What Guidance is Needed—And Not Needed—For Political and Lobbying Activities on the Internet

While some rules may have to be applied in new ways, the Internet need not force changes in the rules themselves.

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On 10/16/00, the IRS published Ann. 2000-84, 2000-42 IRB 385, giving notice that the Service is "considering the necessity of issuing guidance that would clarify the application of the Internal Revenue Code to the use of the Internet by exempt organizations." The Announcement states that "[t]he Service has made no final decision concerning the need for additional guidance," and that the it may conclude that no further guidance is necessary. In short, the IRS is asking for guidance about whether to issue guidance.

The Announcement is unique because it seeks guidance on the application of a variety of different Code provisions to a single technological medium—the Internet. In it, the IRS asks for guidance in each of the following areas:

- Whether guidance is required at all.
- General considerations about how we think about a Web site.
- Political and lobbying activities.
- Unrelated business income tax (UBIT).
- Solicitation of charitable contributions and disclosure by charities.

In each of the substantive areas, the Service identifies some specific questions, but also asks the public to pose questions and consider issues that the Service has not asked.

In a previous article in *The Journal of Taxation of Exempt Organizations,*[1] the authors discussed all of the issue areas listed above except one—political and lobbying activities. A discussion of that area follows. The previous article also proposed some general principles, including definitions and a "one-link safe harbor," that are discussed below as well.

CONTEXT

More and more, charities and Section 501(c)(4) organizations are using the Internet to lobby, to educate the public about legislation, and to provide information about candidates for political office. The IRS has posed seven specific questions seeking guidance in this area.

The preface to these questions on electioneering and lobbying refers to "charitable organizations described in Section 501(c)(3)." The specific questions are directed towards Section 501(c)(3) organizations. The Service could have asked specific

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questions directed towards Section 501(c)(4) or Section 527 organizations. It did not; however, any guidance issued with respect to Section 501(c)(3) organizations will, necessarily, affect the analysis for Section 501(c)(4) organizations and Section 527 organizations as well.

The first two of the seven questions focus on political activity; the remainder on lobbying. Each is discussed below.

DEFINING INTERVENTION

The first question the Service asked is 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 or is permissible charitable activity consistent with the principles set forth in Rev. Rule. 78-248, 1978-1 CB 154, and Rev. Rule. 86-95, 1986-2 CB 73 (dealing with voter guides and candidate debates)?"

Background. By referring to the two Revenue Rulings, this question seems to focus specifically on voter guides and candidate debates, seeking guidance on how to determine whether a Section 501(c)(3) organization may or may not engage in these activities on its own Web site. The leading precedential authorities in this area are 14 and 22 years old. Rev. Rul. 78-248 deals with voter guides and voting records, while Rev. Rul. 86-95 deals with candidate debates. There are also private letter rulings (such as Ltr. Rul. 9652026), articles in the Continuing Professional Education (CPE) Texts, and informal guidance in IRS remarks at conferences that have helped clarify the rules.

The question does not mention Rev. Rul. 80-282, 1986-2 CB 73, which amplified Rev. Rul. 78-248. Any discussion of Rev. Rul. 78-248 requires a discussion of Rev. Rul 80-282 as well.

In 1999, the ABA Exempt Organizations Committee's Subcommittee on Political and Lobbying Activities presented a position paper (the "ABA proposals") that urged the Service to modify, update, and expand the older Revenue Rulings on voter guides. The ABA Proposals do not discuss the Internet, but simply try to bring Rev. Rul. 78-248 up to date. As the ABA proposals indicate, updated guidance in this area is needed generally, and the IRS should also discuss use of the Internet in that guidance.

Existing law. Tax exemption under Section 501(c)(3) requires that an organization not "participate in, or intervene in (including the publishing or distribution of statements), any political campaign on behalf of (or in opposition to) any candidate for public office." Section 4955 provides for a 10% excise tax on political expenditures as a sanction that may be imposed on the organization instead of, or in addition to, revocation of tax-exempt status, as well as a tax on organization managers who approve such expenditures.

Reg. 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. Reg. 1.501(c)(3)-1(c)(3)(iii) defines one type of "action" organization as an organization that participates or intervenes, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office. The regulations further provide that activities constituting 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.

In most situations, the Internet offers the ability to make printed information more useful to the reader in ways that are not equivalent to other media.

In general, Section 501(c)(3) charities must avoid taking positions in support of, or in opposition to, candidates for elected office, whether on a Web site or elsewhere. The body of laws that has developed with respect to such written statements should also apply with respect to statements that a charity puts onto its Web site.

Voter guides. Rev. Rul. 78-248 contains certain safe harbors for voter education materials. Situations 1 and 4 of the Ruling describe the publication of incumbents' voting records, while Situations 2 and 3 deal with voter guides in which candidates for office respond to sets of questions.

