February 27, 2014

CC:PA:LPD:PR
REG-134417-13
Room 5205
Internal Revenue Service
P.O. Box 7604, Ben Franklin Station
1111 Constitution Avenue NW
Washington, DC 20044

Re: Comments on REG-134417-13 (relating to definition of "candidate-related political activity"

Dear Sir or Madam:

These comments are submitted on behalf of Representative Chris Van Hollen, Democracy 21 and the Campaign Legal Center with regard to the Notice of Proposed Rulemaking REG-134417-13, "Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities," 78 Fed. Reg. 71535 (November 29, 2013).[1]

Our comments address the questions raised in the Notice of Proposed Rulemaking (NPRM) related to the definition of "candidate-related political activity." These commenters are filing a separate set of comments that address the related question raised in the NPRM about the scope of permissible campaign intervention by social welfare organizations under § 501(c)(4) of the Internal Revenue Code.

We request the opportunity to testify at any public hearing held on this rulemaking.

[1] Rep. Van Hollen is a leading congressional proponent of disclosure of political contributions and other campaign finance reform measures. Democracy 21, and the Campaign Legal Center are nonprofit organizations that advocate, among other things, the enactment and enforcement of campaign finance laws that protect against corruption of public officials and ensure an informed electorate. Together with Public Citizen, Inc., the commenters were plaintiffs in *Van Hollen v. Internal Revenue Service*, No. 13-1276 (D.D.C.), a lawsuit challenging the IRS's failure to commence rulemaking to revise TR § 1.501(c)(4)-1(a)(2)(i), which they voluntarily dismissed when the IRS initiated this rulemaking proceeding and included reconsideration of the regulation within its scope. Democracy 21 and the Campaign Legal Center had previously filed a petition for rulemaking seeking revision of TR § 1.501(c)(4)-1(a)(2)(i).

Introduction

This rulemaking is timely, and of extraordinary public importance. We applaud the Treasury Department and the IRS for undertaking this rulemaking and for recognizing that problems exist with the current regulations, which were adopted more than a half century ago.

Since the Supreme Court's decision in *Citizens United v. FEC*, 558 U.S. 310 (2010), groups organized under § 501(c)(4) of the Internal Revenue Code have been used as conduits to inject massive amounts of secret money into federal elections. More than $256 million in secret contributions were spent by section 501(c)(4) groups to influence the 2012 federal elections, according to the Center for Responsive Politics.[2]

Much of this spending was done by a relatively small number of section 501(c)(4) organizations, each spending tens of millions of dollars on election-related activity, led by Crossroads GPS, which spent $71 million in 2012, and Americans for Prosperity, which spent $31 million.[3] Such "social welfare" groups are used for election-related spending precisely because of the donor anonymity afforded by § 501(c)(4) status. In this sense, such groups are using the tax code to frustrate the goal of transparency in elections that the Supreme Court itself in *Citizens United* held to be of vital importance to the functioning of our democracy, where the Court said that disclosure of campaign donors "enables the electorate to make informed decisions and give proper weight to different speakers and messages." 558 U.S. at 371.

In a number of cases, furthermore, the groups are not entitled to the tax-exempt status they are claiming and are misusing the tax laws in order to hide from the American people the donors who are financing their campaign expenditures.

This rulemaking is appropriately addressed to ending such abuses by raising two core questions: what activities constitute political intervention (as opposed to social welfare activity) by section 501(c)(4) groups, and how much such campaign activity can a section 501(c)(4) group engage in.

Both questions are crucial to ensuring the tax laws are properly interpreted and enforced, and both questions must be addressed by the Treasury Department in revising existing IRS rules governing political activity by non-profit organizations. These comments are directed to the first question—the question of which activities by section 501(c)(4) groups should be treated as "candidate-related political activity." As noted above, we are submitting separate comments on the second question addressing the amount of "candidate-related political activity" that a section 501(c)(4) group can permissibly engage in under the Internal Revenue Code and court decisions interpreting the Code.

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2 *See* http://www.opensecrets.org/outsidespending/nonprof_summ.php

3 *See* http://www.opensecrets.org/outsidespending/nonprof_elec.php

1. Prior comments to the IRS. We begin by noting that Democracy 21 and the Campaign Legal Center have a long track record of urging action by the IRS on the issues presented in this rulemaking.

On October 5, 2010, Democracy 21 and the Campaign Legal Center filed a complaint with the IRS calling for an investigation of Crossroads GPS which, we alleged, was operating in violation of its claimed tax status under § 501(c)(4) "because it has a primary purpose of participating in political campaigns in support of, or in opposition to, candidates for public office."

