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AND  
THE LOS ANGELES COUNTY BAR ASSOCIATION  
TAXATION SECTION  
TAX-EXEMPT ORGANIZATIONS COMMITTEE<sup>1</sup>**

**GETTING CONNECTED: BUSINESS AND POLITICS OF  
CHARITIES ON THE INTERNET**

This proposal is divided into two distinct chapters, each with its own Executive Summary (pp. 3-5). Chapter 1 (pp. 4-21) consists of the substantiation and disclosure, third-party donation and sponsorship sections, which were principally prepared by Louis E. Michelson, Chair of the Tax-Exempt Organizations Committee of the Taxation Section of the Los Angeles County Bar Association. Chapter 2 (pp. 22-48), the political and lobbying sections of this proposal, were principally prepared by Jennifer S. Gorovitz and Cynthia R. Rowland, Members of the Exempt Organizations Committee of the Taxation Section of the State Bar of California.<sup>2</sup> The authors wish to thank J. Patrick Whaley of Musick, Peeler & Garrett, and Cynthia F. Catalino of Baker & Hostetler LLP for their valuable contributions to this paper.

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<sup>1</sup>The comments contained in this paper are the individual views of the authors who prepared them and do not represent the positions of the State Bar of California or the Los Angeles County Bar Association.

<sup>2</sup>Although the participants on the project might have clients affected by the rules applicable to the subject matter of this paper and have advised such clients on applicable law, no such participant has been specifically engaged by a client to participate in this project.

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## **EXECUTIVE SUMMARY BUSINESS ACTIVITIES**

Although existing regulations provide clear requirements for written acknowledgements that substantiate donors' contributions, guidance is needed which states definitively that webpage or e-mail printouts meeting those requirements will be considered satisfactory. With respect to third-party donation sites, the IRS should issue guidance in the form of a "safe harbor" example of charity malls which act as agents on behalf of the tax-exempt organizations or which act as agents on behalf of multiple donors. In addition, the existing regulations regarding the classification of a sponsor's payments as nontaxable "qualified sponsorship payments" ("QSPs") are helpful to charities operating on the Internet, but the question of links raises unique and unaddressed issues. Clear guidance is needed as to the kinds of links to a sponsor which will cause a payment to be a nontaxable QSP or taxable advertising. Finally, guidance is needed as to when a charity's website is a "periodical" subjecting any sponsorship materials therein to UBIT as advertising.

## **EXECUTIVE SUMMARY POLITICAL AND LOBBYING ACTIVITIES**

Although the Internet is a relatively novel form of mass communication by public charities, existing Treasury Regulations and Revenue Rulings provide sufficient guidance with respect to some of the Internet-based activities of charities. After all, certain features of Internet communication, though dynamic and interactive, are nevertheless akin to off-line printed materials, like direct mail campaigns, postcards or annual reports. There are many more Internet-based activities conducted by charities, however, that are not addressed through existing Regulations or Revenue Rulings, because of the unique attributes of the Internet. This paper addresses some of the areas in most urgent need of guidance.

The primary topics for which guidance is needed concern (1) treatment of hyperlinks to politically partisan, campaign and lobbying sites; (2) application of the "substantial part" test to the Internet activities of non-electing charities; (3) allocation of lobbying costs by electing charities under Section 501(h); and (4) the definitions of "paid advertisement" in the "mass media" and "publisher" in the context of a charity's Internet lobbying activities.

The paper analyzes links to politically partisan or campaign websites and suggests that a "per se" prohibition is inappropriate. Links ought to be permissible in limited situations, when, for example a link is presented in a way that is purely educational, balanced and unbiased; or, when the charity links inadvertently to a politically partisan or campaign site due to changes made to the linked site after the charity has established the link. Clear guidance is also needed about when a link will be considered a lobbying communication. Links to lobbying messages may be motivated by intentions to advocate, lobby or educate; such links may be inadvertent; the lobbying content may not be directly linked to the charity's website, but rather is two clicks away; the lobbying message may be on the shared website of affiliated organizations or it may be generated by a third party specializing in Internet advocacy on a wide variety of issues. A bright line rule attributing the lobbying message to the charity on whose website the link appears would not adequately address this broad range of issues. The Regulations promulgated under Reg. 4911 should be modified to include a

facts-and-circumstances test and should list the relevant factors as well as informative examples, as provided herein.

The "substantial part" test of Section 501(c)(3), as applied to non-electing charities, ought to be clarified generally. Specifically with respect to the Internet-based activities of charities, the test should evaluate not only the percentage of the organization's total expenditures devoted to influencing legislation, but also the direct expenditure of money and volunteer time on Internet lobbying activities. The hardware, software and staff time necessary to establish and maintain the website as a whole should not be considered in the "substantial part" test unless those items would not have been purchased but for the Internet-based lobbying activities of the charity. Similarly, charities making a Section 501(h) election need guidance as to the allocation of the costs of conducting lobbying activities on the Internet. The paper addresses a number of important questions unanswered by current Regulations.

Finally, the paper addresses defining Internet charities as "publishers" and their websites as "paid advertisements" for purposes of the lobbying regulations and suggests that neither outcome is appropriate in most circumstances. Charities posting content on the Internet do not play consistently to large, captive audiences, and their industry has low barriers to entry, unlike traditional mass media, so they ought not engender the same concerns about abuses as pertain to traditional mass media publishers. Accordingly, they ought not be considered mass media publishers that warrant an expansion of the existing definition. To the extent that Internet websites are added to the definition of mass media, in some limited situations, certain charity websites reasonably may be considered "paid advertisements" if they use particular means, such as other Internet websites or paid traditional mass media advertisements to drive viewers to their own websites.

## **DISCUSSION BUSINESS ACTIVITIES**

### **I. SUBSTANTIATION AND DISCLOSURE REQUIREMENTS.**

#### **A. Request for Comment.**

An increasing number of exempt organizations are soliciting contributions on the Internet. An online donation capability provides increased convenience to an organization's donors and may allow the organization to reach computer-savvy individuals who might not otherwise contribute to the charity.

Since January, 1994, two provisions significantly affect charities and their contributors. First, under the substantiation rules under Section 170(f)(8) of the Internal Revenue Code of 1986, as amended (the "Code"), to claim a charitable contribution of \$250 or more, the donor must obtain contemporaneous written substantiation from the charity. Second, under Section 6115 of the Code, a charitable organization must provide a written disclosure statement to donors who make payments described as "quid pro quo" contributions in excess of \$75. A quid pro quo donation is a payment made partly as a contribution and partly as payment for goods or services provided to the donor by the charity.

In Announcement 2000-84, the IRS solicited public comment concerning the applicability of the Internal Revenue Code to the use of the Internet. The questions raised included the following two issues relating to substantiation and disclosure requirements:

- Does a donor satisfy the requirement under Section 170(f)(8) for a written acknowledgment of a contribution of \$250 or more with a printed webpage confirmation or copy of a confirmation e-mail from the donee organization?
- Does an organization meet the requirements of Section 6115 for "quid pro quo" contributions with a webpage confirmation that may be printed out by the contributor or by sending a confirmation e-mail to the donor?

## **B. Existing Authority.**

The donor's substantiation requirements under present law do not require any prescribed format for the acknowledgment. As long as the substantiation is in writing and contains the information required by law, the view of the IRS is that a contemporaneous writing may be in any format.<sup>3</sup> For example, letters, postcards or computer generated forms may be acceptable.<sup>4</sup> The acknowledgment does not have to include the donor's social security or tax identification number. It must, however, provide sufficient information to substantiate the amount of the deductible contribution. The acknowledgment should note the amount of any cash contribution. However, if the donation is in the form of property, then the acknowledgment must describe, but need not value, such property. The written documentation should also note whether the donee organization provided any goods or service in consideration, in whole or in part, of the contribution and, if so, must prove a description and good-faith estimate of the value of the goods or services.

The substantiation must be "contemporaneous." This means it must be obtained by the donor no later than the date the donor actually files a return for the tax year in which the contribution was made. If the return is filed after the due date or the extended due date, then the substantiation must have been obtained by the due date or the extended due date.

The responsibility for obtaining this substantiation lies with the donor who must request it from the charity. The charity is not required to record or report this information to the IRS on behalf of the donors.

The disclosure requirements under Section 6115 "quid pro quo" rule is separate from the substantiation requirement.

In some circumstances, an organization may be able to meet both requirements with the same written document.

The written disclosure statement must inform the donor that the amount of the contribution that is deductible for federal income tax purposes

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<sup>3</sup> TD 8690, 1997-1 C.B. 68.

<sup>4</sup> IRS Publication 1771, *Charitable Contributions -- Substantiation and Disclosure Requirements* (Rev. Nov. 1993).

is limited to the excess of any money (and the value of property other than money) contributed by the donor over the value of the goods or services provided by the charity. The disclosure must also provide the donor with a good faith estimate of the value of the goods or services that the donee provided.

The disclosure statement must be in writing and must be made in a manner that is reasonably likely to come to the attention of the donor. Publication 1771 illustrates this rule as follows: a disclosure in small print within a larger document might not meet this requirement.

The substantiation and disclosure requirements have customarily been met via paper or other paper-based communication, generally sent by U.S. mail. The 2000 CPE Text states that some sites that solicit donations provide acknowledgments via e-mail. The 2000 CPE Text raises the question whether acknowledgments sent by e-mail, standing alone, meet the substantiation requirement. It concludes that the answer is "uncertain."

A commentator has suggested that the IRS is concerned that the ability to print an electronic acknowledgment many times without distinguishing a copy from an "original" may lead to abuses in claiming charitable contributions in excess of those actually made. IRS officials have been reported to have suggested at public seminars that exempt organizations act with "prudence" and add a unique identifier to the e-mail receipt, specifically identifying that receipt as belonging to a particular contributor for a contribution made on a specific date.<sup>5</sup>

There is no statutory basis for adding the "unique identifier" requirement. There seems to be no policy justifying additional substantiation requirements for Internet-based donations. Allowing electronic disclosures would further the stated goal of the IRS to lessen the administrative burden of compliance because it would save substantial mailing costs and perhaps even cause a higher level of compliance through automated acknowledgment and disclosure procedures.

