, and to engage with other organizations and government. Accordingly, their routine work entails substantial legislative and political activity. If they operated under a regime that both excluded political activity as an exempt labor activity *and* defined such political activity in the broad terms proposed by the NPRM, which includes substantial legislative and issue advocacy, then the § 501(c)(5) status of many of these historically recognized labor organizations could be placed very directly at risk. There is no basis in the Code for that result.

considering.

The Service has long acknowledged that legislative activities may be the exclusive purpose of a "labor organization." In 1961, the Service (reversing its prior view) concluded that an organization whose "sole activity is the advocacy of legislation that is…beneficial to a common business interest" may be a § 501(c)(6) business league where "[t]he objectives sought by the…organization can be attained only through legislation," relying on the fact that neither the Code nor the Service's regulations required business leagues to refrain from legislative activity as a condition of exemption. *See* Rev. Rul. 61-177. The Service subsequently applied this rationale in concluding that an organization that was "exclusively engaged in support of legislative proposals germane to labor…interests would thereby confine its activities to the statutory purposes specified in" § 501(c)(5). *See* G.C.M. 34233 (1969). *See also* G.C.M. 36264 (1975). And, this appears to remain the Service's view. *See, e.g.*, John Francis Reilly *et al.*, 2003 EO CPE Text, "Political Campaign and Lobbying Activities of IRS 501(c)(4), (c)(5) and (c)(6) Organizations," p. L-2 ("2003 Political & Lobbying CPE").

Soon after Rev. Rul. 61-77, G.C.M. 32184 (1962) concluded that its rationale regarding an organization exclusively dedicated to legislative activities in support of a common business interest could be applied also to accord § 501(c)(6) status to an organization (apparently comprised of companies in the beer industry) whose sole business-supportive activities were *political* (including that it applied 75% of its spending "toward assisting candidates for political office"). But the G.C.M. observed that "it will ordinarily be far more difficult to pinpoint the germaneness of support of candidates for office (whose position on beer will rarely if ever constitute a predominant feature of their platforms) to a common business interest than it would be to demonstrate the germaneness of specific items of legislation thereto." Although the Tax Rulings Division apparently wished to approve the § 501(c)(6) exemption under consideration, no publication ensued. *See* G.C.M. 32428.

Later that year, G.C.M. 32428 advised without elaboration that a labor organization, like a business league, could undertake "some political activity without jeopardizing its exempt status," but "by the standards the Service has established," a separate organization that was formed for political purposes did not qualify under § 501(c)(5); the "increased civic and political activity of its members [are] matters…not clearly within the ordinarily understood purpose of a labor organization." But the G.C.M. cited for this proposition only an unpublished 1929 G.C.M. that denied the labor organization exemption to "a store open only to members of its sponsoring railway labor unions" – an opinion that was far afield from the issue at hand, and plainly belied by the substantial labor history we have summarized above.

Seven years later, G.C.M. 34233 (1969) revoked G.C.M. 32428 and modified G.C.M. 32184, effectively concluding that the problem of proof identified in G.C.M. 32184 was insurmountable in the political sphere because "support for a candidate for public office necessarily involves the organization in the total political attitudes and positions of the candidate," which "transcends" the "narrower" business or labor interest being pursued. But this memorandum did not explain why it ignored the political reality that union political activities traditionally are far more nuanced and labor-centric than simply absorption in a candidate's campaign apparatus. The G.C.M. added that although a "primary purpose" of political activity would not qualify an organization for exemption under § 501(c)(5) or § 501(c)(6), an

organization whose "primary purpose or activities" qualified under either exemption would not be undermined by its "participation in political activities."

A revenue ruling on the subject of labor organization political activity was considered at this time, but it was rejected so no publication resulted. *See* G.C.M. 36286 (1975). Instead, the Service embarked on a rulemaking concerning the political activities of § 501(c)(5) organizations. A preliminary draft of regulations embodying much of the substance of G.C.M. 34233 was prepared in 1972 and sent to the Treasury Department, but the project was closed without further action in May 1974 for reasons unexplained in the G.C.M. that describes this aborted initiative. *See id.* *See also* G.C.M. 36264 (1975) (referring to this initiative and noting that "there are at present no plans to reopen it"). There was, then, no resolution of the Service's "great uncertainty" regarding "[t]he quantity of political activity in which an exempt labor organization may engage…." G.C.M. 36286. And, that remains true to this day.

C. The Membership Composition and Democratic Structure of Labor Organizations

Labor organizations differ from all other § 501(c) organizations in that, by culture, history and law, they are *uniformly* membership organizations comprised of individuals, and they are uniformly democratically controlled by those members.[12] *See* generally Derek C. Bok & John T. Dunlop, *Labor and the American Community* (1970). That is true for many but not most § 501(c)(4) organizations, and, while § 501(c)(6) organizations must have members, in almost all cases those members are businesses and other enterprises, not individuals. *See generally* John Francis Reilly *et al.*, 2003 EO CPE Text, "IRC 501(c)(6) Organizations," pp. K-2 - K-4.

In fact, the very inception of a union occurs through democratic decision-making processes: under the NLRA, the predicate for workplace representation by a private sector labor organization is its "designat[ion] or select[ion] for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes." *See* 29 U.S.C. § 159(a). A secret ballot election among the workers in that unit is typically conducted by the National Labor Relations Board (NLRB) in order to test that support and justify the union's formal certification by the NLRB as the employees' chosen bargaining representative. If there is no election, there must still be a proven showing of majority worker support for the union to become that representative. And, if a majority of employees stop supporting their union in that role, they can vote to decertify it as their bargaining representative, also through an NLRB representation election. *See* 29 U.S.C. § 159(a). The same is true, with some minor variations, under state and federal public-sector bargaining laws, *see generally* Martin M. Malin *et al., Public Sector Employment* 340-412 (2d. ed. 2011); Civil Service Reform Act, 5 U.S.C. §§ 7101 *et seq.* (federal employees), as well as under the Railway Labor Act, 45 U.S.C. §§ 152, Third and Ninth (railroad and airline employees).

Following their voluntary formation, all unions operate democratically by virtue of the history and culture of the labor movement, and as prescribed in their constitutions and bylaws.

[12] As discussed above, labor organizations that are not also labor unions are in almost all cases controlled by unions, so they too are subject to democratically determined oversight.

And, for all unions that represent or seek to represent private sector employees, the Labor-Management Reporting and Disclosure Act ("LMRDA") of 1959, 29 U.S.C. § 401 *et seq*., provides that: local union officers must be elected at least every three years by secret ballot election; national union officers must be elected at least every five years either by secret ballot or at a convention of delegates themselves chosen by secret ballot; member dues may be increased only by these same methods; and, all union members have equal and federally protected rights to nominate candidates to run for union office, vote in union elections, and exercise speech and association rights within their unions, among other individual guarantees. The LMRDA assures, then, that union decisions are made by either the membership as a whole or by individuals who are both democratically elected by and accountable to that membership.

Moreover, whether or not to become a union member is the completely voluntary decision of an individual worker. Although the NLRA by its literal terms permits unions and employers jointly to require "membership" as a condition of employment in the 26 non-"right-to-work" states, *see* 29 U.S.C. § 158(a)(3), as a matter of law in both the private and public sectors this "membership" means only an employee's payment of representation fees to his or her union representative; the employee need not actually join the union as a member. *See Marquez v. Screen Actors Guild*, 525 U.S. 33 (1998); *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963). And, employees who voluntarily choose membership may resign that membership at any time without restriction. *Pattern Makers League v. NLRB*, 473 U.S. 95 (1985).[13]

The fundamental membership and democratic features of labor organizations trigger special First Amendment concerns with respect to any regulatory regime that would rewrite and expand the classification of what activity is "political" and "inappropriate" for labor organizations to undertake. The core associational relationships within a union between and among the union's officers and members enjoy constitutional protection, including their dealings on political matters. The Supreme Court recognized 65 years ago that construing the federal statutory prohibition on union treasury political contributions and expenditures in federal elections to reach communications between a union and its members would create "the gravest doubt" as to the statute's constitutionality. Accordingly, the Court construed the law (at that time a provision of the LMRA, since incorporated within the Federal Election Campaign Act ("FECA"), 2 U.S.C. § 441b(a)), to exclude from its scope a union's expenditure of funds on its own internal newsletter urging union members to vote for a particular candidate for Congress. *See United States v. C.I.O.*, 335 U.S. 106, 121 (1948). And, over 40 years ago, the Court stated that this exemption "allowing [unions and corporations] to communicate freely with members and shareholders on any subject" by using their general treasuries—and not just using individual voluntary contributions, as federal law requires for certain external political activity—was

[13] As for the *non*-members whom unions represent in a workplace, unions must adhere to a "duty of fair representation" to them. "The designation of a union as exclusive representative carries with it great responsibilities," and "in carrying out these duties, the union is obliged 'fairly and equitably to represent all employees..., union and nonunion,' within the relevant unit." *Abood v. Detroit Board of Education*, 431 U.S. at 221 (*quoting Machinists v. Street,* 367 U.S. at 761). This means that in the 26 states where "union security" clauses are lawful in the private sector, covered employees generally must pay their fair share of that representation and receive *all* of its benefits, including full access to grievance and arbitration processes. But in the 24 so-called "right-to-work" states where union security is unlawful, employees may refuse to pay *anything* to support the union, yet they too are entitled to all the benefits and prerogatives of union representation.

