February 27, 2014

The Honorable Jacob L. Lew
Secretary of the Treasury
CC:PA:LPD:PR (REG-134417-13)
Room 5205
Internal Revenue Service
P.O. Box 7604, Ben Franklin Station
Washington, D.C. 20044

Re: IRS REG-134417-13: Proposed New Restrictions on Candidate-Related Activities of 501(c)(4) Organizations, 78 Fed. Reg. 71535 (Nov. 29, 2013)

Dear Mr. Secretary:

The Treasury Department's proposed rule has been extensively criticized by a wide array of individuals and organizations across the political spectrum. The grounds for their opposition ranges from freedom of speech, to citizen participation, to the Department's lack of statutory authority.[1] CEI agrees with many of these points, but our comments below focus primarily on one specific issue: the Treasury Department's improper attempt to redefine non-partisan criticism of *non-elected* government officials, including communications with lawmakers about executive-branch and judicial nominations, as "candidate-related political activity", in order to restrict such activity by 501(c)(4) groups. 78 Fed. Reg. at 71538. The proposed rule would also unconstitutionally restrict non-profits' advice to the executive branch about nominations.

The proposed rule seeks to restrict such speech even though it has nothing to do with any election or political candidate, and encompasses the very speech aimed at lawmakers that is protected by the First Amendment under *Regan v. Taxation With*

[1] *See, e.g,* Forbes, *IRS Proposed Rules For Nonprofits Alarm Conservatives and Liberals Alike*, www.forbes.com/ sites/kellyphillipserb/2014/02/25/irs-proposed-rules-for-nonprofits-alarm-conservatives-and-liberals-alike/.

Representation, 461 U.S. 540 (1983), in which Supreme Court Justices upheld limits on lobbying by 501(c)(3) groups only because those restrictions left 501(c)(3) groups free to engage in additional such lobbying through their sister 501(c)(4) entities. *See id.* at 544-46 (Opinion of the Court); *id.* at 552-53 (Opinion of Blackmun, J., joined by Brennan and Marshall JJ, concurring). The proposed rule now seeks to restrict just such lobbying by 501(c)(4)'s, as well as a broad range of other constitutionally protected speech having nothing to do with such lobbying.[2]

The communications that the proposed rule seeks to restrict have everything to do with civic participation, which is the central function of many 501(c)(4) groups. The statute itself is designed to protect "civic leagues." 26 U.S.C. 501(c)(4)(A). Civic leagues care about public policy, even if they don't get involved in election campaigns because that would divide their membership between Democrats and Republicans.[3] The statute's requirement that 501(c)(4) groups promote "social welfare" does not rule out participation in public policy, even when it has a political dimension. Indeed, good public policy promotes social welfare through "civic betterments and social improvements," which is expressly sanctioned by the existing Treasury regulation requires. *See* Treas. Reg. §1.501(c)(4)-1(a)(2)(i) (An organization "embraced" within section 501(c)(4) is one that is "operated primarily for the purpose of bringing about civic betterments and social improvements.").

Yet, in its "Definition of 'Candidate,'" Treasury now proposes that candidate be defined to mean "'an individual who identifies himself or is proposed by another for selection, nomination, election, or appointment to any public office or office in a political organization, or to be a Presidential or Vice-Presidential elector, whether or not the individual is ultimately selected, nominated, elected, or appointed.'" *See Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities* (proposed rule), 78 Fed. Reg. 71535, 71538 (Nov. 29, 2013). Thus, restricted activity includes "activities relating to the appointment or confirmation of executive branch officials and judicial nominees." *Id.* As Treasury conceded, this "is a change from the historical application in the section 501(c)(4) context of the section 501(c)(3) standard of political campaign intervention, which focuses on candidates for elective public office

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[2] We agree with the comments filed by the Heritage Foundation on December 19, 2013 regarding the Treasury Department's statutory lack of authority to adopt these regulations. Those comments are also available at http://www.charitableplanning.com/cpc_2081127-1.bin and http://www.campaignfreedom.org/wp-content/uploads/2014/01/THFIRS.pdf. *See* Heritage Foundation, *Comments in Response to Notice of Proposed Rulemaking on 'Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities'.*

[3] *See Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 587 (1980) (White, J., concurring) ("public debate" is "civic" activity).

only." *Id.*, *citing* Treas. Reg. § 1.501(c)(3)– 1(c)(3)(iii). As the Heritage Foundation notes, this proposed regulation "stretches the term 'candidate' beyond its common meaning in the political context."[4]

