CENTER for COMPETITIVE POLITICS

Congress shall make no law...

WWW.CAMPAIGNFREEDOM.ORG

December 10, 2014

Via E-Mail (amy.f.giuliano@irscounsel.treas.gov) and Certified Mail

Ms. Amy F. Giuliano
Office of the Associate Chief Counsel (Tax Exempt and Government Entities)
CC:PA:LPD:PR (REG-134417-13)
Room 5205
Internal Revenue Service
P.O. Box 7604, Ben Franklin Station
Washington, DC 20044

RE: Response to Recent Comments of The Bright Lines Project (REG-134417-13)

Dear Ms. Giuliano:

The Center for Competitive Politics ("CCP") respectfully submits this response to comments filed recently by The Bright Lines Project ("Bright Lines" or "Project") on November 15, 2014 advocating a certain approach to the Internal Revenue Service's ("IRS" or "Service") regulation of political activities by tax-exempt organizations.[1]

CCP commends and agrees with the Project's general premise that the Service should adopt a uniform set of clearly defined, bright-line rules to replace the agency's current "facts and circumstances" approach to regulating in this area.[2]

Indeed, CCP has presented its own draft rule that provides bright-lines rules in less than 1,000 words, including the existing rule it modifies.[3] A similar

[1] The Bright Lines Project, "Proposed Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities (Comments on REG-134417-13)," Nov. 15, 2014 (*hereinafter* "Bright Lines Proposal"), *available at*: http://www.citizen.org/documents/2014-11-15 draft Regs and Cover FINAL.pdf (last visited Dec. 8, 2014).

[2] CCP does not necessarily support the Service regulating exempt organizations' political activities in the first instance, but for the purposes of these comments, CCP takes as a given that the Service does and will continue to regulate in this area.

recommendation to the CCP approach was made by the American Civil Liberties Union.[4]

Nonetheless, as explained in more detail below, there are far too many activities for which the Project fails to provide sufficient clarity to exempt organizations, and where it does, it fails to strike the proper balance with constitutionally protected speech. Specifically, the Bright Lines proposal paints with too broad of a brush with respect to activities that are *per se* political campaign intervention, while its safe harbors are too restrictive to allow sufficient breathing space for exempt organizations to exercise their First Amendment rights. For activities that are neither *per se* political intervention nor protected by a safe harbor, the Bright Lines proposal still relies on a vague, rough-and-tumble, multi-factor facts and circumstances test that unfairly shifts the burden on exempt organizations to justify their activities as not political.

DISCUSSION

I. The Bright Lines Proposal Continues to Rely On a Vague and Flawed Facts and Circumstances Test.

The Project's proposed rule consists of the following general framework: (1) certain activities that are *per se* political intervention, and which are generally prohibited for 501(c)(3) charities and restricted for all other 501(c) organizations; (2) certain safe harbors that are not political intervention; and (3) all other activities, for which a rough-and-tumble, multi-factor, and virtually boundless "facts and circumstances" test will still be used to determine whether an activity is political intervention – essentially the IRS's current approach.[5]

As the IRS has acknowledged, the problem with such an approach is self-evident:

> Over the years, the IRS has stated that whether an organization is engaged in political campaign intervention depends upon all of the

---

[3] *See* CCP Comments on IRS NPRM, REG-134417-13, Dec. 5, 2013, Annex 1, *available at* http://www.campaignfreedom.org/wp-content/uploads/2013/12/IRS-Comments-and-Draft-Rule.pdf.

[4] Letter, American Civil Liberties Union, "Comments on Draft Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities" at numbered pp. 22-23, February 4, 2014, *available at* https://www.aclu.org/sites/default/files/assets/2-4-14_--_aclu_comments_to_irs_re_guidance_for_tax_exempt_social_welfare_orgs_on_crpa_4.pdf (last visited Dec. 8, 2014).

[5] Bright Lines Proposal at numbered pp.1-4.

