CONFERENCE NOTES

Tax-Exempt Organizations and the Internet: Tax and Other Legal Issues

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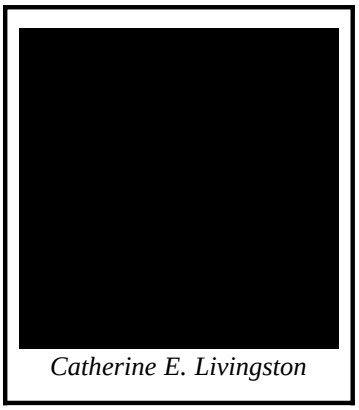
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The Internet has become a key communications tool for section 501(c)(3) charitable organizations. As use of the Internet has spread, and more and more charitable activities have incorporated use of this tool, guidance on the federal tax law implications of Internet use has not kept pace. To date, the IRS has published only two items on this topic: Announcement 2000-84 requesting comments on the answers to a series of questions and asking whether published guidance should be issued addressing them and a request for comments incorporated into the preamble of proposed regulations on corporate sponsorship under section 513(i). Several training articles for agents have also appeared, but they do not work as formal legal authority. Nevertheless, because maintenance of tax-exempt status and eligibility to receive deductible contributions are of critical concern to charities, tax advisors need to evaluate the legal consequences of these Internet developments. The absence of guidance does not mean there is an absence of legal issues. However, the questions posed in the IRS's announcement do not mean that the subjects they address are necessarily problematic. (For Ann. 2000-84, see *The Exempt Organization Tax Review*, November 2000, p. 184; *Doc 2001-26524 (30 original pages)*; or *2000 TNT 200-14*.)

Obviously, charities have been communicating with the public and soliciting support for decades using other largely analogous methods of communication, like newsletters, direct mail, phonebanks, seminars, personal visits, public forums, and press releases. Therefore, much of the applicable tax analysis exists and can readily be applied with proper allowance made for the unique features of Internet technology. The IRS confirmed this view in its FY 2000 continuing professional education text. An article entitled "Tax-Exempt Organizations and Worldwide Web Fundraising and Advertising on the Internet" begins with the following comment.

> [T]he use of the Internet to accomplish a particular task does not change the way the tax laws apply to that task. Advertising is still advertising and fundraising is still fundraising. However, the nature of the Internet does change the way in which these tasks are accomplished.

Exempt Organizations Technical Instruction Program for FY00 (hereafter "FY00 CPE Text"), 119.

This outline begins with a very brief and very general technical overview of how the Internet works. What follows is organized by type of Internet-based activity. It raises tax questions with respect to each and offers the author's answers as can best be supported by analogies to non-Internet activities and general policy principles.

I. Brief Technical Overview of the Internet

The Internet is a form of communications technology. Its open design and flexibility makes it distinctive in certain respects. At its core, the Internet is a set of protocols that allow computers operating with different software and in different physical locations to communicate with each other. These include SMTP (simple mail transfer protocol), Internet Relay Chat Protocol, and HTTP (hypertext transfer protocol). Traffic is routed through many large computers that are programmed to relay traffic coded in these Internet protocols. Many individuals gain access to the Internet by subscribing to an Internet Service Provider (ISP) or commercial network (like AOL). Many government and large nonprofit entities own their own computers that are linked directly to the Internet. Subscribers to commercial companies are given access to the ISP or commercial network computers that are in turn hooked to the Internet.

A Web site is a collection of information encoded and displayed through software and stored on hardware called a server. A server could have the capacity of a personal computer or could be extremely powerful and hold many times as much data. The server has a physical location. It could be in a charity's office. It could also be in a "data center," which is a facility maintained by a company that offers Web hosting and houses hundreds of servers and technical personnel who keep them running 24 hours a day, seven days a week. If a charity chooses a datacenter for its Web hosting, it can either

 The author gratefully acknowledges her collaboration with Amy Segal, Esq., General Counsel of the Education Development Center, on a previous version of this outline. Though this version is substantially revised, it owes a great deal to its predecessor.

buy a server and rent rack space on which to keep it or it can rent the server itself from the Web hosting company. The company will also provide maintenance for a fee, ensuring that the server operates as expected.

When a member of the public wants to get access to a Web site, she submits a Web address through the Web browser software running on her computer. The browser formats the request so that it can be transmitted according to HTTP. The user's request travels across the user's communication line (e.g., modem, cable modem, DSL) to one of the central computers operated by the user's Internet Service Provider (ISP). From the ISP the request goes out on an ultra-highspeed line, through central routing points where lines used by various ISPs connect, to a line that connects to the server where the destination Web site is housed, wherever that may be physically located in the world. The server responds by sending the information needed to display the Web site back to the user at the user's Internet address, again using Internet protocol. Internet communications are divided up into packets, each one of which is addressed and coded. The packets may each travel very different routes over different transmission lines to reach the ultimate destination where the packets are reassembled.

Hyperlinks are a functional tool that can be incorporated into an e-mail message or a Web site. They may appear as a displayed address for another site or as a graphic image. Clicking on the link causes the routine built into the link to run, issuing a request to see the Web site whose address is built into the link. The link does not function until the user clicks on it. The links can carry the user entirely to the new site, with no way to return to the original site other than to use the "back" function of the Web browser. Alternatively, the link can function as a "framing link," causing a new copy of the Web browser to start running on top of the existing copy, leaving the existing copy of the Web browser and the original site still visible in the background. Sites can also have a frame of their own. Clicking on a link may leave the original site's frame in place but change the content that appears inside the frame to be that of a new site.

With that very simplified summary in place, there are some key points to keep in mind about Web site technology that are relevant for purposes of tax analysis. The Center for Democracy and Technology (CDT) (a section 501(c)(3) organization) has summarized some key characteristics relevant to election law analysis in its report "Square Pegs in Round Holes" available on its site, www.cdt.org. The list seems apt and is reproduced here.

Decentralized. There are no gatekeepers. It is a "a network of networks."

Global. Access to sites and users around the world is immediate. Physical distance becomes irrelevant to the delivery of information. Connections to the physical world are not important or even knowable. For example, there is no way to know the physical location of the server you are accessing to view a Web site. Indeed an e-mail address cannot be used to verify the physical location of someone sending or receiving e-mail.

Abundant. As CDT says, "The Internet can accommodate a virtually unlimited number of speakers."

Inexpensive. Messages can be distributed to a mass audience at a modest or even trivial cost.

Interactive. Again as CDT says, the Internet, "allows responsive communications from one-to-one, from one-to-many, and from many-to-one."

User Controlled. Users decide not only which communications they will send but also which communications they will accept. With hyperlinks in particular, a user must initiate access to a site very much as a caller must initiate a telephone call or a television viewer must select a channel on a television set.

The flexibility and cost savings that the Internet makes available has prompted many tax-exempt charities to move forward quickly in implementing Internet-based activities. The fact that the Internet is, fundamentally, a communications technology does not change the law that applies to the charitable organizations that are using it. However, it does raise some interesting questions about how that law applies when certain activities are conducted with the speed and flexibility that the Internet allows.

II. Worldwide Web Sites

Posting a Web site is a convenient, cost-effective way to provide information about an organization to the public at large, communicate with members, conduct educational activities, and engage in advocacy. If the Web site has interactive features, it can also be used to provide services, solicit input and even raise funds. There is nothing about Web technology per se that suggests that posting a Web site jeopardizes compliance with the requirements of section 501(c)(3). It is simply another means of communication with the public. Tax questions tend to arise as a charity considers the specific content it wants to place on the Web site.

A. Corporate Sponsorship and Advertising

An exempt organization may accept contributions from sponsors or advertising from other entities for its Web site as a way of raising revenue. Particularly, if the charity's Web site is popular and regularly receives a lot of "hits" from Web users, advertising may be an attractive way to raise funds. The acknowledgment of the sponsor or the advertising may include text and/or graphic images. The graphics for an advertisement are often in the form of a running "banner" that appears on the Web page, often with images that move or change. The advertisement may or may not include a link to the advertiser's Web site. A charity may also use its Web site as a place to acknowledge the generosity of corporations, foundations, and other donors. In fact, giving those acknowledgements may be a condition of receiving a sponsorship payment or grant. When a charity places this material on its Web site, it should consider the UBIT consequences for any income it receives in return.

