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Via Federal eRulemaking Portal

The Honorable John A. Koskinen
Commissioner of Internal Revenue
CC:PA:LPD:PR (REG-134417-13), Room 5205
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

RE: Comments on IRS NPRM, REG-134417-13 (“Draft Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities”)

Dear Commissioner Koskinen:

On behalf of its more than 12,000 members, the National Association of Manufacturers (“NAM”) respectfully submits these comments in response to the above-referenced Notice of Proposed Rulemaking (the “NPRM”) issued by the Internal Revenue Service (the “IRS”) and the Treasury Department on November 29, 2013.¹

Although the NPRM addresses proposed rules governing 501(c)(4) entities specifically, and thus does not apply directly to the NAM (a trade association under 26 U.S.C. § 501(c)(6)), the NPRM asks whether “the same or a similar approach should be adopted in addressing political campaign activities of other section 501(c) organizations” and, specifically, “the advisability of adopting this approach in defining activities that do not further exempt purposes under sections 501(c)(5) and 501(c)(6).”²

As discussed more fully below, the NAM strongly urges the IRS not to adopt the proposed rules for 501(c)(4) organizations nor to extend them to other 501(c) organizations. The NPRM proposes to treat many legislative advocacy and civic activities as “candidate-related political activity” (“CRPA”), which the IRS up to this point has not considered to be political activity restricted for tax-exempt organizations. Given that any rule adopted for 501(c)(4) entities pertaining to political activity could be applied by the IRS and tax law practitioners by analogy (if not directly) to other tax-exempt organizations, the adoption of the proposed rules would severely restrict the advocacy and civic activities of 501(c)(6) trade associations like the NAM, thereby undermining their core purpose.³

¹ Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities, 78 Fed. Reg. 71,535 (Nov. 29, 2013).

² *Id.* at 71,537.

³ *See, e.g.*, Rev. Rul. 2004-6 (applying a unitary approach to determining political campaign intervention for 501(c)(4), 501(c)(5), and 501(c)(6) entities).

DISCUSSION

A) About the National Association of Manufacturers

The NAM is a trade association organized under 26 U.S.C. § 501(c)(6). Founded in 1895, the NAM is the oldest and largest manufacturing association in the United States, representing more than 12,000 small and large manufacturers in every industrial sector and in all 50 states. Its membership also includes more than 250 other 501(c)(6) trade associations. NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the vital role of manufacturing to America's economic future and living standards.⁴

Throughout its history, the NAM has used mass media to advance its mission and its members' interests. During the 1950s, NAM was a pioneer in commercial television programming with its "Industry on Parade" segments. During the 1980s, before the Internet became common, the NAM reached its members through an online communication network known as "NAMnet." Holding events with elected officials has also been a cornerstone of the NAM's legislative advocacy activities. For example, President Kennedy's speech to NAM members in December 1961 kicked off the effort to pass the Trade Expansion Act of 1962.

As the following discussion explains, the NPRM will undermine all of these longstanding hallmarks of the NAM's activities, in which thousands of other tax-exempt entities-- large and small-- also engage to advance their interests and the interests of their members.

B) Overview of NAM's Advocacy and Civic Activities

The NAM exists for "the improvement of business conditions," not only for its members, but for the public as a whole.⁵ Better business conditions mean a better economy, with better jobs and better lives for all Americans. The NAM accomplishes this by functioning as a speech organization; it acts as a single voice for its many members across the country and articulates their interests and views on how to preserve and strengthen the American manufacturing sector. By its very nature, this involves speaking about legislative and public policy issues.

As the IRS has determined previously, similar to the purpose of 501(c)(4) organizations,⁶ a 501(c)(6) entity's main purpose under the tax code may consist of "the influencing of legislation which is germane to such common business interest" and general policy advocacy.⁷ Similarly, although the IRS has not addressed specifically the sponsorship by 501(c)(6) entities of civic and public education activities such as non-partisan voter registration and get-out-the-vote drives, voter guides compliant with Federal Election Commission regulations, and events

⁴ See, e.g., National Association of Manufacturers, IRS Form 990, 2011.

⁵ See 26 C.F.R. § 1.501(c)(6)-1.

⁶ See Rev. Rul. 71-530, 67-293, 61-177.

⁷ See Rev. Rul. 61-177; *Assoc. Indus. of Cleveland v. Comm'r*, 7 T.C. 1449 (1946).

with public officials who happen to be candidates for reelection, such activities also are consistent with the core purpose of a 501(c)(6),⁸ to the extent the IRS has not determined such activities to be political campaign intervention.⁹

Consistent with this legal framework, NAM has engaged in, and has plans to continue to engage in, all of these activities, which are core to the mission of the organization.

