

JOHN L. MICA, FLORIDA
MICHAEL R. TURNER, OHIO
JOHN J. DUNCAN, JR., TENNESSEE
PATRICK T. McHENRY, NORTH CAROLINA
JIM JORDAN, OHIO
JASON CHAFFETZ, UTAH
TIM WALBERG, MICHIGAN
JAMES LANKFORD, OKLAHOMA
JUSTIN AMASH, MICHIGAN
PAUL A. GOSAR, ARIZONA
PATRICK MEEHAN, PENNSYLVANIA
SCOTT DesJARLAIS, TENNESSEE
TREY GOWDY, SOUTH CAROLINA
BLAKE FARENTHOLD, TEXAS
DOC HASTINGS, WASHINGTON
CYNTHIA M. LUMMIS, WYOMING
ROB WOODALL, GEORGIA
THOMAS MASSIE, KENTUCKY
DOUG COLLINS, GEORGIA
MARK MEADOWS, NORTH CAROLINA
KERRY L. BENTIVOLIO, MICHIGAN
RON DeSANTIS, FLORIDA

Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6143

MAJORITY (202) 225-5074

FACSIMILE (202) 225-3974

MINORITY (202) 225-5051

<http://oversight.house.gov>

CAROLYN B. MALONEY, NEW YORK
ELEANOR HOLMES NORTON,
DISTRICT OF COLUMBIA
JOHN F. TIERNEY, MASSACHUSETTS
WM. LACY CLAY, MISSOURI
STEPHEN F. LYNCH, MASSACHUSETTS
JIM COOPER, TENNESSEE
GERALD E. CONNOLLY, VIRGINIA
JACKIE SPEIER, CALIFORNIA
MATTHEW A. CARTWRIGHT, PENNSYLVANIA
MARK POCAN, WISCONSIN
L. TAMMY DUCKWORTH, ILLINOIS
ROBIN L. KELLY, ILLINOIS
DANNY K. DAVIS, ILLINOIS
PETER WELCH, VERMONT
TONY CARDENAS, CALIFORNIA
STEVEN A. HORSFORD, NEVADA
MICHELLE LUJAN GRISHAM, NEW MEXICO

LAWRENCE J. BRADY
STAFF DIRECTOR

February 4, 2014

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

Dear Mr. Koskinen:

The Committee on Oversight and Government Reform is conducting oversight of the Internal Revenue Service's inappropriate treatment of tax-exempt applicants. The Obama Administration recently issued a proposed regulation limiting political speech by certain nonprofit organizations. The Committee's ongoing investigation has identified several procedural and substantive concerns with the Administration's proposed regulation. We write to request that the IRS withdraw the rule from consideration and that you provide the Committee with information about the process by which this rule was crafted.

On November 29, 2013, the IRS issued a proposed regulation related to political speech by organizations exempt from tax under Internal Revenue Code ("I.R.C.") §501(c)(4). The proposed regulation is intended to clarify the tax-exemption determinations process and resolve problems identified in a Treasury Inspector General for Tax Administration (TIGTA) audit report.¹ It does not. As written, the Administration's proposed rule will stifle the speech of social welfare organizations and will codify and systematize targeting of organizations whose views are at odds with those of the Administration. In addition to these substantive concerns, we also have serious concerns about the process by which the Administration promulgated this rule. Our concerns are discussed in this letter.

I. The proposed rule codifies the Obama Administration's earlier attempts to stifle political speech

The Administration's proposal to restrict political speech by § 501(c)(4) nonprofits must be understood in context. As the Committee's investigation has shown, beginning in 2010, the

¹ Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities, 78 Fed. Reg. 71535 (proposed Nov. 29, 2013) (to be codified at 26 C.F.R. pt. 1) (quoting the "Charting a Path Forward at the IRS: Initial Assessment and Plan of Action" report) [hereinafter "Proposed Regulation"].

Administration “orchestrated a sustained public relations campaign seeking to delegitimize the lawful political activity of conservative tax-exempt organizations and to suppress these groups’ right to assemble and speak.”²

In the wake of the Supreme Court’s *Citizens United* opinion, the President and Democratic allies in Congress loudly bemoaned the lawful political speech of nonprofit groups. During his 2010 State of the Union address, the President declared:

With all due deference to separation of powers, last week the Supreme Court reversed a century of law that I believe will open the floodgates for special interests – including foreign corporations – to spend without limit in our elections. I don’t think American elections should be bankrolled by America’s most powerful interests, or worse, by foreign entities.³

As the 2010 midterm election neared, the President’s rhetoric amplified. “[A]s an election approaches,” the President proclaimed in September 2010, “it’s not just a theory. We can see for ourselves how destructive to our democracy this can become. We see it in the flood of deceptive attack ads sponsored by special interests using front groups with misleading names.”⁴ Singling out the conservative group Americans for Prosperity by name, the President expounded in October 2010: “[Y]ou have these innocuous-sounding names, and we don’t know where this money is coming from. I think that is a problem for our democracy. And it’s a direct result of a Supreme Court decision that said they didn’t have to disclose who their donors are.”⁵

For months, the Administration denounced the rights of these groups to engage in anonymous political speech and baselessly suggested that they were funded by malevolent special interest and foreign entities. This public targeting was intended to shame these groups into disclosing their funding sources and scare potential donors from making otherwise lawful contributions. The proposed regulation represents the culmination of the President’s rhetorical campaign to delegitimize social welfare organizations engaged in political speech. The proposal effectively codifies the Administration’s earlier attempts to suppress political speech by nonprofit organizations.

