Evangelical Council for Financial Accountability

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Enhancing Trust

February 11, 2014

Ms. Amy F. Giuliano
Internal Revenue Service
Room 5205
P.O. Box 7604
Ben Franklin Station
Washington, DC 20004

Re: Proposed Guidance Concerning Political Activity of Tax-Exempt Organizations – CC:PA:LPD:PR (Reg-134417-13)

Dear Ms. Giuliano:

As president of ECFA, an association of more than 1,800 religious nonprofit organizations with 501(c)(3) tax-exempt status,[1] I am pleased to provide comments on recently proposed guidance from the Treasury and the IRS concerning political activity of tax-exempt organizations.

While the regulations issued on November 29, 2013 were primarily intended to propose new rules for governing political activity of 501(c)(4) social welfare organizations, the Treasury and the IRS specifically requested comments on whether the same standards should be applied to other types of tax-exempt entities, including 501(c)(3) public charities.

ECFA agrees that uniformity in the law concerning the definition of political activity across the tax-exempt sector is important. Having a definition of political activity for 501(c)(4) organizations that differs from the definition for other types of exempt organizations (such as 501(c)(3) organizations) would be hugely problematic from an administrative stand-point. Such a scenario would cause significant confusion within the sector and would not simplify or clarify the law and facilitate its administration.

Because ECFA membership is limited to churches and other nonprofits with 501(c)(3) status, the comments provided below specifically address the question of whether the proposed "candidate-related political activity" test should be applied in the context of 501(c)(3) public charities.

[1] ECFA (Evangelical Council for Financial Accountability) is an accreditation agency for Christ-centered churches and nonprofit organizations committed to the highest levels of excellence in the areas of governance, financial transparency, integrity in fundraising, and proper use of charity resources. Founded in 1979, ECFA currently provides accreditation to more than 1,800 organizations and 1,200 related entities across the United States. Collectively, ECFA members represent more than $22 billion in annual revenue from an estimated 20 million donors. ECFA's mission is simple: enhance donor trust to increase giving to Christ-centered organizations that demonstrate integrity.

ECFA is in a unique position to provide feedback on these proposed rules and their potential impact on 501(c)(3) organizations. Just last year, ECFA concluded facilitating the national Commission on Accountability and Policy for Religious Organizations (the "Commission"),[2] a collaborative effort involving the input of a diverse group of leaders from across the religious and broader nonprofit sector. The Commission was formed in response to a request by Senator Charles Grassley for ECFA to facilitate input from the sector, in part, on whether the existing political activity rules for 501(c)(3) organizations should be revised.

In addressing the newly proposed "candidate-related political activity" test, our comments draw upon the collective wisdom of the Commission's deliberations and findings presented in its August 2013 report to Senator Grassley, Congress, and the Treasury Department.[3] A copy of the Commission's report is enclosed with this letter for your convenience.

The Commission concluded—consistent with the proposed guidance from the Treasury and the IRS—that the current "facts and circumstances" approach used by the government to determine an organization's compliance with political activity regulations is problematic. Similarly, the Commission agreed that greater clarity in the political activity rules would benefit the IRS in its administration of the law and charities as they faithfully seek to operate within the boundaries of the law.

There is a significant difference, however, between how the Commission and the federal government would arrive at the same goal of greater clarity in the law. While the Treasury and the IRS seek greater clarity by further restricting the types of permissible political activity of tax-exempt organizations, the Commission would achieve greater clarity by allowing *more* freedom for tax-exempt organizations to engage in political speech—while simultaneously preserving the long-held public policy of not allowing tax-exempt funds to be expended for political purposes.

We offer the following specific comments on the proposed guidance from the Treasury and the IRS.

1. **The Treasury and the IRS should proceed with great caution in applying the proposed "candidate-related political activity" test to 501(c)(3) organizations.**

It is important to note at the outset just how significantly the proposed guidance from the Treasury and the IRS could alter the 501(c)(3) landscape.

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[2] The eighty leaders comprising the Commission and its Panels of Nonprofit Sector Representatives, Religious Sector Representatives, and Legal Experts studied the questions posed by Senator Grassley beginning in January 2011, including whether the political campaign prohibition of Section 501(c)(3) should be repealed or reformed in some manner. For more information on the Commission and its work, visit ReligiousPolicyCommission.org.

[3] With a very high degree of agreement from those participating, the Commission issued a report with its findings and proposed solutions entitled *Government Regulation of Political Speech by Religious and Other 501(c)(3) Organizations*, available at http://religiouspolicycommission.org/CommissionReport.aspx.

