COMMENTS TO THE INTERNAL REVENUE SERVICE (IRS) ON

REG-134417-13

GUIDANCE FOR TAX-EXEMPT SOCIAL WELFARE ORGANIZATIONS
ON CANDIDATE-RELATED POLITICAL ACTIVITIES

BY

THE LEAGUE OF WOMEN VOTERS OF THE UNITED STATES

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The League of Women Voters appreciates the opportunity to comment on the Notice of Proposed Rulemaking by the Internal Revenue Service. We believe that more effective enforcement of the Internal Revenue Code is needed and that defining "candidate-related political activity" will help deal with the two fundamental problems with the current state of 501(c)(4) regulations:

1. The current regulations allow large sums of secret money to flow through the 501(c)(4) form to influence elections in violation of the statute, and
2. The IRS has had difficulty enforcing the current regulations for determining what organizations are eligible for 501(c)(4) status.

Introductory Statement

The League of Women Voters strongly believes the IRS must move ahead with a rigorous and clear definition of "candidate-related political activity" in order to stop the abuse of 501(c)(4) status by electioneering groups that are clearly not social welfare organizations, though we have important objections to the actual definition proposed in the NPRM.

In particular, we believe that truly nonpartisan voter service and voter education activities by a 501(c)(4) organization must be clearly and explicitly allowed. So long as voter service activities are truly nonpartisan and unbiased, they are a social welfare activity as well as a charitable and educational activity allowed for 501(c)(3) organizations. The standards currently applied to (c)(3) organizations governing nonpartisan election activities should also be applied to (c)(4) organizations.

The League of Women Voters

The League of Women Voters of the United States is a nonpartisan, community-based organization that promotes political responsibility by encouraging Americans to participate actively and knowledgeably in government and the electoral process. Founded in 1920 as an outgrowth of the struggle to win voting rights for women, the League now has more than 140,000 members and supporters, and is organized in nearly 800 communities and in every state.

For more than 90 years, the League has worked to protect every U.S. citizen's right to vote and to educate voters in an unbiased way about candidates and elections. As part of its mission, the League—with its state and local chapters—operates one of the longest-running and largest nonpartisan voter registration efforts and one of the best-known and most effective nonpartisan voter service programs in the nation.

One of the League's goals is to promote an open governmental system that is representative, accountable, and responsive and that assures opportunities for citizen participation in government decision making. To further this goal, the League has been a leader in seeking campaign finance reform at the state, local, and federal levels for more than three decades. The League's position on campaign finance states:

> The League of Women Voters of the United States believes that the methods of financing political campaigns should ensure the public's right to know, combat corruption and undue influence, enable candidates to compete more equitably for public office and allow maximum citizen participation in the political process.

Principles

In developing the comments below, we have been guided by three principles, which the League believes should also guide the next iteration by the IRS on the subject of the NPRM.

> 1. Truly nonpartisan electoral activity must be allowed. The proposed definition errs by including truly nonpartisan voter service activities by organizations like the League. This should be corrected by applying the highly articulated "facts and circumstances" tests currently used by the IRS for 501(c)(3) organizations to 501(c)(4) organizations as well.
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> 2. The exploitation of the 501(c)(4) status by organizations that intervene in candidate elections must be eliminated. The IRS should ensure that other 501(c) organizations don't become a new vehicle for groups to hide the sources of vast sums spent on candidate elections.
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> 3. Since any organization or group of individuals can form a tax-exempt 527 organization, the elimination of candidate-related political activity by 501(c) groups is wise and consistent with the Internal Revenue Code and the Constitution.

The Code

The Internal Revenue Code is remarkably clear concerning allowable expenditures by a 501(c)(4) organization: the law states that a 501(c)(4) organization must be "operated **exclusively** for the promotion of social welfare." (Emphasis added.) We understand that the IRS has previously taken the position that a (c)(4) organization can nonetheless intervene in politics so long as this is not its "primary" function. While this may be appropriate for political activity broadly construed, we see no justification for allowing any candidate-related political activity by a (c)(4) organization. It simply is not a social welfare activity to work in ways that can influence the election or defeat of clearly identified candidates for public office.

Moreover, Section 527 is provided as an option for those organizations "influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office…" This shows the congressionally-identified scheme for candidate-related political activity: Section 527 is for candidate activity and Section 501(c)(4) is "exclusively" for social welfare activity.

Further, this division of permissible activities established by Congress is consistent with established Supreme Court precedent. In *Regan v. Taxation With Representation*, the Court found that statutory restrictions on the activities of a 501(c)(3) organization did not violate any First Amendment rights of the organization because those activities could be carried out through an affiliated 501(c)(4) organization set up by the (c)(3). In other words, the availability of the alternative corporate form mooted First Amendment concerns about the restrictions on the (c)(3) organization.

This analysis is even stronger in this instance, where there is no significant tax benefit from the two different corporate forms. In *Regan*, the (c)(3) organization received tax deductible contributions while the alternative (c)(4) would not be eligible for that benefit, being only a tax-exempt organization. Here, both a 501(c)(4) and a 527 organization are tax-exempt and neither can receive tax-deductible contributions.

The major difference between these two forms of incorporation is that contributions to a (c)(4) are not disclosed and those to a 527 must be disclosed. But in *Citizens United v. FEC*, the Court clearly stated that there is no constitutional right to make undisclosed election expenditures except under demonstrated extraordinary circumstances in a particular case. That exception is available to a 527 organization. Thus, the statutory scheme of prohibiting electioneering for or against a candidate by a 501(c)(4) organization, since that is not a social welfare activity, but allowing and providing for electioneering under the 527 corporate form, is consistent with established Supreme Court precedent.

We believe a similar analysis applies to other 501(c) organizations. For example, Section 501(c)(7) clubs or Section 501(c)(8) fraternal organizations are organized for specific purposes, but an overly broad reading of those purposes, like that employed for years by the IRS in regard to (c)(4) organizations, could allow them to engage in candidate-related political activity. The League does not believe the Internal Revenue Code allows such an interpretation, however, and we urge the IRS, in the rulemaking associated with this NPRM, to clearly prohibit it. However, we do understand that prohibiting candidate-related political activity by other 501(c) organizations is likely to require careful consideration and additional public comment.

Section 501(c)(3) organizations are not allowed to "participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office." However, IRS regulations, guidance and revenue rulings make clear that a variety of truly nonpartisan voter service and voter education activities are allowed for (c)(3) organizations. We support this approach and, as the nation's premier nonpartisan voter service organizations, we have found that they work well.

The Problem

Our nation has seen an explosion in the sums of money being spent by 501(c)(4) organizations to elect or defeat candidates for public office. This is contrary to law for social welfare organizations and, we believe, is often contrary to the overly lax regulations defining how much political activity is allowed for such organizations. In addition, this money is not disclosed to the public, which means that voters are deprived of vital information that would help them judge how much credibility should be given to the advertising and campaigning by these 501(c)(4) organizations.

A few of the news articles reporting on these problems include:

1) A Washington Post article on a political coalition designed to shield donors that raised $400 million in 2012.

http://www.washingtonpost.com/politics/koch-backed-political-network-built-to-shield-donors-raised-400-million-in-2012-elections/2014/01/05/9e7cfd9a-719b-11e3-9389-09ef9944065e_story.html

2) A Vanity Fair article entitled: The Real IRS Scandal That No One Is Talking About.

http://www.vanityfair.com/online/eichenwald/2013/05/real-scandal-tea-party-irs-tax-code

3) A Huffington Post article entitled: Dark Money Groups Have Already Spent Way More Than You Think (references liberal groups matching conservative group spending).

http://www.huffingtonpost.com/2014/01/04/dark-money-2014-election_n_4533132.html?view=print&comm_ref=false

4) A Mother Jones article on the "Mystery of the Pro-Obama Dark-Money Group."

http://www.motherjones.com/politics/2012/12/obama-dark-money-priorities-usa

These abuses not only tarnish the reputation and credibility of the IRS, they undermine our democracy by corrupting our elections with unlimited amounts of secret money that overwhelms the voices of regular citizens and voters. That "liberal," "conservative," or "independent" organizations are violating the law and biasing our elections should not be relevant. The IRS must act to protect the public and enforce the law.

Non-Partisan Political Activity

The NPRM includes a definition of "candidate-related political activity" that includes both truly nonpartisan voter service activity and actual electioneering in favor or in opposition to a candidate for public office. This is a deep and significant mistake, both from a policy perspective and a statutory perspective.

The League of Women Voters is organized as a 501(c)(4) organization, as are most of our nearly 800 local affiliates and 50 state Leagues. The League of Women Voters Education Fund is a

501(c)(3) organization and many of our state and local Leagues have an affiliated (c)(3) organization. We conduct truly nonpartisan debates, publish unbiased voter guides, register voters of all political persuasions, and work actively in communities across the nation to encourage all citizens to vote. In fact, in many communities across the country, the Leagues' voter information is the only truly nonpartisan information available to the public. We do these things under both the (c)(4) and (c)(3) designations.

We strongly believe that these truly nonpartisan activities deliver tremendous value to voters, potential voters and our democracy. Public opinion polling shows that the lack of credible information about candidates is one of the most important reasons that individuals say discourages their participation in elections. Voter registration rates are not nearly as high as they should be and some minority communities and young people suffer from very low registration rates. In a democratic country, where government is based on the consent of the governed, there is a vital role for 501(c)(4) organizations to play in providing truly nonpartisan services to voters.

In addition, we believe that these nonpartisan voter service activities are social welfare activities within the meaning of Section 501(c)(4). As such we urge the IRS to change to proposed definition of "candidate-related political activity" to clearly and unambiguously allow truly nonpartisan work by (c)(4) organizations.

The League recognizes that public events styled as "debates" can be conducted in ways that point or direct voters to one candidate or another, just as some so-called "voter guides" can really serve as a way to deliver biased information to influence a voter's choice. So we agree that such activities should be barred for 501(c)(4) organizations, just as they are now for (c)(3)s.

It is vitally important that there be no ambiguity in IRS regulations in allowing truly nonpartisan political activity. If there is confusion, there will inevitably be a chilling effect and organizations like the League will likely not be willing to take the risk associated with that lack of clarity. Because the current system for 501(c)(3) organizations is highly articulated and is a settled body of law, clarity can be achieved by applying the current (c)(3) regime to 501(c)(4) organizations.

The various "facts and circumstances" tests that govern debates, voter registration drives, voter guides and similar activities accurately and clearly differentiate between truly nonpartisan activities and political intervention and candidate-related political activity. This body of law for 501(c)(3) organizations provides sufficient guidance and should not be disturbed by the IRS. Indeed, the IRS should apply this current body of law to 501(c)(4) organizations to ensure that the social welfare activity of informing voters in a nonpartisan manner is allowed for them.

Defining "Candidate-related Political Activity"

The League believes that "candidate-related political activity," which would not be allowed as a social welfare activity for 501(c)(4) organizations, should include:

> 1) mass paid public communications to the general public, such as broadcast advertising, phone banking, mass mailings, outgoing mass electronic messages, and mass leaflets or printed material, and

2) that use the name or likeness of a candidate or otherwise clearly identify a candidate or political party.

We recognize that this is both a broader and a narrower definition in many ways than the one proposed in the NPRM. It is broader because it does not include a time limitation or a content-related limitation such as "taking a view on" or "expressly advocating" the candidate or his or her election. It is narrower since it focuses on the major abuses in the current system. We think this is appropriate for several reasons.

First, the major abuses we have seen of 501(c)(4) status are related to the expenditure of large sums of money on mass communications to the general public, such as broadcast advertising and other items. So it makes sense to focus on those mass paid communications instead of all communications in any form.

