



February 27, 2014

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

Dear Ms. Giuliano:

The Council on Foundations (“Council”) is a 501(c)(3) organization representing over 1,700 independent, operating, community, public and company-sponsored foundations, and corporate giving programs in the United States and abroad. As a national voice for philanthropy, our mission is to provide the opportunity, leadership, and tools needed for philanthropic organizations to expand, enhance, and sustain their ability to advance the common good.

The Council is committed to working closely with the Department of the Treasury (“Treasury”) and the Internal Revenue Service (IRS) to help create a policy environment in which philanthropy can grow and thrive. We appreciate this opportunity to comment on the proposed regulations on the political activities of 501(c)(4) social welfare organizations that were published for comment in the Federal Register on November 29, 2013. We submit our comments on behalf of our members, who are primarily 501(c)(3) organizations.

We recognize that guidance and clarity on the political activities of tax-exempt organizations is overdue—yet, these regulations are far too sweeping. We have three primary concerns to address. First, the proposed rules go beyond the rulemaking authority given to Treasury by Congress in that they reinterpret “social welfare” to exclude a category of civic education activities that Congress did not intend to bar. Second, if applied to 501(c)(3) organizations, the “candidate-related political activity” standard would conflict with a statutory provision that explicitly permits foundations to fund nonpartisan voter registration activities. Finally, the proposed rules, while not directly applicable, would nevertheless drastically chill the civic engagement activities of 501(c)(3) organizations, leaving a gaping void in vital nonpartisan civic education that has enhanced democratic participation for decades.

Issues for Comment

The proposed rules exceed Treasury’s express rulemaking authority delegated by Congress.

Under Internal Revenue Code (IRC) Section 7805(a), the Treasury Secretary “shall prescribe all needful rules and regulations . . . including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue.” In other words, Treasury has the authority to issue rules to implement the express provisions of law laid out by Congress in the IRC. Yet, in this proposed rulemaking, Treasury exceeds its rulemaking authority by transforming the meaning of Section 501(c)(4) of the IRC, radically altering the landscape for nonprofit organizations that engage in valid, nonpartisan civic engagement.

Express language set out by Congress in Section 501(c)(4) of the IRC provides that “an organization is operated exclusively for the promotion of social welfare if it is primarily engaged in *promoting in some way the common good and general welfare of the people of the community.*” For decades, Treasury has interpreted this social welfare standard to encompass organizations “operated primarily for the purpose of bringing about civic betterments and social improvements,” and to exclude “direct or indirect *participation or intervention in political campaigns* on behalf of or in opposition to any candidate for public office.” This interpretation aligns with language in Section 501(c)(3) of the IRC, which bans political campaign participation or intervention but does not prohibit other types of civic engagement activity. The IRC language for Section 501(c)(3) organizations suggests that to the extent that Congress intended to limit Section 501(c) political activity, it contemplated a ban on campaign activity only.

Historically, both 501(c)(3) and 501(c)(4) organizations have long been permitted to engage freely in nonpartisan civic education activities—so long as they were not involved in political campaigns. Yet, without a new mandate or direction from Congress, Treasury has added a new constraint to the definition of social welfare for (c)(4)s in this rulemaking: “the promotion of social welfare does not include direct or indirect *candidate-related political activity.*” The standard for “candidate-related political activity” is sweeping, and captures nonpartisan activities like voter registration and get-out-the-vote drives, voter guides, bipartisan candidate forums or debates, and communications that refer to candidates in any way while in proximity of an election.

With this change, Treasury unilaterally and dramatically narrows the activities that can promote social welfare, essentially redefining a statutory term. This significant policy shift far exceeds Treasury’s authority to implement the terms of the IRC.

If applied to 501(c)(3) organizations, the “candidate-related political activity” standard would be inconsistent with the IRC, which explicitly permits foundations to fund nonpartisan voter education and certain voter registration activities.

