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MAINE

359 DIRKSEN SENATE OFFICE BUILDING
(202) 224-5344
Website: http://www.King.Senate.gov

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February 14, 2014

The Honorable John Koskinen
Commissioner, Internal Revenue Service
1111 Constitution Avenue NW
Washington, DC 20224

Dear Commissioner Koskinen,

As the IRS is engaged in a rulemaking process regarding the political activity of section 501(c)(4) organizations, I write today to register my concern about how these organizations have come to operate in the post-*Citizens United* electoral landscape and to call upon the agency to implement a strict interpretation of the governing statute for these organizations.

First, I commend the IRS for undertaking a revision of the regulations pertaining to section 501(c)(4) organizations. This action is long overdue. The increased prevalence of "dark money" in electoral politics has been a troubling development in recent years, and the use of our tax code to shield the identities of donors represents one of its most egregious manifestations. While I am a staunch defender of free speech, I do not believe that a commitment to this basic right prohibits us from also demanding transparency and accountability, particularly when speech is directed intentionally to influence electoral outcomes. The American people deserve to know who is funding political messaging and for what purpose, regardless of its political persuasion.

In examining the agency's proposed rules, I am pleased to see that the IRS has put forward more precise language regarding the kinds of activities that will be deemed political, and thus, non-exempt. This has long been a source of confusion and no doubt contributed to the unacceptable actions of some IRS staff who used inappropriate criteria to screen section 501(c)(4) applications during the 2010 and 2012 election cycles. In particular, by adjusting the regulatory language to refer to "candidate-related political activity," and by defining the specific actions that would comprise such activity, the IRS has proposed criteria that are better aligned with existing language in the Federal Election Campaign Act and section 527 of the Internal Revenue Code. As the political activity of these organizations in recent elections mirrors that of political action committees, this commonality of language is both welcome and appropriate.

While the development of this more precise language is important, I remain concerned about the ongoing conflict between the statute pertaining to section 501(c)(4) organizations and the regulatory interpretation that governs their activities. The tax code lays out a clear definition for these tax-exempt organizations, describing them as "civic leagues or organizations not

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organized for profit but operated exclusively for the promotion of social welfare" (emphasis mine). The original statute contains no mention of political activity, as these organizations were never anticipated to engage substantially in electoral politics. However, regulations for implementing this statute, adopted in 1959, allow organizations to be considered "exclusively" involved in promoting social welfare so long as they are "primarily" engaged in that work. The regulations further provide that the promotion of social welfare does not include political activity.

Although the new regulations proposed by the IRS in November provide much needed clarity in defining what kind of activity will be considered political in nature, they do not address the more difficult issue of determining exactly how much political activity should be deemed permissible under section 501(c)(4). As you consider this question of whether or not "primarily" is an appropriate standard, I urge you to return to the language of the original statute, which clearly indicates that these organizations should be in the singular work of promoting social welfare for whole communities. The use of "primarily" is a significant departure from the statute's "exclusively," particularly as most legal experts argue that the "primarily" standard may be reached so long as more than 50% of a section 501(c)(4) organization's activities fulfill the social welfare purpose.

It bears repeating: the interpretive distance between "exclusively" and "primarily" is vast, and I urge you to return to the standard of the original statute.

In the absence of enforcing the statute as written – that is, prohibiting section 501(c)(4) organizations from engaging in any kind political activity – I urge the IRS to consider at least bringing its interpretation of "exclusively" in line with the standard used in section 501(c)(3) of the tax code. While the section 501(c)(3) regulations employ a similar interpretation of "exclusively" as "primarily", they also state that "an organization will not be so regarded if more than an insubstantial part of its activities is not in furtherance of an exempt purpose."[1] This standard, to me, seems the minimum which is appropriate. Restricting non-exempt activities – such as political activity – to an insubstantial amount would be a much more limited standard than the 50% threshold currently employed and would better align the function of these organizations with their statutory purpose.

Of course, entities operating under section 501(c)(4) of the tax code are not the only ones involved in the business of shielding donor identities. Labor unions under section 501(c)(5) and trade associations under section 501(c)(6) have also become major players in the campaign finance landscape, but the IRS regulations proposed in November do not provide further guidance about the level of political activity permissible for them. Without comprehensive and consistent guidance for all tax-exempt organizations, we risk facilitating the migration of money

[1] Treas. Reg. § 1.501(c)(3)-1(c)(1).

into whichever organization provides donors the greatest ability to hide their identity. Because of this, I urge the IRS to begin examination of these organizations in conjunction with its rulemaking on section 501(c)(4) organizations in order to arrive at an even-handed solution that impacts all organizations who seek to influence elections.

Critics of the present rulemaking process have suggested that through these proposed rules the government is moving toward dangerous regulation of political speech, or worse, that the rulemaking is a veiled process through which the President can target political opponents. I do not agree. Regardless of their political affiliation, all tax-exempt organizations wishing to participate in political activity should be subject to the highest level of scrutiny. Both Democratic and Republican organizations have used this tax provision to shield the identity of their donors while influencing elections. It is time for an end to this dark money game, and I look forward to working with you and my colleagues in Congress as we seek to achieve that goal.

Sincerely,

Angus S. King, Jr.
United States Senator