> facts and circumstances of each case . . . A recent IRS report relating to IRS review of applications for tax-exempt status states that "[o]ne of the significant challenges with the 501(c)(4) [application] review process has been the lack of a clear and concise definition of 'political campaign intervention.'" In addition, "[t]he distinction between campaign intervention and social welfare activity, and the measurement of the organization's social welfare activities relative to its total activities, have created considerable confusion for both the public and the IRS in making appropriate section 501(c)(4) determinations." The Treasury Department and the IRS recognize that both the public and the IRS would benefit from clearer definitions of these concepts.[6]

Of the problem specifically with the Project's resort to the facts and circumstances test, former White House Counsel Robert F. Bauer has noted:

> The Project in its promotion of "bright lines" leaves the reader with the hope that a new rule has sailed and left the facts and circumstances test to wave good-bye on the dock—only to discover that "facts and circumstances" have snuck into steerage and are ready to be summoned back on deck as needed.[7]

More recently, Mr. Bauer has reviewed the Project's current proposal and wrote:

> [A]s noted in analysis of an earlier Bright Line Project proposal, and as seems still true in this revised version, the agency would have considerable discretion in deciding whether 501(c) communications have crossed into the restricted political zone. And this task—

---

[6] Guidance for Tax-Exempt Social Welfare Organizations on Candidate Related Political Activities, Internal Revenue Service REG 134417-13, 78 Fed. Reg. 71535 (Nov. 29, 2013) (internal citations omitted). CCP quotes this passage for the proposition that both the public and the IRS would benefit from a clearer definition of political campaign intervention than what is currently discernible under the facts and circumstances test. To the extent this passage may be construed to justify the IRS's apparent failure to properly review applications for tax-exempt status, CCP would not necessarily agree with such a proposition.

[7] Robert F. Bauer, "The IRS and 'Bright Lines'," More Soft Money Hard Law blog, May 28, 2013, *at* http://www.moresoftmoneyhardlaw.com/2013/05/irs-bright-lines (last visited Dec. 8, 2014).

operating within the political world—is one which tax agency officials are not trained or well suited for, nor expected to be.[8]

II. The Bright Lines Proposal Unfairly Puts the Burden on Exempt Organizations to Prove a Negative.

The Bright Lines proposal compounds the flaws of the facts and circumstances test by putting exempt organizations in the position of having to carry the burden of proof. Per the proposal, "[t]he burden of proof is *on the organization* to show that the activity (i) directly furthered an exempt purpose or a proper business or investment purpose of the organization and (ii) was unrelated to supporting or opposing one or more candidates."[9] The organization meets its burden only if it can "demonstrate more probably than not that an activity . . . was unrelated to political intervention."[10]

This inverts the traditional principle of American law that plaintiffs bear the burden of proof and persuasion, and defendants are presumed innocent until proven guilty and should not be forced to prove a negative.[11] The proposal insists that "no presumption that the activity constitutes political intervention shall arise from the fact that the activity is not within a safe harbor."[12] But how can there not be such a presumption when the rule otherwise places the burden on the responding organization to prove a negative?

Moreover, in his plurality opinion in *FEC v. Wisconsin Right to Life*, Chief Justice Roberts admonished that, "Where the First Amendment is implicated, the tie goes to the speaker, not the censor."[13] The Bright Lines proposal fails this

---

[8] Robert F. Bauer, "The Bright Line Project, The IRS, and The Question of 'Issue Ads'," More Soft Money Hard Law blog, *at* http://www.moresoftmoneyhardlaw.com/2014/12/bright-line-project-irs-question-issue-ads (last visited Dec. 8, 2014).

[9] Bright Lines Proposal at numbered p.4 (emphasis added).

[10] *Id.*

[11] The burden of proof or persuasion lies with the plaintiff or prosecution in both the civil and criminal contexts. *See, e.g.,* 2 KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE (7th ed. 2013) § 337 ("The burdens of pleading and proof with regard to most facts have been and should be assigned to the plaintiff who seeks to change the present state of affairs and who therefore naturally should be expected to bear the risk of failure of proof or persuasion."); *Coffin v. U.S.*, 156 U.S. 432, 453 (1895) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.").

[12] Bright Lines Proposal at numbered p.4.

[13] 551 U.S. 449, 474 (2007).

constitutional standard by imposing a preponderance standard on the speaker even in cases where the evidence is a close call.

