FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

February 27, 2014

Ms. Amy Giuliano
CC:PA:LPD:PR (REG-134417-13)
Room 205
Internal Revenue Service
P.O. Box 7604, Ben Franklin Station
Washington, DC 20044

RE: Proposed Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities

Dear Ms. Giuliano,

Thank you for this opportunity to comment on your Notice of Proposed Rulemaking ("NPRM"), "Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities." Like many commenters, we applaud the IRS for taking steps to clarify its rules in this important area. Our comments do not reach the specifics of the proposed rules. Rather, we would like to make two general points based on our perspective as Commissioners on the Federal Election Commission (FEC).[1]

I. The IRS should consider the important public interest in the disclosure of political spending

One of the reasons that this rulemaking is important is because it will help to clarify which organizations are required to disclose their donors to the public in exchange for tax-exempt status. Organizations properly classified under 26 U.S.C. § 501(c)(4), which do not have the "primary purpose" of engaging in candidate-related political activity, are exempt from most taxation without being required to disclose their contributors. Organizations that engage in more candidate-related political activity than is permissible under § 501(c)(4) may be entitled to similarly favorable treatment, but may have to file under a different section of the Internal Revenue Code ("IRC") — usually 26 U.S.C. § 527, which requires disclosure of donors whose contributions are used for political activity. In this way, the IRC can draw a sensible balance,

[1] We submit this Comment in our individual capacity and not on behalf of the Commission as a whole.

promoting civic engagement while protecting the public's right to know who is seeking to influence elections.[2]

Although sections 501(c)(4) and 527 govern only who is entitled to tax-exempt status, some have accused the IRS of seeking with its new proposed rules to "ban" or otherwise restrict the ability of organizations to engage in political speech and expression. This is not accurate; organizations affected by the proposed rules change can — and will continue to be able to — spend an *unlimited* amount of money expressing views on political candidates.[3] And they will still be able to do so free from most federal taxation. Some of them may simply be required to comply with modest disclosure requirements in exchange for this subsidy.

To be sure, a number of commenters oppose such disclosure requirements on principle. Very often, their objections are framed as First Amendment concerns. As the Supreme Court has long held, however, disclosure requirements are not subject to as high a level of constitutional scrutiny as prohibitions on political speech. So long as a disclosure requirement has a "substantial relation" to "a sufficiently important governmental interest,"[4] it does not "abridge[e] the freedom of speech."[5]

Applying this framework over the years, solid majorities of the Court — including eight justices in *Citizens United v. FEC* — have embraced disclosure requirements as essential to a well-functioning democracy. Disclosure requirements "provid[e] the electorate with information and insure that the voters are fully informed about the person or group who is speaking."[6] They

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[2] This desire to promote transparency was plainly Congress's objective when it amended Section 527 in 2000. *See, e.g.*, 146 CONG. REC. S6041, S6046 (2000) (statement of Sen. McCain) ("[The amendments] will give the public information regarding one especially pernicious weapon that is being used in modern campaigns."); 146 CONG. REC. S5994, S5995 (2000) (statement of Sen. Feingold) ("[The amendments] will close the loophole that was opened at the intersection of the tax laws and election laws that allows unlimited amounts of completely secret contributions to flow into our campaign finance system and influence our elections."); 146 CONG. REC. H5282, H5285 (2000) (statement of Rep. Archer) ("[t]his bill does nothing but require disclosure... it is a disclosure bill."); 146 CONG. REC. H5282, H5285 (2000) (statement of Rep. Moore) ("[W]hat we are doing tonight...is disclosure so people will know who is trying to influence their vote and who is trying to influence Federal elections. That is the bottom line."); 146 CONG. REC. H5282, H5286 (2000) (statement of Rep. Lewis) ("Mr. Speaker, [the amendments] would close a huge loophole by requiring simple disclosure by these secret political organizations and groups. The American people have a right to know. They have a right to know who is funding political campaigns in this country. They have a right to know who is trying to influence their votes. The American people have a right to a free and open election process.").

[3] *See SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010).

[4] *Citizens United v. FEC*, 558 U.S. 310, 366-67 (2010) (quoting *Buckley v. Valeo*, 424 U.S. 1, 64 (1976)) (internal quotation marks omitted).

[5] U.S. CONST. amend I.

[6] *Citizens United*, 558 U.S. at 368 (internal citations and quotation marks omitted).

