NATIONAL COUNCIL OF NONPROFITS
National voice. State focus. Local impact.

February 25, 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
VIA FEDERAL E-RULEMAKING PORTAL

RE: PROPOSED GUIDANCE FOR TAX-EXEMPT 501(c)(4) SOCIAL WELFARE ORGANIZATIONS ON CANDIDATE-RELATED POLITICAL ACTIVITIES

Dear Ms. Giuliano:

The National Council of Nonprofits welcomes this opportunity to offer comments in response to the Notice of Proposed Rulemaking (REG-134417-13) ("Notice") issued by the Treasury Department and the Internal Revenue Service ("IRS"). Our comments:

- Begin by identifying the core problem to be solved – the serious need for corrective action to stop the use of 501(c)(4) social welfare organizations for partisan political purposes that is, among other things, causing confusion with and harming the work of 501(c)(3) charitable nonprofits;
- Present principles for solving the core problem in a way that protects and promotes, rather than impedes, the significant contributions that charitable nonprofits and social welfare organizations make in their communities;
- Apply those principles by showing how the proposed regulations would negatively affect the ability of 501(c)(3) charitable nonprofits to advance their individual missions and their collective role in ensuring a strong democracy; and
- Conclude by calling on the Treasury Department and the IRS to withdraw the proposed regulations and begin anew with the guiding principles in mind, and by calling on Congress to address the significant statutory issues that are beyond the scope of rulemaking authority.

The National Council of Nonprofits' Interest in the Proposed Rulemaking

The National Council of Nonprofits is a 501(c)(3) charitable nonprofit that serves as a trusted resource and advocate for America's charitable nonprofits. Through our network of State Associations and 25,000-plus members – the nation's largest network of nonprofits – we serve as a central coordinator and mobilizer to help nonprofits achieve greater collective impact in local communities across the country. We identify emerging trends, share proven practices, and promote solutions that benefit charitable nonprofits and the communities they serve. Our core mission is "to advance the vital role, capacity, and voice of charitable nonprofit organizations through our state and national networks."

The National Council of Nonprofits' Public Policy Agenda calls for "[e]nsuring the integrity of charitable nonprofits by supporting the tax-law ban on electioneering and partisan political activities" because we recognize that when members of the public make charitable donations they want to know that their contributions go to advance the charitable mission rather than promote hidden partisan interests. Any confusion on this point puts charitable nonprofits at risk. Our Public Policy Agenda also directs us to "promote, support, and protect nonprofit advocacy" by "opposing restrictions on the advocacy rights of nonprofits [and] correcting misperceptions and clarifying lobbying laws." Again, any confusion about what constitutes legal nonprofit advocacy can silence the legitimate voices of charities.

As explained in more detail below, the proposed regulations would inject unnecessary confusion about the distinction between advocacy and electioneering in ways that threaten the ability of 501(c)(3) charitable nonprofits to meet their missions. Based on our experiences, the proposed rules would hurt charitable nonprofits, the people and communities they serve, and democracy at large.

I. The Core Issue to Be Addressed by New Regulations

Recent events, most notably the United States Supreme Court decision in *Citizens United v. FEC*, have motivated partisan interests to use largely newly-formed 501(c)(4) social welfare organizations to finance their political campaign agendas. The result has been scandal, confusion, diminished public respect for the work of all nonprofits, and, to our perspective, unnecessary and collateral damage to 501(c)(3) charitable nonprofits.

Charitable nonprofits operate in local communities across America. Their particular missions may appear divergent when looking with a narrow focus on the arts, education, health care, human services, religion and so much more, but collectively they also share common broader missions of improving lives, strengthening communities, and often advancing cherished American values of individual freedoms of expression and beliefs.

Federal law has long recognized the fundamental distinction for charitable nonprofits between partisan political electioneering (which is expressly forbidden) and authorized nonprofit advocacy, which comes in many forms, including lobbying, engaging in ballot measures (such as initiatives, referenda, and public bonding issues), and promoting public engagement through nonpartisan election-related activities. While charitable nonprofits can, do, and should advance their missions through advocacy, charitable nonprofits must remain entirely nonpartisan.

The Internal Revenue Code contains a bright-line test that strictly prohibits charitable nonprofits from engaging in partisan political activities. The same clarity of a bright-line, however, has not always existed regarding nonprofit advocacy. Since 1934, a vague standard has existed that "no substantial part of the activities" of charitable organizations may be devoted to legislative lobbying. The ambiguity of this tax-law test has historically and effectively discouraged the advocacy work of many charitable nonprofits, which have wondered where the line is drawn between what is "substantial" versus "insubstantial." In 1976, Congress provided some relief from the ambiguous "no substantial part of activities" limitation by offering nonprofits the option to use a bright-line test (in Section 501(h)) based on a sliding percentage of their expenditures. Yet Congress failed to index the expenditure test's fixed-dollar amounts, which now – more than 35 years later – are unreasonably

low. Furthermore, charitable nonprofits using the optional expenditures test may spend only 25% of their allowable lobbying expenses for "grassroots lobbying" to communicate with the general public.