III. The Bright Lines Proposal Presumes Too Many Activities as *Per Se* Political Intervention.

In addition to the infirmities with the general framework discussed above, the Bright Lines proposal also sweeps too many specific activities within the realm of what it considers to be *per se* political intervention. The following are but three examples of this overbreadth:

Generic Advocacy as Explicit Advocacy. The proposal treats as *per se* political intervention activities that "explicitly advocate" for individuals to support or oppose candidates based on broad criteria, such as "positions on certain issues," even if the organization does not reference specific candidates, or associate specific candidates with certain issues.[14] Thus, for example, if Planned Parenthood generally urges its supporters to back "pro-choice" candidates, the Bright Lines proposal would treat that as political intervention, even though the Supreme Court has never regarded such general exhortations as "explicit" or "express advocacy."

The proposal appears to misapprehend or misapply what is commonly known in this area of the law as "*MCFL*" express advocacy, named after the Supreme Court's decision in *FEC v. Mass. Citizens for Life*.[15] In that case, the Court held that, where a "publication not only urges voters to vote for 'pro-life' candidates, but also *identifies* and provides photographs of *specific candidates* fitting that description," the publication expressly advocates the election of those *specific candidates*.[16] The Supreme Court did not, has not, and likely would not endorse the Project's approach, which equates activities supporting the election of *unidentified candidates in unidentified elections* based on general policy positions with explicit advocacy of *specific candidates*.

The Bright Lines proposal also treats as *per se* political intervention general exhortations to vote for candidates based on "characteristics such as gender, age, race, or religion, or any other criterion or qualification."[17] Thus, if the League of Women Voters were to generally urge its members to support women candidates, or

---

[14] Bright Lines Proposal at numbered p.2.

[15] 479 U.S. 238 (1986).

[16] *Id.* at 249 (emphasis added).

[17] Bright Lines Proposal at numbered p.2.

if the Human Rights Campaign were to generally urge its members to support gay and lesbian candidates, those activities also would count as political intervention. Again, the Supreme Court has not and likely would not endorse such an approach that limits not only an organization's right to speak freely, but also to associate freely under the First Amendment by generically advocating the election of more public officials who share their policy views or who subscribe to their identity politics.

Censorship. The Bright Lines proposal treats as *per se* political intervention communications that "refer to and reflect a view" on a candidate's policy views if they are disseminated in "close contests" during the election year in which the candidate is running.[18]

One way to make politicians see the light on an issue is to make them feel the heat of public criticism. Or, if a politician has taken a courageous stand on an issue, public praise for the politician's position can provide reinforcement and encourage others to adopt the same position. Swing votes on a legislative issue are highly correlated with politically vulnerable incumbents.[19] Treating all hard-hitting lobbying ads, even those run months in advance of an election, as *per se* political intervention is simply wrong. It greatly harms single-issue groups whose issues may come up at a time during which all such speech is treated as political intervention.

The Bright Lines authors might respond that their proposal only covers "targeted" communications, but under their definition, nearly every communication could qualify as targeted. Not only are politically vulnerable incumbents far more likely to be perceived as swing votes in Congress on a legislative issue, but their challengers also may become swing votes on the same issue after the election. Such "targeting" will in many cases simply be a reflection of the legislative environment.

Additionally, the proposed rules also define a "close contest" as one in which, among other factors, the candidates are separated by ten or fewer percentage points in publicly reported polls during the prior 30 days of a communication.[20] An organization that invests substantial time and money in preparing an issue advocacy effort in the middle of a race that previously hadn't been competitive is

---

[18] *Id.*

[19] *See, e.g.*, Scott Bland, "Vulnerable Incumbents Were Most Likely to Stray From Party Line This Congress," NAT'L JOURNAL, Aug. 19, 2014, *available at* http://www.nationaljournal.com/politics/vulnerable-incumbents-were-most-likely-to-stray-from-party-line-this-congress-20140819 (last visited Dec. 8, 2014).

[20] Bright Lines Proposal at numbered p.14.

thus out of luck if the polls suddenly tighten. Due to the unpredictability of polling, the likely real-world effect is that this rule will deter constitutionally protected speech about public policy issues in all jurisdictions, regardless of whether the polling is close at a particular moment. Moreover, the proposal fails to clarify how to treat a race in which one poll shows a 15-point spread and another shows only a difference of 10.

