

## STATEMENT FOR THE RECORD

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HOUSE OVERSIGHT AND GOVERNMENT REFORM COMMITTEE  
SUBCOMMITTEE ON ECONOMIC GROWTH,  
JOB CREATION & REGULATORY AFFAIRS

“HEARING ON THE ADMINISTRATION’S PROPOSED  
RESTRICTIONS ON POLITICAL SPEECH”

FEBRUARY 27, 2014

Chairman Jordan, Representative Cartwright, and distinguished Members of the Subcommittee, thank you for the opportunity to share the perspectives of America’s charitable sector as the Subcommittee examines the recently proposed IRS regulations on political activity by 501(c)(4) organizations.

### Independent Sector

I serve as the president and chief executive officer of Independent Sector, the leadership forum for nonprofits, foundations and corporate giving programs whose member networks collectively represent tens of thousands of organizations locally, nationally and globally. We are committed to advancing the common good in America and around the world in order to fulfill our vision of a just and inclusive society and a healthy democracy of active citizens, effective institutions and vibrant communities. We work to ensure that America’s 1.3 million charitable organizations are able to help people and improve communities across the country and around the world. Our membership also includes a number of charitable organizations with affiliated 501(c)(4) social welfare organizations.

### Good Governance: Importance and Background

Charitable nonprofit organizations understand that continued support from Americans who give of their time – 12.7 billion hours of volunteer service in 2012<sup>1</sup> – and money – \$316.2 billion<sup>2</sup> in charitable giving in 2012 – depends upon the high level of public trust in our sector, and that any erosion of that trust will ultimately limit our effectiveness and harm those we serve. We are therefore deeply committed to ensuring that public charities and private foundations are governed effectively and transparently, maintain maximum accountability, demonstrate the highest levels of ethical conduct, and fully comply with the law.

Independent Sector has long been at the forefront of efforts to promote good governance and ethical practice among tax-exempt charitable organizations. In October 2004, we convened the Panel on the Nonprofit Sector with the written encouragement of Congressional leaders of both parties. The Panel undertook a comprehensive review of governance and other aspects of charitable sector practice in order

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<sup>1</sup> Urban Institute, National Center for Charitable Statistics. 2013. “The Non-profit Sector In Brief: Public Charities, Giving, and Volunteering, 2013.” Sarah L. Pettijohn. <http://www.urban.org/UploadedPDF/412923-The-Nonprofit-Sector-in-Brief.pdf>

<sup>2</sup> Giving USA: The Annual Report on Philanthropy for the Year 2012 (2013). Chicago: Giving USA Foundation.

to develop recommendations for action by Congress, the IRS, and the sector itself that would help charitable organizations maintain the highest possible standards of ethical conduct.

The 24-member Panel conducted extensive outreach to solicit input and comments from the broader charitable community. This outreach included the creation of six committees<sup>3</sup> that met regularly; phone calls with thousands of participants; two public comment periods; and 15 field hearings that gave more than 2,500 people in communities across the country the opportunity to provide input on the Panel's work. The Panel issued a *Final Report to Congress and the Nonprofit Sector* in 2005, which contained an integrated package of more than 120 recommendations for improvements within the sector, more effective government oversight, and changes in the law.

Many of the Panel's legislative and regulatory recommendations were incorporated into the Pension Protection Act of 2006, widely considered to be the most comprehensive reform of the charitable sector since the 1969 Tax Reform Act. Among the key Panel recommendations adopted by Congress were:

- Doubling the excise taxes for charities, social welfare organizations, private foundations, and exempt organization managers found to be participating in abusive tax shelters;
- Requiring exempt organizations with annual gross receipts less than \$25,000 to file an annual notice with the IRS containing basic contact and financial information;
- Clarifying that assets in donor advised funds may not be used in ways that confer substantial benefits on donor/advisors;
- Removing barriers that prevent information sharing between state charity officials and the IRS; and
- Improving the appraisal process to ensure more accurate deductions for donated property.

