CAUSE of ACTION
Advocates for Government Accountability
A 501(c)(3) Nonprofit Corporation

February 5, 2014

VIA CERTIFIED MAIL & E-MAIL

Hon. Howard A. Shelanski
Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
725 17th Street, NW
Washington, D.C. 20503
hshelanski@omb.eop.gov

Re: Request for Meeting with OIRA Administrator/ Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities, 78 Fed. Reg. 71535-42 (proposed Nov. 29, 2013) (to be codified at 26 C.F.R. pt. 1).

Dear Mr. Shelanski:

I write on behalf of Cause of Action, Inc., a 501(c)(3) non-profit, nonpartisan government accountability organization.

On November 29, 2013, the Internal Revenue Service (IRS) and the Department of the Treasury (Treasury) issued a notice of proposed rulemaking (NPRM) containing proposed rules defining and restricting "candidate-related political activities" by Internal Revenue Code § 501(c)(4) social welfare organizations.[1] Contrary to Executive Order 12866,[2] the IRS and Treasury have wrongly determined that the NPRM is not a "significant regulatory action."[3]

The Office of Information and Regulatory Affairs (OIRA), however, has the authority to determine that the NPRM is a significant regulatory action and then review the proposed action to ensure that it conforms with all of the requirements of Executive Order 12866.[4] Given the

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[1] Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities, 78 Fed. Reg. 71535-42 (proposed Nov. 29, 2013) (to be codified at 26 C.F.R. pt. 1).
[2] Executive Order 12866, 58 Fed. Reg. 190, §§ 3(f)(1), (4) (Oct. 4, 1993) [hereinafter EO 12866], *available at* http://www.archives.gov/federal-register/executive-orders/pdf/12866.pdf.
[3] 78 Fed. Reg. 71535, 71540.
[4] Executive Order 12866 provides that Federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need. It mandates that in deciding whether and how to regulate, "agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider." EO 12866, *supra* note 2, § 1.

potentially corrosive impact of the NPRM on political speech and the economic burdens it will impose on small entities nationwide, Cause of Action believes OIRA review is appropriate in this case. Accordingly, Cause of Action—along with other parties impacted by the NPRM—respectfully request a meeting with you to discuss our concerns.

The Proposed Rules Will Substantially and Negatively Affect the Non-Profit Sector

Executive Order 12866 defines a "significant regulatory action" to include any action that has an "annual effect on the economy of $100 million or more or [that] adversely affects[s] in a material way a sector of the economy . . . or State, local, or tribal governments or communities."[5] The NPRM will dramatically burden and adversely and materially affect non-profits nationwide. The proposed rules establish broad new prohibitions of voter education, candidate forums, and civic engagement activities that will require 501(c)(4)s to alter their operations to conform with the new, more encompassing and inflexible standards.

The proposed rules will also burden and adversely and materially affect other section 501(c) organizations by requiring them to learn and establish systems for complying with the new definition of candidate-related political activity. If, for example, a 501(c)(3) expects to receive a grant from a 501(c)(4), both organizations would be required to determine and then track whether the grantee is engaged in prohibited activity.[6] This would both force the 501(c)(3) to learn about the new 501(c)(4) rules and to record and report information related to the new requirements. This additional burden is not reflected in the NPRM. Instead, the IRS insists that the proposed rules will only impose an additional two hours of paperwork annually per recordkeeper.[7] But this estimate bears no relationship to the reality of the matter, and it fails to account for the new information collections required by the NPRM.

The proposed rules will particularly affect small organizations that rely on volunteers. The proposed rules require regulated organizations to include "volunteer activities" in their primary purpose calculations.[8] However, there is no further definition, guidance, means of measurement, or other directions as to how such "volunteer activities" are to be calculated and reported. Further, this new requirement would mean that any communications that could be attributable to the organization—including those made by a volunteer—could be deemed candidate-related political activity. For instance, if a volunteer makes reference to a candidate at an event sponsored by the organization, that "volunteer activity" becomes a "candidate-related political activity" that must be measured and calculated. The proposed regulations would therefore require organizations to create vast monitoring systems to track the quotes and references to the organization, its officers, employees, *and* volunteers in order to record and evaluate whether a candidate-related political activity communication occurred.

Further, in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits unless a statute requires another regulatory approach. *Id.*

[5] *Id.* § 3(f)(1).

[6] 78 Fed. Reg. 71535, 71535.

[7] *Id.*

[8] *Id.* at 71539.

Further, the NPRM would convert non-candidate related political activities into candidate-related political activities merely by the passage of time. While an organization could maintain and publish legislative voting histories as part of its primary purpose, these legislative voting records would automatically be converted to candidate-related political activity if the information were to remain available on the organization's website close in time to an election.[9] Organizations would be required to constantly monitor all their activities and programs to know what communications must be removed from their websites, or withheld from their publications, to ensure that the group's primary purpose is not endangered by engaging in non-exempt activity, and the cost and burden of this monitoring is not reflected in the NPRM.

The Proposed Rules Raise Novel Legal and Policy Issues

Executive Order 12866 also defines a "significant regulatory action" as one that is likely to raise "novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in [Executive Order 12866]."[10] The NPRM qualifies for OIRA review under this definition because it attempts to limit or regulate otherwise constitutionally-protected forms of political speech by redefining political activity.[11] This redefinition captures non-political activity that has traditionally constituted the regular activities of many 501(c)(4) entities, namely, the publication of nonpartisan voter guides, the hosting of speaker forums, the distribution of pamphlets, and the organization of voter-registration drives.