In the October 5 letter to the IRS, Democracy 21 and the Campaign Legal Center further stated:

> The status of Crossroads GPS as a section 501(c)(4) entity allows its donors to evade the public disclosure requirements that would apply if the organization was registered as a section 527 political organization. . . .
>
> If, in fact, Crossroads GPS is impermissibly operating as a section 501(c)(4) organization in order to conceal its donors from the American people, the IRS has an obligation to take steps to protect the integrity of our tax laws and to make clear that such abuses will not be permitted in future elections.
>
> Absent timely and appropriate action by the IRS, such abuses will become commonplace in the 2012 presidential and congressional races, at the expense of the credibility of the tax laws and of the right of the American people to know the identity of the donors who are providing the money to influence their votes and the amounts they are giving.

(Emphasis added). After the IRS failed to act, that last statement proved to be prophetic, as the amount of undisclosed money grew dramatically from $130.1 million spent in the 2010 elections to $310.8 million spent in 2012.[4]

Democracy 21 and the Campaign Legal Center followed our October 2010 letter on Crossroads GPS with a series of subsequent letters to the IRS, dated September 28, 2011, December 14, 2011, March 9, 2012, April 17, 2012, May 24, 2012, July 23, 2012, September 27, 2012, January 2, 2013 and January 16, 2013. These letters discussed the impropriety of § 501(c)(4) status not only for Crossroads GPS, but for other organizations engaged in major campaign activity as well, including Priorities USA, American Action Network, and Americans Elect. As we said in the September 27, 2012 letter:

> We believe the facts we have presented to you in our letters make clear that each of these organizations is, to put it simply, a campaign operation—an organization whose overwhelming focus and purpose has been to elect and/or defeat candidates in the 2012 elections. Because the primary purpose of each of these organizations is to participate or intervene in candidate elections, these organizations are not,

[4] *See* http://www.opensecrets.org/outsidespending/disclosure.php

and should not be permitted to claim status as, "social welfare" organizations under section 501(c)(4).

Indeed, in November 2012, the General Counsel of the Federal Election Commission stated that spending by Crossroads GPS related to federal election activity in 2010 "is alone sufficient to establish that its major purpose in 2010 was the nomination or election of federal candidates."[5]

In addition, Democracy 21 and the Campaign Legal Center filed a Petition for Rulemaking with the IRS on July 27, 2011, calling on the IRS to initiate a rulemaking to revise and clarify its regulations regarding the extent of candidate election activities that a "social welfare" organization can engage in under § 501(c)(4). We subsequently wrote to the IRS on March 22, 2012, urging action on this Petition, noting that "developments in the course of the 2012 national elections have served to underscore the fact that inadequate and flawed IRS regulations are facilitating widespread misuse of the tax laws by organizations claiming tax exempt status under § 501(c)(4) in order to keep secret the donors financing their candidate campaign-related expenditures." We also wrote to the IRS on July 23, 2012, August 9, 2012, and December 3, 2012, each time urging action on our Petition.

Ultimately, Democracy 21 and the Campaign Legal Center, joined by Public Citizen and Rep. Chris Van Hollen (D-MD), filed a lawsuit against the IRS for failing to act on the Petition. *Van Hollen v. IRS,* No. 1:13-cv-1276 (D.D.C. filed Aug. 21, 2013). The lawsuit, which was primarily intended to prompt a rulemaking to address the serious abuses permitted by the agency's existing rules, was voluntarily dismissed by the plaintiffs when this current rulemaking was initiated. *See* Notice of Voluntary Dismissal (D.D.C. filed Dec. 6, 2013). We also made clear at the time that we were prepared to re-file the lawsuit if the IRS did not issue proper new regulations to replace the current, flawed regulations adopted more than a half century ago.

Thus, our organizations have a longstanding interest in this rulemaking, and have long urged the IRS to conduct this rulemaking.

2. The proposed standard for "candidate-related political activity." As explained in the NPRM, the IRS currently uses a "facts and circumstances" test to determine if activity by an organization constitutes political campaign intervention. *See* 78 Fed. Reg. 71536. This "facts and circumstances" test has been explicated in several revenue rulings, most notably in Rev. Rul. 2007-41 (2007-1 CB 1421) and Rev. Rul. 2004-6 (2004-1 CB 328), both of which provide illustrations and lists of factors that tend to support, or tend not to support, a conclusion that a group's activities constitute campaign intervention. As the background discussion in the NPRM notes, the existing "facts and circumstances" test has been determined even by the IRS to "lack . . . a clear and concise definition of 'political campaign intervention.'" *Id.*

[5] First General Counsel Report, MUR 6396 (Nov. 21, 2012) at 17. The FEC Commissioners subsequently voted to close this enforcement action after deadlocking 3-3 on a vote to approve the General Counsel's recommendation to find reason to believe Crossroads GPS violated the campaign finance laws by failing to register as a political committee. Certification, MUR 6396 (Dec. 5, 2013).