All organizations that are exempt from federal income tax under section 501(a) as organizations described in section 501(c) are subject to tax under section 511 on their income

from unrelated trades or businesses. An activity constitutes an unrelated trade or business if (a) it is carried on for the production of income, (b) it is regularly carried on, and (c) it is not substantially related to the performance of exempt functions. Treas. reg. section 1.513-1(a). The fact that the business is carried on in conjunction with other exempt purpose activities, such as where the Web site is used to conduct core exempt purpose functions like education of members and the public, does not affect the characterization of the activity intended to produce the profit as a trade or business. Section 513(c). This "fragmentation rule" as it is called clearly applies to advertising that appears in publications that are otherwise furthering the organization's exempt purpose. See Treas. reg. section 1.513-1(b). In its recently issued announcement, the IRS does ask whether a Web site constitutes a single publication or multiple publications. If it is the latter, it asks how the publications should be separated from each other. The answers to these questions would not change the expectation that income a charity earns from regularly selling advertising space on its Web site will be subject to UBIT unless the charity can demonstrate that the advertisements are related to its cultural and educational mission. (Advertisements from other charities with similar missions, for example, might be considered related.) The division into multiple publications could affect the calculation of the amount of UBIT because it may affect the expenses that may be used to offset the income.

If, in exchange for a payment, a charity posts material on its Web site that constitutes an "acknowledgment" of a corporate sponsor rather than advertising for that sponsor, income received in exchange for that acknowledgment will generally not be subject to UBIT. Section 513(i). A message is considered an acknowledgment and not an advertisement if it does not include qualitative or comparative language, price information or other indications of savings or value, an endorsement, or an inducement to purchase, sell or use such products or services. Section 513(i)(2)(A). An acknowledgment may include the corporate sponsor's name, logo, or product lines and still not constitute an advertisement. The IRS applied these principles in TAM 9805001 to conclude that the benefits granted to a pet food company in return for its financial support of an animal show that was broadcast to millions of television viewers constituted acknowledgments and not advertising. The company's product and its traditional slogans were used in the pages the company used in the organization's printed materials, and its name appeared on arm bands worn by participants and other signs at the show. (For TAM 9805001, see *The Exempt Organization Tax Review*, March 1998, p. 387; *Doc 98-4641 (9 original pages)*; or *98 TNT 21-8*.)

1. Effect of Links on Acknowledgment/ Advertisement Distinction

The IRS has created some modest confusion as to whether adding a graphic or banner that also functions as a link to the sponsor's Web page will convert what would otherwise be an acknowledgment into advertising. There is no published authority on this point. According to one private letter ruling, which discussed the issue in passing, providing a link to the sponsor's Web page would cause a message to be an advertisement rather than an acknowledgment. PLR 9723046 (March 12, 1997). (For PLR 9723046, see *Doc 97-16546* or *97 TNT 110-73*.) However, in an article on Internet Service Providers, the Exempt Organizations Technical Instruction Program for FY 1999 (FY99 CPE Text) states the following:

> In determining what on the Web page is advertising, a rough rule of thumb is that if it is an active or passive placard, or a running banner and income is being derived, it is advertising. If the Web page shows merely a displayed link, then it may not be advertising, but only if related to activities or purposes of the organization.

The IRS repeated this view in the FY00 CPE Text. In speeches, an IRS official who is one of the authors of these articles has rejected this analysis as erroneous.

Treasury and the IRS published proposed regulations under the corporate sponsorship rules on February 29, 2000. The proposed regulations do not specifically address corporate sponsorship activities that take advantage of the Web, but the preamble does invite comments on whether providing a link to a sponsor's Internet site is advertising.[1] The proposed regulations do confirm that an acknowledgment can include information about how to contact the corporate sponsor like an address or telephone number. See prop. reg. section 1.513-4(f) Ex. 8. (For REG-209601-92, see *The Exempt Organization Tax Review*, April 2000, p. 133; *Doc 2000-6180 (8 original pages)*; or *2000 TNT 44-85*.)

A worldwide Web address or a direct link to the sponsor's home page would seem to be analogous in the electronic world to the street address in the physical world. However, the recent IRS announcement requesting comments implies that the speed and efficiency of hyperlinks may give a basis for attributing messages on the other side of the link to the organization originating the link. Specifically, the announcement says, "The ease with which different Web sites may be linked electronically . . . raises a concern about whether the message of a linked Web site is attributable to the charitable organization." Nevertheless, there appears to be no legal basis for distinguishing between giving a link and giving a telephone number or street address.[2] In all three cases, the individual recipient retains the discretion to decide whether he or she wishes to contact the recommended destination organi-

[1]The preamble states as follows:

> These proposed regulations do not specifically address the Internet activities of exempt organizations. However, the IRS and the Treasury Department are reviewing the application of existing tax laws governing exempt organizations, including the UBIT rules, to Internet activities. Comments are specifically requested on the application of the rules governing periodical and trade shows in section 513(I)(2)(B)(ii) to an exempt organization's Internet sites, and on whether providing a link to a sponsor's Internet site is advertising within the meaning of section 513(i)(2)(A) and 1.513-4(c)(2)((iv). 2000-12 IRB 829, 831 (March 20, 2000).

[2]If the mere link does convert the message from an acknowledgment to advertising, it is still possible to divide any payment received from the sponsor into a portion attributable to the advertising and a portion that may still be a qualified sponsorship payment. Congress specifically provided for this type of apportionment in section 513(i)(3).

zation. Furthermore, no one has ever suggested that giving a telephone number for another organization will cause anything that organization says when it answers the telephone to be attributed to the organization while giving a street address will not simply because it is faster and easier to call an organization than to visit it in person. Thus, the IRS's implied reasoning seems highly faulty.

If the material appearing on the Web site is advertising rather than acknowledgment under the section 513(i) definition, and the organization has no policy for screening advertisements so that it displays only those that contain a message that advances the organization's exempt purpose, the carrying of that advertising is likely to constitute a trade or business that is not substantially related to the organization's exempt purpose. This position is supported by the Supreme Court's decision in *U.S. v. American College of Physicians*, 475 U.S. 834 (1986), which held that even though the charitable organization limited advertising in its journal to medical products related to the readers' professional activities, the way the advertising was selected did not provide the readers with either comprehensive or systematic analysis of issues or novel information. The Court noted that to be related, the advertising would have to be coordinated with the journal's editorial content or limited to promoting newly introduced products that were objectively determined to be safe and effective. *Id.* at 849-50. For purposes of determining whether advertising activity is regularly carried on, the regulations state that "the manner of conduct of the activities must be compared with the manner in which commercial activities are normally pursued by nonexempt organizations." Treas. reg. section 1.513-1(c)(2)(ii). However, very infrequent activities, like annual fundraisers, are generally not considered to be regularly carried on. Treas. reg. section 1.513-1(c)(2)(iii).

2. Applying the Special UBIT Rules for Periodicals

If a Web site is being used to produce a "periodical" then the acknowledgment/advertisement distinction no longer applies. The exception for corporate sponsorship payments does not apply if the payment entitles the sponsor to acknowledgment in "regularly scheduled and printed material published by or on behalf of the [sponsored] organization that is not related to and primarily distributed in connection with a specific event conducted by the payee organization. . . ." Section 513(i)(2)(B)(ii). The word "printed" appears to limit this exception to material appearing in hard copy, but the IRS has yet to specify how this exception will apply for acknowledgments provided on a Web site.

