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

February 26, 2014

VIA CERTIFIED MAIL & REGULATIONS.GOV

Internal Revenue Service
CC:PA:LPD:PR (REG-134417-13)
Room 5205
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Re: Cause of Action's Comments on the IRS's Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities, REG-134417-13

To Whom It May Concern:

I write on behalf of Cause of Action, a non-profit, nonpartisan government accountability organization that uses investigative, legal, and communications tools to educate the public on how government transparency and accountability protect economic opportunity. Cause of Action is a tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code (IRC).

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 guidelines defining and restricting "candidate-related political activities" by social welfare entities organized under Section 501(c)(4) of the IRC.[1] By letter dated January 28, 2014, Cause of Action commented on the NPRM to the Office of Management and Budget.[2] By letter dated February 5, 2014, Cause of Action requested an extension of the comment period pending disclosure of information needed by Cause of Action and the public to comment meaningfully on the proposed guidelines.[3] Cause of Action has also scheduled a meeting with the Office of

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[1] Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities, 78 Fed. Reg. 71535 (Nov. 29, 2013) (to be codified at 26 C.F.R. pt. 1).
[2] *See, e.g.*, Letter from Cause of Action to Desk Office for the Dep't of the Treasury, Office of Info. & Regulatory Affairs, Office of Mgmt. & Budget (Jan. 28, 2014) (on file with author).
[3] Letter from Cause of Action to Internal Revenue Serv. (Feb. 5, 2014) *available at* http://causeofaction.org/assets/uploads/2014/02/2014-2-5-NPRM-Comment-Extension-Request.pdf; *see also* IQA Petition for Correction & Disclosure from Cause of Action to the Internal Revenue Serv. (Feb. 5, 2014), *available at* http://causeofaction.org/assets/uploads/2014/02/2014-2-5-IRS-IQA-Petition.pdf.

Information and Regulatory Affairs (OIRA)[4] to discuss the IRS's erroneous determination that the NPRM is not a "significant regulatory action,"[5] as defined by Executive Order 12866,[6] thus bypassing OIRA's review and assessment.[7] Critically, the IRS failed to alert OIRA of the drafting of the proposed guidelines, instead choosing to proceed "off-plan" and secretly.[8]

Because the NPRM will adversely and materially affect the non-profit sector and this is a matter of great public interest, the IRS should have designated the proposed guidelines as significant for purposes of Executive Order 12866.[9] Cause of Action therefore believes that the IRS should reconsider and designate the proposed rules as a "significant regulatory action" requiring an OIRA assessment.

I. Executive Orders 12866 and 13563

President Clinton's Executive Order 12866 creates "central requirements for agencies and OIRA alike"[10] to prevent onerous, inefficient, and ineffective regulation. The Order's regulatory "philosophy" and "principles" require agencies, among other things, to regulate only when necessary and no alternatives to direct regulation exist, to tailor regulations "to impose the least burden on society" and in a "cost-effective manner," and to collaborate with other stakeholders, such as state, local, and tribal governments.[11] The Order directs OIRA to review "significant"

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[4] Letter from Cause of Action to Hon. Howard A. Shelanski, Admin., Office of Info. & Regulatory Affairs, Office of Mgmt. & Budget (Feb. 5, 2014), *available at* http://causeofaction.org/assets/uploads/2014/01/2014-2-5-OIRA-Ltr.pdf.

[5] 58 Fed. Reg. 71535, 71540 ("It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866 as supplemented by Executive Order 13563.").

[6] Exec. Order 12866, 58 Fed. Reg. 190, § 1(b)(11) (Oct. 4, 1993) [hereinafter EO 12866], *available at* http://www.archives.org/federal-register/executive-orders/pdf/12866.pdf.

[7] *See id.* §§ 4(c)(5), 6(a)(3)(A).

[8] *Infra* notes 43-44 and accompanying text.

[9] 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. Cost 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 6, § 1. Further, in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits unless a statute requires another regulatory approach. *Id.*

[10] Cass R. Sunstein, Comment, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1845-46 (2013).