The discussion in the NPRM emphasizes that a principal reason for a new rule is that "more definitive" guidance than "the existing, fact-intensive analysis" would be "helpful" by providing "greater certainty and reduc[ing] the need for detailed factual analysis" in determining whether an organization qualifies for § 501(c)(4) status. *Id.* at 71536-37. We strongly agree that greater precision and clarity is needed in the definition of what constitutes political intervention for purposes of non-profit tax status. Indeed, much of the abuse of the law in the last two election cycles by groups which operate under a claim of § 501(c)(4) status, like Crossroads GPS, has resulted from the indeterminacy of the existing law—indeterminacy that has given room for campaign operatives to wrongly argue that their activities are issue-related and not campaign related. Thus, the promulgation of clearer and more definitive standards is an important step to countering this abuse.

The proposed rule provides an eight-part definition for "candidate-related political activity." We discuss its various elements below.

A. "Public communications" proximate in time to an election. The proposed rule would treat as "candidate-related political activity" any "public communication" made "within 30 days of a primary election or 60 days of a general election" that "refers to" one or more clearly identified candidates or one or more political parties (in the case of the general election). 1.501(c)(4)-1 (a)(2)(iii)(2) (proposed); *see* 78 Fed. Reg. 71541. This rule is based on the definition of "electioneering communications" in the federal campaign finance laws, 2 U.S.C. § 434(f)(3), which uses a similar time-frame test for the purpose of subjecting certain public communications to federal election law disclosure requirements. *Id.* at 434(f)(1).

The commentary in the NPRM states that because certain activities "occur close in time to an election or are election-related, [they] have a greater potential to affect the outcome of an election." 78 Fed. Reg. 71538 (emphasis added). The commentary notes that "the timing of a communication about a candidate that is made shortly before an election" is already a factor under the existing "facts and circumstances" test "tending to indicate a greater risk of political campaign intervention." *Id.* at 71539.

We agree that the proposed time-frame test, which is based on the existing definition of "electioneering communications," is a valuable component of an IRS definition of "candidate-related political activity."[6] This kind of time-frame standard is a test that has been determined by Congress to encompass public communications that are substantially likely to be campaign-related. Importantly, this test has been upheld by the Supreme Court for purposes of the federal disclosure laws. In *Citizens United*, the Court, by an 8-1 vote, rejected a number of challenges, including an overbreadth challenge, to disclosure requirements imposed on groups making electioneering communications. In particular, the Court rejected the "contention that the disclosure requirements must be limited to speech that is the functional equivalent of express

[6] We note that the election law definition of "electioneering communications" includes a targeting element, *i.e.,* "electioneering communications" encompass only broadcast ads that "can be received by 50,000 or more persons" in the district of a federal House candidate or in the State of a federal Senate candidate. 2 U.S.C. § 434(f)(3)(C). We recommend a similar targeting element be added to the proposed IRS definition in order to guard against overbreadth of the proposed definition.

advocacy." 558 U.S. at 369. The Court said that "[e]ven if the ads only pertain to a commercial transaction, the public has an interest in knowing who is speaking about a candidate shortly before an election." *Id.* (emphasis added).

This same informational interest supports the proposed time-frame definition of "candidate-related political activity" for section 501(c)(4) organizations. The time-frame definition is also supported by the agency's interest (and the public's interest) in clarity and precision in the standards used for determining tax exempt status under § 501(c)(4).[7]

We also recommend that the IRS conform its definition of "public communication" for purposes of this proposed rule, *see* § 1.501(c)(4)-1(a)(2)(iii)(B)(5) (proposed), to the definition of the same term enacted by Congress in the campaign finance laws. 2 U.S.C. § 431(22). That term, as construed by the Federal Election Commission, *see* 11 C.F.R. § 100.26, is a narrower and more targeted approach to the definition of "public communication" that better fits with the application of that term to the time frame test used in the proposed rule, in order to guard against overbreadth in the application of the time frame test.

B. Express advocacy. Outside the 30/60 day pre-election windows, "candidate-related political activity" under the proposed rule would include only communications that contain express advocacy or its functional equivalent. We strongly oppose an express advocacy standard as the only test for "candidate-related political activity" outside the pre-election time frame window. For the reasons explained below, this proposal is too narrow and easily evaded, and it will license continuation of the same abuses that are present today.

The proposed rule, § 1.501(c)(4)-1(a)(2)(iii)(1), includes in the definition of "candidate-related political activity" any communication "expressing a view on, whether for or against," the selection or election of a clearly identified candidate, but only if the communication:

> (i) Contains words that expressly advocate, such as "vote," "oppose," "support," "elect," "defeat," or "reject"; or
>
> (ii) Is susceptible of no reasonable interpretation other than a call for or against the selection, nomination, election or appointment of one or more candidates or of candidates of a political party.