In part because of the vague and artificial limitations on lobbying by charitable nonprofits, professional advisors to these organizations historically have often recommended creating companion 501(c)(4) social welfare organizations that could operate with a greater emphasis on advocacy. The IRS has long recognized the relationships and interplay between affiliated 501(c)(3) charitable nonprofits and 501(c)(4) social welfare organizations. Indeed, as the Notice admits, "The IRS generally applies the same facts and circumstances analysis under section 501(c)(4). See Rev. Rul. 81–95 (1981–1 CB 332) (citing revenue rulings under section 501(c)(3) for examples of what constitutes participation or intervention in political campaigns for purposes of section 501(c)(4))."

As a result of the *Citizens United* decision in 2010, however, individuals and special interests have utilized 501(c)(4) social welfare organizations for pursuit of partisan election-related activities and have largely disregarded the historic community-benefit purpose of this category of organizations. They have converted a community-based solution into a vehicle for financing partisan election campaigns that prevent the public from knowing who is seeking to influence their opinions and votes. The National Council of Nonprofits is participating in this rulemaking process because charitable nonprofits – and thereby the individuals and communities they serve – are being hurt in the confusion surrounding the acts of those abusing the legitimate purpose of 501(c)(4) social welfare organizations, and would be injured further by the confusion resulting from the proposed regulations, if adopted.

II. Statement of Principles

The National Council of Nonprofits has no interest in the partisan bickering that has characterized many of the comments submitted during the public comment period. We do acknowledge, however, that the scandals and confusion that prompted the proposed rulemaking are a product of the failed campaign finance laws in the United States. That being said, we believe that the following principles should guide the Treasury Department and the IRS in developing a workable system of regulation and oversight in this area of free speech, community engagement, and transparency:

1. **Maintain the Ban on Partisan Election Activities by Charitable Nonprofits**: The ban on partisan political activities by 501(c)(3) organizations is essential to maintaining public trust in our charitable nonprofits and must be preserved. The public deserves to know that funds they donate to charitable nonprofits are not being used to influence partisan political elections.
2. **Update the Lobbying Restrictions on Charitable Nonprofits**: The limitations on <u>non</u>partisan legislative lobbying by charitable nonprofits are unreasonably low and outdated, forcing larger charities to turn to 501(c)(4) social welfare organizations when their missions can best be advanced by a greater emphasis on lobbying.
3. **Honor the Public's Need for Clear Rules**: The public needs clear, logical, and enforceable rules regulating how organizations engage in partisan election-related activities, and individual voters are entitled to know who is seeking to influence their votes. The recent funneling of hundreds of millions of dollars through 501(c)(4) social welfare organizations for partisan election-related activities has exacerbated public confusion and disrespect for the political process in this country. This disrespect adversely affects the ability of charitable nonprofits to promote solutions in their communities as people tune out anything having to do with government. Confusion has

been exacerbated further by the lack of understanding by public officials and the news media of the distinctions and restrictions that apply to different types of nonprofits. The National Council of Nonprofits is forced to devote considerable time to correcting mistakes of reporters who refer to "political nonprofits" without drawing the essential distinctions between nonpolitical charitable nonprofits and political non-charitable nonprofits. When the public fears that their donations to a charitable nonprofit's mission might be diverted for partisan election-related purposes, they will stop giving to charities, which in turn will hurt local communities.

4. **Lack of Clarity Curbs Free Speech**: The staff members, boards, and volunteers of charitable nonprofits in local communities across America deserve to have bright lines in place that make clear what they can and cannot do without having to hire an attorney. It is the experience in the charitable nonprofit community that individuals and institutions threatened with penalties and revocation of tax-exempt status often steer clear of exercising their rights to free speech, even when raising their voices is essential to advancing their missions and beliefs. Confusion over the distinction of what is and is not partisan election-related activity, as well as what is permissible nonpartisan advocacy versus inappropriate partisan electioneering, damages public trust in the work of charitable nonprofits.
5. **Undisclosed Partisan Contributions Harm Charitable Nonprofits and the People and Communities They Serve**: Since 2010, our nation has experienced the unprecedented infusion of undisclosed partisan political contributions, sometimes called "dark money," to partisan election-related activities through 501(c)(4) social welfare organizations. This undisclosed participation in partisan political campaigns generates misunderstandings and frustrations, adding to the cynicism of the public to our nation's political process and institutions. As a result, the infusion of "dark money" harms the ability of nonpartisan charitable nonprofits to advance their missions in communities because people tune out anything having to do with government.

With these five principles in mind, we find that the proposed regulations fail to advance the needs of the public, our communities, and the ability of charitable nonprofits to advance their missions. For this reason alone, the proposed regulations should be withdrawn and federal officials should convene meetings to gather information and encourage broad public input.

III. Specific Concerns with the Proposed Regulations

Although the proposed regulations purport to focus on anonymous money in partisan election-related activities, as written they inject confusion rather than provide clarity and thus pose great threats to the community-based work of charitable nonprofits.