Situation 1 described what the Service considered to be an appropriate publication of incumbent voting records. Similarly, Situation 2 describes a voter guide that the Service considers appropriate for a Section 501(c)(3) organization. The Service, however, disapproved of guides with ques-

[1] Wexler and Anderson, "Internet Guidance Should Reconcile Old Law With a New Medium," 12 JTEO 187 (Mar/Apr 2001).

tions that showed evidence of bias (Situation 3). It is Situation 2, however, that represents what many have considered to be a safe harbor for voter guides. The requirements for this safe harbor appear to be the following:

- The voter guide must be based only on answers in response to a questionnaire sent to candidates. The ruling does not appear to permit use of information from other sources, such as legislative voting records, the candidate's public statements, news stories, or campaign literature.
- The questionnaire must be sent to all candidates for a particular public office. It appears that this includes minor party candidates and generally anyone who "offers himself, or is proposed by others, as a contestant for an elective public office."[2]
- The questionnaire must solicit a brief statement of each candidate's position on a wide variety of issues. The term "wide variety" is not defined, but it appears to be broader than the scope of issues covered in Situation 4 of Rev. Rul. 78-248—i.e., "land conservation issues of importance to the organization." The issues must be selected solely on the basis of their importance and interest to the electorate as a whole.
- All responses must be published in the voter guide. The ruling is silent as to whether this means that publishing the responses of only one candidate, if the opposing candidate failed to respond, meets the safe harbor. In contrast, regulations of the Federal Election Commission (FEC) require only that all candidates "be provided an equal opportunity to respond."[3]
- The voter guide must be made generally available to the public.
- Neither the candidate questionnaire nor the voter guide, in content or structure, may evidence a bias or preference with respect to the views of any candidate or group of candidates.

Voting records. Rev. Rul. 80-282 examined the specific question of whether the publication of a newsletter containing the voting records of congressional incumbents on selected issues, by an organization otherwise described in Section 501(c)(3), constituted participation or intervention in any political campaign within the meaning of Section 501(c)(3). The IRS approved the particular newsletter in that ruling, looking at all the facts and circumstances. Some of the key points were as follows:

- In one issue of its newsletter, the organization published a summary of the voting records of all incumbent members of Congress on selected legislative issues important to the organization, together with an expression of the organization's position on those issues.
- The newsletter was politically nonpartisan, and did not contain any reference to or mention of any political campaigns, elections, candidates, or statements expressly or impliedly endorsing or rejecting any incumbent as a candidate for public office.
- The voting records of all incumbents were presented, and candidates for re-election were not identified.
- Publication was made after Congress adjourned and was not geared to the timing of any federal election. The newsletter was distributed to the usual subscribers, and was not targeted toward particular areas in which elections were occurring.

The IRS found that there were facts and circumstances to be weighed on both sides. On the one hand, the organization expressed its own views on the issues, and the issues were not "broad ranging." On the other hand, the Service focused on the very limited target audience—only regular newsletter subscribers, numbering a few thousand nationwide—and the fact that the newsletters were timed during periods of adjournment and not during elections. Thus, targeting and timing became crucial new factors.

The facts in Rev. Rul. 80-282 deal with incumbent voting records and do not directly involve voter guides. It is discussed here, however, because some practitioners believe that a voter guide that does not fit squarely within all of the facts of Rev. Rul. 78-242 is more likely to be acceptable to the IRS if it is distributed only to members, not targeted to districts with close races, and not timed to coincide with an election.

Candidate debates. Revenue Ruling 86-95 approved a League of Women Voters-style of candidate debate in which:

- All legally qualified candidates are invited to participate.
- The debate covers a broad range of issues.

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[2] Reg. 1.501(c)(3)-1(c)(3)(iii).

[3] 11 C.F.R. 114.4(c)(5)(ii)(B).

- Questions are prepared by a nonpartisan panel of knowledgeable persons composed of representatives of media, educational organizations, community leaders, and other interested persons.
- Each candidate is given equal opportunity to present his or her views.
- There is a moderator whose sole purpose is to make sure that ground rules are followed.

The ABA proposals. The ABA proposals focused only on voter guides, not on voting records or debates. They recommend the following change to Situation 2 of Rev. Rul. 78-248; both for consistency and to prevent obstruction by nonresponding candidates"

"All candidates for a particular office must be provided an equal and reasonable opportunity to respond. The organization must publish all responses received to all questions. The organization may do so even though only one candidate responded. Where no response is given, the guide may indicate that fact without attaching any negative implication to it."