C) The Proposed Rules' Impact on NAM's Issue Advocacy

Legislative and policy advocacy are at the core of the NAM's mission. The NAM and its members are involved in, and are impacted by, the entire gamut of legislative and regulatory issues, whether it be laws affecting health care, international trade, labor relations, energy, the environment, tax, immigration, and virtually any other public policy issue that may arise.

As the IRS has recognized several times, there are many instances in which a tax-exempt organization may have reason to identify public officials who happen to be candidates for reelection, and to urge their members or the public to contact those officials concerning the officials' public policy positions or votes on legislative matters. The IRS has provided numerous examples of how such activities, if conducted by 501(c)(3), (c)(4), (c)(5), and (c)(6) entities, would not constitute political campaign intervention that is restricted or prohibited for such entities.¹⁰

Yet, the NPRM would categorize any public communication that so much as mentions a public official who happens to be a candidate for reelection, and is made within 60 days before a general election or 30 days before a primary, as restricted candidate-related political activity.¹¹ If these proposed rules were extended (whether directly or indirectly) to trade associations such as the NAM, they would severely undermine the NAM's ability to communicate with its members, with the public, and with public officials about important policy issues and to advocate for its members' interests, which, as discussed above, the IRS and United States Tax Court have recognized is a core activity for 501(c)(6) entities.¹²

Tellingly, the IRS itself previously has acknowledged that tax-exempt entities not only have a compelling interest in identifying elected officials in policy advocacy communications, but that such communications may be made close in time to an election without their being treated as political campaign intervention. In all of the examples from the IRS's revenue rulings

⁸ Internal Revenue Service, IRC 501(c)(6) Organizations, 2003 EO CPE Text at K-21 ("Whether the activities of a business league actually lead to real and permanent improvement of business conditions is immaterial so long as reasonably prudent businessmen believe they will improve business conditions." (citing *Assoc. Industries of Cleveland*, 7 T.C. at 1466).

⁹ See Rev. Rul. 2007-41; see also G.C.M. 34233 (Dec. 3, 1969) (determining that "political activities" may not be a 501(c)(6) entity's "primary purpose," but that "participation in political activities will not disqualify it from exemption" so long as its "primary activity is directed to influencing legislation which is germane to the interests of the organization.").

¹⁰ See, e.g., Rev. Rul. 2004-6 ("Situations 1," "2," and "5"); see also Rev. Rul. 2007-41 ("Situation 14").

¹¹ NPRM at 71,539.

¹² See note 7, *supra*.

discussed above, the communications' proximity to an election was stipulated, and such proximity was not considered to be a factor that caused them to be treated categorically as political activity.¹³

The NPRM further exacerbates the proposed rules' draconian effects by applying the scope of CRPA to content posted on an organization's website, which would cause advocacy communications posted on a website *at any time* that previously was not CRPA to become transformed suddenly into CRPA unless such content were removed during the 30-day and 60-day time windows.¹⁴

The NAM maintains on its website an archive of its posted content about legislative and policy issues going back several years. The NAM believes it is in the interest of its members and the public for its policy positions to remain in a publicly accessible repository, not only because some of the historical content may remain relevant as the same policy issues come up again, but also for the sake of transparency for persons who may have an interest in evaluating NAM's positions over the long term. For example, the NAM has posted on its website the NAM congressional voting record for members of the U.S. House of Representatives and U.S. Senate since January 1997 – the start of the 105th Congress.

If the proposed rules were to apply to 501(c)(6) entities (whether directly or indirectly), the NAM would have to constantly monitor its archived content and remove certain posts to ensure that the organization does not exceed the restrictions imposed by the IRS on the NAM's ability to engage in CRPA, and even then it faces the dilemma of whether to allocate resources necessary to repost the content after the restricted time windows have passed (and subsequently removing it again when the windows recur), or to simply keep the content deleted. As much of an administrative burden as this appears to be, it is compounded by the fact that the time windows are tethered not only to general elections, but to primaries as well, of which there are fifty for elections for federal office,¹⁵ and many states and municipalities also have their own separate primary and general election dates for elections for non-federal elections. The alternative would be for the NAM simply not to make its archived website content publicly available, which would be a disservice to its members and the public, decrease transparency, and infringe on the NAM's First Amendment rights (as discussed more fully below).