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<sup>5</sup>Bills, *Applying Paper Law to the Virtual Activities of Exempt Organizations*, 12 J. Tax'n Exempt Orgs. 46 (September/October 2000).



If the webpage contains the information which is required under the substantiation rules (including the amount of the donation), once the page is printed out by the donor, the paper record which is retained by the donor is virtually indistinguishable from the paper receipt that the charity would have traditionally mailed to the donor.

Some charities have established donor password-protected webpages which accumulate the donor's contributions to the charity. This webpage, if it contains the information which is required under the substantiation rule, when printed out by the donor, should also suffice for the substantiation rules.

An e-mail from the charity to the donor which includes all of the required information for the substantiation or the quid pro quo disclosure, once printed by the donor, should be treated as equivalent to a "hard copy" mailed by the charity. There actually may be a de facto "unique identifier" generated by the e-mail communication from the charity to the donor: each donor generally has a unique e-mail address, the date and time of the e-mail may be unique, and the combination of e-mail address, date/time of donation and amount of the donation would certainly create a "unique identifier" without the need for the charity to manufacture such an item.

### **C. Recommended Action.**

Based on the foregoing, we propose that guidance state that the requirements for Section 6115 quid pro quo disclosures and Section 170(f)(8) acknowledgments be treated as satisfied if (a) all of the regulatory requirements are included in a webpage confirmation, a donor password protected contribution summary or an e-mail communication from the charity, and (b) the donor prints a copy of the webpage confirmation, a donor password-protected contribution summary or an e-mail communication received from the charity.

## **II. THIRD PARTY DONATION SITES.**

### **A. Structure of Internet Donation Sites.**

The newest Internet-based fundraising devices raise funds for exempt-organizations, even if the organizations themselves are only indirect participants in the fund-raising. One advantage offered by these sites is that they provide a secure connection for credit card transactions, without burdening each exempt organization to establish this administrative/fundraising structure.

One variation involves an independent entity which establishes a site as its own. The 2000 CPE Text described one such organization which describes itself as an "international secure donation service" for nonprofit organizations (henceforth referred to as a "charity mall"). It is operated by a for-profit Internet consulting firm. An Internet user may select from a list of charities. A brief mission statement for each is available as well as a link to the organization's website, if it has one. The donor can have a donation/gift charged to the donor's credit card while on-line. An e-mail acknowledgment is sent to the donor immediately. Monthly donations will be sent to the designated charities, along with a list of donors (some sites require the donor to give permission to divulge the donor's identity).

Another variation involves an on-line retailer. Here the donor/purchaser makes a purchase from the retailer. The retailer promises that a fixed percentage of the purchase will be donated to charities selected by the purchaser/donor.

### **B. Request for Guidance.**

There is a wide variance in the amount of disclosure and information available concerning these sites. The differences relate to the following items:

- Is the site a registered fundraiser?
- Does the site list only organizations for which a deduction is available under Section 170(c)?
- To what extent, if any, does the charity mall verify the tax status of the participating exempt organizations?
- Are the exempt organizations aware of the existence of the charity mall site?

- Does the charity mall make any representations concerning whether all of the charities listed are U.S. organizations?
- If foreign organizations are listed, does the charity mall indicate that contributions to such foreign organizations are not deductible for U.S. income tax purposes?
- Does the site have any relationship with the organization for which a deduction is available under Section 170(c)?
- What portion, if any, of a donation is kept by the site as a user fee to cover the expenses incurred in connection with the fundraising program?

### **C. Existing Authority.**

If one assumes that the ultimate recipient is a domestic tax-exempt Section 501(c)(3) organization, guidance should be issued that provides a safe-harbor based on existing authority discussed below. Donors to third-party donation sites such as charity malls and on-line retailers might expect that their contributions are deductible for federal income tax purposes and would be disappointed to learn that their contributions are not deductible.

The touchstone suggested by the 2000 CPE Text for analysis to determine whether deductibility is proper is whether the operators of the websites (charity malls or on-line retailers) act as "agents" for the listed charity. Whether the purported donor in such an arrangement may claim a deduction will in large part depend on the terms of the arrangement between the participating charities and the mall operator. The 2000 CPE Text cites two rulings, both involving utility customers who paid additional amounts on their utility bills to be given to a charitable organization, where the IRS found that the collecting party exercised no dominion and control over the donated funds.

In Rev. Rul. 85-184,<sup>6</sup> the IRS ruled that the donations were deductible when made by utility customers to a charity through their utility company, where an agreement designated the utility as the charity's agent to collect the contributions, the donated funds were segregated at all times from

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<sup>6</sup>1985-2 C.B. 84.

the utilities funds and the donated funds were transferred to the charity on a weekly basis. No donated funds were used for administrative expenses.<sup>7</sup>

In PLR 9335022<sup>8</sup> the IRS reached a similar conclusion in a case in which the funds were initially deposited in the utility's own bank account, but were transferred on a weekly basis to the charitable recipient, which in this case was a state agency. The IRS ruled that the utility received the funds solely as an agent for the charitable recipient and the funds were not within the utility's dominion and control even though they resided briefly in the utility's bank account.

A commentator (Christina Nooney) has noted that most charity malls do not mention tax deductibility because contributions are not optional and members get items of equal value in return for their payments.<sup>9</sup> "Charitymall.com says that, 'Since you are buying goods and services at their regular prices and you are not making a donation directly to your charity there is no tax deduction available to you.'" In general payments made in connection with on-line retailers will not result in tax-deductible charitable contributions unless the purchaser can demonstrate (i) that the amount paid for the item exceeded its fair market value, and (ii) that the excess payment was intended to be a gift to the organization.

Nooney discusses a "variation on the charity mall theme," namely iGive.com, which has altered the typical charity-mall formula in a way that, it asserts, allows its members to claim tax deductions for their contributions.<sup>10</sup> Specifically, when an iGive member purchases something from a vendor in iGive's charity mall, the portion that typically would be given to charity is characterized as a rebate and held in an account for the member. The member may choose either to receive the money directly or to contribute it to a charity. The website specifically states that it will not allow donations over \$250 to any single charity from iGive shopping activity

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<sup>7</sup>See also, Anderson and Wexler, *Making Use of the Internet-Issues for Tax Exempt Organizations*, 92 J. Tax'n 309 (2000).

<sup>8</sup> June 3, 1993.

<sup>9</sup> Nooney, *Tax-Exempt Organizations and the Internet*, 27 Exempt Org. Tax Rev. 33 (2000).

<sup>10</sup> *Id.*

in any single month, thereby addressing the substantiation requirement discussed previously above.

Two private letter rulings issued by the IRS appear to support iGive's position that its members can deduct rebate amounts that are contributed directly to the charity rather than returned to the member. These two rulings are referred to collectively as the "rebate charity mall rulings."

In PLR 9623035,<sup>11</sup> the IRS ruled that credit card holders could claim charitable contributions for purchase price rebates donated to charity where the cardholders could choose to receive the rebates themselves rather than have the amounts contributed to charity. Specifically, a credit card company entered into agreements with various retailers that agreed to transfer to the credit card company a specific portion (a "rebate") of every purchase made at their stores by one of the company's cardholders. When they applied for credit cards, cardholders were asked to designate charitable recipients to receive these rebates, but cardholders could advise the credit card company in writing of their intention to obtain rebates for themselves rather than to the charity, and that the cardholders themselves, rather than the credit-card company, chose a charitable recipient.

Private letter ruling 199939021<sup>12</sup> presented a similar factual setting, except that the program is accomplished through coupons that couponholders present to participating merchants. The IRS ruled that the contributions were deductible.

#### **D. Recommendation.**

Theoretically there should be no difference whether the agent is acting on behalf of the charity or on behalf of multiple donors. In the latter case the donations are not effective until the "donors' agent" transfers the donations to the charity, as long as the donors' agent does so.<sup>13</sup>

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<sup>11</sup> Mar. 8, 1996; *See also* PLR 8309097 (Nov. 30, 1982).

<sup>12</sup> July 1, 1999.

<sup>13</sup> *See* Treas. Reg. § 1.170A-1(b).

The IRS should issue guidance in the form of a "safe harbor" example of charity malls (a) which act as agents on the behalf of the tax-exempt Section 170(c) organizations along the lines of Rev. Rul. 85-184 and the rebate charity mall rulings or (b) which act as agents on behalf of multiple donors. This guidance would give more certainty to donors making what they believe to be charitable contributions.

## **II. APPLICABILITY OF SECTION 513(i), QUALIFIED SPONSORSHIP ACTIVITIES, TO INTERNET ACTIVITIES.**

### **A. Advertising and Sponsorship Activities on the Internet.**

Some tax-exempt organizations receive payments from other entities to display messages on the organization's website. The message might include graphic images, or text or both. Some exempt organizations have banners on their websites containing information about the other entity and a link to the other organization in exchange for a similar banner on the other organization's website.

Because advertising is taxable as unrelated business taxable income ("UBTI") as discussed below, many nonprofit organizations prefer not to accept advertising. Instead the charities seek corporate sponsors to pay for the establishment and/or maintenance of its website in exchange for a donor acknowledgment. The acknowledgment of the Web sponsor might include the sponsor's logo. The exempt organization may also provide hyperlink from the tax-exempt's website to the sponsor's website.