"Know It When I See It." The Bright Lines proposal also treats as *per se* political intervention activities that refer to and "reflect a view" on specific candidates, when conveyed through paid mass media advertising and accompanied by a reference to an election.[21] Whether a communication "reflects a view" on a candidate will be determined by, among other things, its "content, tone, and images."[22] A communication's "tone," however, is not something that is easily ascertainable with metaphysical certainty, as demonstrated by skeptical reactions to the Secret Service's recent plans to acquire software to detect sarcasm on social media.[23] Rather, it often entails a "know it when I see it" determination.[24]

Consider a Sierra Club radio ad that encourages voters to learn more about the environmental policy positions of the congressional candidates in the upcoming election. Since many voters may not have heard of all of the candidates, the ad names the candidates. This ad would be "delivered by paid mass media advertising and contain an election reference" and thus would qualify as *per se* political intervention if its "tone" is determined to "reflect a view" on one or more of the clearly identified candidates and, at a minimum, would not fall within any safe harbor.[25] Will the Sierra Club, which carries the burden of proof under the proposal, now have to retain expert witnesses on linguistics to testify about the tone of this

---

[21] *Id.* at numbered p.2.

[22] *Id.* at numbered p.13.

[23] Katie Zezima, "The Secret Service wants software that detects social media sarcasm. Yeah, sure it will work," WASH. POST, Jun. 3, 2014, *at* http://www.washingtonpost.com/blogs/the-fix/wp/2014/06/03/the-secret-service-wants-software-that-detects-social-media-sarcasm-yeah-sure-it-will-work/ (last visited Dec. 8, 2014).

[24] *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J. concurring) ("[C]riminal laws in this area are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description . . . But *I know it when I see it* . . . .") (emphasis added). Justice Stewart later confessed to regretting having written this concurrence. Al Kamen, "Retired High Court Justice Potter Stewart Dies at 70," WASH. POST, Dec. 8, 1985.

[25] *See* Bright Lines Proposal at numbered pp.2-3, 9-10. Note that this hypothetical ad likely would not qualify for the proposed safe harbor for "comparative voter education" because it is in the form of "paid mass media advertising." *See id.* at numbered p.3.

ad? And what about the tone of music used in the ad? Presumably, that would count as well under the rule, so music theory experts also may be needed.

IV. The Bright Lines Proposal Includes Too Few Activities in its Safe Harbors.

While one side of the Bright Lines coin includes too much as *per se* political intervention, the other side fails to provide sufficient protection under its safe harbors, thus setting forth a "heads I win, tails you lose" regulatory scheme.[26] The following are but two examples of this problem:

Black-Out Periods. One of the factors the Service considers under its current facts and circumstances test is whether a communication "is delivered close in time to the election."[27] The Service does not appear to have ever issued any clear guidance as to how close is too close. The Bright Lines proposal purports to fix this problem by setting a bright line (but not in a good way), whereby communications that refer to a candidate, do not consist of paid mass media advertising, and do not refer to an election will fall under a safe harbor, but only if they are made prior to the calendar year of a candidate's election.[28]

Because, as explained above, any communications that fall outside a safe harbor are presumed to be political intervention, the Bright Lines proposal in effect creates a far broader black-out period than even the 30- and 60-day "electioneering communications" periods under the federal campaign finance laws[29] and similar windows contained in the highly criticized rule proposed by the IRS last year (and which the Service reportedly is now reworking).[30] Many commenters criticized the use of 30- and 60-day windows in that proposal. In this respect, the "safe harbor" suggested here is far less protective of speech than the original rule proposed by the IRS, and gives public officials that much more time to act with diminished accountability to public interest groups when they're facing reelection, which is generally when they should be most attuned to public opinion.

---

[26] *Wisconsin Right to Life*, 551 U.S. at 471 ("This 'heads I win, tails you lose' approach cannot be correct.").

[27] Rev. Rul. 2007-41; *see also* Rev. Rul. 2004-6 (stating that whether the "timing of the communication coincides with an electoral campaign" is a factor under the facts and circumstances test).

[28] Bright Lines Proposal at numbered p.3.

[29] 52 U.S.C. § 30104(f)(3)(A).

[30] Guidance for Tax-Exempt Social Welfare Organizations on Candidate Related Political Activities, 78 Fed. Reg. 71535.

President Obama's evolution on the issue of gay marriage during the 2012 election year is a perfect example of how the campaign season is often the prime window for influencing politicians' views.[31] But under the Bright Lines proposal, gay rights groups that put public pressure on President Obama in the months leading up to his announcement of his support for gay marriage, and well in advance of his party's convention and the general election, would have been engaged in restricted campaign activity. That doesn't seem right.