The Committee’s investigation into the IRS’s targeting of conservative tax-exempt applicants demonstrates that the proposed rule is simply the final act of the Administration’s history of attempts to stifle political speech by conservative § 501(c)(4) organizations.

a. The proposed rule is a continuation of Lois Lerner’s efforts to curb conservative political speech

² Memorandum from Majority Staff, H. Comm. on Oversight & Gov’t Reform, to Members, H. Comm. on Oversight & Gov’t Reform, “Interim update on the Committee’s investigation of the Internal Revenue Service’s inappropriate treatment of certain tax-exempt applicants” (Sept. 17, 2013).

³ The White House, Remarks by the President in the State of the Union Address (Jan. 27, 2010).

⁴ The White House, Weekly Address: President Obama Castigates GOP Leadership for Blocking Fixes for the Citizens United Decision (Sept. 18, 2010).

⁵ The White House, Remarks by the President in a Youth Town Hall (Oct. 14, 2010).

The Committee's investigation uncovered evidence that Lois Lerner, the former IRS Director of Exempt Organizations, sought to crack down on political speech by certain nonprofit groups. Lerner, who previously served as the head of enforcement at the Federal Election Commission, demonstrated a keen interest in curbing nonprofit political speech. Documents and information suggest that under her leadership, the Exempt Organizations Division considered curbing political speech as early as 2010.

In Fall 2010, as the President and Democrats in Congress publicly sought to undermine the legitimacy of conservative-oriented nonprofits engaged in political speech, Lerner told an audience about the immense political pressure on the IRS to "fix the problem" of nonprofit political speech. She stated:

What happened last year was the Supreme Court – the law kept getting chipped away, chipped away in the federal election arena. The Supreme Court dealt a huge blow, overturning a 100-year old precedent that basically corporations couldn't give directly to political campaigns. And everyone is up in arms because they don't like it. The Federal Election Commission can't do anything about it.

They want the IRS to fix the problem. The IRS laws are not set up to fix the problem: (c)(4)s can do straight political activity. They can go out and pay for an ad that says, "Vote for Joe Blow." That's something they can do as long as their primary activity is their (c)(4) activity, which is social welfare.

So everybody is screaming at us right now: 'Fix it now before the election. Can't you see how much these people are spending?' I won't know until I look at their 990s next year whether they have done more than their primary activity as political or not. So I can't do anything right now.⁶

Within the IRS, Lerner proposed a "c4 project" to examine more closely self-declared nonprofits engaged in political speech.⁷ Lerner noted "there is a perception out there" that some 501(c)(4) groups are established only to engage in political activity.⁸ Under her leadership, the Exempt Organizations Division launched a concerted effort to measure and assess the degree of political activity by nonprofits.

By April 2013, the Exempt Organizations Division had finished an analysis of the trends in 501(c)(4) groups with indications of political activity.⁹ This document grounded the concern in *Citizens United*, stating: "Since *Citizens United* (2010) removed the limits on political

⁶ See "Lois Lerner Discusses Political Pressure on IRS in 2010," www.youtube.com (last visited Dec. 10, 2013) (transcription by Committee).

⁷ See E-mail from Lois Lerner, Internal Revenue Serv., to Cheryl Chasin, Laurice Ghougasian, & Judith Kindell, Internal Revenue Serv. (Sept. 15, 2010). [IRSR 191031-32]

⁸ E-mail from Lois Lerner, Internal Revenue Serv., to Cheryl Chasin, Laurice Ghougasian, & Judith Kindell, Internal Revenue Serv. (Sept. 15, 2010). [IRSR 191031]

⁹ See Internal Revenue Serv., Baseline Analysis of 501(c)(4) Form 990 Filers with Schedule C *Political Campaign and Lobbying Activities* (Apr. 15, 2013). [IRSR 195642-65]

spending by corporations and unions, concern has arisen in the public sphere and on Capitol Hill about the potential misuse of 501(c)(4)s for political campaign activity due to their tax exempt status and the anonymity they can provide to donors.”¹⁰ It is unclear how Lerner intended to utilize this information, but other e-mails suggest she hoped to publicize the IRS’s efforts to reign in nonprofit political speech.¹¹ According to one IRS employee, “The mere fact that we are doing anything at all in this area will be huge.”¹²

The Administration’s rule can only be properly understood in this context. As such, the proposal is merely an outgrowth of multi-year effort to “fix the problem” of nonprofit political speech. By April 2013 – a month before TIGTA released its audit report – Lois Lerner’s Exempt Organizations Division already developed an analysis of political speech by tax-exempt organizations. The rule is merely the result of “everybody” – led by the President of the United States – “screaming” at the IRS to fix the perceived problem of nonprofit political speech. Accordingly, the Administration’s proposed rule should be properly understood as the final act of Lois Lerner’s tenure at the IRS.

b. The proposed rule improperly applies Federal Election Commission standards to tax-exempt organizations

According to the notice of proposed rulemaking (NPRM), “[i]n defining candidate-related political activity for purposes of section 501(c)(4), these proposed regulations draw key concepts from federal election campaign laws....”¹³ Without explanation, the IRS co-opts the FEC’s time frames for electioneering communication, a specific type of communication within federal election law, to apply to any communication referring to a candidate.¹⁴ The proposal relies more heavily on federal election law than tax statute or IRS precedential regulatory material, without explanation.¹⁵ Rather than focus on whether political speech advances “social welfare,” as required by the governing statute, the IRS is using FEC standards to improperly expand restrictions on political speech for nonprofit groups. Thus, it appears that the IRS, in advancing the proposed rule, is simply attempting to make up for the FEC’s loss of regulatory authority due to the Supreme Court’s *Citizens United* decision.

c. Lois Lerner’s background at the Federal Election Commission and her questionable communications with FEC employees provide further context for the proposed rule

Prior to her role as the Director of the IRS Exempt Organizations office, Ms. Lerner was an Associate General Counsel and Head of the Enforcement Office at the Federal Election

¹⁰ *Id.* at 3.