In Announcement 2000-84, the IRS stated that it is considering whether clarification is needed regarding whether income received from such activities is advertising or sponsorship subject to the unrelated business income tax. The IRS solicited public comment concerning the applicability of the Section 513(i), which governs the treatment of qualified sponsorship payments, to Internet activities.<sup>14</sup>

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<sup>14</sup>Notice of Proposed Rulemaking (REG 209601-92), Fed. Reg. (March 1, 2000).

## **B. UBTI and Qualified Sponsorship Payments.**

Tax-exempt organizations are subject to tax under Section 511 on their income from any unrelated trade or business. In order for an activity to generate UBTI, the activity must be a (i) trade or business, (ii) not substantially related to the organization's exempt purposes, and (iii) regularly carried on.<sup>15</sup>

The "trade or business" being referred to does not necessarily refer to an integrated aggregate view of all of the assets, activities and goodwill that one commonly views as a single business. In determining whether a tax-exempt organization is engaged in a unrelated trade or business, the IRS may apply a "fragmentation rule" which subdivides a particular business into component parts, some of which may be treated as related and other of which may be taxed as unrelated businesses.<sup>16</sup> An activity, such as advertising, does not lose its identity merely because it is carried on in conjunction with other exempt functions.

Section 513(i) draws a distinction between activities that constitute advertising, the income from which may be subjected to tax as UBTI, and activities that constitute sponsorship, the income from which is not taxed to the recipient exempt organization. The solicitation and receipt of "qualified sponsorship payments" ("QSP") by an exempt organization does not constitute an unrelated trade or business.

A QSP is defined as any payment made by a person engaged in a trade or business where there is no "arrangement" or "expectation" that the person will receive any "substantial return benefit" for the payment.<sup>17</sup> The use or acknowledgment of the payor's name, logo or product lines is not a "substantial return benefit." The use or acknowledgment may not include any qualitative or comparative language or price information.<sup>18</sup> It must not include other indications of savings or value, an endorsement, or an inducement to purchase, sell or use the products or services.<sup>19</sup> Logos or

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<sup>15</sup>26 U.S.C. §§ 511-513 and the Treasury Regulations thereunder.

<sup>16</sup> 26 U.S.C. § 513(c) and Treas. Reg. § 1.513-1(b).

<sup>17</sup> 26 U.S.C. § 513(i)(2)(A).

<sup>18</sup> 26 U.S.C. § 513(i)(2)(A).

<sup>19</sup> 26 U.S.C. § 513(i).

slogans that are an established part of the sponsor's identity are not considered qualitative or comparative descriptions.<sup>20</sup>

Under the proposed regulations, use or acknowledgment may include a list of the payor's locations, telephone numbers or Internet address. The mere display of the payor's product by the payor or by the tax-exempt organization to the general public at the sponsored activity is not considered an inducement to purchase, sell or use the payor's products.<sup>21</sup>

A QSP does not include a payment that is contingent upon factors indicating the degree of public exposure to one or more events, such as the level of attendance or broadcast ratings.<sup>22</sup> The proposed regulations further provide that the fact that a payment is contingent on the sponsored activities actually occurring will not prevent the payment from being a QSP.<sup>23</sup>

The QSP safe-harbor does not apply where the use or acknowledgment appears in regularly scheduled and printed material published by the exempt organization that is not related to and distributed in connection with a specific event conducted by the exempt organization (such as a program).<sup>24</sup>

It is irrelevant whether the sponsorship activity is related or unrelated to the exempt organization's exempt purpose.<sup>25</sup> This is important for fund-raising events that bear no direct relationship to the organization's exempt purpose, other than raising needed funds. It is also not relevant whether the sponsored event is temporary or permanent: it may be an activity of continuing or indefinite duration or a series of events.

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<sup>20</sup> Prop. Reg. § 1.513-4(c)(2)(iii).

<sup>21</sup> *Id.*

<sup>22</sup> 26 U.S.C. § 513(i)(2)(B)(i).

<sup>23</sup> Prop. Reg. § 1.513-4(e)(2).

<sup>24</sup> 26 U.S.C. § 513(i)(2)(B)(ii)(I).

<sup>25</sup> Prop. Reg. § 1.513-4(c)(2).



Section 513(i) does not have the "tainting rule," whereby any message that constitutes advertising "taints" all related messages, even if they might otherwise qualify as mere acknowledgments. Instead, to the extent that any portion of the payment would be a QSP if made separately, it is treated as a separate payment. The statute does not specify the method of allocation. The proposed regulations include an allocation method that places the burden on the exempt organization to establish the fair market value of any substantial return benefit.<sup>26</sup> Effectively, this applies a residual method of allocation to the QSP portion of a payment.

### **C. Application to Internet Activities of Exempt Organizations.**

The following discusses proposed guidance for exempt organization relating to Internet activities with respect to three issues: (1) sponsorship acknowledgments on websites, (2) nature of the links to websites of sponsors and (3) characterization of website materials as periodicals.

#### **1. *Sponsorship Acknowledgments in Websites.***

The acknowledgment in the Internet environment should be measured under an adaptation of existing guidance for QSPs. If the sponsor acknowledgment on the website of the exempt organization contains only the name of the payor, location, telephone number or Internet address, this should still qualify as a QSP. The same elements used in print or other media can be adapted to the Internet acknowledgment.

Just as the display of the payor's products to the general public at a sponsor's event is not considered an inducement to purchase, sell or use a payor's product (and thereby disqualifying a payment from being a QSP), the presence of a link to a sponsor should not be a per se disqualification merely because the acknowledgment is found on the an Internet webpage which has links to a sponsor.

Under the proposed sponsorship regulations, it is not relevant whether the sponsored activity is temporary or permanent. It should therefore not matter if the sponsorship on the Internet website is of continuing or indefinite duration.

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<sup>26</sup> Prop. Reg. § 1.513-4(d)(1).

The link from the exempt organization's webpage to the sponsor presents a question which has been identified by the IRS. One commentator has noted that it is possible that the link from the exempt organization website (that contains no comparative statements about the sponsor or other promotional material) to the sponsor's webpage that does contain promotional material would taint the payment and prohibit the exempt organization from treating the payment as a QSP.<sup>27</sup> This approach, if it puts the tax-exempt organization in the position of having to closely monitor the links from its website, places a heavy administrative burden on tax-exempt organizations.

We suggest that the examination of the sponsorship acknowledgment be "within the four corners" of the website and not require exempt organizations to monitor the links, if any, to their sponsors. There should be no inquiry by the tax-exempt organization at all concerning the links from its webpage to the sponsor.

In the "real" world, there is no problem with the sponsor's phone number; on the Internet, the similar "address" or information is the "link." In both contexts, real and Internet, there must be some additional action taken by the viewer, whether the step is to make a phone call (in the real world) or to click on the link (in the Internet world). As a matter of policy, the law should not penalize the efficiency created by the Internet.

Alternatively, payments to tax exempt organizations should be presumptively treated as qualified sponsorship payments if the agreement between the exempt organization and the sponsor contains a provision which prohibits links from the tax exempt to any location containing elements that preclude treatment as a QSP, such as comparative price information.

## **2. *Nature of Links to Websites of Sponsors.***

The nature of the link has been discussed by the IRS and its tax consequences may turn on the character of the acknowledgment as a passive link as opposed to a banner moving across the exempt organization's website. The authors of the 2000 CPE Text cite the prior year's CPE article for the comment that "a link will retain the passive character associated with

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<sup>27</sup> Nooney, *Tax-Exempt Organizations and the Internet*, 27 Exempt Org. Tax Rev. 33 (2000).

corporate sponsorship while a moving banner is more likely to be considered advertising."<sup>28</sup>

Reportedly, the IRS has shifted the focus of its analysis. One commentator stated that "an IRS official acknowledged informally that links to the main page of an exempt organization's sponsor will probably not be considered advertising, even if the link contain decorative effects, such as moving or spinning. . . . the official (who coauthored the CPE text chapter) went on to say that, if the exempt organization's acknowledgment contains a link to a webpage where transactions could take place, the acknowledgment, whether static or otherwise, will probably be deemed to be advertising for tax purposes."<sup>29</sup>

Please refer to the recommendation made above with respect to the prior section.

### **3. *Characterization of Website Materials as Periodicals.***

The 2000 CPE Text raises the possibility that the IRS will characterize an exempt organization's website as a "periodical." Section 513(i) specifically excludes from the QSP definition any payment that entitles the sponsor to acknowledgment in regularly scheduled and printed material published on behalf of the exempt organization. If characterized as a periodical, any sponsorship payment would not qualify as a QSP.

The authors of the 2000 CPE Text state that whether a website address should be treated as a "periodical" will be decided based on a review of the methodology used in preparing website materials. If, for example, an online publication has an editorial staff, a marketing program and a budget independent of the organization's main site, this activity would probably be viewed as a periodical.

A commentator (Catherine Livingston) has noted that it is unclear how the IRS made the leap from the language of Section 513(i) to this methodology test.<sup>30</sup> Section 513(i)(2)(B)(ii)(I) provides that the safe

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<sup>28</sup> The 2000 CPE Text.

<sup>29</sup> Reaves, *UBIT.Com? Can the Old Laws Apply in the New Cyber Frontier*, 27 Exempt Org. Tax Rev. 251 (2000).

<sup>30</sup> Livingston, *Tax-Exempt Organizations and the Internet: Tax and Other Legal Issues*, Tax Notes Today (Feb. 14, 2001).

harbor does not apply to “regularly scheduled and printed material published by or on behalf of the payee that is not related to and primarily distributed in connection with a specific event conducted by the payee.” There is no reference to the process (which varies greatly from organization to organization) of writing, editing and producing publications. The content may come from staff, professional writers, members, volunteers, unsolicited contributions and other sources. In some instances the content is heavily edited and revised; in other instances the process is simply a mechanical laying out and printing of the author’s submission without editing or revision. It is not clear what methodology one must demonstrate to the IRS to establish that the Internet-based website is a periodical.