Since 1954, public charities with 501(c)(3) tax-exempt status have been completely prohibited from directly or indirectly participating in political campaign-related activity (often referred to as the "political campaign prohibition"). Meanwhile, social welfare organizations with 501(c)(4) tax-exempt status have been permitted to engage in some political campaign-related activity so long as it does not become their primary activity.

As noted in the proposed guidance, the IRS has generally used the same "facts and circumstances" approach to evaluate 501(c)(3) and 501(c)(4) organizations' compliance with their respective rules regarding political activity. The recent controversy over the IRS mishandling of 501(c)(4) tax exemption applications emphasized the need to consider replacing the vague "facts and circumstances" approach with a more clear-cut definition of political activity.

The proposed guidance would institute a new definition—"candidate-related political activity"—to establish clearer boundaries for 501(c)(4) organizations engaging in political campaign-related activity, while requesting comments on whether the same standard should be applied to 501(c)(3) organizations.

The consequences of applying this standard to 501(c)(3) organizations would necessarily be greater given the differences explained above in the legal restrictions imposed on each type of organization.[4] In effect, while 501(c)(4) organizations would still be allowed to engage in some candidate-related political activity (so long as it does not become their primary activity) under the proposed guidance, the IRS could revoke the exempt status of a church or other 501(c)(3) organization for any violation of the proposed "candidate-related political activity" test instead of the "facts and circumstances" approach.

This illustrates the need for the Treasury and the IRS to proceed with great caution when considering adopting the same "candidate-related political activity" test for 501(c)(3) organizations.[5]

2. Replacing the "facts and circumstances" approach with a clear-cut definition of political activity would benefit charities and the IRS.

The Treasury and the IRS concede in the proposed guidance that the "facts and circumstances" approach currently used to determine compliance with political activity rules (in the context of both 501(c)(3) and 501(c)(4) organizations) is problematic. To

[4] Beyond the differences in the law between the two types of organizations, another reason that such a change to the political activity regulations would potentially impact 501(c)(3) organizations more than 501(c)(4) organizations is the sheer number of organizations with 501(c)(3) status compared to 501(c)(4) status. According to the National Center for Charitable Statistics, as of October 2013, 501(c)(3) public charities outnumbered other types of registered tax-exempt organizations, including 501(c)(4) social welfare organizations, by a margin of approximately 3 to 1. *See Quick Facts About Nonprofits*, NCCS, http://nccs.urban.org/statistics/quickfacts.cfm.

[5] In the proposed guidance, the Treasury and the IRS seem to indicate an appreciation for this distinction between the types of organizations and the need to proceed with great caution when applying the same standard to 501(c)(3) organizations: "The Treasury Department and the IRS recognize that, because such intervention is absolutely prohibited under Section 501(c)(3), a more nuanced consideration of the totality of facts and circumstances may be appropriate in that context."

promote greater clarity, the Treasury and the IRS appropriately propose replacing the troubled "facts and circumstances" approach with a more clear-cut definition of political activity.

In its August 2013 report, the Commission cited the vague "facts and circumstances" approach as a key reason in explaining why the current state of affairs with respect to the 501(c)(3) political campaign prohibition is untenable:

> The law prohibiting political campaign participation and intervention by 501(c)(3) organizations as currently applied and administered lacks clarity, integrity, respect, and consistency. Guidance from the Internal Revenue Service states that all the "facts and circumstances" must be taken into consideration in determining whether an organization's activities constitute prohibited conduct. *Consequently, religious and other nonprofit leaders are never quite sure where the lines of demarcation are, and the practical effect of such vagueness is to chill free speech—often in the context of exercising religion.*[6]

As with the proposed guidance from the Treasury and the IRS, the Commission advised that clear definitional guidance should be added to help tax-exempt organizations in their good faith efforts to comply with the laws regarding political activity.[7] The Commission also agreed that instituting clearer definitional guidance would eliminate most of the challenges associated with administration of the law for the IRS.[8]

3. The proposed "candidate-related political activity" test would silence charities from speaking out on issues with political significance.

In lieu of the "facts and circumstances" approach, the Treasury and the IRS propose a new definition of "candidate-related political activity." The definition would be helpful in establishing clearer guidelines for charities and the IRS; however, it is more onerous than necessary to achieve the goal of greater clarity in the law.