¹¹ See E-mail from Lois Lerner, Internal Revenue Serv., to Nancy Marks et al., Internal Revenue Serv. (Apr. 1, 2013). [IRSR 188429]

¹² E-mail from David Fish, Internal Revenue Serv., to Nancy Marks et al., Internal Revenue Serv. (Apr. 1, 2013) (emphasis added). [IRSR 188427]

¹³ Proposed Regulation, *supra* note 1.

¹⁴ Proposed Regulation, *supra* note 1.

¹⁵ See Proposed Regulation, *supra* note 1.

Commission.¹⁶ During her tenure at the FEC, she engaged in questionable tactics to target conservative groups, often subjecting those who wanted to expand their influence in politics to heightened scrutiny.¹⁷ Not only was her political ideology evident to her FEC colleagues, she brazenly subjected conservative groups to meticulous investigations. Similar liberal groups did not receive the same scrutiny.¹⁸

Documents produced to the Committee demonstrate coordination between Lerner and the FEC. Employees from the FEC communicated with Lerner about tax-exempt groups engaged in political speech. For instance, William Powers, an FEC official in the Office of the General Counsel, e-mailed Lerner, on February 3, 2009, seeking information about the conservative nonprofit groups American Issues Project and the American Future Fund.¹⁹ Powers asked about the status of these groups' applications for tax-exempt status and the IRS review process.²⁰ In the course of the e-mail, Powers referenced prior conversations with Lerner from July of 2008 concerning the American Future Fund.²¹

The propriety of this relationship raises serious concerns. In her discussions with Mr. Powers, it appears that Ms. Lerner disclosed information protected by 26 U.S. Code § 6103 by revealing confidential information about specific taxpayers.²² Furthermore, Donald McGahn, former FEC vice chairman, characterized any FEC "dealing" with Lois Lerner as "probably out of the ordinary."²³ McGahn went on to say: "The FEC has not had a good track record with calling balls and strikes. They've been criticized for not playing fair."²⁴ Lerner's background at the FEC, combined with her recent communications with current FEC officials, provide further context for the IRS's effort that culminated in the promulgation of this proposed rule.

d. The IRS's efforts to develop new restrictions on political speech for non-profit groups, led by Lois Lerner and the IRS chief counsel's office, began long before the TIGTA audit was released

The Administration put forth the rule under the guise that it is responsive to TIGTA's recommendations concerning the evaluation of applications for tax exempt status. The

¹⁶ Eliana Johnson, *Lois Lerner at the FEC*, NAT'L REVIEW (May 23, 2013), available at <http://www.nationalreview.com/article/349181/lois-lerner-fec-eliana-johnson> (last accessed Jan. 14, 2014) [hereinafter *Lois Lerner at the FEC*].

¹⁷ *Id.*

¹⁸ *Id.*; Rebekah Metzler, *Lois Lerner: Career Gov't Employee Under Fire*, U.S. NEWS & WORLD REP. (May 30, 2013), available at <http://www.usnews.com/news/articles/2013/05/30/lois-lerner-career-government-employee-under-fire> (last accessed Jan. 14, 2014).

¹⁹ E-mail from Mr. William Powers, Office of the General Counsel, Federal Election Commission, to Ms. Lois Lerner, Director of Exempt Organizations, Internal Revenue Service, February 3, 2009.

²⁰ *Id.*

²¹ *Id.*

²² See e.g. Eliana Johnson, "E-mails Suggest Collusion Between FEC, IRS to Target Conservative Groups," *National Review* (July 31, 2013) available at <<http://www.nationalreview.com/corner/354801/e-mails-suggest-collusion-between-fec-irs-target-conservative-groups-eliana-johnson>>.

²³ Dana Bash and Alan Silverleib, "Republican says e-mails could mean FEC-IRS collusion," CNN (Aug. 6, 2013) available at <<http://www.cnn.com/2013/08/05/politics/irs-fec-controversy>>.

²⁴ *Id.*

Committee's investigation has uncovered evidence that the Administration considered regulating § 501(c)(4) organizations well before the publication of the TIGTA audit. Indeed, according to IRS attorney Don Spellman, the Administration had quietly considered guidance on § 501(c)(4) organizations for several years. He testified:

A [C]ertainly guidance under 501(c)(4) has been under discussion for a great deal of time, including this period.

Q When you say a great deal of time, . . . how much time are you talking about?

A Well, as I said there was a guidance project back in 1969 about whether to address exclusively under 501(c)(4), and it's been on and off since then. But that was a formal guidance project that was open and closed. And then just since I have been there, you know, the topic will just come up periodically. But it's been a very active topic for the last certainly 5 years.

Q And you also said that the (c)(4) primarily standard has been an active topic on and off in the IRS but especially in the last 5 years.