We propose that guidance be issued that requires a case-by-case determination of whether website materials should be treated as a periodical for purposes of Section 513(i). The guidance should focus both the “periodic” schedule for compilation and distribution to the public as well as a review of the methodology used in preparing website materials.<sup>31</sup> A “periodical” may include websites or portions thereof if it meets all of the following criteria:

- The material is updated on a regular quarterly or more frequent basis, with announcements, new articles and other editorial content of the sort commonly found in printed periodicals distributed to members and other constituents.
- There is an editor or editorial board with the traditional responsibilities (such as selection, solicitation and editing of content) of editors in print publications, and
- For a portion of the website, it is clearly separated from other, non-periodical sections of the website.

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<sup>31</sup> See, e.g., Comments on IRS Announcement 2000-84 Regarding the Need for Guidance Clarifying the Application of the Internal Revenue Code to Use of Internet by Exempt Organizations Submitted by American Institute of Certified Public Accountants (Feb. 14, 2001).

Further, guidance should be issued that provides that when an online periodical is, in all significant ways, merely an online version of a tax-exempt organization's print periodical, both activities should be combined as one activity. This guidance should also clarify that the income and costs associated with both the Internet and print periodical should be combined for calculation of unrelated business taxable income.

**DISCUSSION**  
**CAMPAIGN INTERVENTION AND LOBBYING<sup>32</sup>**

**Comment [S1]:** NEW MATERIAL  
STARTS HERE

**I. WEBSITE INFORMATION CONCERNING CANDIDATES FOR PUBLIC OFFICE: WHAT FACTS AND CIRCUMSTANCES ARE RELEVANT IN DETERMINING WHETHER INFORMATION ON A CHARITABLE ORGANIZATION'S WEBSITE ABOUT CANDIDATES FOR PUBLIC OFFICE CONSTITUTES INTERVENTION IN A POLITICAL CAMPAIGN BY THE CHARITABLE ORGANIZATION?**

Traditionally, public charities have attempted to conduct informative, educational and advocacy activities in matters affecting public policy. These activities commonly include voter registration, publication of voter guides, candidate forums, candidate ratings and issue advocacy during political campaigns. All of these efforts will be (or already have been) attempted on the Internet as well.

**A. Current Law.**

Section 501(c)(3) of the Internal Revenue Code of 1986, as amended ("Section 501(c)(3)" and "the Code", respectively) provides for the exemption from Federal income tax of organizations that are established and operated exclusively for charitable purposes and that do "not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office".

Treasury Regulation Section 1.501(c)(3)-1(c)(3)(i) states that an organization is not operated exclusively for one or more exempt purposes if it is an "action" organization. Among the classes of action organizations is an organization which "participates or intervenes, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for

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<sup>32</sup>This portion of the proposal responds to the questions posed by the IRS in Announcement 2000-84, published on October 16, 2000, concerning politics and lobbying by charities on the Internet.

public office. . . . Activities which constitute participation or intervention in a political campaign on behalf of or in opposition to a candidate include, but are not limited to, the publication or distribution of written statements or the making of oral statements on behalf of or in opposition to such a candidate."

Revenue Ruling 78-248,<sup>33</sup> which provides guidance to charities undertaking "voter education" activities in certain situations, should apply as well to the information contained on an Internet website. In Rev. Ruling 78-248, the Internal Revenue Service (the "Service" or the "IRS") analyzed whether the voter-oriented activities of a charity cause the organization to be an "action" organization no longer described in Section 501(c)(3) of the Code. Although a charity may engage in educational activities,<sup>34</sup> such a communication may nevertheless constitute prohibited participation or intervention in a political campaign in certain circumstances.

Revenue Ruling 78-248 provides examples demonstrating the bounds of permissible "voter education" by charities which may be summarized as follows: (1) a charity publishes an annual compilation of the voting records of all members of Congress on major legislative issues in a wide range of subject areas, which contains no editorial opinion or implicit approval or disapproval of any member or his/her voting record; and (2) a charity publishes a voter guide that shows all responses to a questionnaire on a wide variety of issues given to every ballot-qualified candidate in a particular race, provided, however, that no bias is evident in content or structure of the questionnaire or voter guide.

In addition, the Ruling provides examples of impermissible "voter education" as follows: (1) a charity sends to candidates for major public offices a questionnaire as in the example above, then publishes a voter guide that is distributed to the public during a campaign, but some questions evidence a bias on certain issues; and (2) a charity publishes and distributes widely among the public a voter guide which contains incumbents' voting records on selected issues important to the organization; although the guide contains no express statements in support of or opposition to any candidate, its emphasis on one area of concern indicates

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<sup>33</sup> 1978-1 C.B. 154.

<sup>34</sup> Rev. Proc. 86-43, 1986-2 C.B. 729; *National Alliance v. United States*, 710 F.2d 868 (D.C. Cir. 1983)

that its purpose is not nonpartisan voter education; thus, the narrow range of issues and the wide distribution of the guide constitute participation in an election campaign, with the result that the charity is deemed an "action organization" no longer exempt under Section 501(c)(3) of the Code.

## **B. Analysis.**

The facts and circumstances relevant to the Service in Revenue Ruling 78-248 that are used to determine whether a charity's voter-education oriented mailings or publications constitute intervention in a political campaign provide sufficient guidance and should apply equally to charities' Internet content as well as off-line printed materials. Charities can reasonably analyze the content of their own Internet-based communications to determine whether the issue focus of any survey or questionnaire or voter guide is inappropriately narrow, itself suggesting a bias, whether a blatantly biased view is presented, and whether distribution is only to members or to the broad public.

The Internet-based charity Democracy Network, DNet,<sup>35</sup> provides an example of a Section 501(c)(3) organization whose primary mission is nonpartisan "voter education" and to which the existing standards readily apply. In October 1999, the Federal Election Commission ("FEC") issued an Advisory Opinion, 1999-25 (the "Opinion"), ruling that the charity is not violating the Federal Election Campaign Act. The analysis applied by the FEC is analogous to that applied in Rev. Ruling 78-248. Although the Service has not ruled as to whether DNet's Internet-based activities constitute prohibited intervention, in November 1999, the Service's then Exempt Organizations Division Director Marcus Owens said of the ruling that it is "a pretty good fit" with existing tax laws.<sup>36</sup>

DNet, launched in the 1996 presidential election cycle, is an Internet project of the League of Women Voters Education Fund and the Center for Governmental Studies, both exempt organizations under Section 501(c)(3). DNet itself is an exempt organization under Section 501(c)(3) designed to improve the quality and quantity of voter information and to

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<sup>35</sup> www.DNet.org.

<sup>36</sup> 1999 TNT 224-5, Tax Notes Today, November 22, 1999.



create a more educated and involved electorate.<sup>37</sup> It provides on its website Federal candidate-related information on a nonpartisan basis, including voting and voter registration information, substantive discussions and online debates with candidates, as well as hyperlinks to websites of candidates or their committees. To conduct the online discussions and debates, DNet contains a database of textual, audio, and visual statements that candidates can directly and remotely update and which voters can access. Thus, the online charity is dynamic, providing comprehensive, continuous coverage of Federal elections and Federal candidates on a large scale.

The FEC applied a facts-and-circumstances test to determine whether DNet's activities fall within the nonpartisan-activity exception to the political "expenditure" or "contribution" prohibition for corporations. Because the analysis is virtually identical to that applied by the Service in Revenue Ruling 78-248, the Opinion provides a solid reference point for charities with campaign content on their websites. With respect to DNet's online activities, the FEC examined whether (1) DNet invited each ballot-qualified candidate to participate, (2) DNet used objective criteria to create a "grid" showing the candidates and their positions on issues (as provided by the candidates themselves), (3) DNet refrained from seeking to determine the political party or candidate preference of the website viewers, thereby preventing the organization's encouragement of any particular group to participate in the site or vote, (4) DNet merely served a passive function with respect to the information provided by the candidates themselves, (5) DNet refrained from scoring or rating the candidates or their statements and did not expressly advocate the election or defeat of any clearly identified candidate or political party, and (6) DNet's links to other sources were either neutral, or if editorial newspaper columns, provided a representative sample of newspapers (the mere existence of links apparently would not constitute express advocacy).<sup>38</sup>

In making its determination that the Internet-based activities of DNet fell within the nonpartisan exception of the corporate expenditure prohibition, the FEC also looked at the sponsoring organizations, the nature of DNet, and the website itself. Applying the guidance of Rev. Ruling 78-248, the Service would likely evaluate the same variables as did the FEC in

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<sup>37</sup> 1999 TNT 218-53, Tax Notes Today, November 12, 1999.

<sup>38</sup> 1999 TNT 218-53, *supra*.

any attempt to determine whether a charity's online activities constitute prohibited political intervention. Although a charity's Internet-based activities are dynamic and interactive, they are nevertheless akin to printed materials and therefore are amenable to the same analysis as are direct mail publications or annual reports.

Indeed, when asked about the FEC Opinion at an FEC conference, Owens stated that Section 501(c)(3) organizations could follow the FEC Ruling and "feel pretty safe" with the IRS; he believed the reasoning behind the Opinion was "good." He added that although the IRS has not taken a formal position on the type of activity described in the Opinion, the FEC's position appears similar to the Service's stand on candidate debates, which holds that all legally qualified candidates must be invited to participate and that an exempt organization's involvement must be free of bias.<sup>39</sup>

In sum, the substantive guidance of Revenue Ruling 78-248 and the parallel guidance of the FEC in the DNet case provide workable rules for charities to apply to voter education activities on their own Internet websites. However, where website content does not fit squarely within these voter education rules in the subject area of links to other outside organizations, for example, a number of additional concerns arise that are not presently addressed by existing authority, and these concerns are discussed in section B, below.