If the Web site is considered a periodical, not only does the special rule of 513(i) *not* apply, the special rules for calculating UBIT owed on periodical advertising income *do* apply. The rules of Treas. reg. section 1.512-1(f) would govern in determining how much unrelated trade or business income an organization derives from selling advertising on those sites. In general, this would mean that gross income from advertising on the site could be offset at first only by direct costs of that advertising. If the gross advertising income exceeds the direct costs of the advertising, the gross income can be further reduced by editorial costs that exceed circulation income. However, editorial costs cannot be used to generate a net loss from advertising that would offset other unrelated trade or business income.

Potentially, certain Web sites will be treated as periodicals. The preamble to the corporate sponsorship regulations specifically asks for comments on how the periodical exception should be applied to Internet-based communications.[3]

The FY00 CPE Text takes an interesting, and perhaps controversial, position as to whether a Web site should be treated as a periodical. It states:

> Most of the materials made available on exempt organization Web sites are clearly prepared in a manner that is distinguishable from the methodology used in the preparation of periodicals. While there is no precise definition of the term periodical[,] section 513(i) provides that the term qualified sponsorship payments does not include payments that entitle the sponsors to acknowledgments in 'regularly scheduled and printed material' published by or on behalf of the exempt organization. Accordingly, in considering how to treat potential income from Web site materials for income tax purposes[,] the Service will look closely at the methodology used in the preparation of Web site materials. The Service will be unwilling to allow the exempt organization to take advantage of the specialized rules available to compute unrelated business income from periodical advertising income unless the exempt organization can clearly establish that the online materials are prepared and distributed in substantially the same manner as a traditional periodical.

FY00 CPE Text, 138. The benefit of this IRS view is that most Web sites will not be seen as periodicals, meaning that the corporate sponsorship exception to the definition of unrelated business taxable income (UBTI) will be available but the special periodical rules for calculating UBTI — where advertising does occur — will not. It is unclear how the Service made the leap from the language in section 513(i) to this methodology test. Section 513(i)(2)(B)(ii)(I) says that the safe 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. Moreover, the process of writing, editing, and producing publications, in hard copy or electronic form, varies greatly from organization to organization. Content come from staff, professional writers, members, volunteers, unsolicited submissions, and other sources. Some are heavily revised and edited. Others simply go through the mechanical process of laying out and printing submissions as the author has written them. Therefore, no one can say what methodology an organization must show the Service to prove a Web-based item is or is not a periodical. The common element among periodicals is their regular "periodic" schedule for compilation and distribution to the public. The IRS should

[3] *See* footnote 1, *supra*.

rethink its view on this point, and an IRS official has recently acknowledged that the view in the CPE text may be in error.

Section 513(i) identifies the key elements of a periodical. Bulletins distributed by e-mail on an occasional but unscheduled basis should not be considered periodicals any more than they would be if they were in hard copy distributed by U.S. mail. Furthermore, the fact that a Web site may contain certain discrete factual information, like the date or key news items, that are updated on a regularly scheduled basis should not cause the site to be treated as a periodical to the extent the bulk of the site's content does not change on any regularly scheduled basis. That the technology makes it possible to make frequent updates to what functions effectively as a brochure, overview, or educational text, should not dictate the characterization of the site as a periodical. The analysis may be a bit complicated for certain Internet-based publications that change chunks of content on a rolling but regularly scheduled basis. If the intent is to revise all of the content on a regularly scheduled basis, then it seems likely the publication will be characterized as a periodical.

If the IRS accepts that most Web sites are not periodicals, unrelated business taxable income generated from advertising on a non-periodical Web site would be determined by adding the gross income generated to the gross income generated from other unrelated trade or business activities (other than periodical advertising) and subtracting the expenses directly connected with carrying on the unrelated trades or businesses. The expenses must have a "proximate and primary relationship" to the carrying on of the trade or business. Treas. reg. section 1.512(a)-1(a). Expenses should include the allocable portion of expenses for facilities or personnel used both for exempt functions and unrelated trade or business activity. When allocation of dual use expenses is required, taxpayers are entitled to use any "reasonable basis" to make the allocation. Treas. reg. section 1.512(a)-1(c). Under the regulation, allocating expenses based on the time devoted to the relative activities is an acceptable method. See *Rensselaer Polytechnic Institute v. Commissioner*, 732 F.2d 1058 (2d Cir. 1984). In addition, where the non-exempt purpose activity involves exploitation of an exempt function, such as when unrelated advertising is included in an exempt organization periodical, special rules apply that limit the amount of exempt function expenses that can be used to offset unrelated trade or business income. Treas. reg. section 1.512(a)-1(d). The unrelated business activity must have a proximate and primary relationship with the exempt purpose activity in order for the organization to offset its UBTI by expenses incurred to conduct the exempt purpose activity. The new proposed corporate sponsorship regulations contain an example to illustrate this point. The example concludes that producing advertising in the catalog for an art exhibition has a proximate and primary relationship with the publication of the catalog but not with the exhibit as a whole. (Whether this example draws the correct line remains to be seen.)

B. Lobbying and Political Activity

Many exempt organizations take an interest in the political and legislative arena and see the Web as a useful and cost effective tool to use in their advocacy work. Before joining the debate over the Web, or by any other means, exempt organizations, and charities in particular, should refresh their knowledge of the tax rules governing lobbying and political activity.

1. Lobbying Rules Generally

Charities that are exempt from tax under section 501(c)(3) may devote no more than an insubstantial part of their activities to attempts to influence legislation. Section 501(c)(3). The restriction applies to a charity's Internet-based activities in the same way that it does to all other activities. If a section 501(c)(3) organization makes the election provided by section 501(h), its lobbying activities will be measured according to rules set forth in Treasury regulations under section 4911. An electing section 501(c)(3) organization is generally permitted to incur expenditures for direct lobbying of no more than $1 million per year and expenditures for grassroots lobbying of no more than $250,000 per year. Treas. reg. section 53.4911-1(c). The ceilings can be lower depending upon the charity's total annual expenditures.

If a charity does not make the election under section 501(h), it is not clear how its lobbying activities are measured to determine whether they are substantial nor is it clear whether the definitions of lobbying provided in the section 4911 regulations apply. In its recently issued notice, the IRS asks 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 organization that do not make the 501(h) election. It is hard to see how the IRS could answer this question without providing guidance that applies to all kinds of communication, Internet-based and otherwise. It would be troubling if the IRS were to provide guidance on this point limited to Internet communications because such guidance might imply that the substantive rules are different when the Internet is involved. There is nothing in the statute or existing regulations to suggest that whether an activity constitutes a lobbying communication should be analyzed using different criteria if the communication is made over the Internet.

For organizations that do make the 501(h) election, the standards developed under section 4911 are based on an organization's expenditures; thus volunteer contributions of services are disregarded for the purpose of determining whether an electing organization's lobbying activities are in excess of permissible limits. See Treas. reg. section 56.5911-3(a)(1). Messages can be distributed over the Internet to a huge public audience at a fraction of the cost of distribution using direct mail or mass media. Therefore, section 501(c)(3) organizations electing to be subject to the spending limitations may be able to engage in substantially more lobbying activity using the Internet under these limitations than they could using more costly forms of communication. The IRS has given no indication that expenditures for electronic communications will be measured any differently than for the traditional means contemplated when the section 4911 regulations were written. See generally, Robert Smucker, *The Nonprofit Lobbying Guide* (2nd edition 1999).

The section 4911 regulations define two types of lobbying communications: direct lobbying communications and grassroots lobbying communications. Direct lobbying communications must be communicated to a legislator, legislative staff member, or other government official working on the formulation of legislation. It must refer to specific legislation (which can include specific proposals that have not yet been introduced), and it must reflect a view on the legislation. Grassroots lobbying communications must refer to specific legislation, reflect a view on that legislation, and encourage the recipient to take action with respect to the legislation (what is known as a "call to action.")

If a charity posts content on a publicly accessible portion of its Web site that takes a position with respect to specific legislation, the posting will not constitute a direct lobbying communication. There are examples in the existing regulations that make clear that even if an organization knows that a legislator is a regular subscriber to its publication, including a statement about specific legislation and reflecting a view on it in an item intended for a distribution much broader than the legislator-subscriber will not be considered a direct lobbying communication. See Treas. reg. section 56.4911-2(b)(4) Ex. 7. That example should apply equally well where a charity knows that one or more legislators regularly visits its Web site provided that it has a reasonable expectation that the site's visitors include many others who are not legislators. The content will constitute grassroots lobbying only if the Web site contains material that not only refers to specific legislation but also encourages the reader to take action with respect to that legislation. Treas. reg. section 53.4911-2(b)(2).

2. Special Rule on Mass Media Communications

The section 4911 regulations contain an exception to the general definition of grassroots lobbying communications that applies exclusively to paid advertising that appears in the mass media. If such a mass media communication appears within two weeks of a vote in a legislative body on a highly publicized piece of legislation, the communication is presumed to be a grassroots lobbying communication if it reflects a view on the general subject of the legislation and either refers to the highly publicized legislation or encourages the public to contact their legislators on the subject area covered by the piece of legislation. See Treas. reg. section 56.4911-2(b)(5)(ii). The regulations define mass media as "television, radio, billboards and general circulation newspapers and magazines." See Treas. reg. section 56.4911-2(b)(5)(iii)(A). If the charity is itself a mass media publisher or broadcaster, all of the organization's mass media publications or broadcasts are considered to be paid advertisements, except for those portions that are advertising paid for by someone else. See *id.*

Here is a key question: is the Web a form of mass media? And, if so, should an organization with a Web site be considered a publisher or broadcaster? The IRS raised the first question in its recent notice. Analogies to communications covered under existing law can be helpful here. It seems hard to argue that the Web is not a form of mass media. It has the potential to reach many times more people than see many newspapers and magazines or are within the broadcast area of many television and radio stations. One of its hallmarks is its broad popular reach. However, the resources needed to post a Web site are dramatically smaller than those needed to publish a mass circulation newspaper or broadcast from a radio or television station. No licenses, transmitters, printing presses, distribution systems, or advertising departments are needed. With the advent of free Web hosting services, a Web site is within reach of any organization with a volunteer who has some basic Web programming skills. Therefore, it seems sound to conclude that a charity sponsoring a Web site that is freely available to all Internet users should not be considered a publisher. If this conclusion holds true, the paid mass media rule would not apply to communications an organization posts on its freely accessible Web site — regardless of how many hits the Web site gets or what the organization pays to develop or post the site. If the Web site functions as a periodical, (see Section A.2., above) and individuals must pay to subscribe but are not otherwise members of the organization, then it may be reasonable to consider the site a mass media publication as it would then be the electronic equivalent of a mass circulation print periodical.

The IRS notice also asked whether an e-mail or listserv sent to more than 100,000 people, fewer than half of whom are members of the organization, should also be considered a mass media communication. It seems unreasonable to treat these e-mail communications as mass media when direct mail using envelopes and stamps is not considered mass media. The 100,000 number appears in Treas. reg. section 56.4911-2(b)(5)(iii) in connection with saying that general circulation newspapers and magazines do not become mass media until their circulation exceeds 100,000, and fewer than half the recipients are members. E-mail is dramatically faster than regular mail, but it is conceptually the same: delivery of a message to an addressee at a unique address. There is no clear legal reason to treat e-mail as potentially being mass media if regular mail is not.

3. Special Rule on Communications with Members Only

More generous rules apply to communications a charity directs only or primarily to members; the rules treat these communications either as not lobbying expenditures at all if the communication expresses a view on specific legislation but does not contain a call to action or as direct lobbying rather than grassroots lobbying if it does contain a call to action. See Treas. reg. section 53.4911-5. Furthermore, if the members-only communication contains an indirect call to action — naming the recipient's representative in the legislature, or the legislators who will vote on the matter, or identifying legislators as opposed or undecided — rather than a direct call to action, the communication will not be considered a lobbying communication.

The recent IRS notice asks directly what facts and circumstances are relevant in determining whether an Internet communication (either a limited access Web site or a listserv or e-mail communication) is a communication directly to or primarily with members. The answer here ought to be straightforward. It seems reasonable to treat communications placed exclusively on a password-protected part of the Web

site accessible only to the organization's members as directed exclusively to members. Similarly, if a listserv is open exclusively to members or an e-mail list contains only members, then the direction of a communication using such a listserv or e-mail ought to be clear as well. Even if some of the participants or addresses on the list are not members, the communication ought still to be considered directed primarily to members if more than half of the recipients are members. That is the current regulatory rule, see Treas. reg. section 56.4911-5(e), and there is no apparent legal or common sense basis for having a different rule because the communications travels via electrons rather than ink. In the same vein, the definition of member ought to be the same regardless of whether one or more of the membership benefits is access to the Web site, listserv or e-mail. The regulatory definition says a person is a member if he or she pays dues, makes a contribution of more than a nominal amount, makes a contribution of more than a nominal amount of time, or has been selected as one of a limited number of honorary or life members. See Treas. reg. section 56.4911-5(f).

4. Allocating Expenses for Web Sites with Lobbying and Nonlobbying Content

If an organization elects to include lobbying material in a discrete portion of its Web site for a period of time, how does it allocate expenses between the lobbying and nonlobbying parts of the site? The task appears out of proportion to the goal given the very low marginal costs for posting material on the Web, and it seems particularly absurd where the lobbying material is very small as compared to the rest of the site and will appear for a very brief period of time.

The recent IRS notice raises the question of the proper methodology for expense allocation not only where lobbying communications are concerned but in general. The regulations on allocation for mixed purpose communications speak strictly in terms of "pages," and though there are "pages" in cyberspace, they can be of widely varying length — as the IRS acknowledges — and don't seem to be a good uniform basis for measurement. See Treas. reg. section 56.4911-3(b). Theoretically, one might want to use the server capacity needed to hold the site as the base and allocate based on the amount of the total capacity used for any particular part of the site. That would allow for the greater demands of certain video or graphic material and the lesser demands of text in a neutral way. However, in practice, this can become quite complicated quite quickly, especially where lots of material on the site changes with great frequency.

Preparing the lobbying content is what likely to be what consumes most of the time and resources, and it is most likely that they are the same time and resources already being spent and recorded to develop the same content for use off of the Web. Posting the content takes a fleeting amount of staff time and a trivial expense in services and materials. The largest costs associated with using the Web for lobbying are likely to be the capital expenditures to acquire hardware and/or develop the site template. Traditionally, capital expenditures are allocated for lobbying purposes by determining the depreciation cost for the year and allocating across whatever base is otherwise being used, such as total employees or total hours worked. Once the larger capital costs are spread out in this fashion, they are limited as well. In sum, the cost for adding the Web as a tool for lobbying communication are likely to be quite modest, and could in fact be dwarfed by the costs of accounting for them. It would be highly problematic if charities were deterred from using the most efficient tool available for participating in legislative debates because all of the resources gained from the increased efficiency were being consumed by the burdens of an accounting rule. To prevent that from happening, charities may consider proposing to the IRS adoption of some form of de minimis rule or safe harbor for this kind of expense allocation.

5. General Prohibition on Political Campaign Activity

Web site content that relates to political campaigns may also give rise to tax concerns. Organizations that are exempt from tax under section 501(c)(3) may not intervene in any campaign for public office and remain exempt from federal income tax. The prohibition is absolute, and violation results in loss of tax-exempt status. In addition, section 4955 imposes a ten percent excise tax on each expenditure a section 501(c)(3) organization makes to participate or intervene in a political campaign.

The Service has provided some guidance over the years on how to identify political campaign intervention. For a summary of the guidance relating to section 501(c)(3) organizations, see J. Kindell and J. Reilly, "Election Year Issues," Exempt Organizations Technical Instruction Program for FY93, 400. For example, section 501(c)(3) organizations may publish legislators' voting records or issue voter guides under certain circumstances without intervening in a political campaign. See, e.g., Rev. Rul. 78-48, 1978-1 C.B. 154, Situation 1 (publishing voting record with no editorial commentary or structure suggesting opinion on votes); Rev. Rul. 80-282, 1980-2 C.B. 178 (publishing voting record on select issues in regular newsletter without commenting on who is candidate for re-election or timing publication to affect election). It is unclear whether the IRS will treat advocacy with respect to certain issues that are closely identified with particular candidates as campaign intervention. Therefore, if an organization is considering using its Web site to advocate a position on an issue that is closely identified with a candidate for public office or has been publicized intensively in connection with an election, it should seek assistance from knowledgeable sources before using the Web site in this way.

Unlike the standards for permissible lobbying that apply to section 501(c)(3) organizations making an election under section 501(h), the standards for permissible campaign intervention consistent with exemption under section 501(c)(3) are not tied to expenditures. Therefore, any amount of political campaign activity represents a potential basis for revocation of exemption for a section 501(c)(3) organization, regardless of whether it is accomplished over the Web at little or no financial cost to the organization. Limiting the expenditure may reduce or eliminate liability for tax under section 4955, but the IRS retains the discretion to seek revocation in combination with tax under section 4955 or separate and apart from any tax owed under that section. Treas. reg. section

53.4955-1(a). Accordingly, organizations that are subject to tax-based restrictions on their political activities should ensure that any information posted on the organization's Web site on the organization's behalf that refers directly or indirectly to a candidate for public office be evaluated as possible campaign intervention. An individual is a candidate if he or she offers himself or is proposed by others as a contestant for an elective public office at the national, state or local level. See Treas. reg. sections 1.501(c)(3)-1(c)(3)(iii); 53.4945-3(a)(2).

6. Special Concerns for Private Foundations

Placing lobbying or political content on a Web site can also have tax consequences for any private foundation that has provided a grant to support development or maintenance of the Web site. If a private foundation makes a grant to support lobbying or intervention in a political campaign, it makes a taxable expenditure pursuant to 4945(d) and owes a 10-percent excise tax on the expenditure. The connection between the Web site content and the private foundation grant will arise only if the private foundation grant is earmarked for use in connection with placing content on the Web site or the lobbying or political campaign activities. See Treas. reg. sections 53.4945-3(a)(1); 53.4945-2(a)(5). A grant is earmarked "if the grant is given pursuant to an agreement, oral or written, that the grant will be used for specific purposes." *Id*. Specifying that the grant is for the purpose of helping the grantee acquire the hardware and software and professional services necessary to build and operate the site infrastructure may be helpful as it will make clear that such a grant is not available to develop content for the site. However, it may not be a perfect solution if at the time the site infrastructure is being built, the donee intends to use the site, in part, for lobbying. Obviously, private foundations should avoid placing any lobbying content on their own Web sites. (Expenditures for self-defense are generally not considered expenditures for lobbying. Therefore, placing information on the Web site about legislation that affects the organization's powers, duties, or responsibilities, such as legislation that affects the tax benefits for charitable gifts, is not governed by the rules limiting lobbying activities.)

7. Links and Attribution of Political or Lobbying Messages

As noted above in the section on corporate sponsorship, the IRS has raised the question of whether material on the other side of a hyperlink provided on a charity's Web site should be attributed to the charity. The recent notice goes so far as to ask, "Does providing a hyperlink on a charitable organization's Web site to another organization that engages in political campaign intervention result in per se prohibited political intervention?" The question is breathtaking.

Links do distinguish the Internet from other media. They enable members of the public to make connections between pieces of information very easily at their own initiative. However, they do not create an identity between the sites on either side of the link. They are nothing more than a communications tool and are completely independent of the content they bridge. Furthermore, they function entirely at the user's discretion. (Recall the point from Section I: user control is a hallmark of the Internet.) Thus, someone could be reading entirely educational material on a section 501(c)(3) organization's Web site, use a link in that material to move to educational material on a site created by a non-501(c)(3) entity and then move in one more step from that site to a site devoted exclusively to a political or lobbying campaign. The section 501(c)(3) organization did not connect that series of events even though it invited the reader to take the first step.

If the IRS suggestion were valid, charities would also have to give thought to hyperlinks made by others to their sites, not just links they make themselves from their site to others. For example, if the IRS were correct, and establishing a link were to be interpreted as associating an organization with the substantive views of the site to which it is linking, then a charity that became aware of a link made to its site and did not ask to have the link removed could be seen as tacitly reciprocating in the association of views. There is currently no cost-effective technology a charity can use to find all of the third parties creating links into the charity's Web site. It will likely become aware of those links at random, and even if it is aware of them, may not have the time or inclination to investigate the parties who have established them. The charity ought not be made responsible for policing third parties who link to the charity's site, whether or not the charity is aware of the link. The IRS should recognize that the openness of the Internet will create an infinite number of connections that have not previously existed in the non-electronic world. Rather than imputing meaning to the mere existence of those connections, it should look only to what the charity intends when it affirmatively establishes a connection, as demonstrated by the context created for the link.

8. Link/Banner Exchanges

The FY00 CPE Text raised the subject of link or banner exchanges. Swapping of links or banners among organizations with similar programmatic interests is occurring so that the recipients can get access to them readily and post them on their Web sites. The IRS says in its article that it is unclear whether these link exchanges will be treated like mailing list exchanges. They also say it is unclear whether the exchanges are an exchange of advertising or an activity intended to further exempt purposes by drawing more public attention to educational material on an organization's Web site.

Mailing list exchanges are protected from UBIT by section 513(h). An organization must make an investment to create a mailing list. Others are willing to pay to acquire it to save themselves the time and effort needed to create a similar intangible asset. The statute provides that exchanges "names and addresses" is not an unrelated trade or business. To the extent a list of links is considered a list of Web site names and addresses, it could fall under this provision. It is somewhat harder to conceive of banners as names and addresses that would fit within the provision, but the banners themselves are clearly intangibles. Depending upon the nature of the transactions, payments received for use of these intangibles might be excludible as royalties under section 512(b)(2).

III. Selling Goods and Services Over the Worldwide Web

Organizations have begun using the Internet as a new means for selling goods and services that previously were available only on their premises, at gift shops, or by mail-order catalog. All kinds of things from books and reproductions to sound recordings to jewelry to course instruction is available for sale. The Internet can be a cost-effective and highly efficient system for marketing these goods and services, taking orders, and, in some instances, fulfilling orders. However, this kind of activity raises a number of important tax and other legal issues.

A. The On-Line Charity Store

The FY00 CPE Text reminds exempt organizations that the principles used to determine whether UBIT is owed on sales made in stores or through catalogues will also apply in determining whether UBIT is owed on Internet sales of merchandise. Articles must be examined one at a time to determine whether their sale is related to the seller's exempt purpose. FY00 CPE Text, 140. See also, TAM 9720002. If the items the charity is offering for sale have virtually all been donated to the organization, the charity can claim under section 513(a)(3) that the operation of the on-line store is not an unrelated trade or business. Another exception applies to business activity where "substantially all the work in carrying on such trade or business is performed for the organization without compensation." See section 513(a)(1). There is no authority directly on point, but it is likely to be difficult for a charity to use this exception for an on-line store. The operation of an on-line store will require principally three kinds of services: (1) building and modification of the Web site that offers merchandise and accepts purchase orders; (2) processing of orders and credit card transactions; and (3) fulfillment, i.e., sending the merchandise to the person who ordered it. In a physical store, the amount of time spent simply staffing and operating the store will mean that the first and third categories dwarf the second, even if the charity is paying for a credit card account.[4] The balance may be different for an on-line store because ongoing operations are automated. Moreover, the charity may need to pay for the building and modification to the Web site. Therefore, it is not clear that whether the facts will support application of this exception though in theory they could.

B. Earning Income Through Relationships to E-Commerce

More and more Internet-based business offer charities the opportunity to earn income if they agree to create links, license use of their names and logos, provide content, make alliances, or otherwise promote certain e-Commerce Web sites. These arrangements can appear attractive because they may offer the charity revenue without requiring the charity to incur costs or make any effort. For well-established charities, the principal tax question raised by these opportunities is whether the revenue is subject to UBIT. For new charities, connections to an on-line business that is trying to acquire customers through the same process the charity is using to acquire donors or members could raise exemption issues.

One common option for earning income is to provide a link on the charity's Web site to an on-line business. In return for renting a portion of this "cyber real estate" to the business, the charity receives a fee, often calculated to reflect the sales originating from the link. For example, Amazon, best-known as an Internet book seller but not offering a wide array or merchandise, offers an "Associates program" for nonprofits. (See www.amazon.com for details). The operating agreement for the program, which Amazon makes available for review off of its Web site — provides that participating organizations receive "referral fees" for each customer sent to Amazon from the participating organization's Web site who makes a purchase. The referral fee is calculated as a percentage of the sale, with a slightly higher percentage for sales of individually linked books. If the charity is receiving fees exclusively for helping users of its site purchase goods or services that are related to its exempt purpose, such that the charity could sell the material directly without incurring UBIT, then the charity has a good argument that whatever it earns for referring users to a third party is related income earned from a business that furthers exempt purposes. An on-line merchant like Amazon is expert and efficient at taking orders, collecting payments, and delivering merchandise. It would seem logically inconsistent if a charity that had helped to fund the work published in a number of books was subject to UBIT when it collaborated with Amazon to deliver the books to interested purchasers but not if it were to sell the books directly. In order to sell the books directly over the Internet, the charity would most likely have to pay a commercial firm like Amazon to perform many of the necessary tasks. The collaboration through a link to Amazon's site simply streamlines that arrangement and deducts the cost by giving the charity only a portion of the purchase price.

If, as may be the more common case, the charity is earning a fee on sales of goods and services that are not related to its exempt purpose, it will be worth considering whether that fee is properly characterized as a royalty that is exempt from UBIT under section 512(b)(2). A royalty is a payment made in return for the right to use an intangible owned by the charity. Payments in exchange for the use of a charity's name on an affinity credit card or the charity's mailing list are royalties, a position the IRS fought for years, but has now accepted. See *Sierra Club, Inc. v. Commissioner*, T.C. Memo. 1999-86; *Planned Parenthood v. Commissioner*, T.C. Memo 1999-206; *Common Cause v. Commissioner*, 112 T.C. No. 23 (June 22, 1999). Although there is as yet no published guidance nor any court decisions to address this question, it does seem clear that a link on a Web site is an intangible. Therefore, a payment to a charity for the right to place a link on its site could readily be argued to be a royalty.

[4]Treas. reg. section 1.513-1(e) does not specifically address how much activity must be performed by volunteers to be substantial, but it does say that a retail store operated by a charity where substantially all of the work is done by volunteers would qualify for the example. It does not limit the types of payment the retail store can accept, or suggest that paying charges to a bank or other service provider for a part of what is needed to operate the store nullifies its ability to come under the exception.

The royalty cases do make clear, however, that a royalty does not include a payment for services. Thus, to the extent a charity is providing services to an on-line business that is also paying for a link on the charity's Web site, a portion of the business's payment should be specifically allocated to payment for the services. If it is not, the charity runs the risk that the IRS will force an allocation in a way that does not favor the charity. It is hard to determine whether the charity should be considered to be providing services when it permits a business to place a link on the charity's site. Is there any implied endorsement of the business? Would the fact that the payment is based on the percentage of sales originating at the link affect whether the charity should be seen as referring customers? GCM 38083 (September 11, 1979) provides that a payment calculated as a percentage of sales is to be treated as a royalty just as a flat payment for the use of an intangible would be. Certainly in the affinity credit card arrangements, charities are paid a percentage of what the cardholders charge, and those payments have been sanctioned as royalties. If the arguments against attributing statements made on linked sites is to be extended into this domain, then it should be observed that it is the user, and not the charity, who carries him or herself to the linked site and chooses to conduct a business transaction there. If the "cyber real estate" analogy were to hold, then the payment should be viewed as a rental of the intangible property with no further involvement from the charity.

If there is a difficulty, it may be that in the new world of the Web, the conventions are still developing for distinguishing between content third parties have paid to post — for which there is no implied endorsement — and content the Web site has posted itself or otherwise officially sanctioned. To the extent the charity explicitly states that it has a relationship with the on-line merchant, and every transaction done redounds to the charity's benefit, then it has avoided any implied endorsement, but the clarifying statement could be viewed as a marketing service for the on-line business. There may be an exception where a link is seen and available only to the charity's existing members or donors. In that case, the charity may be viewed simply as informing the donors of another tool for offering their already identified support, much as charities now can inform existing constituents about the availability of affinity credit cards. Circulated to the public at large, however, explanation of how the charity benefits from transactions may be viewed as promoting the business. Promotional statements are evidence of advertising under section 513(i). There is no clear resolution to this conundrum. To increase their comfort about their ability to treat payments from a link to an on-line business as tax-free royalties, charities should vet those links carefully to avoid any explicit or implied endorsements of the businesses. If they would prefer to identify the link clearly as a fundraising relationship for the charity or, alternatively, an advertisement, they may be able to treat much of the payment received as a royalty but may be forced to treat a portion as subject to UBIT.

Charities should also be sensitive to the fact that the on-line businesses may derive substantially more value from the relationship than the charities will. Acquisition of customers is very expensive, and many businesses hope to reduce those costs by appealing to the charity's assembled constituency. Using the charity's name in marketing and advertising may help the business establish credibility as well. Therefore, to avoid operating for the private benefit of an on-line business, charities should scrutinize the promised payments carefully. They may want to insist on a minimum payment if the charity is permitted to use the charity's established and valuable name, irrespective of whether the relationship produces any revenue for the charity. It may be appealing to a new charity to combine forces with a new on-line business and work in tandem to acquire individuals who will be both donors and customers. In theory, this could work, but in practice, the charity must be careful not to jeopardize its exemption by operating as a marketing arm for the business. The fact that all of the amounts changing hands are at arm's length may not be adequate protection if the business controls the charity. See *Est. of Hawaii v. Commissioner*, 71 T.C. 1067 (1979); *Church by Mail v. Commissioner*, 765 F.2d 1387 (9th Cir. 1985), *aff'g* TCM 1984-349 (1984); Andrew Megosh, Larry Scollick, Mary Jo Salins and Cheryl Chasin, "Private Benefit Under Section 501(c)(3)," Exempt Organizations Instruction Program for FY01, 135.

Charities may also collect revenue from on-line versions of directories they have traditionally produced. The directory may feature links to the listed parties, rather than just street addresses and telephone numbers. The charity may collect fees in return for providing listings. The IRS has repeatedly reviewed the subject of print listings in exempt organization directories for non- members for purposes of determining whether fees charged for the listings constituted unrelated trade or business income. Where listings are provided in an exempt organization's journal, 60 to a page, the Service has taken the position that fees for the listings are not subject to UBIT. See Rev. Rul. 76-93, 1976-1 C.B. 170. However, display advertisements, even if they do not make specific reference to products or services, may still generate UBIT if they are intended to earn goodwill in furtherance of an advertiser's business. See *id*., Rev. Rul. 74-38, 1974-1 C.B. 144. Obviously, electronic search tools enable nonprofit organizations to offer directory listings in a far more flexible mode than alphabetical listings, 60 to a page. The same principle, though, should apply so that UBIT could be avoided where the listings are primarily for the convenience of the charity's target audience and provide basic contact information in a uniform mode for all entries rather than offering the businesses purchasing the listing an opportunity to promote their goods and services in a form that may vary depending on the amount paid.

C. Sales Tax and the Internet Tax Freedom Act

As organizations that conduct mail order sales have known for some time, determining when state and local sales taxes are owed, how they are to be collected and how they are to be paid is a complex task. The key test has been whether a "substantial nexus" exists between the organization selling the material and the state in which the sale is made. See *Quill Corporation v. North Dakota*, 504 U.S. 298 (1992). Congress recognized that applying the nexus test to electronic commerce on a state by state basis would be extremely complicated and, therefore, enacted the Internet Tax Freedom Act, which imposes a three year moratorium on any tax that

discriminates against electronic commerce or that is on Internet access. Pub. L. No. 105- 277, 105th Cong. (The relevant title is buried in what is principally a transportation appropriations bill.) The moratorium expires October 21, 2001, three years after the date of enactment. Congress also ordered the creation of a national commission to study, international, state and local taxation of electronic commerce and report to Congress on its findings. For more on the Commission's work, see http://www.house.gov/chriscox/nettax/.

The Commission had difficulty reaching consensus because of the conflicting interests of members concerned with the future of large Internet-based businesses and members concerned with future sources of state and local revenue. For obvious reasons, certain businesses that are heavily involved in electronic commerce evidently favor extending the moratorium for as long as possible. However, state and local governments recognize the importance of this new source of tax revenue and are likely to be pushing for a resolution of the issues on a nationwide basis.

The business interests ultimately prevailed, and the Commission's report, which is being presented to Congress on April 12, 2000, contains the following recommendations, among others:

- Forge a meaningful pathway to simplification of states' sales and use taxation systems
- Permanently prohibit states or localities from taxing Internet access subscription charges
- Extend the current Internet Taxation moratorium legislated by the Congress on multiple and discriminatory taxation.

It is now up to Congress to consider what action should be taken. Many knowledgeable observers expect the moratorium on state and local taxation of electronic commerce transactions to be extended for some number of years, though not permanently. In addition, some states are making efforts to address sales tax problems raised by the lack of consistency from state to state.[5] While they are not addressing Internet sales directly, uniform rules on things like definitions of exempt goods and services would be an important step toward clarifying how Internet sales are to be taxed.

D. International Tax

If a tax-exempt organization is generating income from sales of goods or services over the Internet, and some of that income comes from foreign sources, the organization may need to evaluate any liability it has for foreign income or sales taxes. Foreign countries are not necessarily required to honor income tax exemptions granted under U.S. tax law, though mutual recognition is sometimes the subject of provisions in tax treaties between the United States and other countries. Whether or not foreign countries have jurisdiction to tax income from electronic commerce conducted by U.S.-based organizations is a difficult issue subject to largely the same analysis that has been applied to the question of jurisdiction to impose sales and use tax among the fifty states. Key questions include the type and extent of connection that must exist between the taxing jurisdiction and the party being taxed, tax rates, and mutual recognition of exemptions.

The Organization for Economic Cooperation and Development (OECD) is undertaking a thorough study of the principles and administrative practices that should apply when applying tax to revenues from electronic commerce in an international context. The papers produced to date are available on the OECD Web site, www.oecd.org. The hope is to have all the member countries of the OECD (principally developed industrial countries) subscribe to uniform principles that could be memorialized as interpretations or applications for the existing model OECD tax treaty. Key issues are how to determine when electronic commerce creates a permanent establishment sufficient to give a country jurisdiction to tax, how to collect consumption taxes on goods and services in the places where they are consumed, and how to characterize payments, e.g. from sale of good, sale of service, as a royalty? There is likely to be some international disagreement, particularly between the developed and the developing countries.

IV. Listservs, Chat Rooms, E-mail, and Distance Education

Through the Internet, organizations are gaining the capacity to conduct educational programs for people located far away from the organization's physical locations. Participants can follow as an instructor delivers a lecture and then can submit questions or participate in a real-time discussion with others stationed at their own computers in remote locations. Organizations can also facilitate ongoing discussions about topics by hosting listservs for users with common interests. A listserv works by sending a mass e-mailing to all members of the list every time a message is posted. Others can respond by sending further e-mail to the entire list or by responding to another individual list participant.

A. Is there Any Obligation to Monitor?

Charities that organize a listserv, chat room, or e-mail distribution list or that provide e-mail accounts to employees, students, members, or other constituents that individual participants can use at their discretion may ask whether the charity has any duty to monitor the traffic in these areas and bar participants from making statements the charity could not make itself. For example, is the charity required to monitor listservs that it forms and services in order to ensure that participants are not expressing views on candidates for public office? Such a duty would arise only if it were proper to

[5] Twenty-six states have joined together to study problems of coordinating and automating sales tax collection in what they call the Streamlined Sales Tax Project. They intend to report model legislation. Their work can be tracked on their web site: http://www.geocities.com/streamlined2000/index.html. The project could ultimately have an impact on charities as sellers of goods and services as it tries to develop uniform exemption criteria. At present, some states exempt sales by charities entirely. Others exempt only occasional sales. Still others treat sales by charities like sales by any commercial operation. The proposal is trying to define things like food and clothing so that product-based definitions can be applied uniformly from state to state. At present, it does not appear to be seeking a uniform set of exemption rules for charities as sellers.

attribute the statements made on the listserv — or in a chat room or on an e-mail distribution — to the charity.

Outside of the electronic context, the IRS has clearly recognized that a charity can provide a forum for speakers without having statements made by those speakers attributed back to the charity. See Rev. Rul. 74-574, 1974-2 C.B. 160 (hosting forums for political candidates). The IRS has also ruled that a college or university can provide facilities and support to a campus newspaper that takes positions on candidates for public office and can offer a course that requires students to work on a political campaign as part of learning about the electoral process. See Rev. Rul. 72-512, 1972-2 C.B. 246; Rev. Rul. 72-513, 1972-2 C.B. 246.[6] None of these rulings requires the charity to engage in any type of censorship. In Rev. Rul. 74-574, the charity provides an explicit disclaimer to the audience for the candidate forum that the views expressed are strictly those of the candidates. To make an analogy for purposes of listservs, etc., a charity would want to have reasonable objective criteria for participation and require participants to acknowledge that all statements posted represent the views of the individual posting them and do not in any way represent the views of the charity sponsoring the on-line exchange.

B. Distance Education: Payment for Service or Royalty for Intangible

UBIT is the principal tax concern stemming from distance education. Fees earned from providing educational programs on-line should be treated no differently than fees earned from providing educational programs in person. If the programming is truly educational, as demonstrated by the qualifications of the instructor, any readings or other materials used in the program, or any other factors that show the program provides instruction or training for the purpose of improving or developing an individual's capabilities or knowledge on subjects of benefit to the public, see Treas. reg. section 1.501(c)(3)-1(d)(3), then the fees should constitute income from a related trade or business and should not be taxed to the organization. However, if the organization simply lends its name to education provided by unrelated third parties, or develops a class or curriculum that others use for Internet-based educational programs, the organization would more likely be exploiting intellectual property, and hopefully earning royalties that are exempt from UBIT, than providing an educational program.

Another interesting new question involves the use by staff members of materials they develop while working for an educational institution and of the institution's very name in identifying themselves and their credentials. Professor Arthur Miller of Harvard Law School recently prepared a law course entirely on videotape for use by the Concord University School of Law, a Web-based institution. See Vasugi V. Ganeshananthan and Erica B. Levy, "Miller's On-Line Courses Spark Review of Policy," *The Harvard Crimson*, November 24, 1999. Harvard has been reviewing whether Miller's activities violate the university's conflict of interest policies for faculty. Staff at other nonprofit organizations may have similar opportunities to provide distance education over the Internet, and their employers will have to wrestle with whether they want to allow staff members to use the organization's name in identifying themselves as part of similar outside work, whether the organization should collect a royalty if its name is used under circumstances like these, and, finally, whether the organization is failing to meet its obligations as a tax-exempt charitable organization if it allows its name, or material developed by its employees, to be exploited for profit without collecting appropriate compensation. Before the Internet and other communications technologies dramatically increased the significance of "brand names" on information, educational institutions typically allowed faculty and staff to identify themselves by their institutional titles largely at will, and even though the copyright on the material they produced arguably belonged to the institution as work done for hire, faculty and staff were allowed to treat the copyright as if it were their own.