"required by sound policy and the Constitution." *Pipefitters Local 502 v. U.S.*, 407 U.S. 385, 431 (1972) (interior quotation marks and citation omitted).[14]

This union-member relationship has since prompted the Supreme Court to distinguish unions from businesses in the political sphere. In 1990 the Court upheld Michigan's statute barring corporations—but not unions—from using treasury funds to make independent expenditures. Rejecting a § 501(c)(6) business league's Equal Protection Clause challenge that was predicated on that union exemption, the Court recognized "crucial differences between unions and corporations" because employees can decline to be union members and avoid paying for union political expenditures while still receiving the benefits of union representation; contrary to what a corporation may require of its shareholders, "a union may not compel employees to support financially 'union activities beyond those germane to collective bargaining, contract administration, and grievance adjustment.'" *See Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 665, 666 (1990) (*quoting Communications Workers v. Beck*, 487 U.S. 735, 745 (1988)). The Court added:

> An employee who objects to a union's political activities thus can decline to contribute to those activities, while continuing to enjoy the benefits derived from the union's performance of its duties as the exclusive representative of the bargaining unit on labor-management issues. As a result, the funds available for a union's political activities more accurately reflect members' support for the organization's political views than does a corporation's general treasury.

Id. at 665-66 (emphasis added).[15] As one appellate court subsequently put it, a union engaged in political activities is "an archetype of an expressive association" protected by the First Amendment. *See Kidwell v. Transp. Communications Int'l Union*, 946 F.2d 283, 301 (4th Cir. 1991).

D. The Majority of Labor Organizations are Already Subject to Extensive Regulation and Disclosure Requirements Concerning Their Political Activities

Although the NPRM does not acknowledge that increasing disclosure of political activity by § 501(c)(4) organizations is one of its goals, concerns about the transparency of such

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[14] The basic nature and purpose of labor organizations, along with the special associational relationship between an organization and its members that underlies the concerns expressed by the *CIO* and *Pipefitters* Courts, presents a strong rationale against the Service treating communications from an organization to its members, including communications on political matters, as outside a non-§ 501(c)(3) organization's purpose. The Service implicitly acknowledges this by declining to treat such communications as exempt function activities for the purpose of IRC § 527. *See* Treas. Reg. § 1.527-6(b); *see also* T.D. 7744, Income Tax; Final Regulations, "Taxation of Political Organizations," 45 Fed. Reg. 85730 (Dec. 30, 1980). It is the Labor Organization Commenters' position that these membership communications are squarely within the purpose of at least § 501(c)(5) labor organizations.

[15] Although *Citizens United v. FEC*, 558 U.S. 310 (2010), overruled *Austin's* approval of a statutory prohibition against corporate independent expenditures, it did not disturb *Austin's* distinctions between unions and business corporations or the *Austin's* court's holding that imposing greater constraints on corporate political activity than on union political activity did not violate the Equal Protection Clause. *See, e.g., Iowa Right to Life Committee, Inc. v. Tooker,* 717 F. 3d 576, 601-03 (8th Cir. 2013).

organizations, especially insofar as they are politically active, have of course been a dominant theme in general political commentary about the uses of the § 501(c)(4) form in recent years. The Code's information return requirements, IRC § 6033, and Form 990 require from § 501(c) organizations neither public disclosure of donors nor any itemization of spending beyond aggregate figures in general categories, and the form's Schedule C, "Political Campaign and Lobbying Activities," provides little more aggregate and narrative information about political activities. But unlike § 501(c)(3), § 501(c)(4) and § 501(c)(6) entities, the annual financial disclosure obligations of labor unions, which comprise virtually all § 501(c)(5) labor organizations, do not end with Form 990: by virtue of the LMRDA, unions also must publicly disclose *virtually all of their receipts and spending, including for their political activity regardless of its definition.* [16]

Specifically, the LMRDA requires unions to file with the United States Department of Labor ("DoL") their constitutions and bylaws, together with substantial operational information, *see* 29 U.S.C. § 431(a), as well as an exhaustive annual financial report of their receipts, disbursements, assets, liabilities and other information, "all in such categories as [DoL] may prescribe," *id.*, § 431(b). DoL has broad regulatory authority to implement these requirements. *See id.,* § 438. DoL requires every labor union with annual gross receipts of at least $250,000 to record this financial information on Form LM-2, and to file that form electronically; and, DoL posts all Forms LM-2 on its website, with a robust search function. *See id.* § 435(a); http://kcerds.dol-esa.gov/query/getOrgQry.do.

Form LM-2 includes some information that overlaps with what Form 990 requires. But it also requires substantial disclosures about union operations:

- Number of members
- Rates of dues and fees from members
- Changes in constitution and bylaws
- Creation or participation in trusts or other funds or organizations
- Sponsorship of a political action committee
- Acquisition or disposition of property other than by purchase and sale
- Liquidation or reduction of liabilities by means other than cash
- Amount recoverable on fidelity bonds covering officers
- Discovery of any loss or shortage of funds or property
- All encumbrances on assets
- All contingent liabilities

And, Form LM-2 requires the following detail about union financial transactions:

- *Itemization of every receipt from every source aggregating at least $5,000/yr.*
- *Itemization of every expense to any recipient aggregating at least $5,000/yr.*

[16] The obligation attaches to any labor organization that represents any employees in the private sector. This includes all of the Labor Organization Commenters and innumerable other national, intermediate and local unions whose membership includes a high proportion of public sector workers.

- Allocation of all such spending—whether or not itemized—to five "functional categories": representational activities; *political activities and lobbying;* contributions, gifts and grants - general overhead - and union administration.
- Lump sum totals of all of the above, including the non-itemized amounts (that is, under $5,000/yr. from a particular source or to a particular recipient)
- Names and salaries and other direct and indirect disbursements paid to *every officer*, with each salary allocated across the five functional categories
- Names and salaries and direct or indirect disbursements paid *to every employee* who received at least $10,000, with each salary likewise allocated across the five functional categories
- Accounts receivable aging schedule, with itemization at a threshold of $5,000 and 90 days past due;
- Accounts payable aging schedule, likewise itemized at $5,000 and more than 90 days due
- Direct and indirect loans receivable, itemized at $250 or less depending on the identity of the debtor
- All sales of investments and fixed assets
- All purchases of investments and fixed assets
- All ongoing investments other than U.S. Treasury securities
- All fixed assets
- All other assets
- All other liabilities

See DoL "Form LM-2 Labor Organization Annual Report*"* (2010), *available at* http://www.dol.gov/olms/regs/compliance/GPEA_Forms/lm2_blackForm.pdf; *see also* DoL, *"*Instructions for Form LM-2 Labor Organization Annual Report," *available* DoL, "Final Rule, Labor Organization Annual Financial Reports," 68 Fed. Reg. 58373 (Oct. 9, 2003).

Under these rules, with respect to political activities – regardless of how they are defined by the Service – Form LM-2 requires a union to itemize *any* associated spending at an aggregate $5,000 per-year, per-recipient level, including for *each separate disbursement* the *name* and *address* of the payee, and the *purpose, date* and *amount* of the disbursement. *See id.* And, all unitemized political spending—that is, payments to any recipient in the course of political activity, again however defined, that aggregate under $5,000 per year—must be included in the annual totals. *Id.*

Plainly, then, with respect to their political spending—and indeed *all* of their spending and income—unions by law are by far the most transparent of not only all tax-exempt organizations, but of *all* organizations of whatever kind with the sole exception of political organizations themselves. If the NPRM is adopted and applied to unions, and if it prompts unions to shift spending to § 527 entities, it would add nothing whatsoever to the public record about those activities.

E. Labor Organizations Are Not and Cannot Potentially Become Conduits For Undisclosed Political Funding

Labor organizations differ starkly from the other principal § 501(c) categories—charities, social welfare organizations and business leagues—in another respect that is germane to another oft-cited phenomenon that appears to be relevant to this rulemaking: the uses of § 501(c) organizations as vehicles for individuals and others to hide from public view their own political spending. Unlike every other relevant kind of § 501(c) group, *unions do not have "contributors" or "donors"* and with rare exception they do no "fundraising." Instead, labor organizations are almost universally financed entirely from membership dues, investment income, transfers from their own, and likewise fully disclosing, affiliated § 501(c)(5) union bodies, and occasional miscellaneous trade or business income—but not by gifts of any kind from corporations, wealthy individuals, § 501(c)(4) groups or anyone else.