This definition is not identical to, but is based on, a regulation of the Federal Election Commission that defines the term "expressly advocating" for purposes of the campaign finance laws. 11 C.F.R. § 100.22. Subsection (a) of that regulation, and subsection (i) of the proposed IRS rule, both describe what is commonly referred to as the "magic words" test, while both

[7] We further suggest that the IRS consider an expanded time frame test that would encompass the period from 30 days prior to the first primary election for the office in question through the date of the general election. This would eliminate the gap between the date of the primary and the beginning of the 60-day pre-general election period. This "gap" period, which typically encompasses at least the mid- to late-summer of an election year (depending on the date of the primary election in a given state), is frequently a period of a great amount of campaign activity by candidates and outside groups. As discussed below, the PASO test should apply outside this expanded time frame.

subsection (b) of the FEC rule and subsection (ii) of the proposed IRS rule describe what is commonly referred to as "the functional equivalent" of express advocacy.

Both the "magic words" test and the "functional equivalent" test are narrow, and exclude many ads that attack or promote candidates and influence elections, while avoiding magic words of advocacy or their functional equivalent. More importantly, such ads typically are framed around discussion of an issue so that, while sharply attacking a candidate, they are also "susceptible" of an interpretation that the ads are discussing an issue, not calling for the election or defeat of a candidate. As such, they would not fall within the strict confines of the "functional equivalent" test, even though the ads would unmistakably be understood as attacking a candidate and discouraging voter support for that candidate.

For instance, in our letter of May 24, 2012 to the IRS, we discussed a broadcast ad then being sponsored by Crossroads GPS. A story in *The New York Times* described the ad as the "centerpiece" of a $25 million ad campaign "in 10 swing states" that "is expected to become one of the most heavily broadcast political commercials of this phase of the general election."[8] The script of the ad said:

> Woman: "I always loved watching the kids play basketball. I still do, even though things have changed. It's funny, they can't find jobs to get their careers started and I can't afford to retire and now we are all living together again. I supported President Obama because he spoke so beautifully. He promised change, but things changed for the worse. Obama started spending like our credit cards have no limit. His health care law made health insurance even more expensive. We've had stimulus and bailouts. Obama added over $16,000 in debt for every American. How will my kids pay that off when they can't even find jobs? Now, Obama wants more spending and taxes. That won't fix things. I had so many hopes. Cutting taxes and debt and creating jobs. That's the change we need. Tell President Obama to cut the job killing debt and support the new majority agenda at newmajorityagenda.org.[9]

This ad was being run in the spring of 2012, well before the 60 day pre-general election period that would be covered by the time frame test in subsection (a)(2) of the proposed IRS rule. It does not contain "magic words" of express advocacy—it nowhere says "vote against" President Obama—so it would not be covered by the first subclause of subsection (i) of the proposed rule.

So this ad would be considered to be "candidate-related political activity" only if it satisfies the test under subsection (ii)—that it is "susceptible of no reasonable interpretation other than a call" to defeat President Obama's reelection. It is likely that sponsors of ads such as this would vigorously argue, and that the IRS would conclude, that while this ad is sharply critical of President Obama, it is also "susceptible" of an alternative interpretation as urging the public to "tell President Obama" to cut the debt or take other policy actions. As such, the IRS is likely to

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[8] J. Peters, "Subtler Entry From Masters of Attack Ads," *The New York Times* (May 22, 2012).

[9] This ad can be viewed at: http://www.youtube.com/watch?v=PdIKr_zX7FE.

conclude that it does not fall within the subsection (ii) standard, even though it is clearly a campaign attack ad.

Another ad sponsored by Crossroads GPS in July 2012, also well before the 60 day pre-general election window, poses the same problem. That ad, called "Suffered," said:

> Narrator: America has suffered three years of crushing unemployment. Remember this: Obama: "We'll create nearly half a million jobs by investing in clean energy."
> Narrator: What really happened? Billions wasted on failed investments. Thousands of Americans lost jobs. While stimulus money went to companies that created jobs overseas. Paid for by the $4 billion Obama has added to our debt every day. Tell President Obama, for real job growth, cut the debt. Support the New Majority Agenda at newmajorityagenda.org.[10]

Again, the ad is sharply critical of President Obama in the months before his reelection, but avoids words of express advocacy and can be characterized as "susceptible" of an interpretation that it relates to the issues of job growth and the debt, and not solely to advocating the defeat of President Obama.

Both ads set forth above read precisely like a multitude of other ads run in the 2012 campaign that lack express advocacy or its functional equivalent but that plainly were run as campaign ads designed to influence the election.