If adopted as proposed, the most disturbing aspect of the "candidate-related political activity" test would be its further chilling effect on issue-oriented communications from tax-exempt organizations.[9] While this has been a problem for some time even under the

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[6] Commission Report, *supra* note 3, at 3 (emphasis added); *see also id.* at 15–17 ("One practical impact of this vagueness is to chill permissible speech—a deplorable result given the fact that many 501(c)(3) organizations have as their core purposes making a difference in major social and moral conditions. Rather than risk the possibility that the IRS could deem their communications about moral issues of the day to be impermissible political campaign activity (a determination that could jeopardize an organization's tax-exempt status), many nonprofit leaders steer widely away from that possibility and avoid permissible communications that they would otherwise make.").

[7] *Id.* at 28.

[8] In particular, the Commission noted that its recommendation for definitional guidance would "eliminate the obligation of the IRS to evaluate the speech of nonprofit leaders *vis-à-vis* vague 'facts and circumstances' guidelines to discern whether or not such speech is political—a challenge that is particularly troublesome when the organization is a religious institution." *Id.* at 30.

[9] The Treasury and the IRS seem to indicate in the proposed guidance a preference for cutting off issue-oriented communication altogether in favor of clearer guidelines.

existing rules and the IRS's approach to administering the law,[10] the proposed guidelines would compound the concern.

For example, the new definition of "candidate-related political activity" would include "communications that are made within 60 days of a general election (or within 30 days of a primary election) and clearly identify a candidate or political party." The Treasury and the IRS make clear that identification of a candidate can occur through speaking out on social or moral issues, if these issues can also be tied to a particular candidate.

Therefore, under the proposed guidance, addressing a moral or social issue (which could be connected to a candidate) at the height of an election cycle constitutes prohibited candidate-related political activity. Effectively, this has the result of silencing issue advocacy, especially if applied to 501(c)(3) organizations that could lose their tax-exempt status for even one violation (whether intentional or not) of the political activity rules. Further, the question of whether a particular communication on a social or moral issue can be tied to a particular candidate within the proscribed timeline creates another vague, "facts and circumstances"-like test, which the Treasury and the IRS seek to avoid in developing clearer guidance.

Another example of how the "candidate-related political activity" test unnecessarily goes too far in restricting the freedoms of tax-exempt organizations is the proposed ban on hosting events too close in time to an election at which a candidate appears as part of the program. Historically, organizations have used these types of events to educate their constituencies and the public on where candidates stand on the issues.

For instance, in 2008, Saddleback Church (Lake Forest, CA) hosted the "Civil Forum on National Leadership," inviting then-presidential candidates Barack Obama and John McCain to appear at the church and answer questions on issues of importance to voters in the religious community. This very popular non-partisan forum—bringing the candidates together on the same platform for the first time in the 2008 presidential race—was not designed to promote either candidate. Its purpose was to help make people aware of where the candidates stood on issues involving moral and religious concerns.[11]

Imagine also how such a test would apply to colleges or universities, many of which are 501(c)(3) tax-exempt organizations. Would colleges and universities not be able to hold educational debates with respect to candidates or campaigns within the 60-day or 30-day windows?

Or perhaps more significantly, consider the Commission on Presidential Debates—the organization that facilitates the national presidential debates held for the educational benefit of the entire voting populace of the United States to aid voters in making better-informed voting decisions. The Commission on Presidential Debates is a 501(c)(3) public charity. The proposed guidance, if applied to 501(c)(3) organizations, would seem to

[10] *See* Commission Report, *supra* note 3, at 15–17.
[11] *See Pastor Rick Warren Brings McCain, Obama Together*, NPR (Aug. 16, 2008), http://www.npr.org/templates/story/story.php?storyId=93661788.

prohibit the Commission on Presidential Debates from conducting their primary activity—a staple of American existence.[12]

Under the recently issued proposed guidance, even neutral and non-partisan activity of this nature (if held within certain dates of an election cycle) would be unnecessarily prohibited just for the sake of clarity in the law.

This approach is unacceptable. The freedom of tax-exempt organizations to engage in public discourse on issues of interest and importance to their missions must not be cast aside simply for the sake of the ease of administration of the law for the government. Further, such an approach would seem to create massive practical and constitutional concerns.

4. The Commission's recommendations strike a necessary balance of permitting charities to engage in communications that are relevant to their exempt purposes while ensuring that they expend funds in a manner consistent with their tax-exempt purposes.

Greater clarity in the law could be achieved—and problems with the proposed guidance avoided—if the Commission's recommendations related to the 501(c)(3) political campaign prohibition were implemented.