Not only do the proposed rules arguably regulate constitutionally-protected forms of speech, they do so in a discriminatory fashion. Cause of Action is concerned that the proposed rules are part of an effort to stifle political expression by restricting and hampering grassroots education about the Constitution, limited government, and economic freedom. Since many conservative and libertarian groups use voter-registration drives and speaker forums to educate the public on matters pertaining to the U.S. Constitution and government spending, they are especially prone to losing tax-exempt status should the IRS finalize the proposed rules.

The IRS has long been a vehicle for punishing political opponents.[12] Article II of President Richard Nixon's Articles of Impeachment, for example, explained how the President used the IRS to illegally obtain confidential information from and tax audit his enemies.[13] More recently, the Treasury Inspector General for Tax Administration reported on the use of inappropriate criteria in determining the disposition of applications for tax-exempt status for certain conservative and libertarian organizations.[14] The current Administration has subsequently acknowledged the impropriety of this targeting—while paradoxically suggesting

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[9] *Id.*
[10] EO 12866, *supra* note 2, § 3(f)(4).
[11] 78 Fed. Reg. 71535, 71537.
[12] *See generally* DAVID BURNHAM, A LAW UNTO ITSELF: THE IRS AND THE ABUSE OF POWER (1990); Jim F. Couch *et al*, *Political Influence and the Internal Revenue Service*, 19 CATO J. no. 2 (Fall 1999), *available at* http://object.cato.org/sites/cato.org/files/serials/files/cato-journal/1999/11/cj19n2-8.pdf.
[13] H.R. REP. NO. 93-1305 at 3 (1974).
[14] TREASURY INSPECTOR GEN. FOR TAX ADMIN., INAPPROPRIATE CRITERIA WERE USED TO IDENTIFY TAX-EXEMPT APPLICATIONS FOR REVIEW, No. 2013-10-053 (May 14, 2013), *available at* http://www.treasury.gov/tigta/auditreports/2013reports/201310053fr.pdf.

that whatever targeting that did take place was the result of "some bone-headed decisions" and did not evidence "even a smidgen of corruption"[15]—but has nevertheless taken further action to impose similar burdens on these same groups through administrative rulemaking. As Rep. David Camp, Chairman of the House Ways & Means Committee, has observed that the NPRM so closely mirrors "the abused tea-party group applications, it leads me to question *if this new proposed regulation is simply another form of targeting*."[16]

The NPRM is a matter of significant public concern. Over 20,000 comments have been filed on the proposed guidelines,[17] and it has received extensive press coverage.[18] Yet, it appears that the IRS and Treasury have failed to comply with (or ignored) Executive Order 12866's regulatory principles. [19]

As a recent Harvard Law Review article notes:

> The leading academic works on OIRA and presidential control of the administrative state have focused on the White House's and agencies' experiences of centralized review, drawing different conclusions about its success. These accounts, however, have not evaluated the degree to which agencies attempt to avoid the OIRA review process entirely. It is axiomatic that imposing salient costs on an actor gives that actor an incentive to avoid those costs — and OIRA review is costly and time-consuming. Agencies thus have an incentive to avoid OIRA review if possible, either by choosing to act via procedures not subject to review under E.O. 12,866 or by acting strategically should they choose to engage in § 553 rulemaking.[20]

In this case, it seems clear that the IRS and Treasury have acted to prevent and avoid OIRA review.

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[15] *"Not Even a Smidgen of Corruption": Obama Downplays IRS, Other Scandals*, FOX NEWS, http://www.foxnews.com/politics/2014/02/03/not-even-smidgen-corruption-obama-downplays-irs-other-scandals/ (Feb. 3, 2014).

[16] Kimberly A. Strassel, *IRS Targeting: Round 2*, WALL ST. J. (Dec. 12, 2013) http://online.wsj.com/news/articles/SB10001424052702303932504579254521095034070.

[17] *Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities*, REGULATIONS.GOV, http://www.regulations.gov/#!documentDetail;D=IRS-2013-0038-0001 (last visited Feb. 3, 2014).

[18] *See, e.g.*, Michael Cohn, *Congress Requests Documents On Proposed Changes to IRS's Tax-Exempt Rules*, ACCOUNTING TODAY (Feb. 3, 2014), http://www.accountingtoday.com/news/Congress-Requests-Documents-Proposed-Changes-IRS-Tax-Exempt-Rules-69481-1.html; *IRS to Issue 501(c)(4) Rules, but Observers Say Cure May Be Worse Than The Problem*, BLOOMBERG BNA (Jan. 28, 2014), http://www.bna.com/irs-issue-501c4-n17179881660/; Chris Vest, *Rep. Dave Camp Introduces Bill to Block IRS 501(c)(4) Rules*, ASSOCS. NOW (Jan 22, 2014), http://associationsnow.com/2014/01/rep-dave-camp-introduces-bill-to-block-irs-501c4-rules/.

[19] *See generally* EO 12866, *supra* note 2, §§ 1(b)(1),(2),(4),(6),(8) and (11).

[20] Notes: *OIRA Avoidance*, 124 HARV. L. REV. 994, 996 (2011) (citations omitted).

Accordingly, Cause of Action and other interested parties request an opportunity to meet with you to discuss the concerns we have outlined above.[21] If you have any questions about this request, please contact me by e-mail at daniel.epstein@causeofaction.org, or by telephone at (202) 499-4232. Thank you for your attention to this matter.

Sincerely,

DANIEL Z. EPSTEIN
EXECUTIVE DIRECTOR

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[21] *See Office of Information and Regulatory Affairs (OIRA) Q&A's*, OFFICE OF MGMT. & BUDGET, http://www.whitehouse.gov/omb/oira_qsandas (last visited Feb. 4, 2014) ("OIRA's policy is to meet with any party interested in discussing issues. . . . Outside parties may provide written comments to the OIRA Administrator on a rule that is under review or may soon be under review. Those parties may also request a meeting with the Administrator.").