For that reason, in all that has been reported about the uses of tax-exempt forms to shield from disclosure the funding sources of political activity, the focus has been on § 501(c)(4) and § 501(c)(6), and not on § 501(c)(5). If proof of that negative is necessary, one need only review the (approximately more than one million) union annual financial reports that have been filed with DoL since 1961 to see that unions do not receive outside contributions or donations, let alone are used as conduits for other's political spending. This feature of labor organizations results from both union culture and labor law, and no rewrite by the Service of the definitions of political activity for unions is needed to enforce it.

To elaborate, the compelling *legal* reason why unions are neither recipients of others' largesse nor conduits for others' political (or, for that matter, *non*-political) spending is § 302 of the Labor Management Relations Act ("LMRA") of 1947, 29 U.S.C. § 186. That statute criminalizes all but a precisely circumscribed list of payments that "employers" can make to unions, and serves as a unique and potent prophylactic against undue influences by employers on unions and their representatives. There is no remotely comparable restriction on the financial transactions between § 501(c)(4) or § 501(c)(6) entities with any other group or individual.

Section 302 generally prohibits "any employer or association of employers" or any person "who acts in the interest of an employer" from making payments of "any money or other thing of value" to, variously, unions, their representatives, officers and employees in certain circumstances. 29 U.S.C. § 186(a). And, it is likewise unlawful for "any person"—including a union or a union official, employee or representative—to "request, demand, receive, or accept, or agree to receive or accept," any such prohibited payments. *Id.*, § 186(b)(1).[17]

More specifically, there are three key categories of prohibited employer payments and union-side requests or receipts of such payments. First, it is unlawful for any employer to give a thing of value to "any labor organization, or any officer or employee thereof, which represents,

[17] The conduct prohibited by §§ 302(a) or (b) is subject to exceptions that are set forth in § 302(c), 29 U.S.C. § 186(c), including compensation for regular employment; satisfaction of a judgment of a court or arbitrator; transactions involving articles or commodities at the prevailing market prices in the regular course of business; remittance of individual payroll-deducted membership dues paid by employees who voluntarily authorize them; and payments to employee benefit, similar trust funds and certain joint labor-management committees.

seeks to represent, or would admit to membership, any of the employees of such employer…." *Id*., § 186(a)(2). This definition renders many "employers" improper sources of payments to many unions. Second, it is unlawful for an employer to give a thing of value to "any representative of his employees." *Id*. § 186(a)(1). And third, it is unlawful for any employer to give a thing of value "to any officer or employee of a labor organization…with intent to influence him in respect to any of his actions, decisions or duties as a representative of employees or as such officer or employee." *See generally Arroyo v. United States*, 359 U.S. 419 (1959): *United States v. Ryan*, 350 U.S. 299 (1956); *United States v. Pecora,* 798 F. 2d 614 (3d Cir. 1986); *United States v. Cody*, 722 F. 2d 1052 (2d Cir. 1983).

As noted, § 302 prohibits certain payments not only from an "employer" but also from "any association of employers," meaning most if not all § 501(c)(6) business leagues, as well as from "any person…who acts in the interest of an employer" in making such a payment. So, a payment need not "c[o]me from the employer's funds" if the payer acts on the employer's behalf. *See, e.g., United States v. Ferrara*, 458 F. 2d 868, 872-73 (2d. Cir. 1975) (individuals who made payments to union officer in order to influence him acted in interest of employers at issue where they owned substantial stock in and exercised control over them). *See also United States v. Bloch*, 696 F. 2d 1213, 1215-16 (9th Cir. 1982); *Haley v. Palatnik*, 509 F. 2d 1038 (2d Cir. 1975); *United States v. Overton*, 470 F. 2d 761, 765 (2d Cir. 1972); *United States v. Iozzi*, 420 F. 2d 512, 514-15 (4th Cir. 1970). Although the precise scope of § 302's reach to individuals is not entirely clear, there is no question that this aspect of § 302 operates as a considerable deterrent against donative transactions between unions and individuals who are not their members.

II. WITH SOME NOTABLE EXCEPTIONS, IT WOULD BE INAPPROPRIATE FOR THE SERVICE TO APPLY THE NPRM'S DEFINITION OF "CAMPAIGN-RELATED POLITICAL ACTIVITY" TO § 501(c)(5) LABOR ORGANIZATIONS

The immediate matters presented by the NPRM include its proposed definition of "campaign-related political activity" that would not qualify as the promotion of social welfare for a § 501(c)(4) organization and its suggestion that the Service should do the same to § 501(c)(5) labor organizations. As explained in the NPRM, the CRPA category is meant to advance the laudable goal of helping both the Service and § 501(c)(4) organizations more readily identify activities that do and do not promote social welfare. In the remainder of this section, we explain that—whatever its merits may be as applied to § 501(c)(4) organizations—the definition of CRPA would generally *not* be appropriate for application to § 501(c)(5) labor organizations. Indeed, despite the uncertainty that the current "facts and circumstances" approach sometimes entails, it is far preferable to the sweeping and sterile CRPA.

Nonetheless, the following analysis assumes for purposes of this comment that the Service by regulation ought to more clearly define what is "political activity" that is "candidate-related" for labor organizations, leaving aside for the moment the critical question as to the relevance of such a regulation to the § 501(c)(5) exemption itself. Our analysis below addresses only whether or not it would be appropriate to classify certain activities *per se*—as the NPRM uniformly does—as "political."

A. Appropriate NPRM Classifications of Activities as Political

We begin with several areas of substantial or partial agreement as to where the proposed definition of CRPA would be appropriate to apply to§ 501(c)(5) labor organizations. These elements of the definition would advance the Service's goal of promoting certainty and predictability, while not interfering with the activities of labor organizations that are both naturally and historically understood as involving the betterment of the conditions of labor.

The Service rightly would treat as political expenditures public communications that advocate—either by express terms or their clear functional equivalent—the election or defeat of a clearly identified political candidate or the candidates of a political party. But the proposal is apt only insofar as federal election law defines the same kinds of speech. The NPRM veers off from the election-law definitions in several respects that should not be adopted. First, the proposed definition of a "candidate" includes anyone who is "proposed by another" as a candidate. *See* proposed Treas. Reg. § 1.501(c)(4)-1(a)(iii)(B)(1). The literal reach of that formulation would untether the term from any meaningful and regulable scope, and it is so vague as to undermine the clarity that is ostensibly the principal goal of the NPRM. Second, the proposed definition of the term "[c]learly identified" includes "reference to an issue or characteristic used to distinguish the candidate from other candidates." *See id.* § 1.501(c)(4)-1(a)(iii)(B)(2). This would delink candidate identification from objectively determinable references and is likewise unacceptably vague.[18]

We also agree that contributions to candidate committees, political parties, and other political organizations organized under § 527 are properly classified as political.[19] And, in the context of both of these kinds of expenditures, we believe it is appropriate to make explicit that contributions and advocacy directed at the removal of an officeholder by recall petition or recall election are political in nature.

Similarly, we do not oppose treating sponsored solo appearances by endorsed candidates *in a candidate capacity* (the NPRM does not require that necessary element) in proximity to an election as political.[20] And, we agree that such a definition could include the republication or distribution of materials created by a candidate committee, political party, or other political organization under IRC § 527, but, unlike the NPRM, only when such materials are used for partisan political advocacy.[21]

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[18] Moreover, as discussed below, we strongly disagree that the term "candidate" in proposed Treas. Reg. §Section 1.501(c)(4)-1(a)(2)(iii)(B)(*1*) should be extended to include the appointment and confirmation of executive- and judicial-branch officials. Likewise, for reasons given below, we do not think the term "communication" in proposed Treas. Reg. § 1.501(c)(4)-1(a)(2)(iii)(B)(*3*) should extend to all non-public communications, including all "oral" communications.

[19] As discussed below, we contend that some allowance must be made for a labor organization's "prompt and direct" transfers to a separate segregated fund, as permitted by IRC § 527(f)(3) and Treas. Reg. § 1.527–6(e)-(f).

[20] As discussed below, we oppose the inclusion of *nonpartisan* candidate appearances and debates in the definition of CRPA.

[21] There are many contexts in which the republication of some campaign materials should *not* be deemed political, particularly when the materials are used to for nonpartisan purposes such as informing a labor organization's members of an incumbent officeholder's position on a key policy issue that is subject to ongoing legislative debate.

The defining characteristic of all of these activities is that they do not merely touch on the electoral process in some incidental way; rather, their unambiguous purpose is to influence the outcome of an election. Thus, by treating only these categories of activity as political, there is little risk that a § 501(c)(5) labor organization will put its tax status at risk by engaging in activities that, while having some connection to the electoral process, are nevertheless taken for the core purpose of advocating to better the conditions of labor.

B. Inappropriate NPRM Classifications of Activities as Political Irrespective of Circumstances

Unfortunately, much of what remains of the proposed definition of CRPA extends well beyond what would be appropriate to apply to a labor organization without regard to the activity's particular context and circumstances. The NPRM suggests that, for the sake of providing "more definite rules," the definition of political activity—on which a non-profit's tax status relies—may "sweep in[] activities that would (or would not) be captured under the IRS' traditional facts and circumstances approach." See 78 Fed. Reg. at 71536. If this broader sweep merely affected nonpartisan, non-campaign activity at the margins, perhaps it would be an appropriate trade-off for greater clarity and predictability.