A Yes.

Q What has occurred in the last 5 years to make it an active topic during that timeframe?

A Litigation.

Q And who has been actively talking about it within the IRS?

A We certainly actively discussed it within Counsel.

Q And would those discussions be driven by the IRS Chief Counsel?

A Yes.

Q And were there discussions about issuing a new General Counsel memorandum in regard to the (c)(3) – (c)(4) primarily standard in the meeting that you had [with Lerner's direct reports in the Exempt Organizations Division] in April, May 2011?

A There was a discussion and there was even a draft prepared of a legal memo from Counsel to Exempt Organizations on the exemption standard under 501(c)(4), and those discussions started somewhere in 2009, 2010. I don't remember the exact date.²⁵

Mr. Spellman also explained that a legal memo on the exemption standard under 501(c)(4) was approved by the IRS chief counsel's office sometime before 2012, but was not made public.²⁶

Similarly, former IRS Acting Commissioner Steve Miller testified that the IRS and the Treasury Department had considered regulations on § 501(c)(4) organizations well before May 2013. He testified:

Q Why did you want to discuss this article [entitled "The IRS's 'Feeble' Grip on Big Political Cash"] with Ms. [Nikole] Flax and Ms. [Catherine] Barre?

A So, I was interested in thinking about what we might be able to do into the future in the area.

Q What do you mean by "the area"?

A The area of what constitutes political activity for a 501(c)(4) organization. That's my recollection, anyway.

Q And what kind of ideas did you have in mind?

A So, there were issues around the regulation and the definition of "exclusively" as "primarily" in the regulation. And there were other things gone on. I don't even know what else. It actually was a brainstorming session, is my suspicion.

Q Okay. But refining the regulation was one idea that you were brainstorming?

A That had been on – that had been thought about. But I'm not sure we were brainstorming specifically on that.

Q What were the other ideas that you brainstormed, to your recollection?

²⁵ Transcribed interview of Don Spellmann, Internal Revenue Serv., in Wash., D.C. (July 12, 2013).

²⁶ *Id.*

A I think what could be done in terms of, if anything, in terms of a legislative disclosure rule. That's a recollection. I may be wrong on that, but that's the only other one that I can remember right now.

Q And, sir, what do you mean by "legislative disclosure rule"?

A So, under the rules – and, you know, this is a long piece. But under the rules, 501(c)(4) donors are not disclosed to the public. And there is an argument made here and elsewhere that that's a reason why money is flowing into those organizations for political purposes – for purposes of spending on politics. I'm sorry. I'll be more precise.

Q And so you wanted to implement a disclosure rule that would take away that advantage for (c)(4)s?

A Did I want to do that? No. But in terms of brainstorming things that would level the playing field between 527 organizations and 501(c)(4) organizations, that was one thing that was talked about.

Q Did you have discussions with anyone at Treasury about these ideas?

A Probably would have had them with Mark Mazur, the tax policy person. And I think I did have a discussion with him on the concept of, is there a thought about changing the disclosure rules? And we did talk about "exclusively"/"primarily" and whether it made sense to do that or not.

Q And that discussion was in this October 2012 timeframe?

A. I don't know. It would have been – it would have been probably a little later than that. It probably would have been, you know, when I was acting [commissioner]. But I'm not – again, that would have been the timeframe.²⁷

Documents obtained by the Committee confirm that the Treasury Department has 501(c)(4) regulations "on [its] radar" well before the release of the TIGTA report.²⁸ One e-mail from 2010 clearly articulated the Department's concern as being rooted in the FEC's regulatory failure:

Before Citizens United, corporations (including c4s) were limited by the FEC rules re: campaign spending and disclosure and subject to immediate FEC enforcement action. Fear of FEC enforcement in real time may have served to limit the political activities of aggressive c4s more than fear of IRS TEGE

²⁷ Transcribed interview of Steven Miller, in Wash., D.C. (Nov. 13, 2013).

²⁸ E-mail from Ruth Madrigal, Dep't of the Treasury, to Victoria Judson, Internal Revenue Serv. (June 14, 2012). [IRSR 305906]

enforcement action Now that the FEC cannot prohibit corporations (including c4s) from making such expenditures . . . , there is some concern that aggressive c4s will be bolder and multiply, intervening in campaigns with relative impunity.²⁹

Moreover, former Acting Commissioner Miller attributed the discussions about further regulating § 501(c)(4) organizations to pressure placed on the IRS by congressional Democrats. He testified:

Q And, sir, what did you see as the problem that needed to be addressed through either a regulatory change or a legislative change?

A So I'm not sure there was a problem, right? I mean, I think we were – we had, you know, Mr. Levin complaining bitterly to us about – Senator Levin complaining bitterly about our regulation that was older than me, where we had read “exclusively” to mean “primarily” in the 501(c)(4) context. And, you know, we were being asked to take a look at that. And so we were thinking about what things could be done.³⁰

e. The proposed rule is a continuation of the IRS's malfeasance, and not a true response to TIGTA's audit recommendations

The rule is purported to be a direct response to TIGTA's audit of the IRS's targeting of conservative tax-exempt applicants,³¹ but the reality is that the Administration has used the controversy surrounding the IRS targeting as pretext to wrongly justify the need for this regulation. The notice of proposed rulemaking (NPRM) asserts that “both the public and the IRS would benefit from clearer definitions” and cites the IRS's 30-day progress report that responds to the TIGTA audit.³² The Treasury Assistant Secretary for Tax Policy, Mark Mazur confirmed that the rule was intended to be responsive to a recommendation in the TIGTA report.³³