In this sense, the proposed rule would serve to radically narrow from existing law the scope of ads that would be treated by the IRS as campaign related. While the 30/60 day time frame test in subsection (2) of the proposed rule would be broader than the existing "facts and circumstances" test, the proposed express advocacy test of subsection (1) that would apply outside the time frame would be considerably narrower than existing law. The IRS has made clear in past rulings that under existing law, "express advocacy" is not required for a group's spending to count as intervention or participation in a campaign. Revenue Ruling 2004-6, for instance, noted:

> All the facts and circumstances must be considered to determine whether an expenditure for an advocacy communication relating to a public policy issue is for an exempt function under § 527(e)(2). When an advocacy communication explicitly advocates the election or defeat of an individual to public office, the expenditure clearly is for an exempt function under § 527(e)(2). However, when an advocacy communication relating to a public policy issue does not explicitly advocate the election or defeat of a candidate, all the facts and circumstances need to be considered to determine whether the expenditure is for an exempt function under § 527(e)(2).

Id. (emphasis added). Thus, under existing law, even an ad that does not contain express advocacy or its functional equivalent would be considered "exempt function," or (in the terms of

[10] This ad can be viewed at: http://electad.com/video/crossroads-gps-ad-suffered.

the NPRM) "candidate-related political activity," if the facts and circumstances demonstrated that the purpose and effect of the ad was to influence an election. But under the proposed rule, absent express advocacy or its functional equivalent, these ads would not be treated as campaign related outside the 30/60 day pre-election period, which means that section 501(c)(4) groups could run such ads without limitation.

The proposed rule is thus likely to make matters worse, not better, by giving a green light to exactly the kinds of campaign ads masquerading as "issue" ads that have been the stock-in-trade for organizations like Crossroads GPS. These ads run outside the narrow pre-election time frame, skirt the use of "magic words" and are consistent with a claim that they are "susceptible" to an interpretation as discussing an issue, even though the ads primarily constitute sharp attacks on a candidate and would certainly be understood by the public as urging a vote against that candidate. In other words, not only would the proposed IRS rule not end the existing abuse by sham "social welfare" organizations, it would license the continuation and growth of that abuse.

Instead of using an "express advocacy" test for the period outside the 30/60 day pre-election time frame, we urge the IRS to adopt another standard from the campaign finance laws: the "promote, support, attack or oppose" standard (commonly referred to as "PASO"). This standard was enacted by Congress as part of the Bipartisan Campaign Reform Act of 2002 (BCRA), where it appears in the soft money provisions governing communications by state parties. *See* 2 U.S.C. § 431(20)(A)(iii). There, the term "Federal election activity" is defined to include:

> a public communication that refers to a clearly identified candidate for Federal office (regardless of whether a candidate for State or local office is also mentioned or identified) and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate).

Id.

The Supreme Court, in *McConnell v. FEC,* 540 U.S. 93 (2003), upheld the statutory PASO standard in the context of BCRA's provisions limiting the funding of Federal election activities by party committees to Federal funds, noting that "any public communication that promotes or attacks a clearly identified Federal candidate directly affects the election in which he is participating." *McConnell,* 540 U.S. at 170.

The Court further found that the PASO test was not unconstitutionally vague because, according to the Court, the "words 'promote,' 'oppose,' 'attack,' and 'support' clearly set forth the confines within which potential party speakers must act in order to avoid triggering the provision." *Id.* at 170 n.64. The Court stated that the PASO words "'provide explicit standards for those who apply them' and 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited.'" *Id.* (quoting *Grayned v. City of Rockford,* 408 U.S. 104, 108-09 (1972)) (emphasis added).

McConnell thus makes clear that the PASO test is, on its own terms, sufficiently definite to satisfy constitutional requisites regarding vagueness. The Court's conclusion applies not only to party committees, but also to any "person of ordinary intelligence." *McConnell*, 540 U.S. at 170 n.64. In other words, the terms comprising PASO are clear on their face—regardless of the regulatory context in which they are employed, and will provide an additional, necessary bright-line test for the rules defining "candidate-related political activity."

Adoption of the PASO test as the standard outside the 30/60 day pre-election time frame would substantially resolve the problem created by the express advocacy test proposed in the NPRM. The "functional equivalent" express advocacy test, as illustrated above, will not count as "candidate-related political activity" those ads which sharply attack candidates and plainly influence elections—the very types of ads which a number of section 501(c)(4) groups have already been running. By contrast, such ads would be covered by the PASO test, which is targeted precisely to cover ads—and only ads—that "promote, attack, support or oppose" candidates. Importantly, the PASO test does not permit an ad attacking a candidate to escape coverage simply because the ad also discusses an issue as well.

The PASO test—which has already been upheld by the Supreme Court as against a challenge alleging vagueness—is far more tailored and administrable than the multi-variable and unbounded "facts and circumstances" test currently applied by the IRS and should be adopted as part of a new regulation.