Additionally, Independent Sector worked with many member organizations to offer input into the major redesign of the Form 990 subsequently undertaken by the IRS and released in 2008. The IRS engaged in an extensive outreach effort to members of the charitable community during the redesign process. Panel recommendations that were ultimately adopted by the IRS or incorporated in the Form 990 redesign included:

- The mandatory revocation of exempt status for organizations that fail to file an appropriate Form 990 for three consecutive years;
- Expanded Form 990 compensation reporting, to include listing names and reporting compensation for the organization's five most highly compensated employees;
- Requiring additional information, including a summary and statement of purpose on the first page, disclosure of which voting board members are independent, and disclosure of the total amount of donor advised funds; and
- Asking whether an organization has a written conflict of interest policy.

The IRS's solicitation of input from the tax exempt sector on the Form 990 redesign did not end with the release of the new form for tax year 2008, which had been designed with substantial input from the charitable community. Indeed, as the IRS has continued working to improve the Form 990, the agency has continued to seek outside input. During a public comment period conducted in 2011 on several issues of concern that had come to the attention of the agency, Independent Sector conducted an online forum to

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<sup>3</sup> Expert Advisory Group, Governance and Fiduciary Responsibilities Work Group, Government Oversight and Self-Regulation Work Group, Legal Framework Work Group, Transparency and Financial Accountability Work Group, and Small Organizations Work Group.

gather input from exempt organizations, and we ultimately submitted a number of specific recommendations to the IRS, including:

- Revising Part VIII of the Form 990 to better capture the full extent of government revenue received by nonprofit organizations by clarifying that government pay-for-service contracts also qualify as government contributions, and by including lines to record revenue received from Medicaid and Medicare payments;
- Adding lines to the Form 990 to inquire whether audited financial statements are made available to the public, and whether the audit includes an unqualified, qualified, adverse, or disclaimer of opinion; and
- Expanding mandatory electronic filing of the Form 990 to include more organizations.

Independent Sector and the broader charitable and philanthropic community have an extensive history working with the IRS and Congress on specific issues related to the oversight and regulation of tax exempt organizations, including reform of the revised Form 990. The charitable sector's deep commitment to ensuring this nation's laws and regulations are fair and effective while also reflecting our priorities of accountability, transparency and good governance stems from an understanding that doing so enhances our effectiveness and ultimately improves our ability to better serve individuals, families and communities.

As part of our commitment to supporting responsible practice, Independent Sector has for some time been concerned about lack of clarity in the rules surrounding political activity by 501(c)(4) social welfare organizations. We believe the problems with the current rules and regulations governing political activity by nonprofit organizations must be appropriately corrected, in order to provide clear unambiguous guidance for charitable and social welfare organizations.

## **Need for Guidance**

We underscore the importance of the IRS recognizing the need for additional guidance to clarify federal rules governing political activity by tax-exempt organizations and moving away from the ambiguous facts and circumstances approach to determine whether and to what extent an organization has engaged in political activity. We are also encouraged that the IRS prioritized the issuance of the proposed rules and invited public comment on several key areas of reform. However there are some serious flaws in the proposed regulations and we believe that if they are to be useful, they must be substantially revised.

Under current law, tax exempt organizations and regulators lack a clear definition of candidate related political activities or a clearly defined threshold for how much political activity is permissible. This clarification is a critical first step to begin addressing the current ambiguity in defining what constitutes political activity and will provide regulators with a clear consistent standard by which they review applications for tax exempt status, and ensure transparency and the even application of these rules for tax exempt organizations.

## **Concerns with Proposed Guidance**

The proposed guidance fails to provide the necessary clarity for organizations engaging in candidate-related political activities and would undermine the key role that charitable and social welfare organizations play in non-partisan civic engagement work and public policy debates.

## *Nonpartisan voter engagement and candidate forums*

The proposed guidance includes an overly broad definition of candidate-related political activities that conflates partisan and longstanding, widely accepted nonpartisan activities. For the first time, nonpartisan voter registration efforts, get-out-the vote campaigns, voter guides, and nonpartisan candidate forums undertaken by 501(c)(4) social welfare organizations to encourage civic participation and educate the general public would be considered political.

