February 27, 2014

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RE: Comments on IRS NPRM, REG-134417-13 ("Draft Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities")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 2,300 members, the International Sign Association ("ISA") 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 ISA(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 ISA 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 ISA, thereby undermining their core purpose.[3]

DISCUSSION

[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).

A) About the International Sign Association

The ISA is a 2,300 member trade association organized under 26 U.S.C. § 501(c)(6). Our members are manufacturers, suppliers, distributors and users of on-premise signs and sign products from the 50 United States and 60 countries around the world. ISA supports, promotes and improves the worldwide sign and visual communications industry, which employs or directly impacts over 250,000 American workers and more than $49 billion in annual shipments.

As the following discussion explains, the NPRM will undermine the ISA's activities.

B) Overview of ISA's Advocacy and Civic Activities

The ISA exists for "the improvement of business conditions," not only for its members, but for the public as a whole.[4] Better business conditions means a better economy, with better jobs and better lives for all Americans. The ISA accomplishes acting 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 sign and visual communications industry. 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,[5] 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.[6] 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 with public officials who happen to be candidates for reelection, such activities also are consistent with the core purpose of a 501(c)(6),[7] to the extent the IRS has not determined such activities to be political campaign intervention.[8]

Consistent with this legal framework, ISA 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 ISA's Issue Advocacy

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[4] *See* 26 C.F.R. § 1.501(c)(6)-1.

[5] *See* Rev. Rul. 71-530, 67-293, 61-177.

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

[7] 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).

[8] *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.").

Legislative and policy advocacy are at the core of the ISA's mission. The ISA 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 re-election, 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.[9]

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.[10] If these proposed rules were extended (whether directly or indirectly) to trade associations such as the ISA, they would severely undermine the ISA'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.[11]

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 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.[12]

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.[13]

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

[10] NPRM at 71,539.

[11] *See* note 7, *supra*.

[12] *See* note 10, *supra*.

[13] 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).

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

The ISA occasionally 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 ISA, its members and the overall business climate in our country. They are an important component of the ISA'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.[14] 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.[15] 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.[16]

If the proposed rules governing events with elected officials were to apply (whether directly or indirectly) to 501(c)(6) entities such as the ISA, 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."[17] While some may believe there may be a legitimate need for the IRS to address political activity at some 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

[14] NPRM at 71,540.

[15] Rev. Rul. 2007-41.

[16] *Id.*

[17] NPRM at 71,535 and 71,539.

level.[18] 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."[19] As the National Taxpayer Advocate, a statutorily created independent organization within the IRS,[20] 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."[21]

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."[22]

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."[23] 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."[24] 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 committee" subject to more onerous registration and ongoing reporting requirements.[25] 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

[18] *See* Federal Election Campaign Act of 1971, as amended, 2 U.S.C. § 431 et seq.

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

[20] 26 U.S.C. § 7803(c).

[21] 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.

[22] *Id.*

[23] NPRM at 71,539.

[24] 2 U.S.C. §§ 434(f)(3)(B)(ii).

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

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.[26] 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.[27] 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 ISA. 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 . . . ."[28]

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.[29]

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.[30] Here, if the proposed rules were extended to other tax-exempt entities (as they likely 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*.

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[26] *See* 11 C.F.R. §§ 114.4(c)(2) and (c)(5).

[27] 11 C.F.R. § § 114.3(b)(2), 114.4(b)(1).

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

[29] *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)).

[30] 461 U.S. 540 (1983).

Lastly, not only do the proposed rules pose a severe infringement on ISA'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 ISA's speech.[31]

CONCLUSION

The International Sign Association 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.[32] 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 ISA strongly urges the IRS not to adopt these proposed rules for any type of tax-exempt entity.

[31] *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).

[32] *See* 5 U.S.C. § 553(c).