



February 5, 2014

**VIA REGULATIONS.GOV & CERTIFIED MAIL**

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

**Re: Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities, REG-134417-13 / Request for the IRS to Keep the Comment Period Open and to Comply with the Information Quality Act.**

To Whom It May Concern:

I write on behalf of Cause of Action, a nonprofit, nonpartisan government accountability organization that fights to protect economic opportunity when federal regulations, spending, and cronyism threaten it. Cause of Action requests an extension of the comment period for the Internal Revenue Service's (IRS) notice of proposed rulemaking (NPRM) which defines and restricts "candidate-related political activities" by social welfare organizations under Section 501(c)(4) of the Internal Revenue Code.<sup>1</sup> While the comment period for the proposed rules is scheduled to close on February 27, 2014, Cause of Action requests that it be extended until twenty-one days after the IRS produces records in response to Cause of Action's Freedom of Information Act (FOIA) request.

In a press statement announcing the proposed rule, the IRS stated that it "drew upon . . . suggestions made in unsolicited public comments."<sup>2</sup> On December 24, 2013, Cause of Action submitted a FOIA request to the IRS seeking these unsolicited public comments, along with other records that would reveal who or what contributed to and influenced the IRS's drafting of the proposed rules.<sup>3</sup> In response to Cause of Action's FOIA request, the IRS stated that it could not respond by the statutory deadline and therefore would extend the response date to May 16,

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<sup>1</sup> Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities, 78 Fed. Reg. 71,535 (Nov. 29, 2013) (to be codified at 26 C.F.R. pt. 1).

<sup>2</sup> Press Release, Internal Revenue Serv., U.S. Dep't of the Treasury, IRS Will Issue Proposed Guidance for Tax-Exempt Social Welfare Organizations (IR-2013-92) (Nov. 26, 2013), *available at* <http://www.irs.gov/uac/Newsroom/Treasury,-IRS-Will-Issue-Proposed-Guidance-for-Tax-Exempt-Social-Welfare-Organizations>.

<sup>3</sup> Cause of Action, FOIA Request to Bertrand Tzeng, Internal Revenue Serv. (Dec. 24, 2013) (enclosed as Exhibit 1).

2014.<sup>4</sup> This is consistent with the IRS's estimated production date of April 7, 2014 for another individual's FOIA request seeking similar NPRM records.<sup>5</sup> Thus, the IRS intends to issue a final response to these FOIA requests well beyond the close of the comment period.

Without the requested records, Cause of Action will be deprived of an opportunity to effectively comment on the proposed rules. The U.S. Court of Appeals for the District of Columbia has held that in order to effectively comment on a proposed rule, the public must have access to documents that contributed to and influenced the agency's promulgation of the proposed rule.<sup>6</sup> The current Administration also requires agencies to "provide the public with access to all relevant materials" pertaining to proposed regulations, at least "[t]o the extent that they are part of a rulemaking."<sup>7</sup> Such materials would include the "unsolicited public comments," as well as other documents that may have influenced the IRS's proposed rules.

Cause of Action is particularly concerned about obtaining all supporting NPRM documentation since the IRS has already demonstrated its reliance on faulty information during the rulemaking process. For instance, the IRS vastly underestimated the NPRM's recordkeeping burden on regulated entities.<sup>8</sup> The IRS's burden estimate does not meet Information Quality Act ("IQA")<sup>9</sup> requirements, specifically the quality standards in IRS and Office of Management and Budget (OMB) guidelines for influential statistical information.<sup>10</sup> In fact, the NPRM is bare of any suggestion that these information quality requirements, which are mandatory and not permissive, were met.<sup>11</sup> Cause of Action requests that the IRS demonstrate that its burden estimates comply with the IQA. Moreover, the IRS's dissemination of vague and misleading

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<sup>4</sup> Letter from Robert Thomas, Internal Rev. Serv. to Cause of Action (Jan. 30, 2014) (enclosed as Exhibit 2).

<sup>5</sup> Letter from Denise Higley, Tax Law Specialist, IRS Headquarters Disclosure FOIA Group to Cleta Mitchell, Foley & Lardner, LLP (Jan. 6, 2014) (extending "the response date to April 7, 2014 when [IRS] believe[s] [it] can provide a final response." (enclosed as Exhibit 3).

<sup>6</sup> See *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977) ("The notice required by the [Administrative Procedure Act], or information subsequently supplied to the public, must disclose in detail the thinking that has animated the form of a proposed rule and the data upon which that rule is based.").

<sup>7</sup> White House Memorandum on Increasing Openness in the Rulemaking Process 2 (May 28, 2010), available at [http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/edocket\\_final\\_5-28-2010.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/edocket_final_5-28-2010.pdf)

<sup>8</sup> 78 Fed. Reg. 71535, 71535 (estimating the NPRM as requiring 2,000 recordkeepers for two hours per year, for a total of 4,000 annual recordkeeping hours).

<sup>9</sup> Pub. L. No. 106-554, § 515, 114 Stat. 2763A-154 (App. C), 44 U.S.C. § 3516 Note.

<sup>10</sup> 67 Fed. Reg. 8452-60 (Feb. 22, 2002); *Information Quality Guidelines*, INTERNAL REVENUE SERV., <http://www.irs.gov/pub/irs-utl/infoqualityguidelines.pdf> (last visited Jan. 27, 2014).

<sup>11</sup> Like the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq., IQA mandates a process not an outcome and compliance is mandatory not permissive. Compare 44 U.S.C. § 3516 note; 67 Fed. Reg. 8452; 40 C.F.R. § 1505.1(b)(federal agencies must assure NEPA compliance); *Environmental Defense Fund v. Massey*, 986 F.2d 528, 532 (D.C. Cir. 1993)(NEPA "does not dictate agency policy or determine the fate of contemplated action" but failure to comply is grounds for remand). Therefore, all of the statistical information used by the IRS in or to prepare the NPRM, including its estimates of burden, must comply with the IQA and the IRS thus should certify and demonstrate that has met OMB and IRS information quality guidelines requiring validation, the use of methodologies that are consistent with generally accepted professional standards, transparency and reproducibility, among other things. See *Prime Time, Inc. v. Vilsack*, 599 F.3d 678, 682 (granting judicial review and treating OMB Guidelines as legislative rules entitled to *Chevron* deference); see also *Motor Vehicle Mfr. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). The IRS's failure to comply with IQA quality guidelines is, without more, arbitrary, capricious and grounds for remand.

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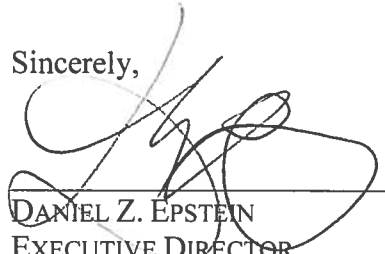
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information makes it even more important that the public obtain all supporting documents to fully understand the basis of the NPRM.

In light of the foregoing, Cause of Action requests that the comment period be extended until twenty-one days after the time the IRS has processed and disclosed all records responsive to Cause of Action's FOIA request. Please contact me by e-mail at [daniel.epstein@causeofaction.org](mailto:daniel.epstein@causeofaction.org), or by telephone at (202) 499-4232, if you should have any questions.

Thank you for your attention to this matter.

Sincerely,



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EXECUTIVE DIRECTOR  
CAUSE OF ACTION

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