Fail to Address the Fundamental Problems

The proposed regulations define "campaign-related political activity," but they do not address the fundamental problems that have led to recent abuses and scandals. The proposed regulations do not provide a clear rule by saying how much campaign-related political activity is too much. Nor do they address the problems associated with "dark money" by requiring the disclosure of donations dedicated to campaign-related political activity. These defects are unfortunate and must be addressed in future rulemaking or through clarification by Congress.

Nonpartisan Election-Related Activities

The proposed definition of "campaign-related political activity" for 501(c)(4) organizations goes too far by including both partisan and nonpartisan election-related activities such as voter guides, candidate forums, and voter registration activities. These activities, when done on a nonpartisan basis, are at the core of the democracy initiatives of many charitable nonprofits. Having different standards for 501(c)(3) charitable nonprofits and 501(c)(4) organizations will be too confusing, especially given that, as the Notice admits, the IRS has generally applied the same factors to the two types of organizations. By switching the rules on 501(c)(4) organizations, people in the field will be confused as to whether the new standard will apply to 501(c)(3) charitable nonprofits as well. The proposed regulations would thus have a chilling effect on the important role that charitable nonprofits play by blurring the lines and confusing the public, while also discouraging the support of funders who seek to promote civic engagement through nonpartisan voter engagement. To prevent gamesmanship and shopping for alternative corporate forms and tax-exempt status due to potentially different standards, the rules for nonpartisan election-related activities should be defined and applied universally to charitable nonprofits and non-charitable nonprofits in the 501(c) categories. On this point, the National Council of Nonprofits endorses the comments submitted by Nonprofit VOTE and numerous other organizations.

Attestation

The proposed regulations (at Sec. 1.501(c)(4)-1(a)(2)(iii)(D)) provide that a contribution to another 501(c) organization will not be treated as a "campaign-related political activity" if the recipient provides a written representation stating that it does not engage in such activity. As "campaign-related campaign activity" is defined, charitable nonprofits that provide nonpartisan election-related materials and promote registration and voting will not be able to make the attestation under this provision. Nonpartisan voter registration or get-out-the-vote efforts and nonpartisan voter guides would all fall under the definition of "candidate-related political activity." A charitable nonprofit that conducts or engages in any of these would not be able to attest to a 501(c)(4) that it was not engaged in "candidate-related political activity," even though the organization is operating entirely in a nonpartisan manner under the law that applies to 501(c)(3) organizations.

Black-Out Periods

The proposed regulations unjustifiably blend and confuse lobbying and electioneering by treating grassroots nonpartisan lobbying activities as "campaign-related political activities" during the period leading up to a primary or general election. The proposal essentially declares all speech that names a candidate during the so-called black-out periods to be "partisan political" speech. As has been the case with partisan election-related actions by some types of nonprofits, the public, policymakers, and the news media will not make a distinction between nonpartisan charitable nonprofits and non-charitable political nonprofits. It is of little consequence that charitable nonprofits are currently exempt from similar provisions in campaign finance laws and may not initially be covered by the proposed regulations. This provision will operate to squelch the speech rights of charitable nonprofits engaging in legitimate and lawful lobbying activities. The National Council of Nonprofits endorses the comments of Independent Sector expressing concern for the impact of the application to black-out periods on 501(c)(4) social welfare organizations.

IV. Recommendations

In light of the foregoing, the National Council of Nonprofits recommends the following actions:

Restart

The Treasury Department and IRS should withdraw the proposed regulations and commit to a new rulemaking process that includes public input before drafting proposed regulations. The rulemaking process should embrace the principles expressed in these comments to ensure the ability of charitable nonprofits to advance their missions in their communities while promoting public confidence and preventing public confusion.

Correct the Artificially Low Lobbying Limits for Charitable Nonprofits

When re-launching the rulemaking regarding 501(c)(4) organizations, the IRS should recognize an important fact not acknowledged in the current set of proposed regulations: that a common legitimate reason that people create new 501(c)(4) organizations has been the arbitrarily low and out-of-date limits on how much 501(c)(3) charitable nonprofits may expend on legislative lobbying activities, including grassroots lobbying. To the extent practicable, Treasury and the IRS should explore ways to raise the existing limits on lobbying activities by 501(c)(3) charitable nonprofits. Likewise, Congress can reduce the need for 501(c)(4) organizations by raising the artificially low lobbying limits on charitable nonprofits set in the Internal Revenue Code.

Money and Politics

The Treasury Department and IRS understandably are seeking to address symptoms of the country's failed campaign finance laws by utilizing their authority under the Internal Revenue Code. The proposed regulations attempt to treat campaign finance problems as tax issues because that is all that Treasury and the IRS can do. The National Council of Nonprofits urges Congress to acknowledge that the tax-enforcement agencies are not adequately resourced to police the enormous challenge of money in politics and will always be seeking, after the fact, to impose new regulations to address new scandals and abuses. The abuses of 501(c)(4) social welfare organizations that prompted this set of proposed regulations should serve as a clear sign that the campaign finance laws are broken, and Congress has the primary role to play in restoring public trust through reforms that will provide transparency and fairness.

Respectfully submitted,

Tim Delaney
President & CEO

David L. Thompson
Vice President of Public Policy