[11] *See* EO 12866, *supra* note 6, § 1(b)(1)-(12).

regulatory actions to ensure compliance with these principles, which includes supervising a cost-benefit regulatory assessment.[12]

The Order defines a "significant regulatory action" to be any action or proposed action that will have an annual effect on the economy of $100 million or more; adversely and materially affect a sector of the economy or State, local, or tribal governments or communities; or, is likely to raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the Order's own principles.[13] For "significant" actions, the proponent-agency must provide OIRA with "a reasonably detailed description of the need for the regulatory action," "an explanation of how the regulatory action will meet that need," and an assessment of the potential costs and benefits."[14] If an agency fails to provide this assessment, then the proposed regulation should not be published in the Federal Register.[15]

President Obama reaffirmed the philosophy, principles, and procedures of Executive Order 12866 in Executive Order 13563.[16] Among other things, Executive Order 13563 restates the requirement that all regulations be based upon a "reasoned determination that . . . benefits justify . . . costs" and that they "impose the least burden on society."[17] Furthermore, Executive Order 13563 directs agencies to allow for widespread "public participation" and "open exchange of ideas," which requires access to any "relevant scientific and technical findings" upon which an agency bases its proposed rules.[18]

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[12] While Executive Order 12866 technically applies to Executive Branch agencies (*e.g.*, Department of Treasury), President Obama has sought to expand OIRA review to the regulatory actions of independent regulatory agencies with the promulgation of Executive Order 13579. *See* 76 Fed. Reg. 41587, 41587-88 (July 14, 2011), *available at* http://www.gpo.gov/fdsys/pkg/FR-2011-07-14/pdf/2011-17953.pdf. Executive Order 13579 is explicitly aspirational ("should consider," "should develop," *etc.*), but, in at least one instance, OIRA has returned a proposed rulemaking to an independent agency for reconsideration. *E.g.*, Letter from Cass R. Sunstein, Admin., Office of Info. & Regulatory Affairs, Office of Mgmt. & Budget, to Lisa P. Jackson, Admin., Environmental Prot. Agency (Sept. 2, 2011), *available at* http://www.whitehouse.gov/sites/default/files/ozone_national_ambient_air_quality_standards_letter.pdf ("The President has instructed me to return this rule to you for reconsideration. He has made it clear that he does not support finalizing the rule at this time.").

[13] EO 12866, *supra* note 6, § 3(f)(1)-(4).

[14] *Id.* § 6(a)(3)(B)(i)-(ii).

[15] *Id.* § 7.

[16] Exec. Order No. 13563, 76 Fed. Reg. 3821, 3821-23 (Jan. 21, 2011), *available at* http://www.gpo.gov/fdsys/pkg/FR-2011-01-21/pdf/2011-1385.pdf.

[17] *Id.* § 1(b)(1)-(2).

[18] *Id.* § 2.

II. The NPRM Constitutes a "Significant Regulatory Action" under Executive Order 12866

A. The Proposed Guidelines Will Materially and Adversely Affect the Non-Profit Sector

The proposed guidelines will dramatically burden and adversely and materially affect non-profits across the United States in a number of ways. First, the IRS proposes to broadly prohibit 501(c)(4) organizations from engaging in traditionally nonpartisan activities, such as voter education and civic engagement activities. For example, the proposed guidelines explicitly reclassify voter registration drives, the distribution of voter guides, and the hosting of candidate forums—even when all these activities are done in a nonpartisan way, such as involving candidates from all parties—as prohibited activities.[19]

Second, the IRS proposes to burden other 501(c) organizations through the broad new definition of "candidate-related political activity."[20] For example, if a 501(c)(3) organization receives a grant from a 501(c)(4), both organizations would be required to determine and track whether the grantee is engaged in prohibited activity.[21] This would force the 501(c)(3) to learn 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 states that the proposed guidelines will impose only an additional two hours of paperwork annually per 501(c)(4) recordkeeper.[22] This estimate, however, bears little relationship to reality because it fails to account for the new information collections required by the NPRM.