Social welfare organizations under these proposed rules would be subject to limits on the amount of nonpartisan civic engagement activities they could pursue. This undermines one of the key ways many such organizations advance their missions: helping American citizens better understand various issues being debated by those running for public office and encouraging them to register and cast their votes. Such a change would send a message to organizations and their donors that longstanding widely acceptable nonpartisan activities that encourage civic participation would no longer be considered part of our common responsibility as citizens of this great democracy.

Many communities rely on the nonpartisan programs provided by tax-exempt social welfare and charitable organizations to assist in voter registration and facilitating turnout in elections, initiatives designed to increase understanding of the electoral process and the mechanics of voting, as well as informing the general public about policy issues and positions of all candidates regardless of party affiliation. The need for this work is underscored by the fact that in 2012, only 59 percent of all eligible voters participated in the general election. A recent study by Nonprofit VOTE determined that nonpartisan voter engagement activities provided by nonprofit organizations increased participation across all registered voters, with the biggest impact on turnout among least-likely voters.<sup>4</sup> Reclassifying as political and limiting these activities could set a dangerous precedent for stifling important and irreplaceable civic engagement work by the tax-exempt charitable sector.

Defining nonpartisan voter engagement activities as political for 501(c)(4) organizations will have a deleterious cascading effect on 501(c)(3) public charities. Given the express prohibition for 501(c)(3) charitable organizations to engage in candidate-related political activity, risk-sensitive public charities and their funders will likely take guidance for the rules governing 501(c)(4) welfare organizations and accordingly, curtail their activities as well in order to avoid association with activities that the IRS views as political. The reclassification adds further confusion by contradicting existing legislation such as the Motor Voter Act, where lawmakers spelled out the key role nonprofits play in registering citizens to vote via nonpartisan means and enabling qualified voters to cast ballots on Election Day.

Our laws have long permitted tax-exempt charitable and social welfare organizations to encourage voter registration, urge eligible citizens to vote, and provide nonpartisan resources to assist the public in making informed judgments about candidates and their views. Our laws and regulations should facilitate more civic engagement, not less. These regulations, as crafted do the opposite.

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<sup>4</sup> "Can Nonprofits Increase Voting among their Clients, Constituents, and Staff: An evaluation of the track the vote program." Nonprofit Vote. 2013. <http://www.nonprofitvote.org/documents/2013/08/can-nonprofits-increase-voting-executive-summary.pdf>

## *Blackout periods*

Under the proposed guidance, any “public communication” that clearly identifies a candidate, or any forum where candidates appear within 30 days of a primary and 60 days of a general election, would now be defined as candidate-related political activity.

Incumbents whose work impacts the programs and services of a tax-exempt organization would become “untouchable” during the 30 day and 60 day blackout period. Any engagement of an incumbent by a 501(c)(4) organization, including events during the blackout periods, would be considered political activity. This redefining of activity as ‘political’ would extend even to the organization simply acknowledging the incumbent’s role in policy issues or proposals. This artificial separation of nonprofit organizations from key decision makers in our democracy, even as these public officials continued to advance their policy work would stifle informed decision-making and strain the crucial relationship between civil society and elected officials.

Any effort to influence legislation during the blackout periods that refers to an elected official who is running for re-election would now be considered political activity. This would blur the lines between what constitutes political activity and lobbying, which 501(c)(4) organizations are currently permitted to engage in without limitation. This rule would have the unintended consequence of undermining longstanding advocacy campaigns by 501(c)(4) organizations that may – by no fault of their own – require action within 30 days of a primary or 60 days of a general election.

Historically, lawmakers have continued to work on legislation in the weeks and days before impending elections. For example, the law banning assault weapons expired within 60 days before the 2004 general election, and the \$700 billion “TARP” bank bailout bill was passed in October before the 2008 election. The guidance would also open the door for elected officials to bypass the objections of opposing voices and pass controversial legislation within the 30 or 60 day blackout period.

The classification as political activity of public communications clearly identifying a candidate within 30 days of a primary and 60 days of a general election would extend to many critical communication vehicles employed by 501(c)(4) organizations, including newsletters, email alerts, social media, and websites. These communications would be deemed political within 60 days of a general election if a political party was mentioned. Organizations would presumably have to erase content mentioning candidates or parties during the blackout period or else risk classifying those communications as political activity. This requirement would place an undue burden on organizations with extensive digital archives and links mentioning public officials, which would necessitate vigilant monitoring, removal, and republishing of content throughout the election cycle.

