February 27, 2014

The Honorable Jacob J. Lew
Secretary of the Treasury
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, D.C. 20044

Re: Comments in Response to Notice of Proposed Rulemaking on "Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities"

Dear Mr. Secretary and Commissioner:

This letter respectfully presents the comments of Federal Election Commission ("FEC") Chairman Lee E. Goodman, Commissioner Caroline C. Hunter, and Commissioner Matthew S. Petersen in response to the Internal Revenue Service's ("IRS") Notice of Proposed Rulemaking ("NPRM") on Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities.

Section 311[1] of the Federal Election Campaign Act of 1971, as amended ("FECA"), calls for the FEC and IRS to "consult and work together to promulgate rules, regulations, and forms which are mutually consistent." In that spirit, and for the reasons explained below, should the IRS elect to promulgate a final rule, we encourage the IRS to harmonize its policies and definitions with respect to "candidate-related political activity" with FEC policies, definitions, and agency precedent.

I. Among All Federal Agencies, the FEC Is Uniquely Tasked With Regulating in the Most Sensitive Areas Protected by the First Amendment.

As the IRS is well aware, the restrictions it imposes upon the political activities of tax-exempt organizations implicate First Amendment rights. The First Amendment reflects a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[2] A major purpose of the First Amendment was to protect discussions about all "matters relating to political processes,"[3] including debates "on the qualifications of candidates [that] are integral to the operation of the system of government established by our Constitution."[4] The First Amendment affords the "broadest protection"[5] to this type of political expression because

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1 2 U.S.C. § 438(f).
2 *Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011).
3 *Mills v. Alabama*, 384 U.S. 214, 218-219 (1966).
4 *Buckley v. Valeo*, 424 U.S. 1, 14 (1976).
5 *Id.*

it represents the very "essence of self-government"[6] and is "the very heart of the organism which the first amendment was intended to nurture and protect."[7]

Regulation in this area is "highly sensitive,"[8] requiring both "specialized knowledge and cumulative experience."[9] Accordingly, Congress created the FEC in 1974 and vested the agency with "wide discretion in order to guarantee that it will be sensitive to the great trust imposed in it to not overstep its authority by interfering unduly in the conduct of elections."[10] The FEC administers the FECA, which, due to the fundamental First Amendment rights at stake, contains a "delicately balanced scheme of procedures and remedies."[11] Among other requirements, the FECA directed that Commissioners (no more than three from each major political party) be chosen on the basis of their "experience, integrity, impartiality, and good judgment,"[12] and the law went to great lengths to insulate agency decisions from misuse "in a partisan manner."[13] And even with all of these statutory protections, the Supreme Court went further and "meticulously scrutinized and substantially restricted"[14] the FECA's text and the agency's operations.

The IRS is quite different. It administers the Internal Revenue Code and focuses on tax revenues and fiscal policy. Because the IRS's mission has not been defined by reference to First Amendment values or sensitivities, it would be prudent for the IRS to defer to FEC regulations and relevant court precedents when its rules venture into politically sensitive areas, absent a compelling policy reason to diverge. The sole purpose of the IRS is revenue collection while the "sole purpose of the FEC is to regulate activities involving political expression,"[15] which implicate fundamental constitutional rights. Thus, there is a clear, constitutionally significant difference between the FEC and "other federal administrative agencies whose authority relates to the regulation of corporate, commercial, or labor activities"[16] And the IRS should not overlook these fundamental distinctions in considering the text of any final rulemaking.

II. Congress Requires the FEC and IRS to Work Together to Adopt "Mutually Consistent" Regulations.

Beyond the structural and organizational differences between the two agencies, there is an explicit statutory requirement that the IRS look to existing FEC definitions, policies, and

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6 *Snyder*, 131 S. Ct. at 1215.

7 *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 388 (D.C. Cir. 1981) ("*Machinists*").

8 *FEC v. Phillips Pub., Inc.*, 517 F. Supp. 1308, 1314 (D.D.C. 1981).

9 H.R. Rep. No. 917, 94th Cong., 2d Sess. 4 (1976); *see also In re Carter-Mondale Reelection Comm., Inc.*, 642 F.2d 538, 545 (D.C. Cir. 1980) (per curiam) (elaborating on this point and explaining how this principle manifested itself in the final legislation).

10 *In re Carter-Mondale Reelection Comm., Inc.*, 642 F.2d at 545.

11 *McNamara v. Johnston*, 522 F.2d 1157, 1162 n.5 (7th Cir. 1975).

12 2 U.S.C. § 437c(a)(3).

13 *McNamara*, 522 F.2d at 1162 n.5. In practical terms, the FEC's membership was split evenly between three Republicans and three Democrats, with four affirmative votes necessary to proceed through the enforcement process. *See, e.g.*, 2 U.S.C. § 437g(a) (requiring an affirmative vote of 4 Commissioners to find "reason to believe" a party violated the FECA).

14 *Machinists*, 655 F.2d at 387.

15 *FEC v. Fla. for Kennedy Comm.*, 681 F.2d 1281, 1284 (11th Cir. 1982).

16 *Machinists*, 655 F.2d at 388. Moreover, the "highly deferential attitude which courts usually apply to business related [matters,] from agencies whose subject matter jurisdiction is unquestioned," will not apply where the IRS attempts to regulate "political activity and association" independent of the FEC's regulations. *Id.*

procedures. Despite their different origins and structures, Congress recognized at an early date that the regulatory interests of the FEC and IRS would occasionally intersect. Thus, in 1979 Congress considered legislative changes to update the FECA in light of its practical experience with inter-agency regulatory conflicts. During a Senate Rules and Administration Committee hearing, then-FEC Chairman Robert Tiernan explained how the FEC had previously worked with other offices to resolve such disputes.[17] In the months following this hearing, Congress would debate – and ultimately pass – a law "to direct that the Commission and the Internal Revenue Service work together in promulgating rules and regulations which are mutually consistent." This requirement is codified at 2 U.S.C. § 438(f) and remains the law today.

In our experience, both as FEC Commissioners and in our previous roles as counsel to participants in the political process, we cannot emphasize enough the need to comply with the congressional call for "expert, uniform enforcement" of laws regulating federal campaign finance.[18] Compliance costs related to FEC regulations are already too high – and in many cases, prohibitively high for small, grassroots organizations – and the prospect of imposing a separate layer of inconsistent IRS rules regarding "candidate-related political activity" would only add unnecessary burden to all who lawfully exercise their core First Amendment rights. Far from providing clarity, many of the NPRM's proposed standards would confuse the public and confound entities regulated by both agencies, particularly because the IRS's proposal would greatly enlarge the categories of speech to be regulated beyond those that exist under court precedent and FEC rules.[19] Rather than

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[17] In particular, a discussion between Senator Mark Hatfied and Chairman Tiernan during the hearing elaborated on the issue of inter-agency conflicts and efforts to resolve them:

> **Senator Mark Hatfield.** . . . An amendment included in the draft bill directs the Commission to work closely with the Internal Revenue Service in promulgating rules and regulations which are mutually consistent.
>
> My question is, have you had experience, or have political candidates or committees encountered problems of inconsistencies, say, between the Federal election laws and the tax laws?
>
> **Mr. Tiernan.** Well, there have been some areas of interpretation by the Internal Revenue Service that appear to be in conflict with the FECA and some of the interpretations the Commission has made; for example, on how candidates or committees handle the excess moneys, excess campaign contributions.
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> Our General Counsel, Mr. Oldaker, is here with me, and we have had a good working relationship with all other Federal agencies. For example, in the area of the Federal Communications Commission, we were able to come out with a joint statement, a disclaimer, that was in conformity with the statutory language of the FCC and our own language. We have resolved that, and we could initiate a similar relationship with Internal Revenue.

To Amend the Federal Election Campaign Act of 1971, As Amended, and for Other Purposes, Before the S. Comm. on Rules and Admin., 96th Cong., 1st Sess. at 30 (1979).

[18] *FEC v. NRA*, 553 F. Supp. 1331, 1339 (D.D.C. 1983) (emphasis added).

[19] For example, the proposed regulation counts as "candidate-related political activity" not only FEC-reported electioneering communications, but also any "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 or, in the case of a general election, refers to one or more political parties represented in that election." 26 C.F.R. § 1.501(c)(4)-1(a)(2)(iii)(2)

strike out on its own and create new tests for the types of speech that may be regulated or restricted, the IRS should harmonize its rules and definitions with the regulations of the FEC.

CONCLUSION

For the foregoing reasons, if the IRS elects to promulgate a final rule, we encourage the agency to harmonize its policies and definition of "candidate-related political activity" with the FEC's policies and definitions.

Sincerely,

Chairman Lee E. Goodman

Commissioner Matthew S. Petersen

Commissioner Caroline C. Hunter

(proposed). The NPRM does not currently incorporate any of the statutory or regulatory exemptions to the definition of an electioneering communication found in section 304 of the FECA (2 U.S.C. § 434(f)(3)(B)) or the accompanying regulations (11 C.F.R. § 100.29(c)).