Third, the NPRM's alleged "safe harbor" for organizations that make grants or contributions pursuant to binding grant letters is hardly that. These letters require recipients to certify that they have not engaged in candidate-related political activities and that they will not use the funds to engage in such activities.[23] The IRS claims this would impose only a two-hour burden per year. However, this estimate is similarly detached from reality.[24]

Fourth, the proposed rules will particularly burden small organizations that rely on volunteers by requiring that "volunteer activities" be included in their primary purpose calculations.[25] Beyond setting forth this requirement, the guidelines provide no further definitions, means of measurement, or directions as to how such "volunteer activities" should

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[19] 78 Fed Reg. 71535, 71541, § 1.501(c)(4)-1(a)(iii)(5), (7)-(8).
[20] *Id.* § 1.501(c)(4)-1(a)(2)(iii).
[21] *Id.* at 71535.
[22] *Id.*
[23] *Id.*
[24] *See* Letter from Barnaby W. Zall, to Desk Officer for the Dep't of Treasury, Office of Info. & Regulatory Affairs, Office of Mgmt. & Budget 9-11 (Jan. 16, 2014), *available at* http://www.campaignfreedom.org/wp-content/uploads/2013/12/Comments-on-PRA-and-RFA-Barnaby-Zall.pdf.
[25] 78 Fed. Reg. 71535, 71539.

actually be calculated and reported. Furthermore, this new requirement means that any communication that could be attributed to a tax-exempt organization, including those made by a volunteer, may be deemed "candidate-related political activity."[26] For instance, if a volunteer refers to a particular candidate at an event sponsored by a social welfare organization, that "volunteer activity" becomes "candidate-related political activity" that must be measured and calculated. The proposed regulations would therefore require organizations to construct vast monitoring systems to track the quotes and references that an organization, and its officers, employees, and volunteers make, in order to record and evaluate whether prohibited political communications have occurred. This dramatically burdens many 501(c)(4)s.

Fifth, the proposed guidelines are likely to convert non-candidate related political activity into candidate-related political activity *merely by the passage of time*. For example, although an organization could lawfully maintain and publish legislative voting histories as part of its primary purpose, these legislative voting records would automatically convert to candidate-related political activity if the information were to remain available on the organization's website close in time to an election.[27] As a result, organizations would be compelled to constantly monitor their activities and programs to ensure that they are not engaging in excessive non-exempt activity. The NPRM does not take into account the cost and burden of this monitoring activity.

When all is said and done, not only is the economic burden imposed by the IRS's proposed regulations quite likely to exceed $100 million annually, it is certain that the non-profit sector will be materially and adversely affected. Consequently, the NPRM clearly constitutes a "significant regulatory action" that should have been subjected to regulatory assessment by OIRA.

B. *The Proposed Guidelines Raise Novel Legal and Policy Issues*

The proposed guidelines also qualify for OIRA review because they attempt to limit or regulate otherwise constitutionally-protected forms of political speech by redefining "political activity"[28] to include non-political activity that has heretofore constituted the regular practices of many 501(c)(4) organizations. Such activities include 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 guidelines regulate constitutionally-protected forms of speech, they are likely to have a discriminatory impact despite their facial neutrality. Many conservative

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[26] *Id.* at 71541, § 1.501(c)(4)-1(a)(2)(iii)(C) ("*Attribution.* . . . Communications made by an organization include communications the creation of distribution of which . . . are made in an official publication . . . as part of the program at an official function . . . by an officer or director . . . or by an employee, volunteer, or other representative otherwise to communicate on behalf of the organization and acting in that capacity.").

[27] *Id.* at 71539.

[28] 78 Fed. Reg. 71535, 71537.

and libertarian groups use voter-registration drives and speaker forums to educate the public on matters pertaining to the Constitution and the dangers of unchecked government spending, these organizations are especially prone to losing their tax-exempt status should the IRS finalize the proposed rules. Given the likelihood of discriminatory effects, there should be great concern that the proposed guidelines are merely part of the Administration's continued effort to stifle political expression by restricting and hampering grassroots education about the Constitution, limited government, and economic freedom.