## **Missing Elements from Proposed Guidance**

Despite reclassifying additional activities as political and broadening the scope of candidate-related political activities, the proposed guidance misses the mark by failing to provide clarity around *how much political activity is permissible*. Without establishing a clear dollar or percentage limit for the amount of political activity 501(c)(4) social welfare organizations may engage in, enforcement of the rules will remain subjective and require evaluations to be handled on a case-by-case basis by IRS officials. This will perpetuate the existing uncertainty for organizations engaging in political activity and create the possibility of uneven rulings depending on the subjective judgment of the particular case officer.

The proposed guidance redefines candidate-related political activity only for 501(c)(4) organizations, which fails to address any of the underlying problems across the full spectrum of tax-exempt organizations. If faced with new restrictions on the timing and types of political activities subject to limits for 501(c)(4) organizations, donors can merely shift their contributions to support these identical activities conducted by other tax-exempt organizations where the rules would not apply – such as 501(c)(6) trade associations. Just as troubling, despite the express prohibition on charities from engaging in political activity, under the new guidance social welfare organizations could establish new charity arms and shift the newly-classified political activities to an affiliated charity.

In addition, the lack of a clearly defined limit for permissible candidate-related political activities and retaining conflicting definitions for other tax-exempt entities makes it extremely difficult for both the IRS and the tax-exempt sector effectively to evaluate the potential impact of each element of the proposed guidance. Additional clarity about expectations and requirements will enable 501(c) organizations to comply with the laws and regulations, and reduce the opportunity for abuses by those who seek to circumvent them.

Finally, the proposed regulations do not address the lack of transparency in the rules for 501(c)(4) organizations engaged in partisan political activity. Such activity, when clearly defined and within appropriate limits, is an important part of advancing the social welfare missions of these organizations, and should be conducted in a way that recognizes the electorate's right to know who is working to influence the outcomes of elections. These social welfare organizations should not be used as a vehicle to hide activity that properly and reasonably belongs in the public domain.

## Recommendations

The proposed guidance for 501(c)(4) social welfare organizations on candidate-related political activities, while an appreciated first step, should be substantially reworked to address the concerns outlined above. We also believe that simply withdrawing the proposed regulations and leaving in place the status quo is also not a desirable or acceptable alternative.

Specifically, we urge the IRS in its subsequent proposed guidance to:

- Revise the definition of candidate-related political activities to avoid infringement on nonpartisan civic engagement work, voter registration activities, advocacy-related communications and candidate forums traditionally undertaken by tax-exempt organizations and avoid excessively restrictive blackout periods prior to elections that may undermine long-standing, nonpartisan issue advocacy;
- Create a universal definition of political activity across all 501(c) organizations in order to provide clarity and consistency for the consideration of tax-exempt status applications and to prevent the shifting of political activity to tax-exempt organizations not covered under the current proposed guidance;
- Establish a clear limit of the amount of permissible political activity for 501(c)(4) social welfare organizations, defined either by a clear percentage or dollar amount indexed for inflation; and
- Ensure that 501(c)(4) social welfare organizations are transparent with regard to the sources of donations concerning only their work on partisan political activity.

We believe that IRS proposed guidance would be best served by rejecting a subjective facts and circumstances test in favor of a bright-line definition of political intervention that applies to all relevant

501(c) organizations, which the current guidance fails to provide. Independent Sector supports the Bright Lines Project<sup>5</sup>, whose recommendations should be incorporated into any future IRS proposed guidance in this area. These recommendations (attached) outline a uniform set of rules that would apply across all tax-exempt categories, provide predictability and clarity for what constitutes political activity, and protect free speech and encourage civic engagement while preventing many prevalent abuses of the system.