Second, the proposed 60-day limitation can result in substantial amounts of mass advertising concerning a true candidate being paid for with secret money. The definition of "candidate-related political activity" should apply when an individual becomes a candidate, though we do believe there should be an outside limit of within one year of a general election.

Third, such formulations as "taking a view on" and "expressly advocating" can be remarkably imprecise as well as under or over inclusive. They are under inclusive simply because large amounts of electioneering money can be spent outside the definitions proposed in the NPRM.

As we saw during the most recent election period, there are any number of ways to advocate for the election or defeat of a candidate that are neither express advocacy nor "susceptible of no other reasonable interpretation." The formulation of "no other reasonable interpretation," imported from campaign finance law, is not appropriate here for tax law where spending is being redirected to another corporate form such as a 527. More importantly, "no other reasonable interpretation" is both under inclusive and remarkably elusive to understand. It is better in our view to have an unambiguous definition that focuses on the real problems.

We believe that a clear definition, one that can easily be applied without expensive legal assistance, is best in order to allow the IRS, applying organizations and existing (c)(4) organizations to understand and comply with the rules and in order to eliminate large sums of secret electoral campaign money from flowing through the (c)(4) form.

Moreover, it is critically important to remember that these IRS regulations will not and do not prohibit any activity. If an activity is barred for a 501(c)(4), it can still be carried out in full using the 527 form. The activity is not being prohibited; rather the rules governing the money are being addressed, as is appropriate for the IRS and the Internal Revenue Code.

By "mass paid public communications to the general public," we mean to say that all mass paid public communications except those to an organization's "members" or other associates should be included.

Mass Communications with "Members" or Other Associates

While the League strongly supports a strict and inclusive definition of "candidate-related political activity" that would be barred for 501(c)(4) organizations (and directed to the 527 form), we recognize that lobbying in support of a 501(c)(4)'s social welfare agenda should be allowed. To accommodate this need, we suggest that mass paid communications to an organization's "members," "supporters," or "associates," be clearly excluded from the mass communications to the general public that we recommended for inclusion above.

The abuses of the 501(c)(4) form that we have seen in recent years have been concentrated on the expenditure of large sums of secret money on paid mass communications to the general public, so the exclusion of member communications would not seem to reduce the effectiveness of the IRS effort to properly enforce the Internal Revenue Code.

This, or course, raises the issue of defining a "member," "supporter," or person associated with a 501(c)(4) organization. As one possibility, we propose that mass communications to individuals who have affirmatively and actively asked to receive information or to be associated with the organization, or have made a monetary contribution to the organization, should be considered "members," "supporters," "associates," or other appropriate designation. This would allow a 501(c)(4) organization to communicate actively with its members for appropriate activities while ensuring that outreach to the general public through mass paid public communications, which is a hallmark of candidate electioneering, would be included within the definition of "candidate-related political activity."

Additional Activities for Inclusion

There are a number of other activities that we believe should be included in "candidate-related political activity" simply because they involve active campaigning for or against an election candidate:

1) Voter registration and get-out-the-vote (GOTV) drives that do not meet the current test for 501(c)(3) nonpartisan voter service;

2) Voter guides or other materials comparing candidates that do not meet the current test for 501(c)(3) nonpartisan voter service;

3) Endorsement of candidates; and

4) Distribution of material prepared by or on behalf of a candidate or 527 organization.

Exclusions from "Candidate-related Political Activity"

There are a number of activities that are political in nature but are not related to candidates for election to public office. We believe these activities should be explicitly excluded from the definition of "candidate-related political activity." These include:

1) taking a position on or advocating for a ballot initiative or referendum; and

2) posting material on an organization's website (i.e., made available for incoming traffic, not information sent out to specific individuals), so long as it is not a candidate endorsement, other statement of support or statement of opposition.

These political activities simply are not related to a candidacy for electoral office. Yet they are activities that might be confused with candidate-related activity, so we believe a clear exemption is in order. In addition, working for or against a ballot initiative, for example, could be closely related to the attainment of an organization's social welfare goals, just as lobbying activity is clearly a political activity, but one that is permissible for a 501(c)(4) organization because it is a legitimate tool for achieving an organization's social welfare purposes.

Other Issues

Transfers, contributions or grants to any organization that engages in "candidate-related political activity" should themselves be considered "candidate-related political activity," with a caveat like one in the NPRM, which provides a "special rule" for exclusion. The special rule should at least provide for legally binding written commitments from both the contributing and the receiving organization that the funds transferred will not be used for "candidate-related political activity."

The basic requirement that transfers should be included as "candidate-related political activity" is essential to avoid creating new loopholes for secret money to penetrate into electoral activity and corrupt the 501(c)(4) process. Moreover, it is essential to avoid other organizations from themselves engaging in "candidate-related political activity" or serving as money laundering devices.

The NPRM proposes a broad definition of "clearly identified" in relation to advertising and other communications concerning a candidate. This is an appropriate step and the League supports it. However, the proposed definition of a "candidate" would be improved with an outside time limitation of one year of a general election in order to ensure that individuals not "game" the system by declaring their candidacy far ahead of the actual election. Still, it is important to remember that any activity covered by the limitations on non-social welfare activities by a 501(c)(4) organizations can be carried out without limit by an affiliated 527.

Summary

The League of Women Voters strongly urges the Internal Revenue Service to clearly allow truly nonpartisan voter service and education activities to be conducted by 501(c)(4) organizations by explicitly applying the "facts and circumstances" tests currently applied to 501(c)(3) organization to 501(c)(4) organizations as well. In addition, this body of law for 501(c)(3) organizations provides sufficient guidance to those organizations and should not be disturbed by the IRS.

Truly nonpartisan voter service activities are social welfare activities, as well as charitable and educational activities, because the health of our democracy depends on an informed and active

electorate. Unbiased and nonpartisan voter service activities deliver tremendous value to voters, potential voters and our democracy, where government is based on the consent of the governed.

At the same time, the League strongly urges the IRS to bar "candidate-related political activity" by 501(c)(4) organizations. The Internal Revenue Code is clear that 501(c)(4) organizations must be "operated **exclusively** for the promotion of social welfare." It simply is not a social welfare activity to work in ways that influence the election of clearly identified candidates for public office.

Groups that wish to influence the election of clearly identified candidates for public office can form Section 527 organizations to conduct those activities. As the Supreme Court has indicated in *Regan v. Taxation With Representation* and *Citizens United v. FEC*, it is proper for the tax code to channel money into appropriate organizational categories and there is no constitutional right to make secret expenditures in candidate elections.

Moreover, we urge the IRS to apply a broader and more inclusive definition of "candidate-related political activity" to 501(c)(4) organizations than the one proposed in the NPRM. Limiting the definition to activities that "expressly advocate," are susceptible "to no other reasonable interpretation," or "take a view on" a candidate will leave much of the abusive intervention in candidate elections uncovered. The same is true of the short 60-day time limitation. In addition, the "take a view on" and similar tests are simply too ambiguous. Clear rules are urgently needed.

Instead, the League urges the IRS to define "candidate-related political activity" as mass paid communications to the general public that clearly identify a candidate or political party. The limitation "to the general public" excludes communications to an organization's "members" or associates, as defined and explained above. We believe this provides ample room for grassroots lobbying. Additional suggestions are also included above.

Finally, the League also urges the IRS to include other 501(c) organizations in this rulemaking, with the same prohibitions on "candidate-related political activity" for such organizations. This is essential to prevent the illicit monies now flowing to 501(c)(4) organizations from merely migrating to other 501(c) organizations and undermining their integrity. We understand that further proposals for public comment will need to be made in this area.

Thank you for the opportunity to comment. The League commends the IRS for addressing these critical issues and we urge the Service to press forward without delay.

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