After time for careful study and deliberation by the Commission and its Panels, the Commission determined that the law prohibiting campaign participation and intervention by 501(c)(3) organizations should not be repealed. In reaching this conclusion, the Commission recognized the public policy served by prohibiting charities from expending funds for campaign-related activities.

The Commission did recommend, however, that Congress and the Treasury should add definitional guidance to the law to clarify that certain "no-cost political communications" would not fall within the scope of the 501(c)(3) political campaign prohibition.[13]

This recommendation stemmed from the Commission's belief that a communication related to one or more political candidates or campaigns[14] that is made in the ordinary course of an organization's regular and customary exempt-purpose activities (religious, charitable, etc.) should not constitute a prohibited activity under Section 501(c)(3). The exception would be conditioned on the organization not incurring more than *de minimis* incremental costs with respect to the communication (that is, the organization's costs

[12] As a side note, we suggest you consider a scenario in which the Commission on Presidential Debates were a 501(c)(4) organization—a status for which it would likely qualify, even though it would not likely choose to be classified as such. Applying the proposed guidance to 501(c)(4) organizations could have significant unintended consequences.

[13] The Commission noted, "The basic purpose and principle of this recommendation is to acknowledge the sacred and protected value of freedom of expression with respect to all persons and organizations and to permit such expression within the context of otherwise exempt-purpose activities, so long as communications do not involve the disbursement of tax-deductible funds." Commission Report, *supra* note 3, at 29.

[14] By issue advocacy or otherwise.

would not have been different by any significant amount had the communication not occurred).[15]

Furthermore, for activities that do not meet the definition of "no-cost political communications," the Commission recommended that clarifying provisions should be adopted in the law establishing that only the following actions constitute political campaign participation or intervention:

a. A communication that involves an expenditure of funds, and

   i. Clearly identifies one or more political candidates for public office or one or more political parties or political organizations described in Section 527 of the Internal Revenue Code by name, title, party affiliation, audio or visual likeness, or other distinctive characteristics; and

   ii. Contains express words of advocacy to:

      a) elect or defeat one or more such candidates, or

      b) make contributions to one or more clearly identified candidates, political parties, or political organizations described in Section 527 of the Internal Revenue Code;

or

b. A contribution of money, goods, services, or use of facilities to one or more political candidates, political parties, or political organizations described in Section 527 of the Internal Revenue Code.

While agreeing with the proposed guidance from the Treasury and the IRS that tax-exempt funds should not be allowed to be expended for political purposes,[16] the Commission's recommendations left appropriate breathing room for organizations to communicate on issues of importance or even on political candidates when deemed appropriate by the organization.

In that vein, it is important to note that the Commission did *not* recommend that tax-exempt charities should engage in particular areas of issue advocacy or campaign-related activity—the Commission simply concluded that organizations should have the freedom to do so under the law.[17]

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[15] *Id.* at 28.

[16] The proposed guidance included "contributions to a candidate, political organization, or any Section 501 entity engaged in candidate-related political activity" within the scope of "candidate-related political activity."

[17] *Id.* at 5 ("Opinions will vary significantly from one organization to another as to whether it is appropriate to engage in certain political communications. Such determinations should be made by each organization, taking into consideration the unique factors that apply to the organization and its constituencies. Having the freedom to do something does not of course, create an obligation to do it. Further, an organization's views about whether to engage in certain types of communication may change over time as both the organization and our culture continue to change.")

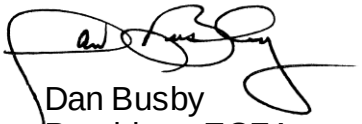
Conclusion

Unlike the approach recently proposed by the Treasury and the IRS, the Commission's recommendations would avoid further restricting the freedoms of tax-exempt organizations while still achieving greater clarity in the law and preventing the use of tax-exempt funds for political purposes. The Treasury and the IRS should recognize that the better means to achieving greater clarity in the law and its administration is more freedom, not less.

If applied to 501(c)(3) tax-exempt organizations, the "candidate-related political activity" test proposed by the Treasury and the IRS would introduce another hugely problematic "facts and circumstances test" and would be unnecessarily harsh in its adverse impact on the freedom of speech and the free exercise of religion by charitable and religious organizations in the United States, in addition to other adverse unintended consequences.

Thank you for carefully considering these and other comments submitted on this issue of utmost importance to the nonprofit, tax-exempt community.

Sincerely,



Dan Busby
President, ECFA

Enclosure