D) The Proposed Rules' Impact on NAM's Non-Partisan, Candidate-Neutral Voter Guides and Voter Registration and Get-Out-the-Vote Drives

The federal campaign finance laws permit a trade association to make certain communications beyond its membership without treating those communications as expenditures in connection with an election. Among them, trade associations may "make registration and get-out-the-vote communications to the general public, provided that the communications do not

¹³ See note 10, *supra*.

¹⁴ NPRM at 71,539. The federal campaign finance statute, by contrast, does not include Internet content under the definition of "electioneering communications," nor does it include many of the other forms of communications that would be covered by the IRS's proposed rules. See 2 U.S.C. § 434(f)(3)(A)(i).

¹⁵ See, e.g., Federal Election Commission, 2014 Electioneering Communications Periods, at http://www.fec.gov/info/charts_ec_dates_2014.shtml (last visited Feb. 20, 2014).

expressly advocate the election or defeat of any clearly identified candidate(s).”¹⁶ The NAM avails itself of the ability to engage in such speech. Trade associations may also distribute to the general public “any registration and voting information, which has been produced by election officials.” The NAM also avails itself of this permissible First Amendment speech. Federal campaign finance laws also allow trade associations to “prepare and distribute . . . voter guides consisting of two or more candidates’ positions on campaign issues” if done in accordance with certain parameters.¹⁷ The NAM also avails itself of this First Amendment speech. None of these activities are deemed to be “expenditures” by trade associations under the federal campaign finance laws.¹⁸ In other words, the federal campaign finance laws, which otherwise prohibit expenditures by trade associations to influence an election (other than independent expenditures), freely permit these activities.

Like the issue advocacy activities discussed above, the NAM has sponsored non-partisan voter registration, absentee ballot and get-out-the-vote (“GOTV”) drives as well as voter guides. The voter registration, absentee ballot and GOTV drives ensure that NAM members’ employees and families, as well as members of the general public, have their voices represented at the polls and have as much information as possible when they cast their votes. The NAM believes that a more engaged citizenry leads to a stronger democracy as well as a better business environment, thereby further benefiting its members.¹⁹

Like its issue advocacy activities, NAM’s non-partisan voter registration and get-out-the-vote efforts are also activities that the IRS previously has concluded do not constitute prohibited or restricted political activities for tax-exempt organizations.²⁰ Yet, the NPRM proposes to treat all of these activities as a subset of CRPA known as “election-related activities,” and, like the other forms of CRPA discussed above, also would be restricted for any tax-exempt organizations to which they were applied (whether directly or indirectly).²¹

As the NPRM states:

The Treasury Department and the IRS acknowledge that under the facts and circumstances analysis currently used for section 501(c)(4) organizations as well as for section 501(c)(3) organizations, these election-related activities may not be considered political campaign intervention if conducted in a non-partisan and unbiased manner. However, these determinations are highly fact-intensive.²²

¹⁶ See 11 C.F.R. §§ 114.4(c)(2).

¹⁷ See 11 C.F.R. §§ 114.4(c)(5).

¹⁸ See 2 U.S.C. §§ 431(a)(B)(ii) and (iii).

¹⁹ See, e.g., Howard Steven Friedman, American Voter Turnout Lower Than Other Wealthy Countries, HUFFINGTON POST, Jul. 10, 2012, at http://www.huffingtonpost.com/howard-steven-friedman/voter-turnout-europe-america_b_1660271.html (last visited Feb. 20, 2014). Professor Friedman suggests that voter participation is a key measure of a country’s global competitiveness.

²⁰ See, e.g., Rev. Rul. 2007-41 (“Situation 1”); Rev. Rul. 78-248 (“Situations 1” and “2”); Rev. Rul. 80-282.

²¹ NPRM at 71,539-71,540.

²² *Id.* at 71,540. See note 3, *supra*.

However, when regulating speech at the core of the First Amendment, one cannot tread on these rights for the sake of expediency. As detailed below, the NPRM infringes on the First Amendment when it categorically restricts the extent to which tax-exempt organizations may communicate with their members and the public about civic participation, even when done in a non-partisan specific fashion.

In short, like the proposed rules regulating issue advocacy, if the proposed rules governing non-partisan, candidate-neutral voter registration, GOTV, absentee and voter guides were to be applied (whether directly or indirectly) to 501(c)(6) entities such as the NAM, they would have a severely detrimental effect on the entities' ability to engage in their core missions of serving their members and the public interest.