However, the proposed definition of CRPA does not accomplish these goals in such a fashion. Far from it: instead, CRPA is drastically overbroad, sweeping in many activities long held to be outside the realm of political activity defined as "exempt function" under IRC § 527, or as "political campaign activities" as defined by Rev. Rul. 81-95. While most of the remaining activities included in the definition of CRPA could have some conceivable or incidental connection to the electoral process, their principal purpose can be otherwise. Therefore, to include these activities as *per se* CRPA would inappropriately undermine Congress' intent in granting tax-exempt status.

Moreover, some proposed categories of CRPA would create serious problems for the practical administration of labor organizations and would discourage nonpartisan activities that support a healthy democracy and are protected by the First Amendment.

1. Nonpartisan voter registration, get-out-the-vote activities and voter guides

Perhaps the most disruptive aspect of the definition of CRPA is its coverage, regardless of circumstance, of all voter registration, get-out-the-vote, and voter-education efforts. When undertaken in a nonpartisan manner, these activities do *not* have the purpose of supporting a particular candidate or party, and they instead serve the core civic function of supporting a well-functioning democracy by encouraging informed participation. Moreover, these activities are critical to the primary function of labor organizations by helping to educate members and the public at large on the issues affecting labor.

The NPRM expresses concern over the highly fact-intensive nature of determinations of whether such activities are partisan or nonpartisan. These concerns are overblown, particularly in relation to the importance of these activities not only to the proper function of labor organizations but also to democratic government. We suggest that the proper way to address these activities is to either accept that fact-intensive determinations are worth the required effort,

or to draw a bright line in a fashion that risks some arguably partisan activity in order to provide more absolute protection for nonpartisan voter registration, get-out-the-vote efforts, and voter guides.

Acknowledging that these nonpartisan activities are *not* political would be consistent with the already settled expectations created by the Service's existing rules. The Service has long eschewed "exempt function" classification of nonpartisan voter registration, get-out-the-vote, and voter education campaigns. *See* Treas. Reg. § 1.527-6(b)(5). The operative regulations draw a bright line, avoiding fact-intensive determinations, by simply stating that "[t]o be nonpartisan voter registration and get-out-the-vote campaigns must not be specifically identified by the organization with any candidate or political party." *Id.*

That approach is also consistent with the regulation of labor organization activities under FECA, which distinguishes between contributions and expenditures in connection with an election, one the one hand, and nonpartisan voter registration, get-out-the-vote, and voter education campaigns aimed at both an organization's members and the public on the other. *See* 11 C.F.R. § 114.4(c)(2)-(5), (d). And, that is not happenstance: FECA commands that "[i]n prescribing such rules, regulations and forms under [2 U.S.C. § 438(f)], the [Federal Election] Commission *and the Internal Revenue Service* shall consult and work together to promulgate rules, regulations, and forms which are mutually consistent." 2 U.S.C. § 438(f) (emphasis added). When it adopted its § 527 regulations, the Service did strive to satisfy this requirement and complement FECA's overlapping regulatory scheme.[22] It would be inconsistent with FECA and undermine the NPRM's professed aims of promoting certainty and predictability to adopt an approach to nonpartisan activity that creates conflicts and inconsistencies with FECA.

2. Advocating appointment and confirmation of executive and judicial branch officials

It would also be wholly inappropriate to define as political an organization's activities related to the appointment and confirmation of executive and judicial nominees. These activities do *not* relate to federal, state, or local elections but are often of significant importance to the principal function of labor organizations, whose ability to affect public policy frequently depends upon the selection of appointed officials who are responsible for policymaking decisions. For instance, appointments to state and federal labor boards have a great impact on workers through both the regulations the boards enact, and the quasi-judicial decisions they make.

The NPRM provides no legal basis for broadening the definition of candidate beyond elected public office. Indeed, the NPRM ignores the Service's longstanding position that such activities do *not* constitute participation or intervention in a political campaign. *See, e.g.,* Notice 88-76, 1988-2 C.B. 392. Although the NPRM suggests that inclusion of executive and judicial nominees as "candidates" under CRPA would "reflect[] the broad scope of section 527 [] that is

[22] *See*, *e.g.*, Treas. Reg. § 1.527-6(b) (noting that political expenditures of a § 501(c) organization which are allowable under FECA or any similar state statute are not treated as being for an "exempt function" for purposes of calculating tax liability under IRC § 527).

already applied to a section 501(c)(4) organization," that is simply not an accurate portrayal of the Service's past practice. To be sure, the Service has discussed the possibility that these activities should be considered exempt functions. *See* Announcement 88-114, 1988-37 I.R.B. 2. Yet the Service has made clear in its most recent reference to the issue that "no final determination…has been made." Judith E. Kindell, *et al*., "Election Year Issues," 2002 EO CPE Text at 397 n.27. And, on the merits, these activities should not be treated the same as partisan political activities.

3. Contributions to other § 501(c) entities

We also urge the Service not to adopt proposed Treas. Reg. § 1.501(c)(4)-1(a)(2)(iii)(A)(*4*)(*iii*), which would treat as CRPA any transfers to another § 501(c) organization "that engages in [CRPA]." It is doubtful that this feature of CRPA's definition promotes the Service's stated aim of increasing certainty and predictability. And, even if it advanced that goal to some degree, it would do so only at the expense of chilling a vast amount of legitimate § 501(c) activity protected by the First Amendment and creating unreasonable and unnecessary administrative burdens.

As an initial matter, this rule could not be applied to § 501(c)(5) labor organizations without considerable and pointless disruption of fundamental and longstanding internal financial relationships. Most union members do not pay dues separately to the local, intermediate, and international labor organizations to which they belong. Instead, those dues are generally collected in the first instance at the local level, and then the local transfers a prescribed portion of them to the intermediate and international affiliates. Such a transfer has nothing to do with the local affiliate engaging in political activities, yet the proposed rule would arguably treat all routine transfers of dues to affiliated labor organizations as CRPA. And, given the sums that might be involved, such treatment could easily compromise a labor organization's §501(c)(5) tax status.

These intra-union transfers also flow in the opposite direction, again in a fashion completely unrelated to campaign related activity. Many national and international labor organizations make grants to their local affiliates specifically to fund collective bargaining or grievance administration. Under the proposed rule, if the local receiving the grant participated in any CRPA (including the above-described transfers to their national or international affiliate) this transfer would be considered CRPA despite the nature and purpose of the grant being directly related to the non-political purposes of the recipient union.

Defining as CRPA transfers to § 501(c) organizations that have, at some point, engaged in even minimal amounts of CRPA would chill the speech of labor organizations and other § 501(c) organizations. While a given organization may undertake some CRPA, if another § 501(c) organization wishes to donate to it due to its other activity, doing so could jeopardize the donor's tax-exempt status even if the funds were earmarked and exclusively used for non-CRPA activities.

Further complicating matters is the lack of clarity in the "special rule regarding contributions to section 501(c) organizations" in proposed Treas. Reg. § 1.501(c)(4)-1(a)(2)(iii)(D). Among the proposed requirements is that, in order to ensure that a contribution

to another § 501(c) organization is not considered CRPA, the contributor must "obtain [ ] a written representation" from the recipient organization that it "does not engage in [CRPA]." It is entirely unclear how the recipient would satisfy that requirement and be able to make that representation. Must the organization confirm that it has not engaged in CRPA at any time since the effective date of the regulation, or ever? Or, does the draft rule's use of the present tense ("does") suggest some kind of time limitation after which an isolated incident of CRPA will no longer cause all contributions to the entity to be deemed CRPA on the part of the contributors?

In either event, the "special rule" is unacceptably problematic. If there is no time limit on how long an organization's past CRPA will affect the CRPA status of transfers to that organization, the restriction will *permanently*—and, in all likelihood, *fatally*—compromise an organization's ability to receive funds from another § 501(c) entity. After all, any donation made to an organization that has engaged in even miniscule amounts of CRPA in the past will itself constitute CRPA attributable to the donor, which will in turn mean that the donor's *own* ability to receive funds from a § 501(c) entity will be similarly impaired. As a result, even small or temporally remote instances of CRPA will have a rippling and magnifying effect that is completely unrelated to the amount or nature of § 501(c) activity the entity performs.