## **II. HYPERLINKS TO POLITICALLY PARTISAN/CAMPAIGN SITES: IF AN ONLINE CHARITY PROVIDES A HYPERLINK TO ANOTHER ORGANIZATION THAT ENGAGES IN POLITICAL CAMPAIGN INTERVENTION, DOES THE PROVISION OF THE LINK CONSTITUTE PROHIBITED POLITICAL INTERVENTION PER SE BY THE CHARITY? WHAT FACTS AND CIRCUMSTANCES ARE RELEVANT?**

### **A. Analysis.**

Although Revenue Ruling 78-248 may apply by analogy to the issue of linking in the context of political campaign activities by charities, current authority does not adequately address the treatment of hyperlinks to

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<sup>39</sup> 1999 TNT 224-5, Tax Notes Today, November 22, 1999.

partisan and campaign sites. Several practitioners who have written on this issue have suggested that charities adopt written policies about the internal regulation of their links and web content, so that their motives are clear and their links to campaign or partisan websites are unbiased despite the absence of clear guidance on the subject by the IRS. Other practitioners have suggested adoption of a bright-line rule, such as a "two-click" rule: so long as the viewer cannot reach the prohibited campaign intervention site in one click from the charity's site, the charity's link cannot be campaign intervention. Because the area of prohibited campaign and partisan links has generated the greatest number of questions from charities, and because this conduct does not fit squarely within existing rules and regulations, the Service should provide guidance in this subject area including a number of informative examples.

One approach to the issue is that suggested by the Service's question, a bright line, "one-click" rule, which amounts to a per se prohibition of links to campaign or partisan websites. However, to conclude that the existence of a link to a political website is prohibited campaign intervention per se is too harsh for a number of reasons. First, the Internet is dynamic and enables persons, corporations, politicians and the media to disseminate information widely and to update or change it quickly and often. Thus, there exists a practical danger that a linked website may contain content devoid of political partisanship on the day the charity establishes the link, but one day, week or month later the linked site, without the knowledge of the charity, may post politically partisan material, even if only temporarily. A per se rule may place an unfair burden on charities to constantly check the content of frequently changing web pages to which they connect by links and over which they have no control, a task that small charities in particular may not have the resources to accomplish.

Second, even a direct link to a partisan website, as in the DNet example above, should be permissible if executed in a manner that is purely educational, balanced and unbiased. The determination of whether a link is educational, balanced and unbiased would require a context-driven facts-and-circumstances analysis.

The Service has apparently revoked the exempt status of one charity, Freedom Alliance, because of its hyperlink(s) to political websites.<sup>40</sup>

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<sup>40</sup> 1999 TNT 220-20, Tax Notes Today, November 16, 1999.

The initial revocation apparently was based upon a conclusion that the existence of a link to a political site causes the linked organization's message to be imputed to the charity. In a subsequently published Exemption Ruling, the Service restored exempt status to the organization once it removed the link to the "politically partisan organization" from its Internet website.<sup>41</sup> The Freedom Alliance Exemption Ruling suggests that the Service has taken the position that a single link to a politically partisan website is per se prohibited political intervention. A per se rule, however, is unfair to those charities (a) that post links in an unbiased way for the purpose of educating the public, or (b) inadvertently link to a website that later posts politically partisan material. A per se rule revoking the exempt status of charities that link to campaign websites would throw the baby out with the bathwater.

One way of looking at these issues is to analogize to other forms of communication. For example, the sponsoring charity's webpage could be likened to a telephone receptionist who provides phone numbers on request. If a charity's receptionist provides a phone number of another organization without knowledge that the automated greeting for the organization includes a campaign message, the charity should not lose its exempt status simply because of the provision of the phone number. However, that analogy takes a somewhat simplistic view of the power of the Internet to influence public opinion.

The following factors (a list drawn in part from DNet and not intended to be exclusive) should be considered in developing a facts-and-circumstances test for the determination of whether a hyperlink to a politically partisan website constitutes prohibited political intervention:

- (a) whether the website providing the link contains statements reflecting a bias for a particular political party or candidate;
- (b) whether the link itself is shrouded in politically charged rhetoric urging support of or opposition to a particular candidate;
- (c) whether the link itself is surrounded by expressions of concern about the fate of the charity's issue resting upon the outcome of a campaign or election;

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<sup>41</sup> *Id.*

- (d) whether the link is part of a list of links that contain all ballot-qualified candidates' websites or political editorials on all sides of an issue; and
- (e) whether the prohibited political material is more than one click away from the charity's website, that is, distanced from the charity by one or more intervening webpages.

**B. Examples.**

The following hypothetical scenarios suggest that a bright line rule is not appropriate in some circumstances.

(a) A well-respected research project (the "Project"), a Section 501(c)(3) organization affiliated with a major university, creates a website to inform the public of the work it does. As an educational service to its viewers, the Project provides the names of six charities and advocacy groups that also operate in its field, as well as links to each of them. The links do not contain any descriptive text or graphic images; nor do they urge viewers to go to any particular website or to join any particular organization that works on the Project's issue. Five of the six hyperlinked organizations fall on one side of the Project's issue, though their missions differ greatly. The hyperlinked organization that falls on the other side of the Project's issue has a single home page for its Section 501(c)(3) charity, its Section 501(c)(4) charity and its Section 527 PAC. Anyone who clicks on the Project's hyperlink arrives at this home page, from which he/she can go instantly to a legislative action page that also contains campaign-related information and links. There, one can engage in lobbying members of Congress through an e-mail campaign. The site also provides voter guides during election cycles. The site would not clearly fall within the safe harbor of Revenue Ruling 78-248, because its campaign related links and message focus only on selected issues important to the organization. A per se prohibition of links to politically partisan websites could make it difficult for the Project to provide an informative and unbiased list of organizations, including charities, action organizations and political action committees, that also work on its issue.

(b) GlobalEnvironment.org, ("Global") seeks to educate the public in the State of California about an environmental issue that is politically controversial. It creates a website to promote this mission. Global's webpage simply tells viewers what it does. During an election cycle, it posts the names of all of the California candidates for Congress, and provides hyperlinks to their websites. It makes no mention of the

candidates' positions regarding the charity's subject area or any other subjects. Prohibited political intervention? Under Revenue Ruling 78-248 and a per se rule, it would appear to be. Under a more flexible facts-and-circumstances test, this type of linking might not constitute prohibited political intervention if the charity has done nothing else to support any candidate or to imply support or opposition.

(c) LinksToEducation.org, (“LinksToEd”) seeks to educate the public throughout the United States about its issue. It decides to provide an educational service to the viewers of its website by providing the names of and hyperlinks to all of the other organizations that work on its particular issue. It seeks and obtains consent from these other organizations, and concludes that the linked websites contain material that promotes its charitable purpose and do not contain any material that constitutes prohibited political intervention. These other organizations are also Section 501(c)(3) charities, some of which have affiliated 501(c)(4)s and Section 527 PACs. Three days after this thorough check, one of the linked charities posts politically partisan campaign-related material on its homepage, which it shares with its sister 501(c)(4) and Section 527 PAC (without the knowledge of the charity which provided the link). A per se rule would cause LinksToEd to lose its exempt status for prohibited political intervention.

**III. LOBBYING AND THE SUBSTANTIAL-PART TEST: FOR CHARITABLE ORGANIZATIONS THAT HAVE NOT MADE THE SECTION 501(h) ELECTION, WHAT FACTS AND CIRCUMSTANCES ARE RELEVANT IN DETERMINING WHETHER LOBBYING COMMUNICATIONS MADE ON THE INTERNET ARE A SUBSTANTIAL PART OF THE ORGANIZATION'S ACTIVITIES? ARE LOCATION OF THE COMMUNICATION ON THE WEBSITE OR NUMBER OF HITS RELEVANT?**

Public charities frequently engage in various forms of legislative and political activities. While charities are prohibited from engaging in any political campaign activities, such organizations may engage in legislative or "lobbying" activities, though such activities are limited by the Internal Revenue Code. A charity which has made an election under Code Section 501(h) is subject to an objective standard for determining whether those legislative activities exceed the prescribed dollar limit and subject it to

penalties, or, in egregious cases of excessive lobbying, loss of exempt status altogether. However, a charity which has not elected to be treated under the objective standard may engage in lobbying activities only if they are not a "substantial part" of its activities, a limitation which has not been defined in the statute, the Treasury Regulations or in case law. The rules applicable to an electing public charity are described in more detail in Section D below. This section discusses only lobbying activities of a non-electing charity that is subject to the subjective test.

#### **A. Current Law.**

Section 501(c)(3) provides that an organization is described therein only if "no substantial part of the activities" of the organization "is carrying on propaganda, or otherwise attempting to influence legislation". If the Service concludes that an organization has devoted a substantial part of its activities to attempting to influence legislation, it will treat the organization as an "action organization" that does not qualify for recognition of exemption under Section 501(c)(3).<sup>42</sup>

Treasury Regulation Section 1.501(c)(3)-1(c)(3)(ii) provides that an organization will be treated as attempting to influence legislation if it "(a) Contacts, or urges the public to contact, members of a legislative body for the purpose of proposing, supporting, or opposing legislation; or (b) Advocates the adoption or rejection of legislation."

Each court that has attempted to interpret the substantial part test has applied different criteria for evaluating the extent of a charity's lobbying activities. In Seasongood v. Commissioner, the Sixth Circuit Court of Appeals relied exclusively on expenditures allocable to attempts to influence legislation.<sup>43</sup> Nearly twenty years later, the Tenth Circuit Court of Appeals considered the balance of an organization's political activities and its objectives and circumstances, an analysis that could be readily applied to Internet lobbying activities.<sup>44</sup> A third case applied a combined approach of evaluating the percentage of expenditures allocable to lobbying and a non-

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<sup>42</sup> Treas. Reg. § 1.501(c)(3) - 1(c)(3).

<sup>43</sup> 227 F.2d 907 (6th Cir. 1955).

<sup>44</sup> *Christian Echoes Nat'l Ministry, Inc. v. United States*, 470 F.2d 849, 855 (10th Cir. 1972), *cert. denied*, 414 U.S. 864 (1973).

numerical significance-of-activities test.<sup>45</sup> In another case, the court looked solely at the amount of staff time devoted to attempts to influence legislation.<sup>46</sup>

## **B. Analysis.**

Because of the absence of a uniform definition of "substantial part", general guidance as to the factors to be considered in evaluating the substantiality of a non-electing charity's legislative lobbying activities both on and off the Internet would be helpful. The subjective substantial part test should evaluate not only the percentage of the organization's total expenditures that consist of attempts to influence legislation, but also the direct expenditure of money and volunteer time involved.

A number of unique issues arise where Internet technology is involved. For example, except in unusual circumstances, the aggregate amount spent to create the website that posts the relevant communication could, but should not, be included in the measure of substantiality. Similarly, the aggregate amount of money spent to purchase the hardware and software necessary to establish and maintain the website should not be included, unless the charity's overall lobbying activities make it clear that the hardware would not have been purchased but for the Internet-based lobbying activities.

The printed content on all of the pages of a charity's website should be measured in the same way the Service would evaluate the printed material in a brochure, annual report, newsletter or seminar produced by the charity. The significant questions should not be whether the lobbying content was simply on the main or subsidiary page of the organization's website. The impact of location, alone, of any particular lobbying activity on a website is generally made insignificant by the very small amount of time and effort necessary for the reader to move from one page to another on a single website and from one link to another. Rather, the Service should consider the overall proportion of the charity's website that involves

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<sup>45</sup> *Haswell v. United States*, 500 F.2d 1133 (Ct. Cl. 1974), *cert. denied*, 419 U.S. 1107 (1975).

<sup>46</sup> *League of Women Voters v. United States*, 180 F. Supp. 379 (Ct. Cl. 1960), *cert. denied*, 364 U.S. 882 (1960).



lobbying activities and the volume of e-mail communications with lobbying messages.

Generally, the substantiality of a non-electing charity's lobbying activities should not depend upon the number of hits its website attracts each month. Hits are not necessarily always within the control of the charity. However, if the charity "drives" people to its site by widely broadcast e-mail messages, television, radio, Internet advertising or a print advertising campaign, the number of hits may be a relevant factor for determining the substantiality of the lobbying activities.

**IV. HYPERLINKS TO LOBBYING MATERIAL: DOES PROVIDING A HYPERLINK TO THE WEBSITE OF ANOTHER ORGANIZATION THAT ENGAGES IN LOBBYING CONSTITUTE LOBBYING BY A CHARITABLE ORGANIZATION? WHAT FACTS AND CIRCUMSTANCES ARE RELEVANT IN DETERMINING WHETHER THE CHARITABLE ORGANIZATION HAS ENGAGED IN LOBBYING ACTIVITIES?**

Although this question is not posed in terms of an electing public charity, our discussion in this Section D refers only to organizations that have elected to be governed by Section 501(h).<sup>47</sup>

In general, an electing public charity may engage in a limited amount of "direct" and "grass roots" lobbying activities. An electing public charity which makes lobbying expenditures in excess of the permissible amounts in any year is subject to an excise tax equal to 25% of the amount of excess lobbying expenditures for the year, and, if the electing public charity "normally" (i.e., on average, over a four-year period) exceeds the applicable limit by more than 150%, it may lose its exempt status under 501(c)(3) and will be ineligible for exempt status under 501(c)(4). The permissible levels of lobbying expenditures which may be made each year by an electing public charity without risk of the excise tax are as follows:

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<sup>47</sup> Although many of the issues discussed herein apply equally to charities governed by the substantial part test, the discussion focuses on electing charities to facilitate the ease and coherence of the discussion.

<i>If Exempt Purpose Expenditures are --</i>	<i>The lobbying Nontaxable Amount is --</i>
Not Over \$500,000	20% of Exempt Purpose Expenditures ("EPE")
Over \$500,000 but not over \$1,000,000	\$100,000 plus 15% of EPE over \$500,000
Over \$1,000,000 but not over \$1,500,000	\$175,000 plus 10% of EPE over \$1,000,000
Over \$1,500,000	\$225,000 plus 5% of EPE over \$1,500,000, but not to exceed \$1,000,000 in any event.

In addition, only 25% of the foregoing amounts may be spent for "grass roots" lobbying. (Internal Revenue Code Section 4911(c)(2) and (3)).

Thus, the permissible level of expenditures depends upon whether an activity is characterized as "direct" or "grass roots" lobbying. For purposes of the lobbying rules, "legislation" includes acts, bills, resolutions, or similar items being considered by Congress, any state legislature, any local council or similar governing body, or by the public in a referendum, initiative, constitutional amendment or similar procedure. "Legislation" does not include efforts to influence "administrative rules and regulations".

**A. Direct lobbying.**

A communication constitutes direct lobbying if the communication:

1. is directed to a legislator or government official
2. refers to specific legislation, and
3. reflects a view on such legislation.<sup>48</sup>

In addition, a communication to the voting public in the state or locality where the vote will take place that refers to and reflects a view on a ballot initiative or referendum is also treated as a direct lobbying communication

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<sup>48</sup> Treas. Reg. § 56.4911-2(b)(1).

because the individual voters are the legislators, unless the communication is nonpartisan analysis, study or research.<sup>49</sup>

Examples of legislative activities include telephone calls, letters, office visits, testimony at a public hearing (without a formal request from the legislative body) and publication of materials that contain a view with respect to specific legislation and that are distributed to legislators.

**B. Grass Roots Lobbying.**

A communication with the public constitutes grass roots lobbying if the communication:

1. refers to specific legislation,
2. reflects a view on such legislation, and
3. encourages the recipient of the communication to take action with respect to the legislation.<sup>50</sup>

For purposes of the definition of grass roots lobbying, "encourages action" has a special meaning. A communication "encourages action" for these purposes if it:

1. states that the recipient should contact legislators,
2. states the address or phone number of a legislator or the legislator's employee,
3. provides a petition, postcard or other convenient means of contacting a legislator, or
4. specifically identifies one or more legislators who will vote on the legislation (other than the sponsors of the legislation) as opposing the communication's view, being undecided with respect to the legislation, being the recipient's representative or being a member of the legislative committee that will consider the legislation.

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<sup>49</sup> Treas. Reg. § 56.4911-2(b)(1)(iii).

<sup>50</sup> Treas. Reg. § 56.4911-2(b)(2).

### **C. Analysis.**

Links to lobbying content within a charity's own website are amenable to the existing guidance, because the content is entirely under the charity's control. However, links to other organizations create new issues unresolved by application of the existing regulations. Charities must determine, for example, what level of proximity between the public charity and the linked lobbying communication constitutes a lobbying communication by the charity. Will a link be considered to create a lobbying communication only when it not only appears on a charity's website, but also states a view, urges the reader to go directly to a webpage that discusses the specific legislation, and provides links and e-mail options to members of Congress? Or, will the mere existence of a link to a legislative action page, without any commentary or urging by the public charity, constitute a lobbying communication? Will a link be considered a lobbying communication if it contains no commentary or prompting, but takes the viewer to the website of an affiliated Section 501(c)(4) organization or Section 527 PAC?

### **D. Examples.**

The following examples should be considered in the development of additional guidance on hyperlinks that relate to specific legislation:

(a) SaveTheCritter.org's website discusses the importance of enacting policies to save the endangered Critter. The site offers links to other organizations that work in this subject area. One of the linked websites for another organization encourages readers to contact their congressional representatives to urge their vote to save the Critters by approving legislation that mandates Critter guards on all lawn mowers and bicycles in their jurisdiction. SaveTheCritter's communication should not be viewed as a lobbying communication if there is no message, either explicit or implicit, on its own website that takes on the cause of the linked website or urges readers to follow the link to take action. If the SaveTheCritter's website simply provides the list of similar organizations as an educational service, it should not be deemed to have made the communication located on the other organization's website, whether the lobbying communication is on the first page linked, or any subsequent page. However, if SaveTheCrittters states on its website that it supports the views/actions of the linked lobbying

site, then a portion of SaveTheCriticter's website should be viewed as a lobbying communication.

(b) Suppose SaveTheCriticters has on its website, in addition to the list of similar organizations, the names of the members of Congress who represent regions where the Critters need protection, and links to the representative's websites. This, too, absent an urging of the public to contact members of Congress in support of specific legislation, even if relevant legislation is pending, is not a lobbying communication, but rather an educational service to viewers who are seeking to learn more about the subject.

(c) A Section 501(c)(3) organization has a name very similar to its 501(c)(4) affiliate. They share a home page on a website, which contains links to an array of materials. There is no legislative advocacy on the home page. The Section 501(c)(4) pays for membership recruitment, member services and the lobbying areas of the website. The 501(c)(3) charity uses the site to post information about its subject area, in the form of reports and research results, and to conduct advocacy on non-legislative policy issues. A viewer must navigate, through a link, to the 501(c)(4) site containing the lobbying content. The link itself does not through text or graphic images support, oppose or advocate action with respect to any legislation. Once at the 501(c)(4)'s site, the lobbying message is not on the first page; and from the home page of the 501(c)(4), the viewer can link back to the shared home page. This kind of interaction between affiliated organizations should not constitute a lobbying communication by the Section 501(c)(3) organization. It is analogous to the sharing of office space by the two organizations, which is permitted so long as they properly allocate expenditures and activities between them.<sup>51</sup> Under the same facts, if the 501(c)(4)'s lobbying message is on the shared homepage, that message reasonably could be imputed to the affiliated 501(c)(3) charity.

#### **E. Subsequent Use and Allocation Issues.**

Many charities will either intentionally or unintentionally post content on their own websites or establish hyperlinks that do constitute lobbying communications. Once the communication is determined to be a

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<sup>51</sup>See Comments on IRS Announcement 2000-84 Submitted by the Alliance for Justice, at p. 4 (<http://www.afj.org/fai/irs/politicallobbying.cfm>).

lobbying communication, the application of the subsequent use and cost allocation rules to Internet activities raises some interesting questions.

Treasury Regulation Section 56.4911-2(b)(2)(v) includes a number of rules governing the allocation of costs when a nonlobbying communication is subsequently used in a lobbying activity. That Regulation provides that even though certain communications or research materials are initially not grass roots lobbying communications, subsequent use of the communications or research materials for grass roots lobbying may cause them to be treated as grass roots lobbying communications. The application of the subsequent-use rules seems relatively straightforward when analyzing the originating charity's lobbying use on its own site. The application of these subsequent use rules to other website communications raises some thorny issues. For example, advocacy<sup>52</sup> materials that a charity posts on its website could be treated as subsequently used in lobbying if the charity either posts a lobbying communication somewhere else on the site, or posts a link to another organization that has, or later posts, a lobbying communication. Yet the existing allocation rules for subsequent use cannot easily be applied to this constantly changing and interactive medium.

In addition, if the originating charity has a link to a lobbying communication posted on another organization's site, the circumstances under which the subsequent-use rule will apply to the originating charity should be clarified. Imposing these subsequent-use rules in the context of links, however, creates questions of how to define the "primary purpose" of a website or webpage and how to allocate expenditures. Because of ever-changing Internet content and the evolving nature of Internet technology, these issues cannot be answered adequately by existing regulations.

Although the political and lobbying questions posed in Announcement 2000-84 do not seek public comments specifically on the issue of allocation of lobbying expenditures, this issue poses difficult questions unanswered by existing regulations. Many practitioners believe the existing regulations to be vague and difficult to apply to charities' off-line activities as well. Any additional guidance should clarify and build

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<sup>52</sup> "Advocacy communications or research materials" are any communications or materials that both refer to and reflect a view on specific legislation but that do not, in their initial format, contain a direct encouragement for recipients to take action with respect to legislation. (Treas. Reg. § 56.4911-2(b)(2)(v)(B).)

upon the allocation rules set forth in Treasury Regulation Sections 56.4911-2(b)(2)(v) and 56.4911-3.

In general, Regulation Section 56.4911-3 provides that, with certain exceptions, all costs of preparing a direct or grass roots lobbying communication must be included as expenditures for direct or grass roots lobbying. Expenditures for a direct or grass roots lobbying communication (“lobbying expenditures”) include amounts paid or incurred as current or deferred compensation for an employee’s services attributable to the direct or grass roots lobbying communication and the allocable portion of administrative, overhead and other general expenditures attributable to the direct or grass roots lobbying communication. For example, these general and overhead expenditures include all expenditures for researching, drafting, reviewing, copying, publishing and mailing a direct or grass roots lobbying communication, as well as an allocable share of overhead expenses.

Subsection (2) of that regulation addresses the allocation of *mixed purpose* expenditures for membership and nonmembership communications. Generally, lobbying expenditures for a nonmembership communication that also has a bona fide nonlobbying purpose must include all costs attributable to those parts of the communication that are on the same specific subject as the lobbying message, and the allocation between lobbying and nonlobbying costs must be made on a reasonable basis. Special rules apply to communications sent only or primarily to members.

Further complicating the analysis, subsection (3) provides special rules for *mixed lobbying* communications. In general, if a communication is both a direct lobbying communication and a grass roots lobbying communication, the communication will be treated as a grass roots lobbying communication except to the extent that the electing public charity demonstrates that the communication was made primarily for direct lobbying purposes, in which case a reasonable allocation must be made between the direct and the grass roots lobbying purposes served by the communication.

This Regulation includes a number of helpful examples, most of which are easily applied in the context of Internet lobbying, provided, however, that all of the lobbying material is located on the charity's own website. Application of Examples 11 and 12 should be clarified in the Internet context. In Example 11, only two out of 200 lines in a charity’s mailed communication state that the recipient should contact legislators

about the pending legislation. The example states that an allocation of one percent of the cost of preparing and distributing the document as a lobbying expenditure and 99 percent as a nonlobbying expenditure is an unreasonable allocation of mixed purpose expenditures. Based upon this Regulation, it would appear that allocation of mixed lobbying expenditures based upon the number of lines devoted to lobbying on a website would be considered an unreasonable allocation. Yet, it is not clear what the basis for measurement is or should be in the Internet context. Posting a two-line lobbying message on a charity's website truly is a trivial cost and endeavor. The off-line time and resources spent to develop the message should be the focus of any guidance in this area.

Similarly, Example 12 provides insufficient guidance in the context of Internet lobbying. In that example, Organization F, a nonmembership organization, sends a one-page letter to all persons on its mailing list. The only subject of the letter is the organization's opposition to a pending bill allowing private uses of certain national parks. The letter requests recipients to send letters opposing the bill to their congressional representatives. A second one-page letter is sent in the same envelope. The second letter discusses the broad educational activities and publications of the organization in all areas of environmental protection and ends by requesting the recipient to make a financial contribution to organization F. Since the separate second letter is on a different subject from the lobbying letter, and the letters are of equal length, 50 percent of the mailing costs must be allocated as an expenditure for a grass roots lobbying communication. If the "mailing costs" in the Internet context include all of the accumulated hardware, software and site development costs in the six months preceding the communication, the lobbying expenditures could be quite substantial, and such means of allocation could be tantamount to a penalty on the charity for conducting Internet operations. If the "mailing costs" include only the staff time and overhead allocable to that staff time to create the lobbying communication, a more reasonable measurement, the lobbying expenditure is likely to be an extremely modest amount. Guidance from the Service is essential to enabling charities to determine how to allocate the costs of their Internet activities.

In addition to clarifications of the application of the existing Regulations, guidance in a number of other situations would also be helpful. For example, the existing Regulations do not answer the following questions:



(a) CleverAdvocacy.org's website is dedicated to issue advocacy only. The site contains neither a reference to specific legislation nor a call to action. The highly attractive and interactive site is updated continually and contains only educational and research materials with no advocacy language whatsoever. CleverAdvocacy.org sends an e-mail to members and non-members referring to specific legislation and containing a call to action. The charity's URL is on the bottom of the e-mail message. The cost of preparing and sending the e-mail is very small. Is that cost the only allocable lobbying expenditure here or must the website costs (however those might be measured) incurred in the six months immediately preceding the e-mail message be allocated to lobbying, merely because the charity's URL appears at the bottom of the e-mail message.

(b) CreateAHealthyHome.org maintains a homepage with educational, research, membership and lobbying content. The lobbying content references a specific piece of legislation and urges viewers to take action. Does the lobbying expenditure include all of the expenditures to develop the homepage and all linked pages within the website? If only a portion of development costs are relevant, what expenditures will be measured?

(c) CleanCharity.org maintains a homepage with educational, research and membership content. It is an issue-advocacy organization whose issue is frequently the subject of different pieces of local or federal legislation. The site mentions all pending legislation relevant to the organization. A third party, PushTheEnvelope.org fashions itself an advocacy organization on a variety of issues, and e-mails everyone on its mailing list urging support for a particular bill and urging viewers to go to this charity's site. CleanCharity is aware of the e-mail, but did not solicit it or participate in developing its content. Unless PushTheEnvelope and CleanCharity are affiliates, under current rules it appears that none of the extensive costs of the CleanCharity.org site would be treated as lobbying expenditures, which would be an appropriate outcome in view of the charity's lack of control over the activities of PushTheEnvelope.org. In sum, the Service should provide clear and simple means of measuring or allocating expenditures for lobbying, linking, subsequent use and mixed purpose communications on the Internet. The danger is in the potential for the creation of highly technical and detailed accounting rules, compliance with which could be more complicated and more costly than posting lobbying content on a website.

**V. GRASS ROOTS LOBBYING. WHAT FACTS AND CIRCUMSTANCES ARE RELEVANT TO A DETERMINATION OF WHETHER A CHARITABLE ORGANIZATION THAT HAS MADE A SECTION 501(h) ELECTION HAS ENGAGED IN GRASS ROOTS LOBBYING ON THE INTERNET? WHAT CONSTITUTES A CALL TO ACTION?**

**A. Analysis.**

In most circumstances, the existing grass roots lobbying regulations discussed above can be applied to the Internet activities of Section 501(c)(3) organizations just as they would apply to the off-line activities of public charities. The posting on a charity's website of information that (1) refers to specific legislation, (2) reflects a view on that legislation, and (3) encourages the viewers to take lobbying action (perhaps by enabling them to e-mail or fax legislators directly or via links), is a call to action indistinguishable from a direct mail or canvassing campaign by the charity which conducts these three activities.

The potential for a charity to post on a single website myriad other details, such as extensive research and analysis, news, links and direct lobbying messages creates complicated allocation issues. Each website should be analyzed as to whether the other details and information on the site should be rolled into the grass roots lobbying communication for expenditure-allocation purposes, or whether they are peripheral to or too attenuated from the call to action.

Another complicating factor is, once again, that of links to the websites of other organizations. Links create the potential for charities to attempt to avoid grass roots lobbying expenditures by distancing themselves from the call to action.

**B. Examples.**

The following examples raise significant questions unanswered by existing regulations and rulings, which may form a basis for amended regulations and examples.

(a) BonaFideCharity.org has a website that includes its many activities, articles, research materials, news bulletins and criticism of a

specific piece of legislation. The website contains links to other similar organizations and to members of Congress. In the absence of an overt call to action, will the mere existence of such links so strongly suggest action that the site or just its links will be deemed a call to action? If so, how must expenditures be allocated? Under Regulation Section 56.4911-2(b)(2)(iii), absent clear guidance to the contrary, the page containing the links to legislators would appear to be a lobbying communication. The allocation of the costs of that page, as well as the costs of the content or webpage containing legislative criticism, would be governed by the allocation rules discussed in the preceding section.