C. Reportable expenditures. The third prong of the proposed IRS rule would treat as "candidate-related political activity" any expenditure for a communication that is reportable to the FEC. This principally would include either independent expenditures or electioneering communications, both of which are encompassed in the time-frame test and express advocacy test already included in the proposed rule. It is analytically correct for the IRS to treat as campaign-related spending any activity that the FEC requires to be reported as an expenditure.

D. Contributions. The fourth prong of the proposed rule would treat as "candidate-related political activity" any contribution to a candidate or solicitation for a candidate, and similarly any contribution to or solicitation of a contribution for any section 527 political organization. We agree with both of these standards. It is obvious that money contributed to a candidate or political organization, or money spent for soliciting contributions to a candidate or political organization, should be counted as campaign-related activity by the spender.

In addition, the proposed rule would treat as "candidate-related political activity" any contribution by a section 501(c)(4) organization to any other section 501(c) organization where the recipient organization itself "engages in candidate-related political activity," unless the contributor organization obtains from a recipient a written statement that the recipient "does not engage in such activity (and the contributor has no reason to know that such statement is inaccurate), or a written statement that the contribution "is subject to a written restriction that it not be used for candidate-related political activity." § 1.501(c)(4)-1(a)(2)(iii)(A)(4)(iii); (a)(2)(iii)(D) (proposed).

We support this standard. One of the core problems that must be addressed by any rule is the increasingly prevalent use of inter-organizational transfers among "social welfare" groups as a means of masking the identity of the original source of funding for campaign ads. A principal example of this abuse is illustrated by an enforcement case brought by the State of California Fair Political Practices Commission which revealed multiple transfers of money among non-profit groups where the money was eventually spent to influence California elections. *See* M. Gold and T. Hamburger, "California donor disclosure case exposes how nonprofits can play in politics," *The Washington Post* (Nov. 4, 2013).

Without a mechanism in the rules to address this problem, transfers of funds from one section 501(c)(4) group to another will be used to evade and frustrate the candidate activity rules. It would be a simple matter for any group to avoid reaching whatever ceiling is set for "candidate-related political activity" simply by transferring a portion of its funds for political spending to another group that is below the ceiling. By setting up multiple organizations, it will easily be possible for no group ever to reach the ceiling, thus making any ceiling pointless and in practical effect allowing a set of social welfare organizations to engage in unlimited campaign-related spending. Thus, the proposed transfers rule is a critical aspect of any effective regulatory system.

The proposed rule is correctly tailored. Where a section 501(c)(4) group transfers money to another non-profit organization that engages in campaign-related spending, it is a reasonable presumption that the recipient could and may use the transferred money for campaign-related purposes. Thus, it is reasonable to count the transfer as campaign-related for purposes of the contributor/transferor's activity.

We also support the proposal that a donation would not be treated as "candidate-related political activity" if the recipient organization provides a written statement to the transferor that it will not use the contributed funds for campaign-related purposes. This safe-harbor, however, should be strengthened by requiring a mechanism to enforce its restrictions. The restricted money, for instance, could be required to be put in a segregated account that the recipient organization will not use for campaign-related purposes. Without this additional safeguard, it will be difficult or impossible to administer and enforce the requirement that the recipient organization restrict use of the contributed funds in instances where it has provided a statement of intent to restrict the funds. We urge the IRS to impose a segregated account requirement, or some similar mechanism to implement the restriction of funds in instances where a statement of restriction has been provided to the contributor organization.

We reiterate that the proposed rule to address the problem of inter-organizational transfers is an indispensable part of the proposed regulations, and it is essential for the IRS to have such a mechanism to ensure that the proposed rules on campaign-related activity are not easily frustrated and evaded by transfers among organizations, a problem that is already very much in evidence.

E. Voter registration and GOTV drives. The proposed rule in its fifth prong provides that "candidate-related political activity" would include "conduct of a voter registration drive or 'get-out-the-vote drive."

In this regard, the proposed rule sweeps too broadly. As drafted, it would cover purely non-partisan voter drive activities as well as partisan activity. Such non-partisan drives are not covered by existing IRS rules, which exempt non-partisan voter drives (and indeed, permit section 501(c)(3) charitable organizations—which are otherwise prohibited entirely from intervening or participating in political campaigns—to nonetheless conduct non-partisan voter drives). Such non-partisan activities have also traditionally been exempt from the campaign finance laws, including from restrictions such as the ban on corporate expenditures to influence elections that was in place prior to *Citizens United*.. 11 C.F.R. § 114.4(c)(3).

The overall point is that truly non-partisan voter drive activity has important benefits to the public interest, and does not threaten to cause the same problems caused by partisan candidate-related political activity, including the use of undisclosed money to fund such activity. The non-partisan character of the activity is itself the best protection against the problems of corruption, undue influence and appearance of corruption that are threatened by partisan activities.