If, on the other hand, there is an implicit limit on how long past instances of CRPA will continue to compromise an organization's ability to receive income, neither the proposed regulation nor the explanatory portions of the NPRM shed any light on how that period would be determined. As a result, the proposed rule would defeat, rather than promote, the Service's stated aim of increasing certainty and predictability.[23]

The proposed rule's contribution classification is also deeply problematic due to its failure to provide an exception in proposed Treas. Reg § 1.501(c)(4)-1(a)(2)(iii)(*4*)(*ii*) for "prompt and direct" transfers by § 501(c) organizations to affiliated separate segregated funds pursuant to IRC § 527(f)(3). Recognizing the administrative needs of labor organizations and other § 501(c) membership organizations, Treas. Reg. § 1.527-6(e)-(f) allows certain transfers from a § 501(c) group to their separate segregated funds to be excluded from the calculation of the group's exempt function income. This exception only applies to political contributions or dues collected by the § 501(c) and then transferred to the separate segregated fund in accordance with particular requirements. This exception acknowledges that while the funds technically move from the § 501(c)'s treasury to the separate segregated fund's account, the § 501(c) group is acting essentially as a pass-through rather than participating in exempt function activity or deliberately earning investment income on funds designated for political use. Any new regulation that fails to account for financing a separate segregated fund will upend over 30 years of settled regulation and embedded practice under existing law, will impose a significant administrative burden for § 501(c) organizations, and will chill the speech of organizational members, all without providing any of the "clarity" that the NPRM asserts is its goal.

[23] Moreover, as we explain in the last section below, the Service already has a means at hand to address the issue of transfers between § 501(c) entities: clarifying and enforcing Treas. Reg. § 1.527–6(b)(ii).

4. Near-election references to candidates

The proposed definition of CRPA is also substantially overbroad in its inclusion of all near-election "candidate" appearances and references to candidates in public communications, regardless of the actual nature of the communication. This approach is premised on the blunt and false assumption that proximity to an election necessarily entails partisan political activity, and it makes no attempt to regulate only political speech, but instead appears to sweep as broadly as possible so that no conceivably campaign-related speech could possibly escape. The regulation would classify as political large amounts of legislative and issue advocacy, or even no advocacy at all, that the Service has no reason or justification to term as political and count against an organization's primary purpose.[24] There is simply no substitute here for either a careful facts-and-circumstances approach or a bright line that is much narrower than what is being proposed; and, "[i]n drawing that line, the First Amendment requires us to err on the side of protecting political speech rather than suppressing it." *FEC v. Wisconsin Right to Life, Inc*., 551 U.S. 449, 457 (2007).

The Service's proposed "electioneering communication" category is plainly drawn from the FECA category applicable to federal elections that bears the same name. *See* 2 U.S.C. § 434(f)(3)(A)(i). But the FECA definition regulates only *disclosure*, which is utterly different from defining an organization's tax-exempt *purpose*. And, the Service's proposed version reaches much farther in the federal electoral realm than does FECA, and it introduces this concept for state and local elections despite the fact that most state campaign finance laws do not regulate any similar category of speech.

For example, the FECA definition of electioneering communication reaches only broadcast media. *See id.* But CRPA's near-election category covers *all* "public communications," which include not only broadcast media, but also Internet, print, any "form of paid advertising" and any communication that "otherwise reaches, or is intended to reach, more than 500 persons." Thus, for example, even an off-hand reference to candidate in moderately well-attended speech would become CRPA because, as the Service explains, the proposed regulation's definition of "communication" includes "oral" statements. *See* 78 Fed. Reg. at 71538.

The FECA definition of electioneering communications also requires that the communication mentioning the candidate be "targeted to the relevant electorate," *see* 2 U.S.C. § 434(f)(3)(A)(i)(III), as does the similar concept in various state election laws. But the proposed regulation contains no such sensible parameter. Thus, a communication that only reaches individuals in California would be CRPA even if the only candidate it references is running for office thousands of miles away in New York.

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[24] A few examples from common labor experience: advocacy of legislative or executive action that can be acted on by the listener only if a responsible public official is identified; time-sensitive responses to the actions of public officials that directly affect a union or its members; references to legislation or executive action popularly known by a name that includes an official ("the McCain-Feingold Bill"); and a private or public sector union's communications to membership or the general public on contract negotiations during the pre-election period, urging them to contact specific public officials to seek their support of the union's bargaining position.

The "electioneering communication" category would also interfere with other customary labor organization activities. For example, many candidate appearance events occur close to an election and provide a nonpartisan service to the public, such as pre-endorsement candidate debates and forums that provide union members and the public with information for their voting decisions. Recognizing this important function and that such events are most effective and common shortly before an election, Congress explicitly excluded them from the definition of electioneering communication that requires reporting to the FEC. *See* 2 U.S.C. § 434(f)(3)(B)(iii). Defining such events as CRPA would implicitly conflict with this congressional judgment and discourage labor and other § 501(c) organizations from holding them.

Moreover, this classification encumbers interactions with incumbents acting in their *official* capacities. Despite the proximity of an election, both the members of a labor organization as well as an incumbent elected official have an interest in meeting to discuss any number of policy issues. These interactions are important to both labor organizations and elected officials who want to learn of and meet the needs of their constituents. Defining them as CRPA based solely on their proximity to an election would simply deter them to no useful end.

The "electioneering communication" proposal is also extremely unreasonable in its application to websites. As the NPRM explains, "content previously posted by an organization on its Web site that clearly identifies a candidate and remains on the Web site during the specified pre-election period would be treated as [CRPA]." 78 Fed. Reg. at 71539. The administrative burden imposed by such a rule would be significant, for it would require every post on a website to be reviewed out of concern that dated references to candidates that have nothing to do with their candidacy would nevertheless become "political," as would references to individuals who were not candidates at the time of the post but have since run for office. This proposal threatens to undermine the core feature of the Internet as a free and public forum and turn it into a trap for labor and other tax-exempt organizations.

5. Application to oral communications and volunteer activities

Yet another problematic aspect of the proposed regulation is that it purports to reach oral communications and volunteer activities. Regulating the oral communications of an organization necessarily means regulating the oral communications of its officers, and employees. Additionally, when combined with volunteer activities, these provisions in many cases would regulate the oral communications of the organization's members. If union officers, employees, and members exercise of core First Amendment rights, sharing their views on which candidate should be elected, doing so could jeopardize the organization's tax status. Such regulation would have a chilling effect on the speech of each individual associated with the organization. Moreover, the idea that ordinary conversation must be tracked and accounted for as CRPA would impose a wholly unrealistic obligation on labor organizations. Volunteer activities, for instance, often entail a great deal of autonomy for the volunteer. Absent an unattainable amount of monitoring, it would be nearly impossible for an organization to control or account for the content of volunteer speech. Such a regulation would also conflict with the regulation of volunteer activities under FECA, 2 U.S.C. § 431(8)(B)(i), which has never treated volunteer activity as a contribution to a campaign precisely because it is the type of activity that the First Amendment seeks to protect.

6. Examining third-party communications to attribute CRPA to an organization

Finally, the Service requests comments on whether third-party content such as user comments and the content of other websites that are linked to on an organization's website should be considered as CRPA.

As an initial matter, this proposal is flatly inconsistent with the broad federal policy expressed by Congress in the Communications Decency Act, 47 U.S.C. § 230, to maintain the robust nature of Internet communication by freeing website operators from the obligation to police and censor user-submitted content. Congress recognized that making website operators responsible for content created by other users would greatly increase the cost and burden of operating a website and would, as a practical matter, result in a drastic reduction of Internet's "unique opportunities for cultural development, and myriad avenues for intellectual activity." 47 U.S.C. § 230(a)(3).

Furthermore, the user-submitted content and unadorned links to other websites have little connection to the efforts of an organization to influence political campaigns. The public does not believe that the views of commenters reflect the views of the website operator, nor does the public believe that a link to another website constitutes an endorsement of a linked site's contents or message. For example, when a news site or blog posts an editorial piece the comment section regularly evolves into a debate between those attacking the author's thesis and those defending it. While the author may appreciate that he or she has started a public discussion on an important subject, no reader believes the author necessarily agrees with any comment, let alone one that contradicts the piece. To the contrary, comment sections on websites are a public forum and the only message that can be properly attributed to the website operator is that it believes that the general subject is worthy of discussion, regardless of the opinions expressed about it.

In weighing whether links to websites that include CRPA should themselves be considered CRPA, the NPRM references the precedent set by Revenue Ruling 2007-41, which declares that a § 501(c)(3) organization is responsible in some circumstances for the content of pages it links to. But in that ruling, the Service looked to the facts and circumstances, including but not limited to "the context for the link on the organization's web site, whether all candidates are represented, any exempt purpose served by offering the link, and the directness of the links between the organization's web site and the web page that contains material favoring or opposing a candidate for public office." Including links under the CRPA definition, however, would be vastly different because it is a wholly indiscriminate standard.

III. THE SERVICE SHOULD NOT MODIFY THE "PRIMARILY ENGAGED" STANDARD FOR § 501(C)(4) ORGANIZATIONS THROUGH THIS RULEMAKING, IF AT ALL

The NPRM invites comment on whether the "primarily engaged" standard governing the amount of social welfare activities versus campaign intervention activities a § 501(c)(4) organization may engage in should be modified. Because the NPRM does not provide affected organizations and the public with sufficient information concerning any possible modification to

the standard to allow them to comment meaningfully on any change that may result from this rulemaking, the Service should not promulgate any rule modifying the "primarily engaged" standard through this rulemaking. Instead, any change to the "primarily engaged" standard should come only—if at all—after the Service has issued a new NPRM setting forth in concrete terms one or more proposals for modifying the standard, along with a modified approach to what is political activity that fixes the fundamental flaws pervading the NPRM definition. Similarly, if the Service were to initiate a similar rulemaking as to labor organizations, it could not do so in such a piecemeal fashion – yet, as we have noted, we have deep concerns that what occurs in this rulemaking will dictate what happens in a future § 501(c)(5) rulemaking.

