

Sent via email to waysandmeansRFI@mail.house.gov

September 8, 2023

The Honorable Jason Smith, Chair
House Committee on Ways and Means

The Honorable David Schweikert, Chair
House Subcommittee on Oversight

RE: Request for Information: Understanding and Examining the Political Activities of Tax-Exempt Organizations under Section 501 of the Internal Revenue Code

Dear Chair Smith and Chair Schweikert,

On behalf of Nonprofit New York, I write to respond to the House Ways and Means Committee's (the Committee) [request for information](#) to understand and examine the political activities of tax-exempt organizations under Section 501 of the Internal Revenue Code issued on August 14, 2023.

[Nonprofit New York](#) is a membership organization of nearly 1,000 not-for-profit corporations in the greater New York City area. Our members are primarily 501(c)(3) public charities, representing all subsectors and organizational sizes. Our membership also includes a range of 501(c)(3) private foundations based in the New York City area. Some of our 501(c)(3) members have 501(c)(4) affiliates, however our policy efforts and general expertise centers 501(c)(3) entities as they comprise the majority of our members. Our responses focus primarily on the Committee's questions regarding 501(c)(3) organizations.

Nonprofit New York champions and strengthens nonprofits through capacity building and advocacy to cultivate a unified, just, and powerful sector. We are also proud members of the [National Council of Nonprofits](#) and support the overarching principles NCN promoted in their [letter](#) to the Committee on September 5, 2023:

- 501(c)(3) nonprofits, commonly referred to as “charitable,” are nonpartisan in law, fact, and culture. 501(c)(3)s are committed to remaining nonpartisan to ensure their integrity and impact.
- All honest efforts to protect the sector from encroaching partisanship are welcome.
- Conflation breeds confusion - when vague, undefined terms like “political advocacy” and “political nonprofit” are used, the public is justifiably confused.

- Charitable nonprofits and civic engagement are synonymous.

Nonprofit organizations are often closest to community strengths and concerns, as trusted resources and service providers. At Nonprofit New York, we believe nonprofits have an important role in the policymaking process under permissible advocacy and lobbying rules; elected officials have a responsibility to engage with a broad range of constituents; and policy that reflects community expertise and perspective will be effective. Nonprofit New York is committed to promoting robust and permissible nonprofit advocacy and supporting nonprofits in their role to strengthen our democracy.

We know this work and the health of our sector requires public trust. Since 1954, section 501(c)(3) of the tax code has protected nonpartisan nonprofit, faith-based, and philanthropic organizations from partisanship through the Johnson Amendment. This amendment requires 501(c)(3) organizations to refrain from participating or intervening in electoral campaigns in order to maintain tax-exempt status. Nonprofit New York and our sector colleagues fully support the nonpartisan requirement and prohibition of work designed to affect the outcome of an election of Section 501(c)(3) as a pillar of maintaining public trust and protecting charitable organizations from politicization and the misuse of contributions.

We welcome the opportunity to comment on ways our federal partners can help ensure public trust in our institutions and improve enforcement mechanisms to identify how “dark money” may be harming our democracy.

Nonprofit New York shares the following answers to the Committee’s solicited questions to clarify the existing rules, reporting schemes, and enforcement mechanisms that address many of the Committee’s concerns. Our overall position is that many of the Committee’s concerns about violations of the prohibition on political activity by 501(c)(3)s are clearly stated in the Internal Revenue Code (IRC), Treasury regulations, guidance, and reporting mechanisms. Good faith nonpartisan efforts to clarify and update existing guidance to provide clarity and reflect current realities are welcome, but the first priority should be providing The Internal Revenue Service (IRS) sufficient resources to monitor and enforce existing rules, rather than create additional reporting requirements for 501(c)(3)s. For 501(c)(4)s, the IRS should return to collecting Schedule Bs, which offer additional transparency regarding source of funds. In addition, with proper Congressional authorization, the IRS should coordinate with the Federal Elections Commission (FEC) who enforces the prohibition on foreign entities donating to electoral activities, to address the use of “dark money.”

- 1. Would it be helpful to 501(c)(3) and 501(c)(4) organizations for the Internal Revenue Service (IRS) to issue updated guidance on how to define “political campaign intervention” and the extent to which 501(c)(4) organizations can engage in “political campaign intervention”?**

a. 501(c)(3) Organizations

Nonprofit New York believes the definition, regulations, and guidance on “political campaign intervention” for 501(c)(3) organizations are clear. 501(c)(3) organizations are expressly prohibited from participating in or intervening in any campaign for the election of any public official.