In its proposals, the ABA also asked the IRS to expand Rev. Rul. 78-248. The ABA focused on four real-life examples of voter guides and explained why these guides should be permitted. In particular, the examples presented by the ABA varied from those in Rev. Rul. 78-248 by permitting the organization to:

- Express its view on questions asked without taking a position on the candidates.
- Send its questionnaire only to major party candidates, using some objective standard to determine appropriate candidates, such as those receiving a certain percentage of votes in a primary.
- Focus a questionnaire on a narrower range of issues important to the organization.
- Publish, in a full and accurate manner, other public statements made by a candidate that were not prepared in direct response to the questionnaire.
- Publish a chart, created by the entity, that fully and fairly summarizes and compares the views of candidates on a range of issues.

FEC guidance. In September 1999, an organization called Democracy Network ("DNet.org") received an advisory opinion from the FEC.[4] DNet.org is a Web site that, among other things, operates a voter guide. It is sponsored by the League of Women Voters (LWV) and the Center for Governmental Studies. The site offers, among other things, an on-line database of textual, audio, and visual statements, which candidates can directly update, and which voters can access according to their interests. Candidates can respond to questions from the public that have been screened by the LWV. To see a candidate's position on an issue, the viewer clicks a checkmark in a grid of issues. The viewer can also create his or her own grid, by topic, by sorting and searching. This type of site makes a voter guide much more useful and practical for the user.

Although the statutes that the IRS and the FEC enforce are very different, the FEC's analysis should be helpful to the IRS. The FEC found that this site did not cause DNet.org or LWV to be engaged in intervention in a political campaign.

The FEC Opinion is also significant because it allows a charitable organization to present the views of candidates other than by asking the candidates questions; for example, by publishing representative samples of newspaper editorials or news articles about the candidate.

A Web site is conceptually like a physical office that a visitor can choose to visit or not.

The Internet difference. How might voter guides and candidate debates be different when delivered or conducted on the Internet?

To the extent that an activity on the Internet is (or could be) exactly the same as an activity not on the Internet, the same law should apply. For example, if a Web site "webcasts" a candidate debate that it sponsors and conducts, and the debate follows the principles of Rev. Rul. 86-95, it should be as acceptable as a similar, televised debate. If a Web site publishes the verbatim transcript from a candidate debate that otherwise would qualify as non-intervention in a campaign, that should be permitted.

In most situations, however, the Internet offers the ability to make printed information more useful to the reader, in ways that are not equivalent to television, radio, newspapers, or other printed materials. Currently, we can only imagine some of the different ways in which the Internet may present information, such as voter guides or candidate debates, in the future.

There are three important ways in which the Internet differs from printed communications:

- Targeting. Information available on a Web site is

[4] FEC Advisory Opinion 1999-25.

not, absent some other facts, targeted to anyone. It is available for anyone who chooses to visit the Web site. Although it is clearly more accessible, a Web site is conceptually like a physical office that a visitor can choose to enter or not. If a charity does not actively e-mail, call, or write to people and suggest that they visit the site to examine its voter guide, a Web site remains a passive communication. A properly drafted voter guide should be treated as such regardless of whether it is mailed to potentially interested parties or simply available on line.

Interactivity alone should not affect the legal status of the voter guide.

- Timing. A printed publication is written at a specific time, and published (mailed or otherwise delivered) at another. A Web site, once "published" (when it first goes on line), can be changed frequently or infrequently, and continues to deliver its contents until it is taken off line. As long as the exempt organization gives candidates a reasonable amount of time before an election to state their positions, the constant availability of the information should not affect a validly configured voter guide.
- Interactivity. Voter guides, voting records, transcripts of candidate debates, and debates themselves become more useful and informative on a Web site that permits interactivity. A good example is DNet.org. It allows the user to take basic information, which otherwise clearly complies with the voting guide standards of Rev. Rul. 78-248, and sort and search in ways that make the information more meaningful to the user. The FEC ruled that this Web site did not violate FEC prohibitions against corporations engaging in candidate activity. The authors believe that the IRS could use DNet.org as an example of a Web site that is consistent with existing Revenue Rulings. Unfortunately, it is not possible at present to anticipate all of the ways in which an interactive Web site might be constructed in the future.