A. The NPRM Lacks Sufficient Detail on Possible Changes to the "Primarily Engaged" Standard and So Fails to Properly Frame the Issues in a Way that Allows for Meaningful Comment on the Proposal.

Only in the most general way does the NPRM indicate that this rulemaking may result in some modification to the "primarily engaged" standard governing the amount of political campaign intervention or (should the proposed rule or something like it be adopted) CRPA that a social welfare organization may engage in. The NPRM notes that the Treasury Department and the Service are considering whether to modify the "primarily engaged" standard in some regard, asks whether the standard should be retained or revised, inquires as to the share of a § 501(c)(4) organization's activities that must promote social welfare, asks whether additional unspecified limits on unspecified non-social welfare activities should be imposed, and requests input on how the activities of social welfare organizations should be measured. *See* 78 Fed. Reg. at 71537-8. Significantly, however, the NPRM fails to set forth any concrete proposal for modifying the "primarily engaged" standard, details no proposed rule that may be substituted for the current standard, does not disclose the Service's position on what form any change to the standard may or should take, and largely leaves affected organizations and the general public guessing as to whether a rule on this matter is actually proposed, and, if so, what a final rule would entail.

The NPRM's circumspection here is quite surprising, considering that the "primarily engaged" standard is one of the two key determinants of whether an organization is exempt from taxation under § 501(c)(4) - the other being, of course, whether the organization promotes "in some way the common good and general welfare of the people of the community." More importantly, because the NPRM declines to make any proposal whatsoever concerning the crucial "primarily engaged" standard, it fails as a matter of law to adequately apprise interested parties of the Service's intentions with respect to that standard and impairs their ability to sufficiently comment on the subject.[25]

Due to of the breadth and generality of the NPRM's request for comments on the "primarily engaged" standard, the regulated community and general public cannot fairly anticipate what, if any, change to the standard is likely or possible and are unable to direct their comments accordingly. For this reason, the NPRM fails to adhere to the "object" of the

[25] And, again, because the Service may well conclude that the same "primarily" standard that it applies to § 501(c)(4) must also apply to § 501(c)(5), the NPRM fails to provide the Labor Organization Commenters with adequate notice about the matter.

Administrative Procedure Act ("APA"),[26] which, "in short, is one of fair notice." *Long Island Care at Home, Ltd. v Coke*, 551 U.S. 158, 174 (2007). Adequate "[n]otice of agency action is 'crucial to 'ensure that agency regulations are tested via exposure to diverse public comment, … to ensure fairness to affected parties, and … to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review'.'" *Daimler Trucks N. Am. LLC, v. EPA*, 737 F.3d 95, 100 (D.C. Cir. 2013) (citations omitted).

The APA requires that an agency's NPRM "adequately frame the subjects for discussion" so that a final rule may be the "logical outgrowth" of the proposed rule. *Connecticut Light and Power Co. v. NRC*, 673 F.2d 525, 533 (D.C. Cir. 1982) (citing *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1031 (D.C. Cir. 1978). But the NPRM presents the issues with respect to the "primarily engaged" standard only very generally, offers no concrete proposal for a rule on the standard, and fails to make its views on the standard known to the public in a focused way. As a result, the public cannot know how to direct its criticism or propose alternatives to the Service's position on the standard and is deprived of the opportunity to offer meaningful comment on what may result in a final rule on the topic. *See Home Box Office, Inc., v FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977). These are the hallmarks of inadequate notice.

In sum, because the NPRM fails to adequately notify affected organizations and the

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[26] The Service incorrectly asserts that "section 553(b) of the Administrative Procedure Act… does not apply" to this rulemaking procedure. *See* 78 Fed. Reg. at 71540. Presumably, the Service takes the position that the regulations at issue are "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice" rather than substantive rules and are therefore exempted from the notice requirement of 5 U.S.C. § 553(b). However, because the regulations at issue "go[] beyond mere formality and substantially affect[] the rights of those over whom the agency exercise authority[,]" the rules are subject to the notice-and-comment requirements of § 553 of the APA. *Pickus v. United States Board of Parole*, 507 F.2d 1107, 1113 (D.C. Cir. 1974). In the absence of Treasury regulations relating to political campaign intervention by social welfare organizations that the proposed rule would alter, there would be no basis for the Service to impose a tax on, regulate the amount of, or revoke a tax exemption due to the political activity of a social welfare organization insofar as that activity may further some social welfare purpose. Because the existing and proposed rules would add content to the "governing legal norm," they are substantive rules and their promulgation must accord with § 553(b) of the APA. *See Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 96 (D.C. Cir. 1997) (relying on one of the four factors for distinguishing between interpretive and substantive rules set forth in *American Mining Congress v. Mine Safety & Health Admin*., 995 F.2d. 1106, 1112 (D.C. Cir. 1993)).

In *American Mining Congress*, the court set forth a four-inquiry test for determining whether a rule is interpretive or substantive, and explained that an affirmative answer to any of those inquiries means the rule is substantive. 995 F.2d at 1112. Those inquiries are: "(1) whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties, (2) whether the agency has published the rule in the Code of Federal Regulations, (3) whether the agency has explicitly invoked its general legislative authority, or (4) whether the rule effectively amends a prior legislative rule." *Id.* In this case, all four inquiries must be answered in the affirmative. First, as discussed above, without the regulations at issue, there would be no basis for the Service to impose a tax on, or require social welfare organizations to refrain from engaging in some amount of, certain political activities. Second, the regulations to which the proposed rule relates are Treasury regulations published in the Code of Federal Regulations. Third, in the NPRM the agency explicitly invoked its general legislative authority, granted at IRC § 7805, as its basis for promulgating the rule. Finally, the stated purpose of the proposed rule, as described in the NPRM, is to amend the existing legislative rules codified at Treas Reg. § 1.501(c)(4)-1. So, the rule is a substantive one, and it must be promulgated through notice-and-comment rulemaking in accordance with § 553(b) of the APA.

public of the revisions to the "primarily engaged" standard that may be encompassed in the final rule and deprives them of the opportunity to comment meaningfully on those revisions, no modification to the "primarily engaged" standard should result from this rulemaking.

B. At a Minimum, Any Change to the "Primarily Engaged" Standard Should Result from a Notice that Adequately Frames the Subject for Discussion and Allows for Meaningful Comment on a Proposed Rule on the Standard.

Should the Service deem it necessary or advisable to revise or eliminate the "primarily engaged" standard of Treas. Reg. § 1.501(c)(4)-1, or to promulgate a regulation governing the application of that standard, it should do so only after initiating a new rulemaking that offers one or more concrete proposals of what that standard should be. The regulated community, the general public, and the Service would be better served by a new notice of proposed rulemaking that proffers one or more specific proposals identifying how the longstanding "primarily engaged" regulations are to be altered or what may take their place in the event that they are jettisoned altogether, and precisely why the Service makes the proposals.

As the NPRM points out, the current § 501(c)(4) regulations were finalized in 1959 and have not since been amended. *See* 78 Fed. Reg. 71536. For the past 55 years, social welfare organizations of all sizes have been structuring themselves and organizing their activities so as to comply with the "primarily engaged" standard, a premise of their exempt status under § 501(c)(4). It is patently unfair to those organizations (and, again, to the potentially next-in-line § 501(c)(5) organizations) to revise that standard without giving them advance notice of what such revisions might look like and how those revisions might require them to implement fundamental changes in the way they have ordered themselves, some for decades. In the interests of both fairness to the affected organizations and producing the best possible regulatory outcome, the Service should issue an NPRM which specifically: (1) identifies existing problems with the "primarily engaged" standard, if any; (2) details one or more proposed rules that would revise or replace the "primarily engaged" standard, if necessary; (3) sets forth the Service's position on those proposed rules; (4) explains how the proposed rules would address the existing issues with the "primarily engaged" standard identified in the NPRM; and (5) explains how the proposed rules would enhance the Service's ability to carry out its mission of revenue collection.

An NPRM specifying proposed changes to the "primarily engaged" standard would not only provide notice of the proposed changes to the regulated community and the public, but would "make criticism or formulation of alternatives possible." *Home Box Office,* 567 F.2d at 36. By "making its views known to the public in a concrete and focused form," *id.*, the Service would ensure that comments will be directed at the precise issues involved and that it receives information from interested parties concerning issues with the proposed rule that may not have been contemplated when the proposal was drafted. This would assist the Service in improving upon the proposed rule or, alternatively, in determining that no revision in the "primarily engaged" standard is necessary.