Contrary to the Administration's assertion, TIGTA did not recommend that the IRS issue regulations narrowing the type of permissible political speech by § 501(c)(4) organizations. The report offered nine recommendations, but not one recommended a change in the term political campaign intervention.³⁴ On December 13, 2013, Russell George, the Treasury Inspector General for Tax Administration, told the Committee that the proposed rule was not responsive to any recommendation of his office's audit.³⁵

²⁹ E-mail from Ruth Madrigal, Dep't of the Treasury, to Jeffrey Van Hove, Dep't of the Treasury (Aug. 23, 2010). [OGR 11-7-13 2260]

³⁰ *Id.*

³¹ Proposed Regulation, *supra* note 1.

³² Proposed Regulation, *supra* note 1.

³³ Transcribed interview of Mark J. Mazur, Internal Revenue Serv., in Wash., D.C. (January 10, 2014).

³⁴ See Treasury Inspector Gen. for Tax Admin., *Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review* (May 14, 2013).

³⁵ Meeting with J. Russell George, TIGTA, and House Committee on Oversight and Government Reform, December 13, 2013.

Given these circumstances, we are concerned about the stated purposes and justification for the Administration's proposed regulation. Especially in light of the close White House coordination with the IRS concerning ObamaCare, including the potential sharing of confidential taxpayer information,³⁶ we have serious reservations about the integrity and transparency of the rulemaking process. The rule appears to be a continuation of a troubling pattern, wherein the IRS, rather than enforcing laws, carries water for the Administration's political agenda.

The rule was developed by those complicit in the targeting of the President's enemies and conceived with the intention of stifling political speech under false pretenses. The unexplainable reliance and deference to FEC definitions of political activity made applicable to social welfare organizations further calls into question the underlying motivations of the proposal. Given the facts revealed through the course of the Committee's investigation, allowing the rule to go forward can only be properly explained as the codification of the Administration's desire to stifle the activities of non-profits with which it disagrees.

II. The Administration purposefully concealed its efforts that culminated in the promulgation of the proposed rule

The Committee's investigation uncovered evidence indicating the Administration hid its efforts to curb political speech by nonprofits. Repeatedly, the Administration has failed to live up to President Obama's promise that his would be "the most transparent administration in history."³⁷ The proposed rule is yet another example of deliberate regulatory and legal subterfuge, designed to conceal unpopular and unconstitutional public policy actions. Released before the conclusion of several investigations into the multi-year political targeting campaign of conservative leaning social welfare nonprofit organizations, the proposed regulation is designed to alter a 50-year-old regulation in a manner that lacks transparency.

In June 2012, Ruth Madrigal of the Treasury Department's Office of Tax Policy wrote to several IRS leaders about potential § 501(c)(4) regulations. She wrote: "**Don't know who in your organization is keeping tabs on c4s, but since we mentioned potentially addressing them (off-plan) in 2013, I've got my radar up and this seemed interesting.**"³⁸ [emphasis added] Madrigal forwarded a short article about a court decision with "potentially major ramifications for politically active section 501(c)(4) organizations."³⁹ In her transcribed interview with Committee staff, IRS attorney Janine Cook explained how the Administration works a regulation "off-plan." She testified:

³⁶ See Letter from Darrell Issa & Jim Jordan, H. Comm. on Oversight & Gov't Reform, to J. Russell George, Treasury Inspector Gen. for Tax Admin. (Oct. 21, 2013).

³⁷ Jonathan Easley, "Obama says his is 'most transparent administration' ever," The Hill (Feb. 14, 2013) available at <http://thehill.com/blogs/blog-briefing-room/news/283335-obama-this-is-the-most-transparent-administration-in-history>.

³⁸ E-mail from Ruth Madrigal, Dep't of the Treasury, to Victoria Judson, Internal Revenue Serv. (June 14, 2012). [IRSR 305906]

³⁹ *Id.*

[T]o understand the term, when it says off plan, it means working it. Working on it, but not listing it on the plan. . . . The term – I mean it’s a loose term, obviously, it’s a coined term, the term means the idea of spending some resources on working it, getting legal issues together, things like that, but not listing it on the published plan as an item we are working. That’s what the term off plan means.⁴⁰

Not only did the IRS and Treasury develop the rule “off-plan”, but they also did not include their work on the proposed rule on the Administration’s Unified Agenda until the fall of 2013, concurrently with the release of the proposed regulation.⁴¹ The Unified Agenda is the federal government-wide report on current and future regulatory action under consideration by agencies.⁴² In summary, it is clear that the IRS and Treasury went to great lengths to prevent the public from learning about their ongoing work that culminated in the proposed rule.