It has long been settled by tax law and campaign finance law that both public and private foundations may fund many types of nonpartisan, civic education activities without jeopardizing their tax-exempt status. Under current law, foundations can fund any voter education activities concerning issues or candidates that a 501(c)(3) public charity is permitted to conduct—including many of the nonpartisan

activities swallowed up by the proposed rule—as long as these activities are conducted in a nonpartisan manner and do not constitute impermissible legislative lobbying.

IRC Section 4945 creates an excise tax to discourage private foundations from engaging in grassroots or direct lobbying. Generally speaking, Section 4945 narrowly defines lobbying as attempting to influence the public or lawmakers about a piece of legislation. However, Section 4945(f) explicitly allows private foundations to make grants that are earmarked for nonpartisan voter registration purposes under specific guidelines. Yet, the sweeping definition of “candidate-related political activity” in the proposed rules would prohibit these nonpartisan voter registration activities by 501(c)(4)s. If this standard were to be applied to 501(c)(3)s—either explicitly or due to uncertainty and confusion involved with implementing these complicated rules—it would be contrary to the language of the IRC that expressly allows foundations to fund these activities.

The proposed rules would have a substantial chilling effect on civic engagement efforts of 501(c)(3) organizations, undermining decades of vital work educating the public and elevating the level of political discourse in the United States.

Philanthropy has a deep and rich history in U.S. civil society. 501(c)(3) foundations have long provided critical support to enable public charities to elevate important issues for public discourse. They are often the backbone behind grassroots efforts to create a more informed citizenry and energize voters to participate in the democratic process.

Yet, the proposed rules will inevitably deter 501(c)(3)s from engaging in perfectly legitimate nonpartisan civic education and voter engagement activities. Many nonpartisan activities that 501(c)(4)s currently undertake would be considered “political” for 501(c)(4)s but not for 501(c)(3)s, creating tremendous uncertainty, confusion, and burdensome compliance costs. In the face of this uncertainty, foundations concerned about compliance are far more likely to be cautious. Instead of continuing to rely on the “facts and circumstances” test for 501(c)(3)s, foundation staff may, out of an abundance of caution, conflate this test with the “candidate-related political activity” standard in the new rules and prohibit grantmaking for civic engagement activities altogether.

Even if most foundations comprehend the distinction between the political activity standards for 501(c)(3)s and 501(c)(4)s, cautious grantmakers may still decline from funding even nonpartisan civic engagement activities of 501(c)(3)s for fear that the IRS would deem this activity “political.” And, as IRS officers are charged with administering these complex rules and making nuanced distinctions between the standards governing (c)(3) versus (c)(4) organizations, they may err in imposing the more stringent standard for (c)(4)s on (c)(3)s.

At a time when the influence of big money in our election cycles has never been more pronounced, foundations and nonprofit organizations have an essential role to play in helping to educate and empower everyday citizens to make their voices heard. We strongly urge Treasury to consider the impact of this rule on the larger civic education environment in the United States, much of which is funded and carried out by 501(c)(3) organizations, and revisit the overly restrictive standard for “candidate-related political activity.”

Recommendations and Conclusion

We appreciate Treasury's efforts to provide much-needed clarity in an area of the law that has long been confusing for both nonprofit organizations and the IRS. We believe there is tremendous value in providing much more certainty on what types of political activity are permissible for all types of nonprofit organizations. Yet, we strongly urge Treasury to revisit the line for political activity drawn by these proposed regulations.

The "candidate-related political activity" standard goes beyond Treasury's rulemaking authority by capturing benign, nonpartisan activities that have traditionally been allowed and even encouraged. We also caution Treasury about extending the definitions in these rules to 501(c)(3) organizations. If applied to 501(c)(3)s, the "candidate-related political activity" standard would directly conflict with Section 4945(f) of the IRC. Finally, we are concerned that these rules would dampen the civic engagement efforts of 501(c)(3) organizations. If both 501(c)(4) and 501(c)(3) organizations no longer provide or support nonpartisan voter education activities, the public would be deprived of these invaluable services that are vital for democracy to function and thrive.

Respectfully submitted,

A handwritten signature in black ink that reads "Sue Santa". The signature is written in a cursive, flowing style.

Sue Santa
Senior Vice President
Public Policy & Legal Affairs
Council on Foundations