D) The Proposed Rules' Impact on the NAM's Events With Elected Officials

The NAM routinely invites elected officials to address its members and its board of directors. These events are an opportunity to meet with and to hear first-hand from public officials who are instrumental in enacting and executing the policies that impact the NAM, its members and the overall business climate in our country. They are an important component of the NAM's core mission, as discussed above, of advocating on behalf of its members' policy interests, and they are an integral part of democratic governance. These types of meetings between elected officials and constituencies representing vast segments of the economy and society occur every day across America.

Yet, like the other activities discussed above, the proposed rules would severely restrict tax-exempt organizations' ability to sponsor such meetings by treating them as CRPA if they feature a public official up for reelection within 30 days of a primary or 60 days of a general election.²³ Again, this is unjustified, as the IRS previously has determined that tax-exempt organizations could sponsor such events without implicating the restrictions on political campaign intervention.²⁴ The IRS has permitted such events not only where a speaker appears in his or her official capacity, but even in instances where the candidate's appearance is overtly political.²⁵

If the proposed rules governing events with elected officials were to apply (whether directly or indirectly) to 501(c)(6) entities such as the NAM, they would severely undermine the ability of trade associations to hear directly from or speak directly to government officials about their members' legitimate policy concerns.

E) The Proposed Rules' Inconsistency With Federal Election Law

The proposed rules, by their own terms, are intended to regulate all manner of "political activities," "candidate-related political activities," and "election-related activities."²⁶ While some may believe there may be a legitimate need for the IRS to address political activity at some

²³ NPRM at 71,540.

²⁴ Rev. Rul. 2007-41.

²⁵ *Id.*

²⁶ NPRM at 71,535 and 71,539.

level, due to the tax code's exclusion or restriction of political activity for 501(c) organizations, this does not warrant the development of a completely separate and mostly contradictory set of substantive law setting forth what constitutes political activity.

Congress has already written almost 100 pages of statute on this matter, and, in the same laws, has provided for a separate administrative agency to regulate political activity at the federal level.²⁷ As the Supreme Court has noted, "The [Federal Election Commission] has adopted 568 pages of regulations, 1,278 pages of explanations and justifications for those regulations, and 1,771 advisory opinions since 1975."²⁸ As the National Taxpayer Advocate, a statutorily created independent organization within the IRS,²⁹ has stated, under the current approach, "The IRS, a tax agency, is assigned to make an inherently controversial determination about political activity that another agency may be more qualified to make."³⁰

Instead, the Taxpayer Advocate has recommended "legislation [that] could authorize the IRS to rely on a determination of political activity from the Federal Election Commission (FEC) or other programmatic agency. Specifically, the FEC would have to determine that proposed activity would not or does not constitute excessive political campaign activity."³¹

The problem the Taxpayer Advocate has identified is the confusing and disparate treatment of political activity by the IRS and FEC. This lack of uniformity between the two authorities undermines compliance with the law because the regulated community cannot understand how to comply with both sets of rules when they appear to contradict each other. Instead of mitigating this problem, the NPRM makes things worse.

To begin with, the NPRM explains that the definition of CRPA "draw[s] from provisions of federal election campaign laws that treat certain communications that are close in time to an election and that refer to a clearly identified candidate as electioneering communications, but make certain modifications."³² However, the NPRM's treatment of electioneering-communications-based CRPA is actually contrary to the campaign finance law's treatment of electioneering communications ("ECs").

Specifically, the federal campaign finance statute provides that "electioneering communications," which are certain broadcast advertisements that reference candidates shortly before elections, are not to be treated as "expenditures" or "independent expenditures."³³ If an entity spends more than \$1,000 per calendar year on "expenditures" or "independent expenditures," and such activities are its "major purpose," it is regulated as a "political

²⁷ See Federal Election Campaign Act of 1971, as amended, 2 U.S.C. § 431 et seq.

²⁸ *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 334 (2010).

²⁹ 26 U.S.C. § 7803(c).

³⁰ Nina Olson, National Taxpayer Advocate, Special Report to Congress: Political Activity and the Rights of Applicants for Tax-Exempt Status 16 (2013), available at <http://www.taxpayeradvocate.irs.gov/userfiles/file/FullReport/Special-Report.pdf>.

³¹ *Id.*

³² NPRM at 71,539.

³³ 2 U.S.C. §§ 434(f)(3)(B)(ii).

committee” subject to more onerous registration and ongoing reporting requirements.³⁴ Because ECs are not expenditures or independent expenditures, an entity could sponsor ECs as its exclusive activity and not be subject to the transformative regulatory treatment as a political committee. However, the NPRM takes a contrary approach with its EC-based “candidate-related political activities,” which already do not count toward an entity’s exempt purpose. In contrast to how the campaign finance law treats ECs, under the proposed rule, a 501(c)(4) entity that engaged primarily in CRPA would be subject to a transformative regulatory treatment.