Existing IRS standards set forth guidelines to define the requirements of non-partisan activity. *E.g.*, Treas. Reg. § 1.527-6(b)(5) ("[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."); T.A.M. 9117001 (April 26, 1991) (voter registration and GOTV drives should be limited to urging people to vote or informing them of polling information, mention no candidates or all candidates, and be made available without regard to a voter's political preference). Further, the geographic area chosen for such activities must be based on nonpartisan criteria and not with a purpose to influence the outcome of an election. *E.g.*, PLR 199925021 (voter drive was partisan "due to the intentional and deliberate targeting of individual voters or groups of voters on the basis of their expected preference for" certain candidates).

Instead of covering all voter drive activity as "candidate-related political activity," the proposed rule should be modified to exempt non-partisan activity from the definition (thereby covering partisan voter drive activity) and to codify the existing regulatory standards for non-partisan activity.

F. Distribution of campaign material. The sixth prong treats as "candidate-related political activity" any distribution of material "prepared by or on behalf of" a candidate or by a section 527 organization.

This standard is appropriate. Materials prepared by or on behalf of a candidate or political organization are, by definition, campaign-related and should be treated as such by the IRS rules.[11]

G. Voter guides. The seventh prong covers "preparation or distribution of a voter guide" that refers to one or more candidates or one or more political parties. As with voter drive

[11] It would be appropriate to create a narrow exception for truly non-partisan distribution of candidate materials; *i.e.*, where comparable materials of all candidates in a race are distributed on a non-partisan basis and where no preference is shown or any candidate and no candidate is advantaged or disadvantaged by the means of distribution of materials.

activity, the proposed rule would make all voter guides fall within the scope of "candidate-related political activity."

And as with voter drive activities, we believe the IRS should apply its existing standards to exclude voter guides that meet rigorous non-partisan standards. For instance, under existing standards, voter guides are treated as non-partisan if they do not contain editorial comment, cover a broad range of issues, cover all viable candidates for public office, are not distributed to coincide with an election and contain a disclaimer that the organization is nonpartisan and does not endorse any candidate. Rev. Rul. 78-248, 1978-1 C.B. 154; PLR 200836033.

We think these standards reasonably draw the line between partisan and nonpartisan activity. Instead of covering all voter guides as "candidate-related political activity," the proposed rule should exempt non-partisan activity from the definition (thereby covering partisan voter guides) and codify the existing regulatory standards for non-partisan activity.

H. Events close to an election. The eighth prong covers the "hosting or conducting an event within 30 days of a primary election or 60 days of a general election" at which one or more candidates appear as part of the program.

We agree with this standard. An event held close to an election at which one, or fewer than all, candidates appear should be treated as a partisan event that favors the candidate or candidates who appear at the event. It is appropriate to include such events as "candidate-related political activity" by an organization.[12]

3. The rules should apply to all section 501(c) organizations. As proposed, the draft rules govern the definition of "candidate-related political activity" only for social welfare groups organized under § 501(c)(4) of the Code. The NPRM seeks comment on "whether the same or a similar approach should be adopted in addressing political campaign activities of other section 501(c) organizations. . . ." 78 Fed. Reg. 71537.

We strongly urge the IRS to adopt a common approach to the definition of "candidate-related political activity" for all section 501(c) groups. This is for two principal reasons.

First, a single definition of "candidate-related political activity" will be far easier to administer and enforce, and far easier for the regulated community to learn, understand and comply with, than multiple definitions that vary by non-profit status. In principle, there is no reason for different definitions—"candidate-related political activity" is what it is, and it does not change its nature based on which type of organization engages in it. The rules for permissible spending by different organizations may be different—some non-profits (like charitable organizations) may be prohibited entirely from engaging in partisan political activity, while others may be permitted to do insubstantial amounts of it—but that does not justify different definitions of what "candidate-related political activity" the rules apply to. To maintain different

[12] It would be appropriate to create a narrow exception for candidate appearances at truly non-partisan events, such as candidate debates or forums where, for instance, all major candidates are invited and the sponsors do not show preference for any candidate.

definitions is just to sow complexity and confusion, and disserves the purpose of this rulemaking, which is to simplify, rationalize and clarify the IRS rules in this area.

Second, and more importantly, having different definitions for different types of non-profit groups is likely to provide avenues for evasion of the rules, and thereby to defeat the whole purpose of this rulemaking. In other words, if rules defining "campaign-related political activity" are clarified and tightened for § 501(c)(4) purposes but not for other types of non-profit organizations, the activities at issue will simply shift to those other kinds of groups, and little will have been achieved. Uniformity of the rules is a key means to prevent evasion of the rules, by closing off the opportunity for groups seeking to evade disclosure simply shifting operations to a different kind of non-profit arm subject to more complaisant rules.