In the authors' view, interactivity alone should not affect the legal status of the voter guide. As long as the voter guide is presented and available in a manner that complies with Situation 2 of Rev. Rul. 78-248 (as modified by the ABA proposals), and as long as the site is structured in a way that allows the user to select the material he or she deems important (allowing sorting or searching based on the user's priorities), a charity should not be penalized for making a more flexible, functional voter guide available to users. The IRS needs to encourage exempt organizations to make the most of technology. Overall, therefore, the authors recommend the following:

1. The Service should consider the examples suggested in the ABA proposals, and should adopt a Revenue Ruling based on the ABA proposals to update the law generally.
2. The Service could provide a Revenue Ruling with a safe harbor based on the DNet.org site. This one example might at least be helpful in showing how one interactive voter guide might work.
3. With respect to candidate debates, it might be helpful if the Service could indicate that the format approved in Rev. Rul. 86-95 would also be acceptable on the Internet, even if the candidates were given an extended time to respond to questions in writing. The medium of the Internet would allow candidates to consider their thoughts rather than responding immediately. It might cause them not to avoid answering questions that they are unable or unwilling to answer quickly in a live debate. In addition, it would be helpful if the Service could clarify that questions from the audience are permitted as well, whether or not they are screened by the charity, as long as any screening is done in a non-biased, non-partisan manner.
4. The Service should make it clear that interactivity, in and of itself, does not transform the status of a valid voter guide. The status of the voting guide should not be affected just because users are provided with the ability to make the guide more useful by being able to sort, search, or otherwise tailor it to cover issues of concern to them. Again, the DNet.org site is a good safe harbor example.

LINKS

The IRS asked whether "providing a hyperlink on a charitable organization's website to another

organization that engages in political campaign intervention result in per se prohibited political intervention?" It also asked what "facts and circumstances are relevant in determining whether the hyperlink constitutes a political campaign intervention by the charitable organization?"

Guidance on the entire issue of links would be helpful. There is not very much current law on this issue. The authors are aware of one matter that touched on the issue—the Service's revocation of exempt status for the Freedom Alliance (Oliver North's organization) for reasons unrelated to the Internet.[5] The Alliance successfully re-applied for exemption and, in its determination letter dated 11/5/99, the Service said that its determination "is based in part on your representation that you have taken steps to remove, from the Internet, the Web site formerly maintained by you that among other things contains a link to a politically partisan organization." There was, however, no further discussion in the record of what types of links might have been acceptable or unacceptable.

While the creative uses of technology are always changing, today, exempt organizations use links for one of two principal reasons: (1) to link to the Web site of a sponsor or contributor or (2) to provide the user with another place to get additional information about a topic. In the latter case, there is a risk that a link to a candidate's Web site, the site of a political action committee, or the site of another organization that supports a particular candidate or political party will constitute intervention in a campaign.

It is impossible to anticipate all of the ways in which links might be handled, and so impossible to issue any definitive guidance in this area. It might be helpful, however, if the IRS could at least articulate the following principles:

1. A Section 501(c)(3) organization should be permitted to link to candidates' Web sites as part of its nonpartisan voter education activities. For example, if a (c)(3) publishes a nonpartisan voter guide that otherwise qualifies as nonpartisan educational activity, its Web site should also be able to provide links to the Web sites of all qualified candidates, as long as all candidates in a race are treated equally. Presumably, if some candidates in the race do not have Web sites, the organization should make available phone numbers or addresses where the user can receive comparable information.
2. A Section 501(c)(3) organization should be able to link to a broad range of politically diverse PACs or other political organizations that provide candidate profiles, voting history and records, and similar information. The relevant fact and circumstance is whether the (c)(3) is providing access to a broad range of Web sites that represents the full spectrum of views. The IRS might provide some examples, including safe harbors.
3. Section 501(c)(3) and 501(c)(4) organizations often are affiliated, sharing a common name, some common board members and employees, and even common offices. A Section 501(c)(3) organization that is affiliated with a Section 501(c)(4) organization should be able to provide a link directly to the (c)(4)'s home page, particularly if the (c)(4) also links back to the (c)(3)'s site. The rule might be different if the Section 501(c)(3) organization's Web site provides a link directly to a portion of the (c)(4)'s site that takes positions in support of, or opposition to, candidates. The proposed "one-link" safe harbor would permit this type of link.[6]

Guidance on the entire issue of links would be helpful.

Sometimes a Section 501(c)(3) organization and a related Section 501(c)(4) organization will share a Web site. It would be helpful to have clarity in such a situation. As a safe harbor, the IRS might provide that a (c)(3) and a (c)(4) that are legally affiliated through common board members, a shared name, or both, can share a Web site if all of the following tests are met:

- Some pages on the site are shared and others are not.
- The shared pages, such as the home page and pages with educational information, do not contain any statements in support of or opposition to candidates.
- Pages specific to the (c)(4)'s work or that contain any electioneering are paid for and maintained exclusively by the (c)(4).
- The (c)(3) pays for no more than its fair share of the

[5] TAM 199907021. The Service had found that "a major activity" of the Alliance was advocating and disseminating policy positions with goals that could be achieved only through enacting legislation and winning elections.

[6] Wexler and Anderson, *supra* note 1 at 182.

common areas of the Web site.