"deter[] actual corruption and avoid[] any appearance thereof."[7] And they "enable[] the electorate to make informed decisions and give proper weight to different speakers and messages."[8] As the Tenth Circuit has noted, disclosure requirements are "*even more essential and necessary* to enable informed choice in the political marketplace" after the Supreme Court's decision in *Citizens United*.[9]

Since *Buckley*, moreover, the Supreme Court has affirmed that disclosure requirements "in most applications appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist."[10] As the Court in *Citizens United* explained:

> "[D]isclosure is a less restrictive alternative to more comprehensive regulations of speech. In *Buckley*, the Court upheld a disclosure requirement for independent expenditures even though it invalidated a provision that imposed a ceiling on those expenditures. In *McConnell*, three Justices who would have found §441b to be unconstitutional nonetheless voted to uphold BCRA's disclosure and disclaimer requirements. And the Court has upheld registration and disclosure requirements on lobbyists, even though Congress has no power to ban lobbying itself."[11]

Disclosure's vital importance has been evident to us through our own work administering and enforcing campaign finance laws. Disclosure allows the media and voters to evaluate the true interests lying behind competing political messages. A more informed public can in turn better evaluate the substance of different policy alternatives. Disclosure is particularly important in an era when so much political spending comes from vaguely-named organizations about which there is otherwise little public information. Disclosure requirements also frequently play a vital role in helping authorities to detect serious violations of other campaign finance and ethics laws.

These important benefits to our democracy easily outweigh the incidental burdens that disclosure places on speech. As Justice Antonin Scalia has noted, "[r]equiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed."[12]

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[7] *McConnell v. FEC*, 540 U.S. 93, 195 (2003).

[8] *Citizens United*, 558 U.S. at 370.

[9] *Free Speech v. FEC*, 720 F.3d 788, 798 (10th Cir. 2013) (emphasis added).

[10] *Buckley v. Valeo*, 424 U.S. 1, 68 (1976) (per curiam).

[11] *Citizens United*, 558 U.S. at 369 (internal citations omitted).

[12] *Doe v. Reed*, 561 U.S. ___, 130 S. Ct. 2811, 2837 (2010) (Scalia, J., concurring).

The balance in favor of robust disclosure is particularly one-sided when such disclosure is not even an affirmative legal requirement, but merely a condition placed on a valuable tax subsidy.

Accordingly, in considering its proposed rules, we urge the IRS to keep in mind the important public interest in disclosure of candidate-related political spending.

II. The IRS need not defer to the FEC

In deciding whether and how to clarify its rules, the IRS should not feel obligated to defer to the FEC in determining how to apply section 501(c)(4)'s "primary purpose" test or in determining what constitutes "political activity," as some commenters urge.

In addition to the Federal Election Campaign Act ("FECA"), the FEC has jurisdiction over civil enforcement of the Presidential Election Campaign Fund Act and the Presidential Primary Matching Payment Account Act.[13] The Commission does not have jurisdiction over any other section of the tax code.

In applying the FECA's definition of "political committee," the FEC must use the "major purpose test" — a creation of the Supreme Court in *Buckley v. Valeo* that limits the definition of a political committee to "only encompass organizations that are under the control of a candidate or *the major purpose of which is the nomination or election of a candidate.*"[14] The Court did not specify how an organization's "major purpose" should be determined, but the FEC over time has developed a body of precedent and guidance elaborating how it interprets the test.[15]

Ironically, as the FEC has developed its approach to major purpose analysis, it has been urged to defer to primary purpose determinations *by the IRS.*[16] Most recently, in 2007, the FEC was urged to make an organization's election of tax-exempt status under section 527 a dispositive factor in its major purpose analysis under *Buckley*. The FEC declined to do so, observing in a Supplemental Explanation and Justification (the "2007 E&J") that "[n]either the FECA, its subsequent amendments, nor any judicial decision interpreting either, has substituted tax status as an acceptable proxy" for major purpose analysis.[17] The 2007 E&J goes on to explain that 527 tax-exempt status under the IRC is a much broader classification than federal political committee status, and that "it does not necessarily follow that all 527 organizations are

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[13] 2 U.S.C. § 437c(b)(1).

[14] 424 U.S. at 79.

[15] *See* Political Committee Status, Supplemental Explanation and Justification, 72 Fed. Reg. 5595 (Feb. 7, 2007) ("2007 E&J")

[16] *See, e.g., id.* at 5596.