III. The proposed rule is a radical deviation from any precedential guidance and completely lacks statutory authority

Nonprofit organizations “operated exclusively for the promotion of social welfare” and for which “no part of the net earnings . . . inures to the benefit of any private shareholder or individual” are entitled to tax exemption under I.R.C. §501(c)(4).⁴³ Treasury regulations promulgated in 1959 interpreted the statutory language to define “the promotion of social welfare activity.”⁴⁴ The regulations state: 1) “An organization is operated exclusively for the promotion of social welfare if it is primarily engaged in promoting in some way the common good and general welfare”⁴⁵ and 2) “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.”⁴⁶

The Administration’s current proposal significantly broadens the exclusion of political activity well beyond any reasonable interpretation of §501(c)(4)’s statutory text. The proposed definition replaces the phrase “participation or intervention in political campaigns . . . for public office” with the much broader phrase “candidate related political activity” and a far-reaching eight point test.⁴⁷ As the NPRM states, the proposed regulation “is intended to help organizations and the IRS more readily identify activities that . . . do not promote social welfare.”⁴⁸ Paradoxically, the proposed regulation shifts the burden of proof from the presence

⁴⁰ Transcribed interview of Janine Cook, Internal Revenue Serv., in Wash., D.C. (Aug. 23, 2013).

⁴¹ Leland E. Beck, *Fall 2013 Unified Agenda Published: Something New, Something Old*, Federal Regulations Advisor (Nov. 27, 2013) available at: <http://www.fedregsadvisor.com/2013/11/27/fall-2013-unified-agenda-published-something-new-something-old/>.

⁴² *How to Read the Unified Agenda*, Center for Effective Government (last visited Jan. 13, 2013) available at: <http://www.foreffectivegov.org/node/4062>.

⁴³ I.R.C. §501(c)(4) (2013).

⁴⁴ Treas. Reg. §1.501(c)(4)-1 (as amended in 1990).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Proposed Regulation, *supra* note 1.

⁴⁸ Proposed Regulation, *supra* note 1.

of social welfare activities to the absence of political activities. Whereas, by its plain language, the statute recognizes exemption for an organization that promotes the social welfare, the proposed regulation precludes recognition for an organization engaged in activities arbitrarily deemed to be political. The “candidate related political activity” definition focuses on types of activities that may be political, rather than types of activities that promote social welfare.

As discussed above, the Committee’s investigation uncovered a hidden agenda within the IRS – conceived “off-plan” and before the issuance of the TIGTA report – to neuter the ability of non-profits to participate in the political process and thereby engage in activities that promote their respective views of social welfare. The rule’s departure from the statutory text is the work of an overzealous and unchecked agency and must not go forward.

IV. The Proposed Rule suffers from deficient regulatory review and analysis

The proposed regulation did not undergo the standard regulatory analysis that most agency rulemakings require. Generally for significant regulatory action, like this proposed regulation, agencies must include a comprehensive cost-benefit analysis and the Office of Information and Regulatory Affairs (OIRA) engages in a thorough review of the proposed regulation before it is offered to the public for comment.⁴⁹ However, the IRS did not provide any cost-benefit analysis and the proposed regulation was never sent to OIRA for review.⁵⁰ This gap in the IRS’s regulatory process allows faulty rules like this one to reach the public without adequate analysis.

V. The Proposed Regulation will needlessly harm social welfare organizations

The result of this inadequate regulatory review is a proposed regulation that will exclude nonprofit organizations from a tax exempt status based on arbitrary and statutorily unfounded restrictions on political speech. The new definitions of “political activity” are overly broad, create an unnecessarily harsh standard for §501(c)(4) organizations, and stifle socially beneficial activities that I.R.C. §501(c) was designed to cover. Even the left-leaning Alliance of Justice, a “broad array of groups committed to progressive values,”⁵¹ believes that the Administration’s rule will chill political speech by nonprofits. It stated:

If implemented, there would be no such thing as a nonpartisan election activity conducted by a 501(c)(4); it would all be considered “political.” By expanding the definition of what activities are political, the rules would drastically reduce the ability of (c)(4)s to engage in nonpartisan get-out-the-vote drives, candidate questionnaires, and voter registration drives. These activities have been critical to

⁴⁹ Exec. Order No. 12866 (1993).

⁵⁰ See Proposed Regulation, *supra* note 1.

⁵¹ Alliance for Justice, About AFJ, <http://www.afj.org/about-afj> (last visited Jan. 30, 2014).

the ability of nonprofits to influence the public policy debate on a wealth of issues.⁵²

a. The new definition of political activity will stifle constitutionally protected political speech

“Speech is an essential mechanism of democracy,”⁵³ but the proposed regulation redefines social welfare to exclude constitutionally protected political speech. In recognition of the “fundamental importance of the free flow of ideas and opinions on matters of public interest and concern,” the First Amendment protects the freedom of speech and freedom of association.⁵⁴ In particular, political speech is “central to the meaning and purpose of the First Amendment” and “must prevail against laws that would suppress it, whether by design or inadvertence.”⁵⁵ Through the proposed rule, the IRS is rejecting America’s “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open”⁵⁶ in favor of “more definitive rules” to “reduce the need for detailed factual analysis.”⁵⁷

Traditionally, social welfare organizations were permitted to engage in unlimited issue based advocacy and comment on the selection of executive branch officials and judicial nominees, as part of the promotion of the common good and general welfare. As examples, environmental advocacy groups have been able to comment and advocate for the removal of a conservative EPA Administrator⁵⁸ and gun rights advocacy groups have been able to speak against the nomination of anti-Second Amendment judicial appointees.⁵⁹ In a radical deviation from the “historical application” of express advocacy, the proposed rule chills speech by restricting advocacy for appointed administrators that will hold incredible power over the social and public policy issues that are fundamental to the missions of social welfare organizations.⁶⁰

The proposed rule creates a profound disincentive to engage in any constitutionally protected political speech because the mere mention of a candidate may affect the tax status of a social welfare group. Under the rule, “[a]ny public communication... within 30 days of a primary election or 60 days of a general election that refers to one or more clearly identified candidates in that election” is political activity.⁶¹ Organizations might reference the election in

⁵² Press Release, Alliance for Justice, AFJ: Treasury, IRS proposal endangers citizen participation in democracy (Nov. 27, 2013) available at <http://www.afj.org/press-room/press-releases/afj-treasury-irs-proposal-endangers-citizen-participation-in-democracy>.