A multitude of factors contribute to the current ambiguity and uncertainty on the part of exempt organizations, the lack of enforcement of the existing rules governing political activity, and the increasing misuse of 501(c)(4) social welfare organizations for partisan political purposes. We urge the IRS to consider in totality these contributing factors, including existing donor disclosure and registration and reporting requirements. In evaluating these issues, we further recommend that reforms reflect the principles on 501(c)(4) political activity<sup>6</sup> adopted by Independent Sector in 2012 (attached).

We encourage the IRS to engage tax-exempt organizations in a meaningful dialogue to address the many concerns expressed during this comment process, and provide the public an opportunity to provide input on a revised proposed rule that better defines permissible political activity while preserving the important advocacy role and vital voice of tax-exempt organizations in civic engagement and public policy work.

We thank the House Oversight and Government Reform Committee Subcommittee on Economic Growth, Job Creation and Regulatory Affairs for its consideration of these important issues.

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<sup>5</sup> "The Bright Lines Project: Clarifying IRS Rules for Political Intervention." Bright Lines Project. December, 2013. <http://www.citizen.org/documents/bright-lines-project-december-2013-summary.pdf>.

<sup>6</sup> "Principles for Evaluating Legislative and Regulatory Proposals on 501(c)(4) Electoral Campaign Activity." Independent Sector. December 2012. [http://www.independentsector.org/principles\\_501c4\\_electoral\\_campaign\\_activity](http://www.independentsector.org/principles_501c4_electoral_campaign_activity)



**INDEPENDENT SECTOR**  
A vital voice for us all



Diana Aviv is president and CEO of Independent Sector, the national leadership network for America's nonprofits, foundations, and corporate giving programs. Through its members and their tens of thousands of affiliated organizations across the US and around the globe, Independent Sector advances the common good by leading, strengthening, and mobilizing the charitable community.

Diana is a frequent speaker on trends in and key issues for the charitable and philanthropic sector. She has testified before Congress and has been featured in media outlets such as The New York Times, The Washington Post, The Wall

Street Journal, NPR, and MSNBC.com.

Diana also served as executive director of the Panel on the Nonprofit Sector, convened by Independent Sector at the encouragement of the leadership of the Senate Finance Committee. This independent panel recommended actions to strengthen the governance, transparency, and accountability of public charities and private foundations, many of which were enacted into law.

Diana came to Independent Sector in 2003 after spending nine years with Jewish Federations of North America as their vice president for public policy and director of its Washington Action Office. Diana focused on federal legislation and regulations, particularly policies affecting health and human service organizations.

Diana was formerly associate executive vice chair at the Jewish Council of Public Affairs, director of programs for the National Council of Jewish Women, and executive director of a comprehensive program to serve battered women and their families. She had a private psychotherapy practice in New York and New Jersey and has served as an expert witness in capital cases in New Jersey.

In December 2010, President Obama appointed Diana to the White House Council for Community Solutions. She serves on the board of directors for the Southern Africa Legal Services Foundation and is a member of the advisory boards of the Comptroller General's at the Government Accountability Office, the Peter G. Peterson Foundation, the International Center for Not-for-Profit Law, the Centers on the Public Service of George Mason University, and Urban Institute's Outcomes and Effective Practices Portal among others.

Diana previously has served on numerous boards and advisory committees including the Smithsonian Institution's Board of Regents' Committee on Governance, GuideStar, the National Council on Aging, and the National Center on Philanthropy and the Law. A native of South Africa, Diana graduated from the University of Witwatersrand in Johannesburg and received a master's degree at Columbia University.



Committee on Oversight and Government Reform  
Witness Disclosure Requirement – "Truth in Testimony"  
Required by House Rule XI, Clause 2(g)(5)

Name: DIANA AVIV

1. Please list any federal grants or contracts (including subgrants or subcontracts) you have received since October 1, 2011. Include the source and amount of each grant or contract.

-NONE

2. Please list any entity you are testifying on behalf of and briefly describe your relationship with these entities.

Testifying on behalf of Independent Sector as President and CEO.

3. Please list any federal grants or contracts (including subgrants or subcontracts) received since October 1, 2010, by the entity(ies) you listed above. Include the source and amount of each grant or contract.

- NONE



2-25-14

I certify that the above information is true and correct.

Signature:

Date: