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January 28, 2014

Office of Management and Budget
Attn: Desk Officer for the Department of Treasury
Office of Information and Regulatory Affairs
Washington, D.C. 20503

RE: Comments on Paperwork Reduction Act and Collection of Information under Internal Revenue Service NPRM, REG-134417-13, Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities

To Whom It May Concern:

On behalf of Judicial Watch, a Section 501(c)(3) organization, we submit the following comment letter concerning the erroneous assessment of the new recordkeeping and collection of information burden by the Department of Treasury contained in the Notice of Proposed Rulemaking, Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities, 78 Fed. Reg. 71535 (REG-134417-13) (Nov. 29, 2013) (the "NPRM").

Although Judicial Watch is not directly affected by the NPRM, Judicial Watch promotes integrity, transparency and accountability in government and fidelity to the rule of law through public advocacy, litigation and monitoring and investigating federal, state, local government entities and officials, among other civic and educational activities.

We respectfully request that the Office of Management and Budget ("OMB") direct the Department of Treasury to withdraw the NPRM in order to properly conduct the review required under the Paperwork Reduction Act of 1995 ("PRA")¹. The PRA directs federal agencies to "minimize the paperwork burden for individuals, small businesses, educational and nonprofit organizations,...and other persons resulting from the collection of information by or for the Federal Government."² The Director of the Office of Information and Regulatory Affairs is mandated to "minimize the Federal information collection burden with particular emphasis on those individuals and entities most adversely affected."³

¹ 44 U.S.C. § 3506(c)(1).

² 44 U.S.C. § 3501(1).

³ 44 U.S.C. § 3504(c)(3).

The Collection of Information Submitted to OMB is Incomplete

The Service's PRA submission is fundamentally flawed in several key respects. The Service does not mention the collection of information arising out of the NPRM's new term, which replaces a decades-old definition. Consequently, it does not analyze the substantial burden this new term will place on nearly all of the more than 100,000 § 501(c)(4) organizations.⁴

First, the Service's PRA submission addresses only the collection of information in § 1.501(c)(4)-1(a)(2)(iii)(D) of the NPRM. The Service fails to mention, let alone review and evaluate as required under the PRA, the burden of the collection of information arising out of its replacement of long-standing language – “participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office’ - with a new term - ‘candidate-related political activity.’”⁵ This error taints the entire PRA notice.

This new term, “candidate-related political activity,” includes several activities listed below that, under the long-standing concept of “participation, or intervention in, . . . , any political campaign,” would not be treated as political activity. This expansion will require social welfare organizations to track and collect information about five *additional* categories of activities that were completely disregarded by the Service in its PRA analysis.

- Any public communication within 30 days of a primary election or 60 days of a general election that refers to one or more clearly identified candidates in that election or, in the case of a general election, refers to one or more political parties represented in that election.⁶
- Conduct of a non-partisan voter registration drive or non-partisan “get-out-the-vote” drive.⁷
- Preparation or distribution of a non-partisan voter guide that refers to one or more clearly identified candidates or, in the case of a general election, to one or more political parties (including material accompanying the voter guide).⁸
- Hosting or conducting a nonpartisan, e.g., community, event within 30 days of a primary election or 60 days of a general election at which one or more candidates in such election appear as part of the program.⁹

⁴ National Center for Charitable Statistics, <http://nccsdataweb.urban.org/PubApps/profile1.php?state=US> (last visited Jan. 28, 2014).

⁵ Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities, 78 Fed. Reg. 71535, 71538 (Nov. 29, 2013).

⁶ § 1.501(c)(4)-1(a)(2)(iii)(A)(2); 78 Fed. Reg. at 71541.

⁷ § 1.501(c)(4)-1(a)(2)(iii)(A)(5); 78 Fed. Reg. at 71541.

⁸ § 1.501(c)(4)-1(a)(2)(iii)(A)(7); 78 Fed. Reg. at 71541.

WEBSTER, CHAMBERLAIN & BEAN, LLP

Office of Information and Regulatory Affairs

Re: §501(c)(4) NPRM

January 28, 2014

Page 3

- Activities conducted by volunteers “acting under the organization’s direction or supervision” (made even more difficult due to no guidance on “direction or supervision”).¹⁰

Although the Service is now proposing to regulate these activities (by limiting their amount), it does not analyze the burden arising from this landscape-changing definition. As a result, the Service has grossly underestimated the average annual burden hours, both with respect to the 2 hours per organization and its estimate that the additional burden will affect only 2,000 organizations.

Second, “burden” is broadly defined in the PRA to include all of the “time, effort, or financial resources expended by persons to generate, maintain, or provide information to or for a Federal agency,” including any time or other expenditure needed to review instructions, acquire technology, or search data sources.¹¹ Considerable time, effort, and financial resources will be expended by the more than 100,000 § 501(c)(4) organizations to understand the new regulations and educate staff and volunteers about the new categories of activities that will need to be tracked. Yet, the Service has completely ignored these components of burden.

In the past, only those § 501(c)(4) organizations who were engaged in traditional “political” activities, such as partisan communications, tracked and kept records on such activities. Those § 501(c)(4) organizations not involved in such activities, had no need to collect this information. However, due to the expansive new definition, which sweeps in both partisan and nonpartisan activity, nearly every § 501(c)(4) organization will be adversely affected.

Most § 501(c)(4) organizations do not currently track or collect this information. For example, a local civic organization currently does not need to track expenses and volunteer hours associated with a non-partisan event at which the mayor (who happens to be a candidate) attends to provide an update on the status of a neighborhood project. Under the proposed regulations, if the non-partisan event is held within 30 or 60 days of an election, the time and expenses associated with the event must be recorded.

The burden is particularly great on those organizations which heretofore have never had to collect and record such activity. They will need to establish new recordkeeping systems and procedures to track and collect this information. Moreover, the information collection required by the proposed regulations is not an isolated event; the Service’s proposed definition of “candidate-related political activity” will require ongoing recordkeeping and tracking of activities by almost every § 501(c)(4) organization. The recordkeeping will be particularly

⁹ § 1.501(c)(4)-1(a)(2)(iii)(A)(8); 78 Fed. Reg. at 71541.

¹⁰ § 1.501(c)(4)-1(a)(2)(iii)(C); 78 Fed. Reg. at 71541.

¹¹ 44 U.S.C. § 3502(2).

WEBSTER, CHAMBERLAIN & BEAN, LLP

Office of Information and Regulatory Affairs

Re: §501(c)(4) NPRM

January 28, 2014

Page 4

intensive during any 30 or 60 day period before a primary or general election when organizations will need to scrutinize *every* public communication (direct mail, website, emails, blog posts, etc.), including those completely unrelated to an election, to determine whether it *mentions* a government official, and whether that official is also a candidate.

Third, the new inclusion of volunteer hours imposes an additional layer of recordkeeping and burden upon these non-profit organizations, many of which rely heavily upon local volunteers. Although the Service gives no guidance as to how to determine which volunteers are under an organization's "direction or supervision," organizations will need to track and record volunteers, their activities, and time expended. Anyone who has worked with volunteers knows that recordkeeping can be notoriously difficult – how many volunteers are going to want to fill out time cards for their service? How many volunteers are going to be turned off from civic engagement due to this paperwork burden?

While the NPRM estimates that 2,000 organizations¹² will have to collect information under the new certification process for making contributions to § 501(c) organizations, the broad new definition of "candidate-related political activities" covers activities engaged in by nearly every § 501(c)(4) organization. More than 100,000 organizations, not the 2,000 estimated by the Service, will need to collect this information, especially given the Service's failure to state how much "candidate-related political activities" is too much.

The Service has drafted these proposed regulations to eliminate its requirement to make necessary fact-intensive determinations.¹³ The result is an enormous burden on over 100,000 § 501(c)(4) organizations, many of which do not engage in traditional, partisan "political activities." This burden has not been supported by the Service's PRA submission, nor is it justified.

Conclusion

In short, the Service has failed to address the collection of information arising out of the NPRM's new term – "candidate-related political activity" – which replaces a decades-old definition. Consequently, the Service has not reviewed and evaluated the substantial burden this new term will place on nearly all of the more than 100,000 § 501(c)(4) organizations. Accordingly, we respectfully request that the Director disapprove the collection of information contained in the NPRM and/or file public comments on the collection of information.¹⁴ In

¹² The Service provides no support or explanation for this number.

¹³ 78 Fed. Reg. at 71538 (stating that "the proposed approach is justified by the need to provide greater certainty to section 501(c)(4) organizations regarding their activities and reduce the need for fact-intensive determinations."); *see also id.* at 71537 (new definition would "reduce the need for detailed factual analysis").

¹⁴ 44 U.S.C. § 3507(d)(4)(A) and (d)(1)(B).

WEBSTER, CHAMBERLAIN & BEAN, LLP

Office of Information and Regulatory Affairs

Re: §501(c)(4) NPRM

January 28, 2014

Page 5

addition, we urge the Department of Treasury to withdraw the NPRM in order to properly conduct the review and analysis required under the PRA.

Judicial Watch appreciates the opportunity to comment. Please contact me at (202-785-9500) or adye@wc-b.com if you have questions or would like to set up a meeting to discuss our comments.

Yours very truly,

Handwritten signature of Alan P. Dye in cursive script.

Alan P. Dye

cc: Internal Revenue Service
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