The proposed guidelines are a matter of significant public concern. More than 100,000 comments have been filed on the NPRM,[29] and it has received extensive press coverage.[30] Criticism of the proposed changes has come from all points along the political spectrum.[31] The American Civil Liberties Union, the Sierra Club, the Alliance for Justice, and the League of Conservation Voters, for example, have all opposed the finalization of the proposed guidelines on various grounds.[32] Simply put, there can be no doubt that the guidelines will impose significant new burdens that will adversely and materially affect tax-exempt organizations. Moreover, they raise significant and novel issues of law and policy. Thus, it is troubling that the IRS has determined that the proposed guidelines are not significant, thereby bypassing OIRA review.[33]

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[29] *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. 27, 2014).

[30] *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/.

[31] Letter from Citizens for Responsibility & Ethics in Washington to Hon. John Koskinen, Comm'r, Internal Revenue Serv. (Feb. 19, 2014), *available at* http://www.citizensforethics.org/page/-/PDFs/Legal/2-19-14_CREW_IRS_Comments_Social_Welfare_Rule.pdf?nocdn=1.

[32] *Liberals vs. The IRS*, WALL ST. J. (Feb. 24, 2014), http://online.wsj.com/news/articles/SB10001424052702303704304579382983945174994?mg=reno64-wsj&url=http%3A%2F%2Fonline.wsj.com%2Farticle%2FSB10001424052702303704304579382983945174994.html; Stephen Dinan, *Obama's Proposed IRS Rules to Limit Tax-Exempt Status Concern Liberals, Too*, WASH. TIMES (Feb. 24, 2014), http://www.washingtontimes.com/news/2014/feb/24/obamas-proposed-irs-rules-to-limit-tax-exempt-stat/.

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

III. The IRS Did Not Meet Its Reporting Requirements

The IRS is required to provide OIRA with "a list of its planned regulatory actions, indicating those which [it] believes are significant."[34] Further, as part of the Unified Regulatory Agenda, the IRS is required to prepare lists of "all regulations under development or review," including, at a minimum, a regulation identifier number, a brief summary of the actions, the legal authority for each action, any legal deadlines and telephone number of a knowledgeable agency official.[35]

For the "most important significant regulatory actions" contained on this Unified Regulatory Agenda, and which are expected to be issued "in proposed or final form in that fiscal year of thereafter," agencies must prepare a separate and unique "regulatory plan."[36] Among other things, these plans "shall be approved personally by the agency head" and shall contain, "at a minimum," a statement of the agency's regulatory objectives and priorities and how they relate to the President's priorities; a summary of each planned significant regulatory action including, to the extent possible, alternatives to be considered and preliminary estimates of the anticipated costs and benefits; a summary of the legal basis for each such action, including whether any aspect of the action is required by statute or court order; and, a statement of the need for each such action.[37] Further, these plans "shall be published annually in the October publication of the Unified Regulatory Agenda," a publication available to Congress; state, local, and tribal governments; and, members of the general public.[38]

Although the NPRM was published in November 2013, the genesis of the proposed guidelines dates back several years. According to Don Spellman, an IRS attorney, the Obama Administration had considered proposing new guidance on 501(c)(4) organizations as early as 2009.[39] For nearly five years then, the IRS was considering revising 501(c)(4) regulations. Congressional testimony provided by former IRS Acting Commissioner Steven Miller corroborates the claim that the IRS was crafting new regulations for social welfare organizations long before May 2013.[40] Indeed, according to an e-mail message between Ruth Madrigal, an attorney-advisor in the IRS's Office of Tax Policy, and IRS officials—including Lois Lerner, former Director of Exempt Organizations—the proposed guidelines, in some form, had been "on [the] radar" long before the release of Treasury Inspector General for Tax Administration's

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[34] *Id.* § 6(a)(3)(A).
[35] *Id.* § 4(b).
[36] *Id.* § 4(c)(1).
[37] *Id.* § 4(c)(1)(A)-(D).
[38] *Id.* § 4(c)(7).
[39] Letter from Hon. Darrell Issa and Hon. Jim Jordan, U.S. House of Representatives, to Hon. John Koskinen, Comm'r, Internal Revenue Serv. 7 (Feb. 4, 2014), *available at* http://oversight.house.gov/wp-content/uploads/2014-02-04-DEI-JDJ-to-Koskinen-IRS-c4-Rule.pdf (citing transcribed interview of Don Spellman, Internal Revenue Serv., in Washington, D.C. (July 12, 2013)).
[40] *Id.* at 7-8 (citing transcribed interview of Steven Miller in Washington, D.C. (Nov. 13, 2013)).

report on the targeting of tea-party groups.[41] They were, moreover, the likely continuation of the sort of politicization that epitomized the efforts of Lois Lerner to discriminate against certain tax-exempt organizations on the basis of disfavored political views.[42]

Given that the IRS and Treasury clearly intended to propose new guidelines on 501(c)(4) organizations, they were required to report these plans to OIRA as required by Executive Order 12866. Instead of notifying Congress or the public, the IRS and Treasury chose to conceal their plans to dramatically transform the regulatory landscape. Not only were the proposed guidelines formulated secretly and "off-plan," as one IRS employee forthrightly conceded,[43] but they were never included on the Unified Regulatory Agenda until the fall of 2013, *concurrent* with the release of the NPRM.[44] In short, it appears the IRS and Treasury did *none* of things that Executive Order 12866 requires.[45]

IV. The IRS's Characterization of the NPRM as Guidance Does Not Short-Circuit OIRA Review.

The IRS frequently characterizes Treasury regulations as interpretive rules exempt from the Administrative Procedure Act (APA), 5 U.S.C. § 553(b), which imposes a general notice

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[41] *Id.* at 8 (citing e-mail from Ruth Madrigal, Office of Tax Policy, Dep't of the Treasury, to Victoria A. Judson, et al., Internal Revenue Serv. (June 14, 2012) [IRSR 305906]).
[42] *Id.* at 2-4.
[43] *Id.* at 11 (citing e-mail from Ruth Madrigal, Office of Tax Policy, Dep't of the Treasury, to Victoria A. Judson, et al., Internal Revenue Serv. (June 14, 2012) [IRSR 305906] (stating that the Administration was addressing the 501(c)(4) regulations "off-plan")).
[44] *Id.* at 11 (citing 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).
[45] It should be noted that the IRS has long had a "cozy" relationship with OIRA in terms of abiding by the requirements of Executive Order 12866 and its predecessors. As early as 1983, OIRA and IRS had agreed to exempt particular types of (proposed) rulemaking activities from executive review. *See* Memorandum of Agreement between Dep't of Treasury and Office of Mgmt. & Budget Concerning Exec. Order 12291 (Apr. 29, 1983) (on file with Cause of Action). This practice continued with the issuance of Executive Order 12866. *See* Leon E. Panetta, Dir., Office of Mgmt. & Budget, Memorandum for Heads of Exec. Dep'ts & Agencies & Indep. Regulatory Agencies (Oct. 12, 1993) (on file with Cause of Action). Nevertheless, while much of IRS's rulemaking was explicitly exempted from OIRA review, the agency was still expected to submit lists of regulations under development to OIRA periodically so that it could determine whether any proposed rulemakings might be "significant," and "hence warrant centralized review." Letter from Sally Katzen, Admin., Office of Info. & Regulatory Affairs, to Jean E. Hanson, Gen. Counsel, Dep't of the Treasury (Dec. 22, 1993) (on file with Cause of Action).

requirement on agencies engaged in rulemaking.[46] Interpretive rules lack binding, legal effect.[47] Rather, they represent existing legal obligations or state the agency's view on a matter of policy without creating legal rights or obligations.[48] In contrast, legislative rules alter legal requirements and create new rights or duties.[49]

The IRS describes the NPRM as providing "*guidance* to tax-exempt social welfare organizations."[50] While the IRS permits public comment it predictably exempts itself from the APA, stating that it "has been determined that section 553(b) of the Administrative Procedure Act [(APA)] (5 U.S.C. chapter 5) *does not apply*."[51] However, the IRS's formulaic APA disclaimer should not short-circuit OIRA review. The proposed rules are legislative in character. Courts are not bound by an agency's "say-so." Instead, they should look to a proposed action's "legal effect."[52] The IRS should not be permitted to attempt to evade OIRA review by underestimating the impact of the proposed rules and treating them as mere "guidance."[53] 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

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[46] Kristin E. Hickman, *A Problem of Remedy: Responding to Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 76 GEO. WASH. L. REV. 1153, 1158 (2008).