(b) Assume the same facts as above, except that BonaFide's website contains a statement that viewers may e-mail their legislators, or provides a link to another organization's e-mail page which provides the e-mail addresses of legislators and enables the viewer to draft an e-mail message. This communication logically would constitute grass roots lobbying, as the call to action occurs on the same page as the organization's views on the legislation.<sup>53</sup>

(c) LookingForTheLine.org ("Looking"), another savvy Internet charity, maintains a single website with a diverse array of communications and links. There is a navigation bar that links to Looking's legislative news web page and which offers its support or criticism of pending bills in its area of interest. The names and addresses, as well as links, to all members of the Senate in regions affected by the organization's issues remain on the home page of the charity and do not appear on the legislative news page. Looking, being well advised, ensures that there is no express call to action anywhere on its site. Furthermore, Looking states its views on one page, which is a subsidiary page, then, as an educational service, offers the means of contacting all relevant members of Congress on a separate page where its general educational materials and list of resources appear. Despite the close proximity of the lobbying and non-lobbying materials and the ease with which a viewer can access all of them, there is no overt call to action nor even an implicit one under these circumstances. Is this example analogous to Reg. Section 56.4911-2(b)(2)(iii)(B), wherein stating the address of a legislator constitutes encouragement to take action? In this context, since the lobbying messages and educational messages are

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<sup>53</sup>See Comments on IRS Announcement 2000-84 Submitted by Alliance for Justice, *supra*, at p.6.

on separate webpages, and the names of legislators appear at all times on the educational homepage, a reasonable argument can be made that there is no grass roots lobbying here.

The example posed by LookingForTheLine raises an important question of just how the variables of proximity, time and access ought to be evaluated together to determine whether a charity has made a grass roots lobbying communication. A flexible standard ought to be adopted which provides very general guidance as to relevant facts and circumstances that will be examined in the context of each charity's activities. A bright line rule as to the permissible number of clicks or intervening webpages between one charity's website and another organization's site(s) may seem practical but would fail to account for and shield a charity from penalty for inadvertent links and purely educational motives, as discussed earlier in B. A facts-and-circumstances analysis may be more appropriate when addressing whether intervening pages on the charity's own website will affect the allocation of costs for lobbying and nonlobbying pages.

**VI. MASS MEDIA: DOES PUBLICATION OF A WEBPAGE ON THE INTERNET BY A CHARITABLE ORGANIZATION THAT HAS MADE AN ELECTION UNDER SECTION 501(h) CONSTITUTE AN APPEARANCE IN THE MASS MEDIA? DOES AN E-MAIL OR LISTSERV COMMUNICATION BY THE ORGANIZATION CONSTITUTE AN APPEARANCE IN MASS MEDIA IF IT IS SENT TO MORE THAN 100,000 PEOPLE AND FEWER THAN HALF OF THOSE PEOPLE ARE MEMBERS OF THE ORGANIZATION?**

**A. Current Law.**

A mass-media advertisement that is not a grass-roots lobbying communication under the three-part test of Reg. 56.4911-2(b)(2)(ii) nevertheless may be treated as grass roots lobbying under the following circumstances: (a) the paid advertisement appears in the mass media within the two weeks before a vote of a legislative body or committee thereof, (b) the advertisement concerns a piece of highly publicized legislation, and (c) the paid advertisement reflects a view on the general subject of the legislation, and (i) either refers to the legislation, or (ii) encourages the

public to communicate with legislators on the general subject of the legislation.<sup>54</sup>

An organization can rebut this presumption by demonstrating either that (1) the paid advertisement is a type of communication regularly made by the organization in the mass media without regard to the timing of the legislation, or (2) the timing of the paid advertisement was unrelated to the upcoming legislative action.<sup>55</sup>

"Mass media" means television, radio, billboards and general circulation newspapers and magazines. The current definition of "mass media" does not include the Internet, and should not be amended to include the Internet generally. However, it may be reasonable to conclude that certain websites contain certain attributes of the traditional forms of mass media.

For purposes of the mass media regulations, where the charity itself is the mass media publisher or broadcaster, all portions of the organization's mass media publications or broadcasts are treated as paid advertisements in the mass media. For purposes of these regulations, "highly publicized" means frequent coverage on television and radio and in general circulation newspapers during the two weeks preceding the vote by the legislative body or committee. Even where the legislation receives frequent coverage, it is "highly publicized" only if the pendency of the legislation or its general terms, purpose or effect are known to a significant segment of the general public.

## **B. Analysis.**

The appearance of the mass media question in Announcement 2000-84 suggests the view that charities are mass media publishers anytime they publish a webpage on the Internet, thereby making all of their Internet publications or postings "paid advertisements" in the mass media. That interpretation of the Internet activities of a public charity is too broad.

Charities conducting some of their activities on the Internet are not "publishers" in the sense intended under the mass media regulation; nor

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<sup>54</sup>Treas. Reg. § 56.4911-2(b)(5).

<sup>55</sup>*Id.*

is their website content "paid" advertisements in the traditional sense. These charities do not exist for the primary purpose of advertising their issues or others' issues to large audiences, unlike traditional television, newspaper, magazine or radio publishers. Their missions, instead, are to pursue education, advocacy, science, or other charitable purposes, as their charters provide. Their Internet visitors seek out these charities periodically because of their interests in particular charitable subjects. In addition, the number of voices on the Internet competing for the attention of each viewer is unlimited and already very large, whereas the traditional media specified in the mass media rule are capital-intensive, strictly regulated enterprises, which means there are relatively few of them and the barriers to entry are high.<sup>56</sup> These traditional media essentially have a large, captive audience for their paid advertisements. The viewers of Internet charities, in contrast, are generally self-selected individuals who are receiving communications which are akin to newsletters or annual reports and which contain no commercial advertising.

To the extent the Service is considering expanding the definition of mass media to include the Internet, however, it should in addition create a safe harbor for the Internet sites of small, mid-sized and even large charities that do not regularly receive a large volume of traffic on their websites beyond their own members, if any. The traditional forms of mass media covered by the existing definition still differ dramatically from the Internet as very effective means of heightening public awareness on a grand scale. This specialized and narrow grass roots lobbying rule was created only because in very exceptional circumstances, these particular media can be used to skirt and abuse the general grass roots lobbying regulations.<sup>57</sup> Charities that post grassroots lobbying messages on their websites will plainly and simply be subject to the grassroots lobbying regulations. Charities that post lobbying messages elsewhere on the Internet should not in most instances be subject to the mass media rule.

Most charities conducting some of their activities on the Internet do not have "high profile" websites. Any regulation that is intended to deem the high profile websites of mass media charities "publishers" should first define clearly the factors that constitute Internet mass media and

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<sup>56</sup> See Comments on IRS Announcement 2000-84 Submitted by Alliance for Justice, *supra*, at p.8.

<sup>57</sup> T.D. 8303, 8308 (1990); See also Comments of the Alliance for Justice, *supra*, at p.8.

should then create a high threshold for the designation of a charity as a mass media publisher. Such a rule would acknowledge that the vast majority of lobbying activities by Internet charity websites, even those that bear the features of "paid advertisements" under the current mass media rule, are not mass media; nor are the charities that communicate lobbying messages mass media publishers. Such a rule would scrutinize only those charities that: (1) use traditional mass media to drive large numbers of viewers to their websites; (2) use other Internet websites or a paid advertisement on another site to drive people to their own websites; or (3) receive an extremely large number of "hits" or visits which are shown not to be repeat visitors (though current technology cannot decipher new vs. repeat visitors with great accuracy). If the mass media rule were expanded to include communications by a charity on its own website, its application should be rebuttable.

For example, a safe harbor should exist for a news release or commentary posted by a charity on its own website concerning its views on specific legislation pending for vote within two weeks, and requesting support of its views, absent any attempt to encourage viewers to contact legislators or other government officials through links or otherwise. This result should pertain even when the "advertisement" is "paid" in that the charity hires a consultant to design and post the content or hires a third party to host or maintain its website.<sup>58</sup>

The existing mass media regulations do not apply to direct mail campaigns of charities unless circulation exceeds 100,000 and fewer than half of the recipients are members. Any e-mail or listserv communications by charities with their members or non-member supporters are akin to direct mailings, and, therefore, the existing regulations may be reasonably applied.<sup>59</sup>

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<sup>58</sup> See Comments on IRS Announcement 2000-84 Submitted by Alliance for Justice, *supra*, at p.9.

<sup>59</sup> *Id.* at 8.

**VII. COMMUNICATIONS TO MEMBERS: WHAT FACTS AND CIRCUMSTANCES ARE RELEVANT IN DETERMINING WHETHER AN INTERNET COMMUNICATION (A LIMITED ACCESS WEBSITE, LISTSERV OR E-MAIL) IS A COMMUNICATION DIRECTLY TO OR PRIMARILY WITH MEMBERS OF THE ORGANIZATION FOR A CHARITABLE ORGANIZATION THAT HAS MADE AN ELECTION UNDER SECTION 501(h)?**

The regulations concerning a public charity's communications directed to members provide in certain circumstances that, although the communications may contain grass roots lobbying messages, the charity need not allocate its costs as grass roots lobbying expenditures but, instead, may consider them direct lobbying costs. (Treasury Reg. Section 56.4911-5.) These regulations are directly applicable to the new technologies of limited access websites, listservs or e-mail communications, since they operate in much the same way as traditional off-line communications via telephone or mail between a charity and its members. The Alliance for Justice has prepared extensive and useful comments on these issues, which can be found at the Alliance for Justice website.<sup>60</sup>

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<sup>60</sup> See [www.afj.org](http://www.afj.org).