⁵³ *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

⁵⁴ *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

⁵⁵ *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

⁵⁶ *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

⁵⁷ Proposed Regulation, *supra* note 1.

⁵⁸ See “Environmentalists Protest Selection of Utah Gov. Michael Leavitt at EPA Head,” Democracy Now (Aug. 12, 2003) available at http://www.democracynow.org/2003/8/12/environmentalists_protest_selection_of_utah_gov.

⁵⁹ See Declan McCullagh, “Gun Rights Groups are Wary of Sotomayor,” CBS News (May 27, 2009) available at <http://www.cbsnews.com/news/gun-rights-groups-are-wary-of-sotomayor/>.

⁶⁰ Proposed Regulation, *supra* note 1.

⁶¹ Proposed Regulation, *supra* note 1.

a newsletter, write a blog post about the election linking to the candidates' web pages, or simply mention the activities of the incumbent elected official in a non-election related communication, but the new rule will flatly declare that these activities do not promote social welfare, thus jeopardizing the tax status of the group engaged in political speech.

b. The proposed definition will limit the public's ability to petition government officials and learn about public policy

Under the proposed rule, invitations to incumbent elected officials might turn an otherwise nonpartisan event into political activity for up to 90 days out of any election year. Members of Congress are regularly invited to speak at policy forums, community events, and many other occasions, even while serving as candidates. For example, many nonprofit groups host Tax Day events every year on April 15 and often invite Members of Congress to speak on matters of tax and fiscal policy. This rule will chill these expressive demonstrations, the purpose of which is to educate the public on the nation's fiscal state.

c. The proposed definition will curb important voter education activities

Ensuring that eligible citizens are legally able to vote on Election Day is important to our democracy. Voter registration and get-out-the-vote drives promote social welfare by encouraging citizens to participate in electing their representatives. Several IRS guidance materials have expressly permitted voter registration drives, recognizing the value to social welfare,⁶² but the proposed rule classifies voter registration drives or "get-out-the-vote" drives as political activity. The rule would thus discourage this type of behavior and have a negative effect on democracy.

In addition, voter education activities are essential to the promotion of social welfare. Many organizations that engage in voter education activity distribute information about the candidates in the form of voter guides. According to Revenue Ruling 78-248, exempt organizations may permissibly distribute voter guides,⁶³ but this new rule declares that the "[p]reparation or distribution of a voter guide that refers to one or more clearly identified candidates" is political activity.⁶⁴

Moreover, under the rule, "[h]osting or conducting an event within 30 days of a primary election or 60 days of a general election at which one or more candidates in such election appear as part of the program" does not promote social welfare.⁶⁵ The rule declares that all candidate forums, all debates, and all opportunities to hear from candidates provided by any nonprofit tax exempt organization are political activity. It discourages nonprofit social welfare organizations to host important voter education events, which will be deleterious to democracy.

⁶² See Elizabeth Kingsley & John Pomeranz, *A Crash at the Crossroads: Tax and Campaign Finance Laws Collide in Regulation of Political Activities of Tax-Exempt Organization*, 31 Wm. Mitchell L. Rev. 55 (2004) and see Rev. Rul. 2007-41 (Jun. 18, 2007).

⁶³ Rev. Rul. 78-248, 1978-1 C.B. 154.

⁶⁴ Proposed Regulation, *supra* note 1.

⁶⁵ Proposed Regulation, *supra* note 1.

Confusingly, the new definitions run counter to IRS precedence and guidance. Standards for what constitutes a permissibly apolitical voter guide have been in place for decades and are well understood.⁶⁶ Candidate forums have long been permissible and many nonprofit tax-exempt host events with candidates and elected officials to educate voters prior to an election.⁶⁷ The deviations from long standing understandings of permissible and impermissible activities are illogical and without explanation.

VI. Conclusion

The Committee is conducting a comprehensive investigation into the IRS's targeting of conservative tax-exempt applicants. Over the course of the last nine months, the Committee reviewed over 400,000 pages of documents and conducted dozens of transcribed interviews with Administration employees. Information received in the course of this investigation shows that the proposed regulation is little more than a veiled attempt to stifle the exercise of constitutionally protected speech afforded to non-profit organizations by law. Accordingly, we request that you rescind the Administration's misguided regulation.

Because of the serious concerns outlined above, the Committee has questions about the process by which the Administration developed the proposed regulation. To assist the Committee's oversight obligations, we request the IRS produce the following information, in electronic format, for the time period January 1, 2012, to the present:

1. All communications between the current or former IRS employees, including but not limited to Lois Lerner, and the Executive Office of the President including but not limited to the White House Office and the Office of Management and Budget, referring or relating to the development of the proposed regulation and any suggested amendment to Treas. Reg. §1.501(c)(4)-1.
2. All communications between the IRS and the Department of Treasury referring or relating to the development of the proposed regulation and any suggested amendment to Treas. Reg. §1.501(c)(4)-1.
3. All communications between the IRS and the FEC referring or relating to the development of the proposed regulation and any suggested amendment to Treas. Reg. §1.501(c)(4)-1.
4. All documents and communications referring or relating to the decision not to send the proposed regulation to OIRA for review.