[17] *Id.* at 5597.

or should be registered as political committees."[18] While the test for applying section 527 appeared to be "constitutionally adequate for the enforcement of tax laws," the FEC believed that the same test transposed on to the FECA would sweep in too many organizations that neither Congress nor the courts intended to be considered political committees.[19]

Today, the shoe appears to be on the other foot, with a number of commenters arguing that only organizations satisfying *Buckley*'s major purpose test should be required to elect 527 instead of 501(c)(4) status to obtain a tax exemption. Just as the FEC refused to transpose tax law onto the test for federal political committee status, however, so the IRS is not constrained by the more restrictive framework that *Buckley* mandated under the FECA in clarifying its own "primary purpose" analysis.[20] To adhere to such a limitation would arguably frustrate the broader goals of the IRC that the FEC itself recognized in the 2007 E&J, and unduly limit the IRS's ability to draw a common sense balance between encouraging civic engagement and fostering transparency.[21]

Finally, it should be noted that the current members of the FEC do not agree on the appropriate application of the major purpose test. Three Commissioners (including the undersigned) are in favor of adhering to the Commission's longstanding approach, which takes into account an organization's range of activities that support or oppose federal candidates.[22] Three other Commissioners favor a new, far narrower conception of the test, one that takes into account only an organization's communications "expressly advocating" the election or defeat of a federal candidate.[23] To the extent that commenters suggest that the FEC as a body has adopted

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[18] *Id.* at 5598.

[19] *Id.* (quoting comments) (internal elipses omitted).

[20] Of course, many of the activities that the FEC has traditionally analyzed in applying the major purpose test, *see* note 22, *infra*, also appear relevant to determining an organization's primary purpose. It does not follow from this partial overlap that section 527 can only be applied to organizations that satisfy the major purpose test, however.

[21] In fact, now that political committee status primarily serves a transparency function, federal courts have begun to question the constitutional necessity of imposing the major purpose test even in the campaign finance context. *See, e.g., Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 59 (1st Cir. 2011), *cert. denied*, 132 S. Ct. 1635 (2012); *Vermont Right to Life v. Sorrell*, 875 F. Supp. 2d 376, 392-95 (D. Vt. 2012).

[22] *See* Statement of Vice Chair Ravel and Commissioners Walther and Weintraub, Jan. 10, 2014, in Matter Under Review ("MUR") 6396 (Crossroads Grassroots Political Strategies). Such activities have traditionally included "direct mail attacking *or* expressly advocating the defeat of a Presidential candidate," "television advertising opposing a Federal candidate," spending on "candidate research" and polling, and "other spending . . . for public communications mentioning Federal candidates." 2007 E&J, 72 Fed. Reg. at 5605 (emphasis added).

[23] *See* Statement of Chairman Goodman and Commissioners Hunter and Petersen, Jan 8, 2014, in MUR 6396 (Crossroads Grassroots Policy Strategies). This approach runs decidedly again the weight of recent case law upholding the Commission's longstanding application of the major purpose test. *See, e.g., Free Speech*, 720 F.3d at 798; *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d. 544, 556 (4th Cir. 2012) ("*RTAA*"), *cert. denied*, 133 S. Ct. 841 (2013); *Shays v. FEC*, 511 F. Supp. 2d 19, 29-31 (D.D.C. 2007). It should also be noted that even what constitutes express advocacy has been a source of disagreement on the Commission. *Compare, e.g.*, Statement of

the latter view, they are mistaken. Moreover, it would be difficult to defer to "the FEC" as a whole under these circumstances.

The proposed rules outlined in the NPRM contain only limited cross-references to the FEC's regulations, leaving most important determinations in the hands of the IRS. This is a reasonable approach. We encourage the IRS to pursue clear guidance that represents the best of its independent judgment.

Thank you for the opportunity to submit these comments and for taking the time to address this important topic.

2/27/14
Date

Ann M. Ravel
Vice Chair

2/27/14
Date

Ellen L. Weintraub
Commissioner

Reasons of Chair Bauerly and Commissioner Weintraub, Oct. 21, 2011, in MUR 6346 (Cornerstone Action, et al.) *and* Statement of Reasons of Vice Chairman McGahn and Commissioners. Hunter and Petersen, Sept. 19, 2013, in MUR 6346 (Cornerstone Action, et al.).