September 9, 2015

John Koskinen
Commissioner
Internal Revenue Service
1111 Constitution Avenue NW
Washington, DC 20224

Re: Standards for tax exemption for social welfare organizations

Dear Commissioner Koskinen:

Our organizations are writing to strongly urge the Internal Revenue Service to adopt new regulations that properly interpret the statutory eligibility requirements to qualify for tax-exempt status as a 501(c)(4) "social welfare" organization.

Our groups include the Campaign Legal Center, Common Cause, Demand Progress, Democracy 21, League of Women Voters, People For the American Way, Public Citizen, and Sunlight Foundation.

Proper new IRS regulations must, among other things, limit to an "insubstantial" amount, the campaign-related expenditures that a "social welfare" organization can undertake.

In your recent testimony before the Senate Judiciary Committee, you reportedly stated – as you have previously said – that section 501(c)(4) organizations can engage in political intervention so long as it constitutes less than half of their activities. You also reportedly stated that the IRS is not trying to significantly change the way nonprofits operate today.

Your position, however, is not legally sustainable because the existing IRS regulations contradict the nation's tax laws and court decisions interpreting these laws. The fact is the IRS for many years has misinterpreted and failed to properly enforce the eligibility standards for obtaining section 501(c)(4) tax-exempt status under the Internal Revenue Code.

The legal responsibility that you and the IRS have is to interpret the tax laws properly and to adhere to authoritative court decisions interpreting those laws. Your legal responsibility is not to preserve the status quo by leaving in place regulations and informal actions regarding those regulations that for years have improperly interpreted and applied the nation's tax laws that govern eligibility for section 501(c)(4) tax-exempt status.

In recent testimony before the Senate Judiciary Subcommittee hearing at which you also appeared, Independent Sector also took the position that allowing section 501(c)(4) groups to spend up to 49 percent of their funds on political intervention was too high a percentage.

Independent Sector is a national coalition of more than 500 public charities, foundations and corporate giving programs, including a number of 501(c)(4) social welfare organizations.

The need for you and the IRS to move expeditiously to interpret the tax laws properly is all the more important in light of the great damage that the IRS's misinterpretation of the tax laws has done to the integrity of our political system and the interests of the American people.

The failure of the IRS to interpret the eligibility requirements for section 501(c)(4) tax-exempt status properly has resulted in hundreds of millions of dollars in secret contributions being laundered into federal elections.

Secret money in American politics is the most dangerous kind of influence-buying money. It provides widespread opportunities for government corruption that remains unknown to the American people and for which neither public officials nor those seeking to influence them can be held accountable.

It is simply wrong and unfair to the American people for the IRS to fail to address this problem when the problem is being caused by the IRS's legally erroneous interpretation of the tax laws.

The Internal Revenue Code says that a social welfare organization must be operated "exclusively" for the promotion of social welfare. 26 U.S.C. § 501(c)(4). As the IRS has long recognized, the "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." Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii).

The IRS, however, by regulation replaced the statutory command that section 501(c)(4) organizations be operated "exclusively" to pursue social welfare goals with a very different requirement that they must only be primarily operated for these goals. Treas. Reg. §1.501(c)(4)-1(a)(2)(i). And the IRS compounded this error by informally acceding, without any written explanation or justification, to an improper interpretation of "primarily" to allow social welfare groups to spend up to 49 percent of their expenditures on non-social welfare activities, such as campaign activities.

All of this is contrary to multiple court cases that have held that the statutory "exclusively" social welfare standard does not allow an organization to spend more than an "insubstantial" amount on non-social welfare activities, which includes campaign activities. Under these decisions, any substantial non-exempt purpose is sufficient to disqualify an organization from exempt status under section 501(c)(4).[1]

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[1] *See Better Business Bur. v. United States, 326 U.S. 279, 283-84 (1945); Contracting Plumbers Coop. Restor. Corp. v. U.S.*, 488 F.2d 684, 686 (2d Cir. 1973) (section 501(c)(4)); *American Ass'n of Christian Sch. Vol. Emp. v. U.S.*, 850 F.2d 1510, 1516 (11th Cir. 1988) ("the presence of a substantial non-exempt purpose precludes exemption under Section 501(c)(4)"); *Mutual Aid Association v. U.S.*, 759 F.2d 792, 796 (10th Cir. 1985) (same; section 501(c)(4)).

The requirement to limit a section 501(c)(4) organization to an "insubstantial" amount of campaign activities means, in our view, a limited amount of expenditures, such as no more than 5 or 10 percent of total annual expenditures.

Under the language of the statute and the applicable court decisions, there is simply no legal way to interpret the "insubstantial" test to allow a social welfare organization to spend up to 49 percent of their expenditures on non-social welfare activities, like campaign activities.

The current IRS regulation, and the fact that the agency has informally acceded to an improper interpretation of the regulation, however, allows section 501(c)(4) groups to spend up to 49 percent of their annual expenditures on political intervention. This is contrary to the framework set up by Congress to govern non-profit organizations and contrary to court decisions interpreting that framework.

The tax laws require the IRS to change the regulation.

The IRS has an obligation to not only ensure that the tax laws are properly interpreted and enforced, but also to avoid improperly providing license for activities that abuse the tax laws and, in doing so, undermine the integrity and transparency of the nation's elections.

If the IRS does not end the current practices, the agency will provide license to hundreds of millions of dollars in additional secret contributions to be laundered into federal elections, in contravention of the tax laws.

Our organizations strongly urge you and the IRS to use the ongoing rulemaking process to conform the IRS regulations to the statute and to applicable court decisions that require social welfare organizations to spend no more than an "insubstantial" amount on campaign activities.

We also strongly urge you to make clear that the requirement for "insubstantial" expenditures means that a social welfare organization can only spend a small percentage of its total annual expenditures on campaign activities, such as no more than 5 or 10 percent, in order to be eligible for section 501(c)(4) tax status.

Sincerely,

Campaign Legal Center
Common Cause
Demand Progress
Democracy 21
League of Women Voters
People For the American Way
Public Citizen
Sunlight Foundation