[47] James Hunnicutt, Note, *Another Reason to Reform the Federal Regulatory System: Agencies; Treating Nonlegislative Rules as Binding Law*, 41 B.C. L. REV. 153, 165 (1999). The Internal Revenue Manual states that "[a]lthough most IRS/Treasury regulations are interpretative, and therefore not subject to the notice-and-comment provisions of the APA, the Service usually solicits public comment when it promulgates a rule." Internal Revenue Manual § 32.1.5.4.7.5.1(5) (2011).

[48] *Id.*

[49] *Id.*

[50] 78 Fed. Reg. 71535, 71535 (emphasis added).

[51] *Id.* (emphasis added).

[52] Amer. Mining Congress v. Mine Safety & Health Admin., 995 F.2d 1106, 1112 (D.C. Cir. 1993) (whether a proposed rulemaking has 'legal effect' is "ascertained by asking (1) whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties, (2) whether the agency has published in the rule of the Code of Federal Regulations, (3) whether the agency has explicitly invoked its general legislative authority, or (4) whether the rule effectively amends a prior legislative rule").

[53] *See generally* Jennifer Nou, *Agency Self-Insulation under Presidential Review*, 126 HARV. L. REV. 1755 (2013).

> 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.[54]

The NPRM imposes a whole host of new legal obligations on 501(c)(4) social welfare organizations, as well as other 501(c) tax-exempt entities with which 501(c)(4)s interact.[55] The proposed "guidelines" are hardly hortatory, providing aspirational guidance to IRS agents; rather, they are obligatory rules for classifying prohibited political activity.[56] Tax-exempt organizations of all types will be subjected to new legal obligations. Full OIRA review is therefore proper.

Conclusion

In light of the foregoing, the proposed rules represent a "significant regulatory action" under the terms of Executive Order 12866. Accordingly, Cause of Action requests that the IRS properly designate the proposed rules as "significant" and permit OIRA to conduct a comprehensive regulatory assessment. Further, we request that the IRS reconsider its definition of candidate-related political activity and abandon broad language that would prohibit tax-exempt organizations from engaging in traditionally nonpartisan-activities that benefit the social welfare, contribute to a robust democratic society, and permit the exercise of constitutionally-protected speech.

Thank you for your consideration. Please contact me by e-mail at daniel.epstein@causeofaction.org, or by telephone at (202) 499-4232 if you have any questions.

Sincerely,

DANIEL Z. EPSTEIN
EXECUTIVE DIRECTOR

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[54] Note, *OIRA Avoidance*, 124 HARV. L. REV. 994, 996 (2001) (citations omitted).
[55] *See* Gen. Motors Corp. v. Ruckleshaus, 742 F.2d 1561, 1565 ("An interpretative rule simply states what the administrative agency thinks the statute means, and only 'reminds affected parties of existing duties.'" (citing Citizens to Save Spencer Cnty. v. EPA, 600 F.2d 844, 876 n.153 (D.C. Cir. 1979))) ("On the other hand, if by its action the agency intends to create new law, rights or duties, the rule is properly considered to be a legislative rule." (citing Amer. Postal Workers Union v. U.S. Postal Serv., 707 F.2d 548, 558-59 (D.C. Cir. 1983))).
[56] *See* Syncor Int'l Corp. v. Shalala, 127 F.3d 90, 94 (D.C. Cir. 1997) ("[P]olicy statements are binding on neither the public nor the agency." (citations omitted)).

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