Relatedly, we support the additional proposal raised in the NPRM that a rulemaking be conducted to amend current regulations and provide that "candidate-related political activities" do not further the exempt purposes of groups organized under § 501(c)(5) (labor organizations) and § 501(c)(6) (trade associations). 78 Fed. Reg. 71537. Currently a regulation specifically states, with regard to § 501(c)(4) social welfare organizations, that "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." Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii). But there is no comparable rule with regard to §§ 501(c)(5) or (c)(6) status.

There should be. Just as campaign intervention has long been understood not to further the exempt purposes of social welfare organizations, the same is true of labor organizations and trade associations, both of which are organized for different exempt purposes. In principle, Congress did not create exemptions from taxation for these groups in order to facilitate their campaign activities, but instead to further their core purposes. The IRS should clearly state that campaign activity is not encompassed within those core purposes.

Indeed, without such parallel treatment of section 501(c)(4), (c)(5) and (c)(6) organizations, there is a great danger that campaign activity will simply shift away from section 501(c)(4) groups to the more permissively treated section 501(c)(5) and (c)(6) groups, both of which are already engaging in high levels of campaign spending. According to the Center for Responsive Politics, section 501(c)(5) groups spent $23.9 million dollars in election-related spending in 2012, and section 501(c)(6) groups spent a total of $55.3 million.[13] (Of this amount of spending by section 501(c)(6) groups, over $35.6 million was spent by the Chamber of Commerce alone). The sources of virtually all of the money for this spending were undisclosed because donor disclosure requirements do not apply to section 501(c)(5) or (c)(6) groups. If new rules constrain campaign-related spending by section 501(c)(4) groups—as they should—the pressure will increase to shift that undisclosed spending to labor organizations and trade associations. This will serve as a major avenue for evasion of the new § 501(c)(4) rules. Only by rationalizing the tax code treatment of all section 501(c) groups—both in the definition of "candidate-related political activity" and in rules governing how much such activity a group can engage in—will the law be most effectively enforced and the chances for circumvention minimized.

[13] *See* http://www.opensecrets.org/outsidespending/.

4. Conclusion. This is an extraordinarily important rulemaking. The IRS has a responsibility to see that the tax laws are properly interpreted, implemented and enforced. The tax laws provide that social welfare organizations operating under § 501(c)(4) of the tax code will be devoted "exclusively" to their exempt purposes, which do not include campaign-related activity. The tax laws further provide that any group that wishes to engage in substantial campaign-related spending is free to do so, but must organize under § 527 of the code.

The difference is not merely form over substance. Section 527 provides for public disclosure of spending, and of the sources of funding, for expenditures by "political organizations." This requirement of the tax code is being frustrated by groups that are engaging in substantial amounts of campaign-related spending and claiming tax-exempt status as social welfare organizations, in violation of the requirements of § 501(c)(4), and without complying with the disclosure obligations imposed by the tax code on section 527 groups.

There have been two election cycles since the *Citizens United* opinion was issued, and we are well into a third. The amount of money spent by 501(c)(4) organizations on candidate-related political activity from undisclosed sources grew dramatically between 2010 and 2012, and there is every reason to believe further growth will occur in the future. This is a problem that is directly within the purview of the IRS, since the principal vehicle for such spending has been groups claiming tax-exempt status as § 501(c)(4) social welfare organizations, which are taking advantage of lax, ill-defined and poorly enforced rules to exceed restrictions on campaign activities by such groups.

It is the responsibility of the IRS to fix this problem. Although the agency has been remiss in failing to start this rulemaking earlier, it is now underway and the agency should move forward with determination to take the steps necessary to restore effective disclosure of campaign money to elections in this country, by closing the loopholes that have allowed undisclosed money to flow into campaigns since *Citizens United.*

The IRS should not allow false and misleading claims about the purpose of this rulemaking to deter it from the clear need to adopt new rules and prevent future abuses of the tax laws.

We appreciate the opportunity to present these comments and we look forward to the opportunity to testify and to answer any questions.

Respectfully submitted,

/s/ Fred Wertheimer

Fred Wertheimer
President
Democracy 21
2000 Massachusetts Ave NW
Washington, DC 20036
202-355-9600

/s/ Rep. Chris Van Hollen

Rep. Chris Van Hollen
Member of Congress
1707 Longworth H.O.B.
Washington, DC 20515

/s/ J. Gerald Herbert

J. Gerald Herbert
Executive Director
Campaign Legal Center
215 E Street NE
Washington, DC 20002
202-736-2200

Donald J. Simon
Sonosky, Chambers, Sachse
Endreson & Perry LLP
1425 K Street NW—Suite 600
Washington, DC 20005
202-682-0240

Counsel to Democracy 21

Paul S. Ryan
The Campaign Legal Center
215 E Street NE
Washington, DC 20002
202-736-2200

Counsel to the Campaign Legal Center