IRC Section 501 clearly prohibits charitable organizations from participating in or intervening in any political campaign on behalf of, or in opposition to, any candidate for public office.¹ Section 4955 of the Code, taxes on political expenditures of Section 501(c)(3) organizations, imposes severe financial penalties on organizations and their managers who violate the prohibition on political expenditures.²

Section 1.501(c)(3)-1(c)(3)(i) of the Income Tax Regulations clarifies that an organization may not be considered exempt from taxes pursuant to 501(c)(3) if it is not operated *exclusively* for one or more exempt purposes including religious, charitable, scientific, testing for public safety, literary or educational purposes, or the prevention of cruelty to children or animals [emphasis added]. “Action” organizations are expressly excluded from 501(c)(3) exempt purposes, and an “action” organization under the regulations is defined as an organization that participates or intervenes, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office.³

Treasury Regulation Section 53.4955-1 provides clear rules for organizations on political campaign intervention and factors to be considered when determining if an organization is promoting the candidacy or prospective candidacy of an individual for public office.⁴

IRS Revenue Ruling 2007-41 further provides 21 examples illustrating the application of facts and circumstances to be considered in determining whether a 501(c)(3) organization has participated in, or intervened in, any political campaign on behalf of, or in opposition to, a candidate for public office.⁵

501(c)(3) organizations are clearly prohibited from engaging in political campaign intervention on the face of the statutory language in Section 501 of the Code and corresponding regulations and guidance.

b. 501(c)(4) Organizations

While we do not have significant experience with the rules for 501(c)(4) organizations because our membership primarily centers 501(c)(3) organizations, we believe the definitions of political activity are clear for 501(c)(4)s. Where difficulties arise is not in defining political activity, but in determining the appropriate degree of political activity. Treasury regulations require organizations to deduce from

¹ 26 USC § 501(c)(3).

² 26 USC § 4955.

³ 26 CFR § 1.501(c)(3)-1.

⁴ 26 CFR § 53.4955-1.

⁵ Rev. Rul. 2007-41, 2007-1 C.B. 1421 (2007).

reference to regulations applicable to 501(c)(3) organizations that a 501(c)(4) organization may engage in more than insubstantial non-exempt activities,⁶ but Congress, the IRS, nor Treasury have defined any limit.

In addition, the Supreme Court's decision in *Citizens United v. FEC*⁷ vastly expanded the role of 501(c)(4)s in financing partisan campaigns.

Congress must first unblock the Treasury Department from rulemaking on the political activities of 501(c)(4) organizations to bring further guidance and clarity to the sector. The Treasury Department is currently prevented from rulemaking on clarifying the term “political campaign intervention” because Congress has consistently included a rider in appropriations bills prohibiting the use of funds for regulatory action, revenue rulings, or other guidance that would clarify permissible actions by social welfare organizations. For example, legislation currently pending in the House, [H.R. 4664](#) (118th Congress), making appropriations for financial services and general government for fiscal year 2024, would continue the ban preventing such regulatory action at Section 124: “(1) none of the funds made available in this or any other Act may be used by the Department of the Treasury, including the Internal Revenue Service, to issue, revise, or finalize any regulation, revenue ruling, or other guidance not limited to a particular taxpayer relating to the standard which is used to determine whether an organization is operated exclusively for the promotion of social welfare for purposes of section 501(c)(4) of the Internal Revenue Code of 1986 (including the proposed regulations published at 78 Fed. Reg. 71535 (November 29, 2013)).”⁸

2. Does the IRS's current guidance on the definition of “political campaign intervention” properly account for new forms of political advocacy?

The IRS's current guidance on the definition of political campaign intervention for 501(c)(3) organizations clearly prohibits any action that may oppose or support a party or candidate. This includes not only expenditures, but also any kind of statement. There is no exception by dollar amount, medium, or any other criterion. The current guidance further prohibits even ostensibly neutral activities, such as voter registration, if they are conducted in a manner that would benefit a party or candidate.⁹ The IRS's “facts and circumstances test” provided through Revenue Ruling 2007-41¹⁰ remains a useful tool for assessing the intent and impact of communications. However, we recognize that over fifteen years have passed since this revenue ruling and welcome nonpartisan and good faith efforts to provide updated examples for organizations using digital tools and other evolving means of communicating with the communities they serve.

⁶ 26 CFR § 1.501(c)(3)-1(c)(1).

⁷ *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

⁸ Making Appropriations for Financial Services and General Government for the Fiscal Year Ending September 30, 2023, H.R. 4664, 118th Cong. (2023). <https://www.congress.gov/bill/118th-congress/house-bill/4664>

⁹ 2002 EO CPE, pp. 5, 20. See also: 60 FR 62209.

¹⁰ Rev. Rul. 2007-41, 2007-1 C.B. 1421 (2007).

3. Are there any tax-exempt organizations whose voter education or registration activities might have had the effect of favoring a candidate or group of candidates which would constitute prohibited participation or intervention?

501(c)(3) organizations are allowed to engage in voter education and registration activities if they are conducted in a neutral, non-partisan manner.¹¹ Nonprofit organizations are integral contributors to our economy, social safety net, and democracy. Nonprofit New York believes that ensuring that all New Yorkers have their voices heard, supporting voter education, and encouraging participation are not partisan or political issues — they are actions required to support our democratic institutions and responsibilities. Nonprofits with 501(c)(3) tax-exempt status are prohibited from engaging in any efforts to influence the outcome of an election, but this does not mean that nonprofits need to be passive observers of democracy in action. We need to embrace and expand our role in motivating and facilitating civic engagement. We encourage our partners in government to view the nonprofit sector as partners in promoting nonpartisan civic engagement.

The IRS currently has a reporting mechanism for individuals with credible evidence of violations of tax-exempt laws. Individuals with credible evidence of tax-exempt organizations engaging in prohibited political participation or intervention should submit a “**Tax-Exempt Organization Complaint**” ([Form 13909](#)) with the IRS. The form expressly lists as a potential violation “Organization is involved in a political campaign” and “Income/Assets are being used to support illegal or terrorist activities.”¹²

4. Are there changes to Form 990 – which is used by tax-exempt organizations to file their tax returns– that would help clarify how contributions are being used by 501(c) organizations – especially 501(c)(4) political activities or nonpartisan voter education activities of 501(c)(3)s?

Voter registration activities are permissible general 501(c)(3) activities¹³ and when 501(c)(3) organizations promote nonpartisan civic engagement it strengthens our democracy. Additional reporting requirements to the Form 990 regarding voter education activities would divert organizational resources from mission-related activities, and may stifle nonprofit organizations’ civic engagement to the detriment of all of us. Organizations do report their allowable lobbying expenses on the Form 990,¹⁴ and the IRC sets a limit on the amount of lobbying a 501(c)(3) organization may do

¹¹ IRS Frequently Asked Questions About the Ban on Political Campaign Intervention by 501(c)(3) Organizations: Get-Out-the-Vote Activities.

<https://www.irs.gov/charities-non-profits/charitable-organizations/frequently-asked-questions-about-the-ban-on-political-campaign-intervention-by-501c3-organizations-get-out-the-vote-activities>

¹² IRS Form 13909, Section 3. <https://www.irs.gov/pub/irs-pdf/f13909.pdf>

¹³ See Footnote 11.

¹⁴ IRS Form 990, Parts IV and IX.

relative to their overall activity. 501(c)(3) voter education and engagement activities, by comparison, are not limited under the IRC, nor should they be.

Political activities by 501(c)(4) organizations are currently reported on Form 990 through Schedule C. Under Schedule C, 501(c)(4) organizations must provide a description of the organization's direct and indirect political campaign activities and report all political campaign activity expenditures.¹⁵ Separately, the Federal Election Commission (FEC) requires disclosure – within 24 hours, a far faster pace than the 990 – of all donors who contribute to an electioneering communication in support of a candidate, including independent expenditures.¹⁶

Prior to 2020, 501(c)(4)s were also required to file a Form 990 Schedule B. Schedule B confidentially lists the names and addresses of substantial contributors and amounts donated.¹⁷ Nonprofit New York would strongly support the IRS again requiring all 501 organizations, including 501(c)(4)s to submit Schedule B with assurances that the IRS would treat the information confidentially and use it to enforce existing rules governing permissible uses of contributions.

5. Should Congress consider policy changes to address money from foreign nationals –who are prohibited from contributing directly to political campaigns, candidates, and super PACs—flowing through 501(c)(3) and 501(c)(4) organizations to influence U.S. elections?

a. 501(c)(3) Organizations

Foreign nationals are allowed to contribute to nonprofit organizations. As previously shared, under the IRC, 501(c)(3) organizations are prohibited from using funds to influence elections or otherwise engage in political activity.¹⁸ It is abundantly clear that 501(c)(3)s are already prohibited from influencing U.S. elections, regardless of the source of their funds. The existing prohibitions sufficiently protect against any contributions, including those made by foreign nationals, to 501(c)(3)s being used to influence elections to influence U.S. elections.

Federal law flatly prohibits the giving or receiving of monetary or in-kind donations from foreign nationals to parties, candidates, or independent expenditures.¹⁹ This applies to all entities, regardless of form or tax status, and includes a prohibition on assisting or acting as a conduit for such a donation.²⁰

¹⁵ IRS Form 990, Schedule C. <https://www.irs.gov/pub/irs-pdf/f990sc.pdf>

¹⁶ 11 CFR 100.16(a), 109.21.

¹⁷ Final Regulation: Guidance Under Section 6033 Regarding the Reporting Requirements of Exempt Organizations, 1545-BN28, Effective May 28, 2023. <https://www.federalregister.gov/documents/2020/05/28/2020-11465/guidance-under-section-6033-regarding-the-reporting-requirements-of-exempt-organizations>

¹⁸ 26 USC § 501(c)(3), 26 USC § 4955.

¹⁹ 51 USC 30121, 36 USC 510, 11 C.F.R 110.20.

²⁰ 11 CFR 110.20(h).

The FEC enforces this prohibition and requires disclosure that would bring violations to light. 501(c)(4) organizations, like labor unions and other corporations, may not make a direct political campaign contribution using their general funds; they must establish a separate, segregated fund (SSF) to do so, and these SSFs are subject to FEC restrictions as to who may give and how much.²¹ The FEC further requires disclosure of the donors supporting electioneering communications, both coordinated and direct, within days rather than fiscal years.²²

b. 501(c)(4) Organizations

Congress should encourage the IRS to again collect information from 501(c)(4) organizations about the domicile of major contributors in an effort to address money from foreign nationals that may flow to influence elections. We and our colleagues take note of reports which raise allegations about improper activities of 501(c) organizations using foreign funding.²³ We again reiterate that the lack of information accessible to the IRS through Schedule B makes determining whether there are impermissible donations from foreign nationals used by Section 501(c)(4) organizations increasingly difficult.

IRS Form 990 has two regimes that currently collect information about donations from foreign nationals. Schedule B requires 501(c)(3) organizations, but not 501(c)(4) organizations,²⁴ to provide the name and address of major contributors. Also on Form 990, Schedule F, Statement of Activities Outside the United States, must be completed if an organization received aggregate revenues or expenses of more than \$10,000 from activities outside the United States, or aggregate foreign investments of \$100,000 or more.²⁵ Nonprofit New York supports requiring 501(c)(4) organizations to again file Schedule B to the IRS for enforcement purposes related to Committee Question 5.

6. Does the IRS collect information from 501(c)(3) and 501(c)(4) organizations that would aid the Federal Election Commission (FEC) in enforcing the foreign national prohibition under the Federal Election Campaign Act of 1971 (FECA)?

The IRS currently collects information from 501(c)(3) organizations through Form 990 that identifies revenue sources. See answer to Question Five. The FEC enforces the Federal Election Campaign Act of 1971 (FECA) through an open reporting system.²⁶ Anyone can file a complaint against an organization they suspect may be in violation of FECA.

²¹ 11 CFR 110.1(d).

²² 11 CFR 104.3-104.4.

²³ E.g., [Trojan Horse Charities and the Foreign Agents Registration Act](#), Darryll K. Jones, Nonprofit Law Prof Blog, Aug. 21, 2023.

²⁴ See Footnote 17.

²⁵ IRS Form 990, Schedule F. <https://www.irs.gov/pub/irs-pdf/i990sf.pdf>

²⁶ Federal Election Commission, How to File a Complaint with the FEC.

<https://www.fec.gov/legal-resources/enforcement/complaints-process/how-to-file-complaint-with-fec/>

7. Given concerns over foreign influence in our elections, should IRS examiners review the national origin of sources of donations reported by a tax-exempt organization on the agency's IRS Form 990-series?

IRS examiners may currently review the national origin of sources of donations reported by 501(c)(3) organizations under Schedule B. However, 501(c)(3) organizations are expressly prohibited from intervening in elections. As stated above, Nonprofit New York supports the IRS requiring 501(c)(4) organizations to again file Schedule B, which includes the name and address of major donors, and coordinating with the FEC, once required authorization is provided by Congress.²⁷

8. Are there additional disclosures by 501(c)(3) and 501(c)(4) organizations engaged in “political campaign intervention” that would help prevent illegal contributions made by foreign nationals to influence U.S. elections?