⁶⁶ See e.g. Rev. Rul. 78-248, 1978-1 C.B. 154 and see Elizabeth Kingsley & John Pomeranz, *A Crash at the Crossroads: Tax and Campaign Finance Laws Collide in Regulation of Political Activities of Tax-Exempt Organization*, 31 Wm. Mitchell L. Rev. 55 (2004).

⁶⁷ See Rev. Rul. 2007-41, 2007-25. I.R.B. and Rev. Rul. 86-95, 1986-2 C.B. 73.

5. All documents and communications referring or relating to the decision to exclude this regulation from the Spring 2013 Unified Agenda and the Fall 2012 Unified Agenda.

The Committee on Oversight and Government Reform is the principal oversight committee of the House of Representatives and may at “any time” investigate “any matter” as set forth in House Rule X. An attachment to this letter provides additional information about responding to the Committee’s request.

We request that you provide the requested documents and information as soon as possible, but no later than 5:00 p.m. on February 18, 2014. When producing documents to the Committee, please deliver production sets to the Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building. The Committee prefers, if possible, to receive all documents in electronic format.

If you have any questions about this request, please contact Katy Rother or Tyler Grimm of the Committee Staff at 202-225-5074. Thank you for your attention to this matter.

Sincerely,



Darrell Issa
Chairman



Jim Jordan
Chairman
Subcommittee on Economic Growth,
Job Creation and Regulatory Affairs

Enclosure

cc: The Honorable Elijah E. Cummings, Ranking Minority Member

The Honorable Matthew A. Cartwright, Ranking Minority Member
Subcommittee on Economic Growth, Job Creation and Regulatory Affairs

ONE HUNDRED THIRTEENTH CONGRESS
Congress of the United States
House of Representatives
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
2157 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6143

Majority (202) 225-5074
Minority (202) 225-5051

Responding to Committee Document Requests

1. In complying with this request, you are required to produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Requested records, documents, data or information should not be destroyed, modified, removed, transferred or otherwise made inaccessible to the Committee.
2. In the event that any entity, organization or individual denoted in this request has been, or is also known by any other name than that herein denoted, the request shall be read also to include that alternative identification.
3. The Committee's preference is to receive documents in electronic form (i.e., CD, memory stick, or thumb drive) in lieu of paper productions.
4. Documents produced in electronic format should also be organized, identified, and indexed electronically.
5. Electronic document productions should be prepared according to the following standards:
 - (a) The production should consist of single page Tagged Image File ("TIF"), files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.
 - (b) Document numbers in the load file should match document Bates numbers and TIF file names.
 - (c) If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.
 - (d) All electronic documents produced to the Committee should include the following fields of metadata specific to each document;

BEGDOC, ENDDOC, TEXT, BEGATTACH, ENDATTACH,
PAGECOUNT, CUSTODIAN, RECORDTYPE, DATE, TIME, SENTDATE,
SENTTIME, BEGINDATE, BEGINTIME, ENDDATE, ENDTIME, AUTHOR, FROM,

CC, TO, BCC, SUBJECT, TITLE, FILENAME, FILEEXT, FILESIZE, DATECREATED, TIMECREATED, DATELASTMOD, TIMELASTMOD, INTMSGID, INTMSGHEADER, NATIVELINK, INTFILPATH, EXCEPTION, BEGATTACH.

6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, box or folder is produced, each CD, hard drive, memory stick, thumb drive, box or folder should contain an index describing its contents.
7. Documents produced in response to this request shall be produced together with copies of file labels, dividers or identifying markers with which they were associated when the request was served.
8. When you produce documents, you should identify the paragraph in the Committee's schedule to which the documents respond.
9. It shall not be a basis for refusal to produce documents that any other person or entity also possesses non-identical or identical copies of the same documents.
10. If any of the requested information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), you should consult with the Committee staff to determine the appropriate format in which to produce the information.
11. If compliance with the request cannot be made in full by the specified return date, compliance shall be made to the extent possible by that date. An explanation of why full compliance is not possible shall be provided along with any partial production.
12. In the event that a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.
13. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.
14. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you are required to produce all documents which would be responsive as if the date or other descriptive detail were correct.
15. Unless otherwise specified, the time period covered by this request is from January 1, 2009 to the present.
16. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data or information, not produced because it has not been

located or discovered by the return date, shall be produced immediately upon subsequent location or discovery.

17. All documents shall be Bates-stamped sequentially and produced sequentially.
18. Two sets of documents shall be delivered, one set to the Majority Staff and one set to the Minority Staff. When documents are produced to the Committee, production sets shall be delivered to the Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building.
19. Upon completion of the document production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee.

Schedule Definitions

1. The term “document” means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.
2. The term “communication” means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, email (desktop or mobile device), text message, instant message, MMS or SMS message, regular mail, telexes, releases, or otherwise.

3. The terms “and” and “or” shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information which might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.
4. The terms “person” or “persons” mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.
5. The term “identify,” when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.
6. The term “referring or relating,” with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.
7. The term “employee” means agent, borrowed employee, casual employee, consultant, contractor, de facto employee, independent contractor, joint adventurer, loaned employee, part-time employee, permanent employee, provisional employee, subcontractor, or any other type of service provider.