Treasury's proposed definition would restrict even truthful, nonpartisan criticism of wrongdoing by judicial and executive-branch nominees, and communication with lawmakers about their nominations, by classifying it as "candidate-related political activity." But simply because Treasury declares such speech to be "candidate-related political activity" does not make it so.[5] The government is not allowed to restrict the exercise of First Amendment rights through such wordplay. As the D.C. Circuit Court of Appeals has noted, restrictions on speech cannot be justified merely by government officials' declarations regarding "the existence of certain facts"; if government officials "could make a statute constitutional by 'finding' that black is white or freedom slavery, judicial review would be an elaborate farce."[6] As the Supreme Court has noted, factual assertions by government officials "cannot limit judicial inquiry when First Amendment rights are at stake."[7]

These restrictions on lobbying Congress violate the First Amendment under the Supreme Court's decision in *Regan v. Taxation With Representation*, 461 U.S. 540, 544 (1983), which upheld restrictions on lobbying activity by 501(c)(3)'s only *because* those groups could set up sister 501(c)(4) entities to engage in *just such* lobbying activity. Such activity can be restricted for 501(c)(3)'s since donations to them are tax-deductible, making them heavily subsidized by the government, but donations to 501(c)(4)'s are not

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[4] *See* Heritage comments at pg. 8, available at www.charitableplanning.com/cpc_2081127-1.bin. We generally agree with the Heritage Foundation's proposed revisions to 26 C.F.R. § 1-501(c)(4)-1(a)(2)(iii)(B)(1), although we would be more explicit in making clear that judicial and executive branch nominations do not qualify as "candidates." *See* Heritage comments at pg. 9 (suggesting revisions to Treasury's proposed definition of "candidate").

[5] Some have suggested that the IRS should adopt new rules to prevent political donors from using 501(c)(4)'s as a conduit for intervening in political campaigns. *See, e.g.,* Mike Beebe, letter, *The Real IRS Nonprofit Scandal*, Nashua Telegraph, July 18, 2013. That purpose obviously cannot justify restricting speech regarding *judicial and executive branch* nominations the way the proposed rule does. Moreover, as the ACLU noted in its February 4 comments, the proposed rules are grossly overbroad and restrict vastly more speech than is appropriate even with regard to lawmakers facing upcoming elections. *See* http://www.campaignfreedom.org/wp-content/uploads/2014/02/2-4-14-ACLU-Comments-to-IRS.pdf.

[6] *Lamprecht v. FCC*, 958 F.2d 382, 392 n.2 (D.C. Cir. 1992) (invalidating challenged policy as violation of would-be broadcaster's constitutional rights).

[7] *Landmark Communications. Inc. v. Virginia*, 435 U.S. 829, 843 (1978).

tax-deductible, so 501(c)(4) groups' political activity cannot be restricted based simply on the assumption that "Congress chose not to subsidize" it.[8]

As Justices Blackmun, Brennan, and Marshall explained, restrictions on such expression by 501(c)(4)'s would render the restrictions on *both* 501(c)(3) and 501(c)(4) groups invalid by shutting off an essential safety valve for political expression. As they noted, "the Constitutional defect that would inhere in 501(c)(3) alone is avoided by 501(c)(4). As the Court notes," a 501(c)(3) "may create a 501(c)(4) affiliate to pursue its charitable goals through lobbying." *Regan v. Taxation With Representation*, 461 U.S. 540, 552 (1983) (Blackmun, J., joined by Brennan & Marshall, JJ., concurring). As they warned, "Any significant restriction on this channel of communication, however, would negate the saving effect of 501(c)(4). . .Should the IRS attempt to limit the control these organizations exercise over the lobbying of their 501(c)(4) affiliates, the First Amendment problems would be insurmountable." *Id.* at 553.

Treasury's proposed restriction on criticism of executive branch and judicial nominees would have perverse consequences. For example, if an IRS official were to subject citizens to incredibly burdensome demands for irrelevant information just to harass them for their political or religious beliefs,[9] no 501(c)(4) group could later criticize that official's nomination to be IRS commissioner (or any other office), without engaging in restricted activity. That's because the IRS's proposed regulation defines even unelected government officials, like agency heads and judges, as "candidates" if they have been nominated for a position requiring Senate confirmation. The IRS's proposed rules are an attack on the First Amendment that will make it easier for the government to get away with harassing political dissenters and whistleblowers in the future. The potentially self-serving nature of the proposed regulation also makes it more legally suspect, since even an otherwise valid regulation may become tainted by a constitutionally-forbidden motive, such as the desire to silence particular speakers.[10]

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[8] *See also id.* at 546 ("Congress has simply chosen not to pay for" 501(c)(3) groups' lobbying beyond a certain point, by requiring them to use a 501(c)(4) group to engage in any additional lobbying).