In this context, it may be helpful to think of a Web site in terms of a physical office occupied by one or more organizations. Section 501(c)(3) and (c)(4) organizations will often share office space and other resources, which is permitted as long as the (c)(3) pays for no more than its fair share and does not contribute to any electioneering that the (c)(4) engages in.

If the IRS is not going to update its general guidance on the 'substantial part' test, it might be misleading to provide guidance solely with respect to the Internet.

There may be other situations in which a Section 501(c)(3) organization should be able to link to a more limited number of Web sites because those sites provide the comprehensive discussion of a particular issue, even if other portions of those sites are political. It would be particularly helpful for charities trying to develop some certainty about their affairs if the Service were to adopt some clear rules. The proposed one-link safe harbor would permit a Section 501(c)(3) organization to link to the portions of another organization's Web site that contain purely educational content. Additional, more liberal standards should be provided for Section 501(c)(4) organizations with links.

SUBSTANTIALITY OF LOBBYING COMMUNICATIONS

The first of the Service's questions on lobbying concerns organizations that have not made the election under Section 501(h). For these organizations, "what facts and circumstances are relevant in determining whether lobbying communications made on the Internet are a substantial part of the organization's activities? For example, are location of the communication on the website (main page or subsidiary page) or number of hits relevant?"

This is an area in which exempt organizations and their attorneys would benefit from additional guidance only if the IRS updated its overall guidance with respect to non-Internet activities as well.

Under current law, Section 501(c)(3) organizations that are not private foundations are permitted to engage in lobbying activities as long as the lobbying does not constitute a "substantial part" of the organization's activities. Some public charities are allowed to make an election under Section 501(h) and have their permitted lobbying measured by a specific test based on their lobbying expenditures. For other organizations, the election is not available, and some organizations that can make the election choose not to.

Organizations that do not make the Section 501(h) election are subject to a facts-and-circumstances analysis as to whether their lobbying constitutes a substantial part of their activities. Instead of looking at the dollar level of expenditures, as is the case with the Section 501(h) election, the Service approach to non-electing organizations is to look at the totality of activities, and there is no clearly defined rule or test. In addition, the definitions of lobbying under Section 501(h) do not necessarily apply if the election is not made. Accordingly, certain communications may be lobbying for organizations that do not make the Section 501(h) election, but not for electing organizations, and some of the exceptions to the lobbying definitions for electing charities may not be available for non-electing charities.

The 1997 CPE text contains a good summary and discussion of the lobbying rules, including a discussion of "When are attempts to influence legislation considered substantial."[7] That article summarizes the holdings of the leading cases and rulings.

Seasongood, 227 F.2d 907, 48 AFTR 711 (CA-6, 1955), suggested that attempts to influence legislation that constituted 5% of an organization's total activities were not substantial. The concept of "activities," however, was not clearly defined. *Christian Echoes National Ministry, Inc.*, 470 F.2d 849, 31 AFTR2d 73-460 (CA-10, 1972), *cert. den.*, held that there is no percentage test. *Haswell*, 500 F.2d 1133, 34 AFTR2d 74-5559 (Ct. Cl., 1974), held that 16.6% to 20.5% of an organization's activities, devoted to lobbying, is substantial. Again "activities" was not clearly defined. GCM 36148 (1/28/75) attempts to summarize the law, and includes the following among the relevant factors:

- The percentage of time devoted to an activity.
- The amount of volunteer time devoted to an activity.
- The percentage of a budget devoted to an activity.
- The amount of publicity the organization assigns to the activity.
- The continuous or intermittent nature of the activity.

The IRS also looks at the overall impact and effect of the activity.

[7] Kindell and Reilly, "Lobbying Issues," *Continuing Professional Education, Exempt Organizations—Technical Instruction Program for FY 1997* (1996), page 261, 279.

Based on the lack of clear guidance under current law, the authors recommend that the IRS apply the same types of tests it uses in non-Internet scenarios when it analyzes a Web site. If the same amount of time and energy is put into a Web site as is put into other, non-Web activities, there is no reason to consider the Web site lobbying just because it might have a more far-reaching audience. Charities should not be penalized for using the Internet if they spend the same amount of activity and energy on a lobbying activity that happens to involve the Internet, even if it may have a broader impact than a non-Web activity that involves substantially more time and energy.

The IRS has indicated that the vast majority of charities still have not made a Section 501(h) election. Nevertheless—perhaps because the IRS wants to encourage those charities that can elect to do so—it has not updated its guidance in any appreciable way in many years. Clearly, concrete guidance on this issue would be helpful. If the IRS is going to update its formal guidance on the "substantial part" test, it would be helpful—indeed essential—to discuss lobbying on the Internet as well. If the IRS is not going to update generally in this area, it might be misleading to provide guidance solely with respect to the Internet.

