[DATE]

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

SENT VIA FEDERAL E-RULEMAKING PORTAL

RE: PROPOSED GUIDANCE FOR TAX-EXEMPT SOCIAL WELFARE ORGANIZATIONS ON CANDIDATE-RELATED POLITICAL ACTIVITIES

Dear Ms. Giuliano:

With this proposed rulemaking the Internal Revenue Service (IRS) has taken an important step, starting a conversation to design better rules defining political campaign activity for nonprofits that may include [OUR ORGANIZATION]. We recognize the intention behind the proposal—to create clear rules of the road to guide the IRS internally and the public externally. However, significant changes are in order, we think. As currently drafted, the rules, if applied to us, would unnecessarily hinder our participation in the democratic life of our republic. We urge the IRS and Treasury to rework the draft regulations, with cogent, objective definitions and safe harbor exceptions that carefully distinguish partisan and nonpartisan activities. A new set of rules that universally applies to all nonprofits will overcome decades of confusion and uncertainty under the old "facts and circumstances" approach that has been used, with great difficulty, to judge the qualifications of tax-exempt organizations.

[STATEMENT ABOUT YOUR ORGANIZATION'S MISSION AND THE WORK YOU DO]. Special tax benefits for nonprofit organizations were created by Congress to encourage the work of organizations like ours, but those tax advantages were not intended to subsidize intervention in the political campaigns of candidates for public office. Bright-line rules about what is or isn't political activity, applicable to everyone, would allow us to more confidently conduct programs such as [SAY SOMETHING ABOUT YOUR NONPARTISAN ACTIVITIES TO ENGAGE VOTERS, INFLUENCE PUBLIC POLICY, ETC.], without hampering our ability to work with other nonprofits or the public on a level playing field.

With IRS REG-134417-13, some of the proposed rules are over-inclusive and others are under-inclusive. Without a doubt, the IRS' current "facts and circumstances" test chills free speech and democratic participation while allowing room for aggressive players to manipulate

the tax system. The newly-proposed definition of "candidate-related political activity"—while capturing some (but not all) partisan and electioneering activity—also captures some nonpartisan activity that has long been recognized as a legitimate function of nonprofit organizations.

For example, the proposed regulations treat as "political" any mention of a lawmaker who is running for office, any grassroots lobbying efforts aimed at a lawmaker who is a candidate, and any use of the name Democrat or Republican, on our web pages or in our email messages within 60 days of a general election or 30 days of a primary election. Further, during any time of the year, nonpartisan civic activities (such as voter registration, GOTV drives, and distribution of voter guides) would be defined as candidate-related activity and count against our tax-exempt status. During an election window any public communication mentioning a candidate would be deemed political, even if that communication was just to alert the public of an upcoming debate—and the debate itself would be deemed political. Thus, the proposed rules would deprive voters of valuable, unbiased information days before an election. At the same time, by failing to include communications (short of express advocacy) in the definition of candidate-related activity outside the 60/30 day window, the IRS opens the door to vast tax-exempt spending on sham issue ads that praise or disparage candidates earlier in the campaign season.

What would be the contours of a better alternative? First, recognizing the reality of modern campaigns, more than the "magic words" of express advocacy (vote for or against the candidate) must be treated as political. The regulations need to address all communications that reflect positively or negatively on a candidate, and begin to draw lines that sort out and protect genuine grass roots lobbying, as well as fair candidate comparisons resulting from a debate or questionnaire in which the contestants have an equal chance to speak. Paid mass media ads that praise or disparage candidates and are directed to closely-contested elections should be deemed political. Messages that do not mention a candidate generally should not be treated as political, although instructions to voters to use a "litmus test" in deciding who to vote for should be considered political. Voter engagement programs that target an organization's natural constituency or infrequent voters with neutral motivational messages should fall within the scope of an organization's tax-exempt social-welfare or charitable purposes, while activating voters based on candidate or party preference should be political. With such bright lines, the need to use "facts and circumstances" to evaluate the remaining cases should be greatly lessened, and in all close cases, the tie-breaker should be a tax policy favoring freedom of speech.

The proposed rules are under-inclusive, covering only those groups organized under section 501(c)(4). This will muddy the water for charities and nonprofits classified under other 501(c) sections who cannot be sure whether previously permissible activities (such as sponsoring or funding voter engagement programs, or joining in grass roots lobbying efforts or ballot measure campaigns) now would jeopardize their tax status. If it does not apply to all types of exempt organizations, the rulemaking may also merely shift the problem to a different arena:

those preferring the vague “facts and circumstances” test may choose to organize and fundraise under other tax-exempt categories where they have more latitude.

Our organization supports the continuation of constructive rulemaking by the IRS but would advocate for improvements in the next round of drafting. Clear, sensible guidelines and safe harbors would encourage more nonpartisan public engagement by nonprofits and help prevent abusive exploitation of the tax-exempt system by political operatives. With fair, predictable rules, every one of us will benefit, regardless of ideology.

The IRS must move forward with the rulemaking process. It has never been more important, since the Supreme Court declared in *Citizens United* that election laws cannot prohibit corporations from independent political spending, for our tax laws to plainly identify what may and may not be funded with tax-free money. We need objective, bright-line definitions of political intervention that apply consistently across the tax code and that are comprehensible both to those inside the IRS who must enforce the law and to those in the nonprofit sector who must comply with the law. [INSERT YOUR ORGANIZATION NAME] urges the IRS and Treasury to chart a middle course that differentiates nonpartisan engagement from partisan electioneering and produce a new, improved set of rules for public comment.

Sincerely,

[NAME, ORGANIZATION]