Content Discrimination and Internal Contradictions. The Bright Lines proposal inexplicably distinguishes between what it calls "comparative voter education," which may qualify for a safe harbor, and candidate pledges, which are left to fend for themselves under the facts and circumstances test and its presumption of political intervention.

Under the Bright Lines proposal, "comparative voter education" generally falls within the safe harbor if it is not in the form of paid mass media advertising, and will not be treated as political intervention.[32] Such "comparative voter education" may include publishing the results of candidates' responses to questionnaires about where they stand on issues in comparison not only with each other, but also with the organization's views on those issues.[33]

In contrast, the proposal casts to the fate of the facts and circumstances test candidate pledges (where an organization asks candidates to pledge their support for certain policies favored by the organization). Under the Bright Lines rule, if all of the candidates for a given office have the same stance on a pledge, then the organization may publicize their stance; but if they give differing responses, then the organization must justify why publicizing their positions is not political intervention.[34]

As a preliminary matter, whether or not an organization's issue advocacy effort is treated as political intervention should not depend on where candidates stand on the issue, as this will inevitably lead to de facto content-based

---

[31] *See, e.g.*, Phil Gast, "Obama announces he supports same-sex marriage," CNN.com, May 9, 2012, *at* http://www.cnn.com/2012/05/09/politics/obama-same-sex-marriage/ (last visited Dec. 8, 2014).

[32] Bright Lines Proposal at numbered p.3.

[33] *Id.* at numbered pp.3 and 6.

[34] Bright Lines Proposal at numbered p.5-6.

discrimination, a major taboo under the First Amendment.[35] For example, an organization advocating a pledge to support a higher minimum wage in a Democratic primary is likelier to have greater latitude under these rules than an organization advocating a pledge to support the Keystone Pipeline – an issue over which there is much greater intra-party disagreement.[36]

Additionally, there is no discernible principled distinction for why an organization that publishes the results of a candidate pledge, in which the candidates differ with each other and agree or disagree with the organization, risks having the activity be treated as political intervention, and yet the functionally equivalent activity is not treated as political intervention when it is characterized as a questionnaire.

* * *

The Bright Lines Project's authors attempt to sell their proposal with a promise of just "four pages" of rules that provide "a succinct operational tool" to the public and to the IRS.[37] In fact, the proposal entails 16 pages of dense, single-spaced, lawyerly regulatory code with 28 defined terms, many of which need their own additional subsidiary definitions. Even with this level of complexity (or perhaps because of it), the proposal falls into the significant pitfalls noted above and fails to provide a sufficient level of clarity for organizations engaged in activities falling outside of the proposal's excessively narrow safe harbors and its unreasonably broad definitions of *per se* political intervention. For these reasons, CCP maintains that, if the IRS is to have any regulatory role at all in this area, it should be as limited as possible and along the lines of what CCP originally suggested in its first set of comments to the IRS regarding this rulemaking filed on December 5, 2013.[38]

---

[35] *See*, *e.g.*, *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content.") (collecting authority).

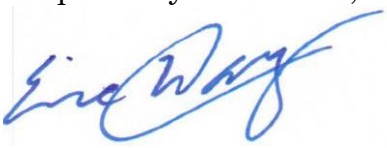
[36] *See*, *e.g.*, "See Who Voted for the Keystone Pipeline, and Who Didn't," FoxNews.com, Nov. 19, 2014, *at* http://nation.foxnews.com/2014/11/19/see-who-voted-keystone-pipeline-and-who-didnt (last visited Dec. 8, 2014).

[37] Bright Lines Proposal at unnumbered p.1.

[38] *See* note 1, *supra*. See *also* CCP Supplemental Comments on IRS NPRM, REG-134417-13, Jan. 23, 2014, *available at* http://www.campaignfreedom.org/wp-content/uploads/2014/01/CCP-IRS-NPRM-PRA-comments-1-22-14-final-2.pdf; CCP Supplemental Comments on IRS NPRM, REG-134417-13, Feb. 20, 2014, *available at* http://www.campaignfreedom.org/wp-content/uploads/2013/12/Center-for-Competitive-Politics-Supplemental-Comments.pdf.

Thank you for your consideration. Please do not hesitate to contact me or any of my colleagues at CCP should you have any questions about any of our comments.

Respectfully Submitted,



Eric Wang
Senior Fellow