As stated throughout our responses, 501(c)(3) organizations are prohibited from engaging in political campaign intervention. Both 501(c)(3) and 501(c)(4) organizations must attest, under penalty of perjury, whether the organization engaged in direct or indirect political campaign activities on behalf of or in opposition to candidates for public office.²⁸ No further disclosure requirements for 501(c)(3) organizations would be relevant for this question.

501(c)(4) organizations that engage in political campaign activities must complete Schedule C of Form 990. For additional scrutiny about the source of funds for 501(c)(4) organizations, the IRS should again require these organizations to file Form 990 (see answer to questions Three, Four, and Five).

9. Are you aware of organizations under Section 501(c) that are tax-exempt but have the true purpose of influencing elections in favor of one political party?

²⁷ The IRS does not have authority to enforce laws outside internal revenue laws.

²⁸ Form 990, Part IV.

Nonprofit New York is not aware of 501(c)(3) organizations whose true purpose is to influence elections in favor of one political party.²⁹ 501(c)(3) organizations are prohibited from engaging in political campaign intervention. Organizations face severe penalties for violating this prohibition.³⁰

For 501(c)(4) organizations, FECA requires the disclosure of donors for political campaign expenditures. See Question Five answer for FECA regulations, IRS Form 990 disclosures, and relevant recommendations that would aid the IRS and FEC in enforcing existing rules.

10. Are you aware of organizations under Section 501(c) that are tax-exempt but have misused donor funds for the personal benefit of organization executives or have misused donor funds outside the stated purpose of the donor?

Nonprofit New York is unaware of organizations within our membership deemed tax exempt under Section 501(c) that have an unstated purpose of influencing elections in favor of one political party. 501(c)(3) tax-exempt organizations are expressly prohibited from political campaign intervention.³¹ The allowable political campaign intervention activities of 501(c)(4) organizations are not tax-exempt.³²

Nonprofit New York is not aware of organizations deemed tax exempt pursuant to Section 501(c) that have misused donor funds for personal benefit of organization executives or have spent donor funds for purposes other than those stated by the donor.

Also, as explained above, individuals with credible evidence of violations of tax-exempt laws have a mechanism for reporting this information by a “**Tax-Exempt Organization Complaint**” ([Form 13909](#)) with the IRS.

²⁹ We note reporting of churches violating the ban on directly or indirectly participating in political campaigns. E.g. [Churches are breaking the law and endorsing in elections, experts say. The IRS looks the other way](#). Jeremy Schwartz and Jessica Priest, the Texas Tribune and ProPublica. Oct. 30, 2022.

We also take note of allegations of abuse from 501(c) organizations intended to favor various political parties. [Don't Make Me Pull This Car Over! More Dark Money Fights](#), Darryll K. Jones, Nonprofit Law Prof Blog, Aug. 18, 2023. [US 'Dark Money' Donor Groups Accuse Each Other of Abusing System](#), Emily Birnbaum, Bloomberg, Aug. 15, 2023. [ALEC State Lawmakers Lead Campaign to Conceal Conservative Donors](#), Juliana Broad, Exposed by CMD, July 13, 2023. [For many Southern Baptists, the only campaign question is which Republican candidate to support](#), AP News, June 7, 2023. ['Dark money' groups have poured billions into federal elections since the Supreme Court's 2010 Citizens United decision](#), Anna Massoglia, Open Secrets, Jan. 24, 2023. [20 Examples of Johnson Amendment Violations, Experts Say](#), Pro Publica and Texas Tribune, Nov. 7, 2022. [How Dark Money and Super PACs Are Influencing the 2022 Election](#), J. David Herman, Yahoo!, Nov. 7, 2022. [Two "dark money" groups bankrolled a "pop-up" super PAC spending millions on GOP primaries](#), Taylor Giorno, Open Secrets, Aug. 23, 2022. [House quietly passes tax exemption for megadonors](#), Kenneth P. Vogel and Hillary Flynn, Politico, Apr. 16, 2015.

³⁰ See IRC and Treasury regulation citations under answer to Question One.

³¹ *Id.*

³² 26 USC 527(f)(1).

We thank the Committee for the opportunity to clarify and educate Congress and the general public on rules governing tax exempt 501(c)(3) and 501(c)(4) organizations and provide recommendations for nonpartisan and good faith proposals to maintain public trust and strengthen our democracy.

Signed,

A handwritten signature in black ink, appearing to read "Chai Jindasurat". The signature is written in a cursive style with a large, stylized initial "CJ".

Chai Jindasurat, Vice President, Policy, Nonprofit New York