[9] Such conduct would violate the Ninth Circuit Court of Appeals' decision in *White v. Lee*, 227 F.3d 1214 (9th Cir. 2000), even if it were not aimed at a group based on whether it was liberal versus conservative. That ruling found that individual federal officials could be sued for damages under the First Amendment for subjecting a citizens' group to an unduly burdensome and prolonged investigation, in response to their speech, and denied qualified immunity to the federal civil-rights officials responsible for the investigation.

[10] *See, e.g., Perry v. Sindermann*, 408 U.S. 593, 598 (1972) (even if public employee were untenured and could be discharged at will, he could not be discharged *because of* his speech, *i.e.*, if "the decision not to renew his contract was, in fact, made in retaliation for his exercise of the

The statute itself never suggests — as the IRS now argues without explanation — that non-partisan criticism of government abuses and wrongdoing fails to promote "social welfare." In reality, such criticism does indeed promote the betterment of society, since society itself has a vital interest in such criticism, in light of the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," including "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials" for alleged wrongdoing, as the Supreme Court observed in *New York Times Co. v. Sullivan,* 376 U.S. 254, 270 (1964). Indeed, society possesses a compelling interest in the uninhibited discussion of matters of public concern.[11]

Even if Treasury's interpretation of the statute were not contrary to its plain text (for the reasons given above, and for the additional reasons given in the Heritage Foundation's December 19 comments[12]), and even if it ordinarily receives some leeway from courts in interpreting ambiguous statutes (no such ambiguity is present here), no such deference is warranted here, because an agency receives no deference from the courts when its interpretation even *potentially* burdens First Amendment rights.[13]

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constitutional right of free speech"); *Leonard v. Columbus*, 705 F.2d 1299, 1306 (11th Cir. 1983) (generally valid municipal rule requiring flag patch on police uniforms could not necessarily be applied to punish cops who removed it as part of a political protest); *American Postal Workers Union v. U.S. Postal Service*, 830 F.2d 294, 311 (D.C. Cir. 1987) (pretextual use of generally-applicable, content-neutral, otherwise-valid disciplinary rule to punish employee for his speech would violate the First Amendment).

[11] *See, e.g., Clairmont v. Sound Mental Health*, 632 F.3d 1091 (9th Cir. 2011) (noting society's "compelling interests in speaking on matters of public concern"), *quoting Kinney v. Weaver*, 367 F.3d 337, 366 (5th Cir.2004) (en banc); *Belyeu v. Coosa County Bd. of Education*, 998 F.2d 925, 929 (11th Cir. 1993) ("Society possesses a compelling interest in the unrestrained discussion" of matters of public concern such as "racial problems.").

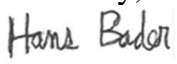
[12] Those comments are available at http://www.charitableplanning.com/cpc_2081127-1.bin and http://www.campaignfreedom.org/wp-content/uploads/2014/01/THFIRS.pdf.

[13] *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council,* 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress"; rejecting agency interpretation of statute and refusing to apply *Chevron* deference); *NLRB v. Catholic Bishop of Chicago,* 440 U.S. 490, 507 (1979) (Court would decline to construe an act of Congress "in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religious Clauses").

Finally, Treasury's proposed rule would also improperly restrict a 501(c)(4)'s ability to urge the President or heads of executive branch departments to nominate or appoint an individual to any one of the thousands of appointed positions in the federal government. But a 501(c)(4) organization serves the social welfare when it advises a President or department head concerning nominations or appointments. For example, employees of 501(c)(3) and 501(c)(4) organizations, such as think-tanks, commonly propose qualified people with specialized expertise, sometimes even their own staff, for positions that require such expertise, in fields such as international trade regulation. Indeed, the President has a constitutional prerogative to obtain such advice, which the proposed rule would restrict. *See In re Cheney*, 406 F.3d 723, 728 (D.C. Cir. 2005) ("In making decisions on personnel and policy, the President must be free to seek confidential information from many sources, both inside the government and outside").

For the foregoing reasons, the IRS's proposed rule should be rescinded.

Sincerely,



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