Additionally, if the Service intends to or contemplates applying any revised "primarily engaged" standard across the spectrum of § 501(c) organizations, including to labor organizations, an NPRM that puts non-social welfare § 501(c) organizations on notice that the rulemaking may affect them in the long run is necessary. This would permit those organizations

to assess the rule's impact on them and allow them to provide meaningful comment on the proposed standard at the critical point, rather than during a second rulemaking that, as we have pointed out, may be a perfunctory exercise on the path to a pre-ordained regulatory result. That is especially so because, as we have explained, for labor organizations the application of any "primary purpose" standard is inextricably linked with the very definition of what that "purpose" is and is not.

Relatedly, of course, the proposed rule on CRPA and any proposed revision to the "primarily engaged" standard must be considered together. The interplay between the current campaign intervention or the proposed CRPA rules and the "primarily engaged" standard is so close that these concepts cannot properly be addressed in separate rulemakings. But the lack of a concrete proposal for revision of the "primarily engaged" standard in the current NPRM leaves affected organizations unable to divine whether or how engaging in some amount of proposed CRPA-defined conduct will affect their § 501(c)(4) status under an altered threshold for obtaining and maintaining that status. And, as discussed above, the proposed rule on CRPA is fundamentally flawed at least with respect to labor organizations. Accordingly, we urge the Service to withdraw the current NPRM and issue a revised NPRM setting forth a new proposed rule rectifying those flaws, and, if the Service intends to conduct a rulemaking on the "primarily engaged" standard, we likewise urge the Service to set forth with particularity its proposal of how to revise that standard so that both key determinants of tax-exempt status may be considered concurrently.

IV. THE SERVICE LACKS THE STATUTORY AUTHORITY TO MODIFY § 527 IN A MANNER THAT WOULD MAKE IT COMPATIBLE WITH THE REGULATION PROPOSED IN THE NPRM

The NPRM asks whether, in the interest of having "a more uniform set of rules relating to political campaign activity for tax-exempt organizations," the Service should revise its regulations under IRC § 527 "to adopt the same or a similar approach in defining [§] 527 exempt function activity" as the proposed rule does in defining CRPA. 78 Fed. Reg. at 71537.

The Labor Organization Commenters believe that the NPRM itself would create significant regulatory gaps and inconsistencies in the interaction of § 501(c) and § 527. But we believe that the Service should not—and, indeed, cannot—solve that problem by purporting to amend the definition of "exempt function" activity under § 527 by regulation so that it instead comprises CRPA.

IRC § 527(e)(2) provides a statutory definition of political activity, termed "exempt function" activity, that comprises in relevant part "the function of influencing or attempting to influence the selection, nomination, election or appointment of any individual to any Federal, State or local office, public office or office in a political organization, or the election of Presidential and Vice Presidential elections…." The Service has elaborated on this definition in both regulations, *see* Treas. Reg. §§ 1.527-1 and 1.527-9, and revenue rulings, *see* Rev. Ruls. 2007-41, 2004-6. In particular, nonpartisan registration, get-out-the-vote, and voter education activities are not considered exempt function activities, *see* Treas. Reg. § 1.527-6(b)(5), nor are near-election public communications that reference candidates if, under the totality of the circumstances, they more clearly relate to public policy issues, including lobbying and grassroots

advocacy for legislation, *see* Rev. Rul. 2004-6.

The "exempt function" category defines the activities that qualify an entity as a "political organization" if it is "organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both" for that function. *See* IRC § 527(e)(1); Treas. Reg. §§ 1.527-1, 1.527-2(a). Importantly to the NPRM, this category also defines for *every* § 501(c) organization the activities that, if undertaken by it and not by its separate segregated fund, trigger a 35% federal tax on the lesser amount of the organization's associated spending or its (otherwise *un*taxed) net investment income for a given year. *See* IRC § 527(f); Treas. Reg. § 1.527-6. This tax is *not* avoidable by the § 501(c) organization channeling funds to another entity for the latter to undertake exempt function activity, except for a separate segregated fund that is financed in accordance with the Service's rules; and, if that fund's gross receipts reach $25,000/yr. then it must publicly disclose its receipts and disbursements to the Service, at certain monetary thresholds. *See* IRC § 527(i) & (j); Treas. Reg. § 1.527-6 (b)(1)(iii); 2003 Political & Lobbying CPE pp. L6 - L-7.[27] The Code, then, with respect to *taxation,* treats all § 501(c) organizations in the same manner, explicitly appropriating the defining conduct of a § 527 organization to define also the potentially *taxable* conduct of a § 501(c) organization.

However, § 527 and its regulations do *not* address what activities are *"appropriate"* for § 501(c)(5) labor organizations, including whether particular kinds of activities, whether or not they are "exempt function," are undertaken "to protect and promote the interest of labor." *See Portland Co-Operative Labor Temple Association v. C.I.R.*, 39 B.T.A. at 455. Nor does § 527 address how to measure the "labor" activities of a "labor organization" against other activities that such an organization might undertake, in order to determine whether a particular organization qualifies under § 501(c)(5).

If the proposed regulation and its definition of CRPA were enacted without any corresponding changes to what qualifies as exempt function activity under §527, the regulatory gaps would be obvious and severe. For example, a social welfare organization that previously engaged *solely* in nonpartisan voter registration, get-out-the-vote activities, and voter education could no longer claim exempt status under § 501(c)(4); yet, that organization could not qualify as a § 527 political organization because its activities do not satisfy the definition of "exempt function." *See* IRC § 527(e)(1) & (2); Treas. Reg. § 1.527-6(b)(5). Nor could a social welfare organization that engages in some of these activities protect its exempt status by conducting them through a separate segregated fund. After all, if such a fund "expends more than an insubstantial amount…for activities that are not for an exempt function during a taxable year, the fund will not be treated as a segregated fund for such year," Treas. Reg. § 1.527-2(b)(1), and "if more than insubstantial amounts segregated for an exempt function in prior years are expended for other than an exempt function the facts and circumstances may indicate that the fund was never a segregated fund," Treas. Reg. § 1.527-2(b)(1). Adoption of the CRPA standard therefore would place organizations in a classic Catch-22: deterred from engaging in CRPA yet unable instead to use a separate segregated fund for much of CRPA even though such a fund is the very device that Congress established for a § 501(c) organization to undertake political activity without

[27] Even if the separate segregated fund does not reach that gross receipts threshold, it may be required by a particular state's campaign finance law to register and publicly disclose all of its transactions.

risking an adverse tax consequence.

This Catch-22 cannot be resolved by the NPRM's suggestion of making regulatory changes to the definition of § 527 exempt function activity. IRC § 527(e)'s definition—"the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice-Presidential electors"—cannot be reasonably construed to encompass much of the explicitly *non*-partisan activity that permeates CRPA. The Service for many years in long-settled *precedential* materials has correctly taken and enforced the position that much of what it would now define as CRPA is *not* "exempt function" activity. *See, e.g.,* Rev. Rul. 2007-41; Rev. Rul. 2004-6; Rev. Rul. 86-95; Rev. Rul. 80-282; Rev. Rul. 78-248; Rev. Rul. 76-456.[28] The Service lacks the statutory authority to make the changes that would cause § 527 to work in harmony with the proposed rule. *See Cuomo v. Clearing House Ass'n, L.L.C.*, 557 U.S. 519, 525 (2009) (noting that courts will only enforce an agency's regulation if it embodies a "*reasonable* interpretation of a statute [the agency] is charged with administering" (emphasis added)) (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). Indeed, that the NPRM's proposed regulation would create such discord between § 501(c) and § 527 strongly suggests that the Service lacks the necessary authority to adopt it. *See Holloway v. United States*, 526 U.S. 1, 6 (1999) ("In interpreting the statute at issue, '[w]e consider not only the bare meaning' of the critical word or phrase 'but also its placement and purpose in the statutory scheme.'") (quoting *Bailey v. United States*, 516 U.S. 137, 145 (1995)).

Just this month, a federal court of appeals held that the Service exceeded its statutory authority by asserting and exercising, for the first time ever, the power to regulate the practice of income tax return-preparers, where the applicable and longstanding Code provision could not be read to support such authority. *See Loving v. Internal Revenue Service,* 2014 U.S. App. LEXIS 2512 (D.C. Cir. Feb. 11, 2014). Similarly, § 527(e)(2) provides no basis for virtually of all CRPA, yet the Service's claim of statutory authority here would be even weaker than its claim of authority in *Loving*: until issuing its regulation of return-preparers, the Service had only occasionally and informally eschewed that authority, *see id.* at **21-22, but, as noted, the Service has *formally* ruled on many occasions that elements of CRPA are *not* "exempt function" activities. The Service cannot suddenly, in a belated pursuit of greater "clarity," renounce that history and expand the statutory definition beyond its scope. Only Congress could so act, by amending § 527(e)(2) itself.

