February 27, 2014

Via Electronic Submission

The Honorable John Koskinen
Commissioner of Internal Revenue
CC:PA:LPD:PR (REG-134417-13), Room 5205
Internal Revenue Service
P.O. Box 7604, Ben Franklin Station
Washington, DC 20044

Re: Comments on IRS Notice of Proposed Rulemaking, REG-134417-13

Dear Mr. Koskinen:

The National Retail Federation ("NRF") submits these comments in response to the Notice of Proposed Rulemaking issued Nov. 29, 2013 by the Treasury Department and the Internal Revenue Service ("IRS") regarding the definitions of political activity applicable to social welfare organization under Section 501(c)(4) of the Internal Revenue Code. In short, NRF believes these definitions are unconstitutional, arbitrary and capricious and an abuse of discretion, and contrary to the statutory framework of section 501(c) of the Code. Should IRS nonetheless adopt some form of these proposed regulations, it should not – indeed cannot – use similar definitions with respect to trade and professional organizations like NRF which are exempt from taxation under Section 501(c)(6) of the Code. A number of other organizations have provided detailed arguments in their comments that reflect NRF's concerns, so these comments provide an overview of NRF's concerns.

About NRF

NRF is a trade association exempt from taxation pursuant to Section 501(c)(6) of the Code. It is the world's largest retail trade association representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants, and Internet retailers from the United States and more than 45 countries. Retail is the nation's largest private sector employer, supporting one in four U.S. jobs – 42 million working Americans. Contributing $2.5 trillion to annual GDP, retail is a daily barometer for the nation's economy. NRF's *This is Retail* campaign highlights the industry's opportunities for life-long careers, how retailers strengthen communities, and the critical role that retail plays in driving innovation.

Discussion

1. Campaign activity <u>does</u> promote social welfare.

At the outset, NRF questions the underlying premise of Treasury Regulation Section 1.501(c)(4)–1(a)(2)(ii)'s construct that "promotion of social welfare does not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office." IRS recognizes that promoting social welfare encompasses an unlimited amount of lobbying. Simply put, sometimes the only way to advance an organization's lobbying efforts to promote social welfare is to change who is in office making and executing the laws.

Moreover, nothing in the Code compels the current regulation. Indeed, given the specific prohibitions on campaign intervention found in Section 501(c)(3), lack of similar language in Section 501(c)(4), and intervening case law recognizing the importance of political speech, there is a strong argument that the regulation is contrary to the statute.

Accordingly, NRF urges IRS to revisit its underlying framework for these regulations and recognize that promoting social welfare can include candidate related activity.

2. No additional regulations are needed, but if IRS insists on additional regulations, they should protect, rather than limit, political speech.

Presuming for purposes of these comments that IRS will not revisit its earlier rules and treat political activity as part of advancing social welfare, NRF suggests that there is no need to change the existing regulations. The current facts-and-circumstances test is more than sufficient to allow organizations to operate to promote social welfare and to engage in campaign-related activities. Moreover, as the United States Supreme Court has long recognized, "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application." *Buckley v. Valeo*, 424 U.S. 1, 42 (1976). Thus, attempts at splitting the two will be inherently difficult.

Therefore, if IRS believes additional guidance is necessary, then it should draw bright lines that protect and permit political discourse, not hinder it. The rules as proposed would do the exact opposite, sweeping pure lobbying, grassroots lobbying, and other activities that are not campaign-related into the orbit of political activities. First, the proposed definition of "campaign-related political activity" ("CRPA") would treat activities that have long been permitted for 501(c)(3) organizations, such as candidate debates, voter registration activities, and events with sitting office holders, as CRPA. Second, activities that are purely legislative

in nature will be considered CRPA. For example, a roundtable with a sitting Member of Congress to discuss issues of importance will be treated as CRPA. Updates to members on an organization's website the discuss legislation using a candidate's name would be considered CRPA if done 30 days before a primary election or 60 days before a general election. Indeed, old materials on a website that mention a candidate could be treated as CRPA if the organization does not scrub its site when those windows approach.

This is an intolerable chilling of not only political speech, but of lobbying speech as well. Accordingly, if IRS is to create new rules – which NRF opposes – it should create rules that protect, rather than limit, speech.

3. The concepts in this rulemaking should not be applied to other types of tax-exempt organizations.

If IRS insists on pushing forward with new rules, NRF opposes any effort to export these rules to 501(c)(6) organizations. 501(c)(6) organizations interact with their members and the public on a daily basis to discuss issues of importance. Many of those issues are intertwined with candidates, and the rules as proposed would effectively silence organizations from speaking out on issues of importance. As such, the scope of these proposed rules should be as limited as possible. This is particularly true since Section 501(c)(6) of the Code does not contain the "exclusive" language found in Section 501(c)(4) (and, as NRF has argued above, that language does not compel or even support the conclusion that promoting social welfare does not include campaign activity).

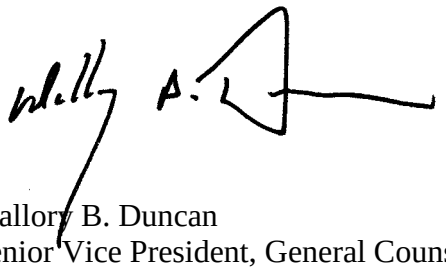
4. If it imposes new rules, IRS should not make the rules effective until the next tax year.

If IRS decides to adopt new rules, it should provide the regulated community with sufficient time to conform its activities to the rules. This means two things. First, the rules defining CRPA should not be finalized until IRS determines what level of political activity is permissible for a 501(c)(4) organization (as NRF has stated, it believes the answer to this question is that there should be *no* limits on political activity). Second, if IRS finalizes the rules, they should take effect the following tax year. Otherwise, organizations will face an impossible task of conforming their actions – i.e., stifling their political and legislative speech – within a tax year. Unlike tax regulations that deal with accounting issues, these rules would radically alter what 501(c)(4) organizations can and cannot do, would require extensive record-keeping changes, and may even require organizations to conduct activities through related organizations. As such, regulations with an effective date in the middle of a tax year will be ex post facto regulations, which the U.S. Supreme Court highly disfavors.

Conclusion

In sum, NRF opposes this proposal and opposes any effort by IRS to expand the proposal to include 501(c)(6) organizations.

Respectfully submitted,



Mallory B. Duncan
Senior Vice President, General Counsel

Jeffrey S. Tenenbaum
Ronald M. Jacobs
VENABLE LLP
575 7th Street, N.W.
Washington, D.C. 20004
jstenenbaum@venable.com
rmjacobs@venable.com
Counsel to National Retail Federation