This same conflict between the IRS’s NPRM and the campaign finance laws is evident in all of the other activities discussed above as well. While the FEC regulations do not treat non-partisan voter registration and GOTV and voter guides as political expenditures or contributions, the NPRM takes the opposite approach.³⁵ While the FEC regulations provide that corporate entities (whether for- or non-profit) may sponsor events with elected officials without their being considered a political contribution or expenditure by the sponsoring entity, the NPRM takes the opposite approach.³⁶ As with the campaign finance law’s treatment of ECs, none of these activities would cause a transformative change in the way an entity is regarded under the campaign finance laws, but under the NPRM, they could cause a revocation of a 501(c) entity’s tax status.

F) The Proposed Rules’ Infringement on the First Amendment

As explained above, the NPRM would regulate speech activities that form the core purpose of tax-exempt entities like the NAM. Thus, the proposed rules must be considered “against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open”³⁷

The proposed rules regulate the content of speech. The definition of CRPA is triggered if exempt organizations’ communications contain references to elected officials, to voting, or to candidates’ positions on the issues. The proposed rules also regulate the amount of speech, by limiting the extent to which exempt organizations may sponsor communications meeting the definition of CRPA. Courts generally have frowned on exactly these types of limits on the content and amount of speech as violative of the First Amendment.³⁸

Additionally, in the seminal case of *Regan v. Taxation with Representation*, the Supreme Court held that restrictions on a 501(c)(3) entity’s ability to engage in lobbying do not infringe on its First Amendment rights, provided that the entity may form an affiliated 501(c)(4) entity to lobby.³⁹ Here, if the proposed rules were extended to other tax-exempt entities (as they likely

³⁴ See 2 U.S.C. §§ 431(4), 433, 434(a) and (b); *Buckley v. Valeo*, 424 U.S. 1, 79 (1976).

³⁵ See 11 C.F.R. §§ 114.4(c)(2) and (c)(5).

³⁶ 11 C.F.R. § 114.3(b)(2), 114.4(b)(1).

³⁷ *New York Times Co. v. Sullivan*, 376 U.S. 254, 271 (U.S. 1964).

³⁸ See, e.g., *Reno v. ACLU*, 521 U.S. 844, 874 (1997) (“The CDA [Communications Decency Act] lacks the precision that the First Amendment requires when a statute regulates the *content* of speech . . . the CDA effectively suppresses a large *amount* of speech that adults have a constitutional right to receive and to address to one another.” (emphasis added)).

³⁹ 461 U.S. 540 (1983).

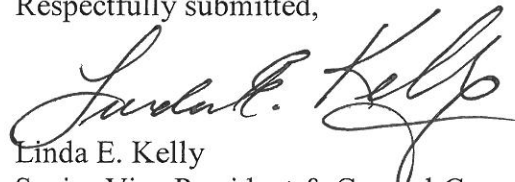
would be if adopted, as discussed above), exempt organizations would have to choose between either limiting the amount of their speech or altering the content of their speech. They would not have the alternative means of speaking that the Supreme Court found was dispositive in *Regan*.

Lastly, not only do the proposed rules pose a severe infringement on NAM's First Amendment right to speak, they infringe on the rights of its members, the public, and their elected representatives to be the recipients of the NAM's speech.⁴⁰

CONCLUSION

The National Association of Manufacturers appreciates the opportunity to submit these comments. The Administrative Procedure Act guarantees members of the public the opportunity to provide their input on rulemakings such as this one because it is important for policymakers within federal administrative agencies to be informed by perspectives outside the ivory tower of government.⁴¹ This public input is no less important for policymaking and legislating by elected government officials. The proposed rules would severely impact the ability of tax-exempt groups, in a very negative way, to mobilize their members and the public to voice their opinions to their elected officials, as well as inhibit the ability to sponsor basic civic activities that encourage a more participatory democracy. For these reasons, the NAM strongly urges the IRS not to adopt these proposed rules for any type of tax-exempt entity.

Respectfully submitted,



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⁴⁰ *Martin v. Struthers*, 319 U.S. 141, 143 (1943) (the First Amendment “embraces the right to distribute literature, and necessarily protects the right to receive it.”) (internal citations omitted).

⁴¹ See 5 U.S.C. § 553(c).