LINKS TO LOBBYERS

Again raising the problem of links, the Service asked whether "providing a hyperlink to the website of another organization that engages in lobbying activity constitute[s] lobbying by a charitable organization?" If so, what "facts and circumstances are relevant in determining whether the charitable organization has engaged in lobbying activity (for example, does it make a difference if lobbying activity is on the specific webpage to which the charitable organization provides the hyperlink rather than elsewhere on the other organization's website)?"

As in the context of political activity, exempt organizations could benefit from guidance on the use of links in lobbying situations. There really is no relevant law directly on point today. This question is very much related to the next question discussed below, which asks whether an organization has made a call to action on a Web site. For purposes of this question, the authors assume that:

- The first organization's Web site contains none of the elements of lobbying itself, and the organization would be considered to be lobbying only if the activities of the linked-to site were attributed to it.
- The linked-to page either contains all three elements of grass roots lobbying or contains none of the elements. (The analysis of the question that follows below, regarding a "call to action," considers, among other things, the possibility that the first Web site could contain some of the elements of lobbying with the call to action on another Web site, or that the second Web site contains different parts of the lobbying elements on different pages within the site.)

To bring clarity to this question, the Service should adopt the following guidelines:

1. As a general presumption or rule, the activities of one organization should not be attributed to another organization. It is true that a link is very different, in terms of timing and efficiency, from a printed reference to a phone number or address. Nonetheless, a link is no different *conceptually* than a reference in written material to the name and phone number of another organization—it is simply a more efficient way of getting from the first location to the second. Charities should not be penalized for taking advantage of more efficient technology.
2. The Service should adopt the one-link safe harbor. If a link takes the user to a Web page that does not itself contain lobbying, and an additional link would be required to move to the lobbying page, the link should not "create" lobbying in the first site. Presumably, with a safe harbor, organizations would structure their affairs to take advantage of it; for example, by creating multiple pages within a Web site, rather than a site that consists of one continuous page. The more attenuated the elements, the less likely the user will "hear" the lobbying message.
3. If the link falls outside of the safe harbor, and the page to which the user is taken does contain lobbying, the Service should examine at least two key facts—the message on the first home page, from

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which the user was sent, and the proximity of the lobbying message to the place on the page to which the user is taken by the link. There would be lobbying only if it

A Section 501(c)(3) organization should be able to link to a related organization's home page without having that organization's activities attributed to the (c)(3).

were clear that communication on the first page, combined with the proximity on the second page to the lobbying communication, would cause a reasonable user to consider the communication to be lobbying.

4. A Section 501(c)(3) organization should be able to link to a related organization's home page without having the activities of that related organization attributed to the (c)(3). To take advantage of the proposed safe harbor, the related entity should not place lobbying on its home page.
5. Related Section 501(c)(3) and 501(c)(4) organizations, or other related organizations, should be able to share Web sites, under the same circumstances described above as part of the general discussion on links. The authors believe that www.SierraClub.org is an excellent example of how a (c)(3) and a (c)(4) can share a Web site.

Much of what is involved in this issue goes to how the Web site is treated and what portion of the costs of constructing the site are included in lobbying, because the Section 501(h) election is based on actual expenses. The authors believe that cost allocation should be the subject of separate guidance.

CALL TO ACTION

The next question involves a charitable organization that *has* made the election under Section 501(h). To determine whether such an organization has engaged in grass roots lobbying on the Internet, "what facts and circumstances are relevant regarding whether the organization made a 'call to action?'"

It would be helpful for the Service to issue guidance in the form of a Revenue Ruling on this issue, combined with the other lobbying issues.

Under current law, grass roots lobbying is defined as a communication with the general public or any segment thereof, that (1) refers to specific legislation, (2) reflects a view on that legislation, and (3) encourages the recipient to take action with respect to the legislation (a "call to action").

There are four types of calls to action.[8] The first three are considered direct calls to action; the last is considered indirect.

- A statement that the recipient should contact a legislator or an employee of a legislative body, or should contact any other government official or employee who may participate in the formulation of legislation.
- A statement of the address, telephone number, or similar information of a legislator or an employee of a legislative body.
- Inclusion of a petition, tear-off postcard, or similar material for the recipient to communicate with a legislator or an employee of a legislative body (or other government official involved in the legislation).
- Specifically identifying one or more legislators who will vote on the legislation as either opposing the charity's view on the legislation, being undecided, being the recipient's representative in the legislature, or being on the committee or subcommittee that will consider the legislation.

Often the analysis is straightforward: a charity publishes a message such as: "Call Legislator X and tell her to vote no on the Clean Air Bill." In other situations, one must review a complicated communication to determine if, within the entire communication, all of the required elements for lobbying are present. For example, a two-page document may contain a general discussion of an issue, with a single reference to a specific piece of legislation embedded in the article but not discussed at great length. At the end of the discussion, the document might say, "So contact your Congressmen to ask about their views on clean air." None, part, or all of this discussion piece might be grass roots lobbying, depending on the overall context.

In its simplest form, the IRS is asking when something on a Web site constitutes a "call to action." With respect to this narrow question, the only difference between a Web site and a printed text is that a Web site allows for links. Each of the four types of calls to action described above should also be considered a call to action if set out directly on a Web site. A direct link

[8] Reg. 56.4911-2(b)(2)(iii).

on a Web site to the e-mail address of a legislator is very much like a tear-off post card, and should be treated as such.

There are other scenarios for which it would be helpful to have some guidance. These have to do with when the three elements for grass roots lobbying are deemed to be part of the same communication; a question that relates very much to the issue of whether to treat a Web site with multiple pages as one communication or as many. There are at least four scenarios (and probably more):

1. In the first (simplest) scenario, a single Web page (meaning that the user can scroll from beginning to end without using further links) contains all three elements of grass roots lobbying. In that case, there will usually be a grass roots lobbying communication.
2. In the second, an exempt organization operates a Web site, but the different elements of grass roots lobbying are not set out on the same page. For example, one page discusses a substantive issue, refers to pending legislation, and then reflects a view on the legislation. This first page links to another page that sets out the names and addresses of legislators. The link could be in the text itself or appear as an overlay, usually on the left side or top of the Web site. This would normally constitute a grass roots lobbying communication.
3. As in the second scenario, one page on the organization's Web site contains a discussion of legislation and reflects a view on it, and another page contains the call to action. Here, though, the two pages are not directly linked. Either the user must link back to the home page to then link again to the page with the names and addresses of legislators, or there is an intermediary page between the first page and the page with the names and addresses, and that intermediary page contains some non-lobbying substance (for example, a discussion of various ways in which a user might learn more about the pending legislation). In this situation, it is the authors' view that the exempt organization should be able to avail itself of the proposed one-link safe harbor. It should be able to host a Web site that sets out a discussion of and views on legislation in one location, and the elements of a call to action in another location, as long as the two are not directly linked.
4. In the fourth scenario, the first organization has a Web page with the first two elements of grass roots lobbying, but it links to another entity's Web site, which contains the names and addresses of legislators. In this case, we would again suggest a one-link safe harbor. If the link goes to a page that does not have any of the four types of calls to action, there is no lobbying. If the link goes to a page that does have a call to action, what the first organization said in connection with the link and the proximity of the linked location to the actual information would have to be examined to determine whether it constitutes a call to action.

MASS MEDIA?

The Service asks whether "publication of a webpage on the Internet by a charitable organization that has made an election under section 501(h) constitute[s] an appearance in the mass media? Does an email or listserve 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 direct link on a Web site to the e-mail address of a legislator is very much like a tear-off post card, and should be treated as such.

Guidance is not required on this issue, because the law is clear, and the answer to both questions is "no."

Although one of the requirements for grass roots lobbying is a "call to action," communications via paid mass media advertisements regarding highly publicized legislation are subject to special rules that can obviate the need for a such a call.

A paid mass media ad is presumed to be grass roots lobbying if it meets all of the following tests:

- It is made within two weeks before a vote by a legislative body or committee.
- It relates to highly publicized legislation.
- It reflects a view on the general subject of that legislation
- It *either* (1) refers to the legislation *or* (2) encourages the public to contact legislators on the general subject of the legislation, *even though* it does not include any call to action.

The grass roots presumption may be overcome by showing that the timing of the ad was unrelated to the upcoming vote.

It is important to keep in mind that this exception to the call to action rule requires a "paid" mass media ad. The current rule includes an explicit list of media that are included in the definition of "mass media"—a list that includes "television, radio, billboards, and general circulation newspapers and magazines." The regulations also tell us that "general circulation newspapers and magazines" do not include newspapers and magazines published by an organization that has filed a Section 501(h) election, unless (1) the total circulation of the newspaper or magazine is greater than 100,000 *and* (2) fewer than one-half of the recipients are members of the organization. In the definition of "mass media," there is no mention of the Internet or a Web site.[9] The regulations further provide that "where an electing public charity is itself a mass media publisher or broadcaster, all portions of that organization's mass media publications or broadcasts are treated as paid advertisements in the mass media, except those specific portions that are advertisements paid for by another person."[10]

While an e-mail message might constitute a mass mailing, sending messages in bulk does not appear similar to a paid mass media advertisement.