V. THE NPRM DOES NOT ADEQUATELY ACCOUNT FOR THE IMPACT AND BURDEN THE PROPOSED REGULATION WOULD CREATE

As other commenters have already explained, the NPRM does not satisfy its obligation under the Paperwork Reduction Act, 44 U.S.C. § 3507(d), with respect to the required estimate of the proposed rule's recordkeeping burden. The Labor Organization Commenters concur that

[28] The Service has also embraced these positions in its CPE publications and in many private letter rulings, over the years, which, along with the Code, the regulations and precedential rulings, have greatly influenced how unions and other tax-exempt groups structure their operations and define their missions.

the Service's current estimate of the proposed regulation's demands—that it would affect a mere 2,000 record-keepers and impose on each a burden of only two hours on average—is wildly off-base.

In addition, we submit that the NPRM does not adequately comply with the Service's obligation under Executive Orders 12866, "Regulatory Planning and Review" (September 30, 1993) ("EO 12866") and 13563, "Improving Regulation and Regulatory Review" (January 18, 2011), to conduct regulatory assessments. The proposed regulation obviously qualifies as "significant regulatory action" requiring an assessment, as it both "adversely affect[s] in a material way . . . a sector of the economy" and "[r]aise[s] novel legal or policy issues arising out of legal mandates." EO 12866 § 3(f)(1), (4).

By like token, the NPRM fails to provide the regulatory flexibility analysis under the Regulatory Flexibility Act, 5 U.S.C. § 601, *et seq*. The NPRM's claim that such an analysis is unwarranted because the proposed rule "will not have a significant economic impact on a substantial number of small entities" is insupportable. The Service's certification is based on downplaying one aspect of the proposed rule—namely, its inclusion in the definition of CRPA of transfers to other § 501(c) entities that have engaged in CRPA—while ignoring every other aspect of the proposed rule. So, the certification ignores such significant economic impacts as the fact that small § 501(c)(4) entities that have historically engaged in nonpartisan activities like voter registration, get-out-the-vote, and voter education will not be entitled § 501(c) status as all.

Simply put, the Service failed to appreciate the magnitude of the burden imposed on many § 501(c)(4)s by the proposed rule, and in so doing, it has failed to comply with its legal obligations in proposing the rule.

Were the Service to propose the same treatment of § 510(c)(5) labor organizations with a similar certification, it would only compound that error. And, if the NPRM were applied to labor organizations, they would be subject to an even more confusing set of partially overlapping regulations than they are now. Not only would they have to comply with accounting and disclosure of political activities under the LMRDA, FECA, applicable state or local campaign finance laws *and* the Service's regulations, but the Service's regulations would impose *two* drastically different standards—one under § 501(c) and another under § 527—for accounting for political activity. The vast majority of labor organizations in this country are relatively small local unions that often operate with volunteer treasurer who is a layperson at accounting. The added, and unnecessary, burden that would be imposed by extending the NPRM's proposed rule to labor organizations would be nothing but a trap for these unwary entities.

VI. SUGGESTIONS FOR IMPROVING THE ADMINISTRATION AND ENFORCEMENT OF EXISTING LAW AND REGULATIONS

As a final matter, we suggest that the Service look to other approaches that are well within its statutory authority to address shortfalls in the clarity of current political-activity standards.

A. The Service Should Establish Transparent and Effective Procedures to Address Complaints, and It Should Allow Litigation on Tax-Exempt Issues to Proceed

The Service's enforcement of the standards that distinguish§ 501(c) and § 527 entities from each other has long been erratic and generally ineffective, contributing to the lack of clarity and, to some extent, disregard of the current rules. Despite widespread publicity about alleged abuses by some § 501(c) organizations, and frequent complaints submitted to the Service about particular organizations, the Service has been either passive or inscrutable, and it offers no publicly cognizable procedures to entertain and act upon complaints or to investigate and redress potential violations of current law.

In addition, the Service has historically sought to avoid litigation related to § 501(c) organizations' political activities that could have provided clearer definitions and guidance. For example, after revoking the Christian Coalition's § 501(c)(4) exemption due to alleged excessive political campaign activity, the Service ended the ensuing litigation by refunding the tax payment that enabled the Coalition to file its legal challenge. If the Service had not done so, and if it allowed similar litigation to proceed to decision, it is likely that a substantial body of jurisprudence would now exist concerning the nature and rules for political activity, which in turn would guide organizations and narrow the opportunities for evasion.

Instead, however, in stark contrast to the development of campaign finance law at the federal and state levels, the federal tax law concerning political activity remains unnecessarily thin. But no legislative action is required for the Service to develop a systematic and rigorous enforcement program that facilitates and responds to third party complaints, generates internally-initiated examinations and advances litigation.

B. The Service Should Revise Form 1024

A §501(c)(4) or § 501(c)(5) entity seeking formal recognition of its tax-exempt status from the Service is required to file Form 1024 and there provide information regarding its proposed activities, finances and governance. The form was last revised in 1998 and has just one question about an applicant's political activities. The Service could revise Form 1024 to elicit more specific information about an applicant's proposed political activities, and the Service in subsequent years could compare the application to the group's annual Form 990 and determine whether, how and why the group materially departed from its original representations about its mission and plans. Both Form 1024 and Form 990 are publicly accessible documents. While groups should continue to have flexibility and to evolve over time without losing their tax qualification so long as they still satisfy the requirements of that qualification, a more fulsome Form 1024 could enable the public to evaluate whether a group is acting consistently with the specific commitments and declarations that gained it tax qualification in the first place. If, as has been reported, some newer and substantial § 501(c)(4) organizations in their initial years are acting arguably contrary to what they represented in their Form 1024s, an enhanced Form 1024 would enable the public to discern such inconsistencies more clearly and would deter both misleading tax qualification applications and subsequent conduct that casts doubt on the application's veracity.

C. Treas. Reg. § 1.527–6(b)(ii) Already Regulates Donations Between § 501(c) Organizations and Further Guidance Could Be Developed

One of the key questions raised in the debate about political activity and disclosure by

§ 501(c)(4) organizations is how to regulate contributions and transfers between and among § 501(c) organizations. As discussed above, the NPRM wrongly proposes to treat as CRPA *any* contribution or transfer from a § 501(c)(4) to any other § 501(c) organization if the recipient organization conducts any CRPA. But the NPRM ignores the current and longstanding regulation that provides a basis to distinguish between political and other transfers. Treas. Reg. § 1.527–6(b)(ii) provides that, so long as a § 501(c) organization takes "reasonable steps" to ensure that the receiving organization does not use the transferred funds for an exempt function, the transfer is not considered an exempt function expenditure by the transferor. The Service has provided no guidance about what constitutes "reasonable steps," there is scant history of enforcement of this explicit regulatory standard, and it is likely that few organizations are aware of or comply with it. But the Senate Report underlying § 527 explained it as follows: "It is not intended that the section [501](c) exempt organization be absolutely liable for any expenditures made by an organization to which it gives funds. However, if the payment is made for any of the political purposes described in this section, then the exempt organization is to be treated as having indirectly made the political expenditure." Pub. L. 93-625, S. Rep. No. 1357, 93rd Cong., 2nd Sess. 1974, 1974 U.S.C.C.A.N. 7478, 7505-7506.

A new notice to revise or elaborate on the "reasonable steps" regulation would enable all those affected to weigh in concerning the appropriate considerations, including whether and to what extent any direction or constraint by the donor organization is required so as to avoid "exempt function" treatment of the donation or transfer. In light of the availability of this alternative, the proposed *per se* transfer rule should not be adopted.

D. The Service Should Clarify the Definition to IRC Section 162(e) Applicable to For-Profit Entities and Trade Associations

Unlike the current standards applicable to § 501(c)(3) and § 501(c)(4) organizations, there is little guidance pertaining to what constitutes "political campaign intervention" for purposes of IRC § 162(e), which proscribes for-profit enterprises from deducting expenses for such activities. In the absence of guidance, it is possible, if not likely, that businesses may be deducting expenses that are subject to this exclusion. In addition, many businesses pay dues or make similar payments to trade associations that are tax-exempt under section § 501(c)(6). While those payments are generally deductible as a trade or business expense, they may not be to the extent that the trade association engages in lobbying or campaign activities. The Service should address this by developing regulations that clarify the meaning of political activity under § 162(e) and strengthening enforcement of that standard. Even if this took the form of formally applying the "exempt function" definition, that would provide greater certainty to a neglected area of the Code.

* * *

We have little doubt that the Service has acted with the best of intentions in issuing the NPRM. But the proposed regulation—along with the suggestion to extend that regulation to § 501(c)(5) labor organizations—is not an appropriate means for addressing the Service's stated concerns about ensuring clarity and predictability in the administration of the Code. We therefore join many others in the regulated community in urging the Service not to adopt the proposed regulation.

If the Service wishes to address these topics in a future rulemaking, we request that it work with the regulated community to develop a more sensible approach. We would look forward to working with the Service in that endeavor.

Thank you for your consideration of these comments.

Sincerely,

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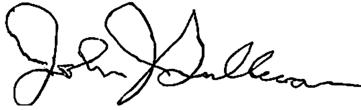

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