The IRS question asks about communications sent via listserve or e-mail as well as information posted on the Web site. Neither of these normally includes a "paid" advertisement. The current mass media regulation does not seem to encompass the mass mailing of a letter. While an e-mail message might constitute a mass mailing, sending such messages in bulk, even via a listserve, does not appear substantively similar to a paid mass media advertisement.

Robert Harper of the IRS has indicated informally that "the Service has yet to rule on whether the Internet is considered a mass media within the meaning of the above special rule," but that "judging from comments by certain IRS officials ... it would seem that the answer to this question is in the affirmative."[11] The authors find this tentative conclusion to be highly disturbing. First, there is a regulation that provides a specific definition of mass media. Presumably, then, if there were to be a change in this definition, it would require an amendment to the regulation. The regulation is not stated in terms of a descriptive list, but rather provides an exclusive list of media that can be mass media.

Second, even if the regulations are amended to treat the Internet as a mass media, like television or radio, every organization that operates a Web site should not be considered to be a mass media publisher. The exception in the regulation that treats a charity, itself, as a mass media publisher or broadcaster was designed to apply to a limited number of organizations that actually publish newspapers and magazines for sale to the public, not to all organizations that simply use the Internet as another tool for conveying their message.

Absent an amendment to the regulations, guidance is not required on this subject, but the authors are concerned that the Service has even asked the question.

COMMUNICATION WITH MEMBERS

Finally, the Service asked "what facts and circumstances are relevant in determining whether an Internet communication (either a limited access website or a listserve or email communication) 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)?"

Although technology is changing, guidance at least with respect to current technology would be helpful. Reg. 56.4911-5 sets out some rules about when communications with members are treated differently from other communications. In some situations, communications with only members are not lobbying at all (even if they might have been lobbying had they been communicated to nonmembers). In other situations, communications made only to members become direct lobbying when they might otherwise have been characterized as grass roots lobbying. The regulations also discuss situations in which communications directed "primarily" (but not exclusively) to members take on a different character.

The authors believe that, for the most part, the existing rules should be followed with respect to Web sites. Since Web sites offer different technological opportunities, the IRS could clarify the following:

- *E-mail.* If an exempt organization maintains a current list of the e-mail addresses of

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[9] Reg. 56.4911-2(b)(5)(iii)(A).

[10] Reg. 56.4911-2(b)(5)(iii)(B).

[11] See Harper and Chasin, "Update on Internet Tax Issue for Exempt Organizations," presented 10/20/00 at "Advising Nonprofit Organizations in Colorado," sponsored by the Colorado and Denver Bar Associations.

its members, in the same way that it maintains a current list of the mailing addresses of its members, it should be able to send communications only to members or primarily to members. Charities should not be penalized for saving charitable dollars in using e-mail rather than postage.

- *Listserves.* A listserve is simply a group of e-mail addresses "bunched together." It is analogous to, albeit even more efficient than, a database that generates mailing labels. If a charity sends lobbying materials only to members or primarily to members, via listserve or any other media, the existing rules should apply.
- *Limited access.* Charities should be able to provide information to members only, in limited-access areas of their Web sites. If a charity exercises reasonable diligence in offering its passwords only (or primarily) to members and in updating passwords on a regular basis, it is providing information only to members, or primarily to members, as the case may be. The authors recognize that members could pass their codes on to nonmembers, but members could also provide a written newsletter to nonmembers, and the charity should not be penalized for either. Again, the Service needs to encourage charities to take advantage of new technologies, especially those that save charitable dollars.

Accordingly, for communications sent exclusively to, or primarily to, members, the current regulations should apply to provide the needed guidance.

CONCLUSION

To its credit, the IRS is attempting to tackle a very complex topic that cuts across a variety of different Code sections. Most practitioners in this field would probably disagree with the remarks of House Majority Leader Dick Armey (R-Tex.)[12] and conclude that, indeed, the IRS needs to provide some concrete and practical guidance on the ways in which the various tax laws affecting exempt organizations should apply to activities conducted on the Internet.

As to what guidance the IRS should provide and in what form, the two installments of this article have suggested some areas in which guidance might be appropriate, and have proposed some of the content of that guidance. This is a potentially massive area of exploration, and one in which the law cannot possibly keep up with the technology. It is important, however, that the enormity of the task not prevent the IRS from making a reasonable effort to deal with at least part of the problem. Exempt organizations deserve as much clarity as possible on the ways in which they can conduct their affairs over the Internet. ■

For the most part, the existing rules on communications with members should be followed with respect to Web sites.

[12] "The idea of turning the tax man into a Net cop would have a chilling effect on free speech on the Internet. We will be watching what they do, and we will not tolerate any backdoor attempt to regulate the Internet." Williams, "GOP House Leader Slams IRS on Internet Issue," Williams, *Chronicle of Philanthropy*, 11/16/00.