C. E-Mail List Rentals

Charities certainly can rent or exchange their lists of e-mail addresses in the same way they have rented or exchanged their lists of street addresses. The recent IRS notice does not ask about this subject, and the CPE articles have not addressed it directly, perhaps because the analogy seems so clear. Section 513(h)(1)(B) specifically provides that for section 501(c)(3) organizations, renting or exchanging a list of donor or member names and addresses with another section 501(c)(3) organization is not an unrelated trade or business, and, therefore, does not generate taxable income. If the IRS does indeed agree that section 513(h)(1)(B) applies to e-mail addresses in the same way it applies to street addresses, that may be helpful in establishing that a link to a Web site "address" should be treated no differently than distributing a street address.

D. Virtual Trade Shows

Under section 513(d)(3)(A) certain "qualified convention and trade show activity" does not constitute a trade or business. The definition states that this is activity "of a kind traditionally conducted at conventions, annual meetings, or trade shows, including, but not limited to, any activity one of the purposes of which is to attract persons in an industry generally . . . as well as members of the public to the show for the purpose of displaying industry products or to stimulate interest in, and demand for, industry products or services, or to educate persons engaged in the industry in the development of new products and services or new rules and regulations affecting the industry." The regulations further provide that the exception applies only to an organization that "regularly

[6] It may be instructive for colleges and universities in particular to revisit the American Council on Education Guidelines on Questions Relating to Tax Exemption and Political Activities. *See* http://www.acenet.edu/washington/legalupdate/2000/07july/guidelines.html. Developed in 1970, the guidelines have received unofficial support from the IRS. They address an issue of particular interest: use of the organization's facilities. They state, "Educational institutions traditionally have recognized and provided facilities on an impartial basis to various activities on the college campuses, even those activities which have a partisan political bent, such as, for example, the Republican, Democratic, and other political clubs. This presents no problem."

conducts as one of its substantial exempt purposes a qualified convention or trade show." Income earned from an exposition of vendors held at the charity's annual membership meeting generally counts as income from a qualified convention or trade show. See Treas. reg. section 1.513-3(e) Ex. 2. However, a supplier show held independent of a membership meeting devoted to educating members will generally not constitute a qualified convention or trade show. See *id*., Ex. 4.

Section 513(i) provides clearly that payments received in connection with any qualified convention or trade show activity are not qualified sponsorship payments. This means that such payments are excludable from UBIT regardless of whether the payor receives something in return that may constitute an advertisement. Amounts that suppliers pay to rent space at a live qualified convention or trade show are excludable from unrelated trade or business income even though the suppliers are permitted to sell products or solicit orders at the show. See Treas. reg. section 1.513-3(d)(1).

In the preamble to the corporate sponsorship regulations, the IRS asked how the exception to the corporate sponsorship safe harbor for trade shows should be applied with respect to "virtual trade shows" conducted over the Internet. The Internet can offer exempt organizations a way to reduce the cost and increase the participation in their meetings. The use of video streaming and other Internet technology can allow a person at home to absorb the same proceedings at the meeting that they would observe if they attended in person. Similarly the quality and utility of the accompanying trade show can be equivalent when delivered over the Internet as it would be in person. Thus, it seems there is a good argument for trade shows conducted over the Internet to be treated the same as trade shows conducted in person. It would follow that under section 513(d)(3)(A), the presentation of information about goods and services relevant to the exempt organization's constituencies should be treated as an activity "traditionally" conducted at a convention, annual meeting or trade show, irrespective of the fact that the technology may allow the displays to be made electronically to people who are geographically dispersed. If a charity elects to hold a virtual trade show independent of a physical gathering of members at an educational meeting, it will have to establish a basis for excluding the income it receives. It can do that by including a substantial proportion of member exhibits designed to educate fellow members about products and services. If the show is exclusively for suppliers, the charity will want to establish an on-line equivalent of an educational meeting for the charity's members in order to provide the context needed under the current regulations for treating the income received from the suppliers as excludable.

V. Fundraising Over the Worldwide Web

More and more charitable organizations are soliciting contributions over the Internet. Again, the ability to reach a large audience for a low cost has proved very inviting. Some charities allow donors to make donations directly through the charity's Web site. Others receive contributions through Web sites that raise money on behalf of multiple charities. The most salient legal concern may be a non-tax matter: is registration required with all 50 states? Thirty-nine states require some form of registration before conducting charitable solicitation within the state. From a tax perspective, it is important that the charity understand the legal consequences of the structure used for Internet fundraising and that contributions received in response to Internet solicitations be processed as all other contributions are, with proper attention to the requirements for providing acknowledgments and disclosures with respect to any items that may be provided in return.

A. Using Intermediaries to Solicit Contributions Over the Web

The IRS has made some observations about the deductions available to donors when for-profit firms offer secure on-line donation services through which they collect contributions from taxpayers, deduct a fee, and then transfer the balance to the taxpayer's designated charity. The IRS believes it would be necessary to see the agreement between the charity and the donation service to determine whether the donation service is acting as an agent for the charity. FY00 CPE Text, 129. If so, the fees deducted from the contribution are a cost to the charity and the full amount of the contribution would be deductible. If not, presumably the donation service is acting as either a broker or an agent for the donor. If the intermediary is the donor's agent, the fees would not be deductible as a contribution to the charity. Furthermore, if the intermediary is the donor's agent, the donor's charitable contribution will not be complete, and deductible, until the intermediary delivers it to the donee charity. Consequently, donors may make contributions late in the year, thinking they are deductible in the year they "point and click," and then discovering later that the deduction is pushed off into the following year because of delays in processing.

B. Acknowledging Contributions and Disclosing Value of Goods and Services Provided in Return

A donor who makes a charitable contribution in excess of $250 may not take a charitable contribution deduction for that payment unless he or she has a written acknowledgment from the charitable donee on or before the date the donor files his/her income tax return (or the due date, if earlier). Section 170(f)(8). The acknowledgment is required regardless of whether the contribution is made in cash, by check, by credit card or by some other electronic means. Therefore, charitable organizations that receive contributions over the Internet must be sure to provide acknowledgments for them as they would for contributions received by any other route.

If a donee charitable organization solicits or receives a payment in excess of $75 that is part contribution and part payment for goods or services, the organization must inform the donor in writing that only the amount of the payment in excess of the goods or services provided in return is deductible and provide a good faith estimate of the value of the goods and services provided. Section 6115.

The IRS has yet to confirm whether providing disclosures and acknowledgments by e-mail or other electronic means will satisfy the requirements of these statutory provisions. The recently issued notice asks for comments on both of these questions. (It also asks whether solicitations made over the Internet are considered to be in "written or printed" form for

purposes of section 6113, which requires non-charitable organizations to inform potential donors when solicited in writing that the contributions are deductible as charitable contributions.) Other than the need to be comfortable with the materials that will be available to the IRS during an examination, there appears to be no policy reason for objecting to the use of the Web or e-mail for these purposes. Moreover, at a time when the IRS is trying to lessen the administrative burden of compliance, permitting electronic disclosures and acknowledgments could save substantial mailing costs and allow for better compliance through automated procedures.[7]

C. State Registration

There has been significant debate about whether an organization that posts a fundraising request over the Internet, either on a Web site or by e-mail, must register in each of the states it reaches.[8] The National Association of State Charities Officials (NASCO) has published a proposed set of guidelines for determining when a charity would be required to register and/or subject to a state charities official's jurisdiction. Known as the "Charleston Principles" (the Principles) because of where they were first developed, they are available at www.nasconet.org. The Principles were the subject of extended discussion at NASCO's annual meeting this past October in San Diego, and NASCO intends to publish a revised version of the guidelines that takes comments received into account.

If a charity intends to begin charitable solicitation over the Internet, the Charleston Principles would require it to register in a state if:

(a) the charity is domiciled in the state;

(b) the charity's non-Internet solicitation activities create sufficient contact with the state to require registration;

(c) the charity offers the ability to complete a charitable contribution entirely over the Internet, and it either targets people in the state or receives repeated and ongoing contributions from people in the state; or

(d) the charity does not offer the ability to complete a charitable contribution entirely over the Internet, but it does provide instructions over the Internet on how to complete an off-line donation and it either targets people in the state or receives repeated and ongoing contributions from people in the state.

Solicitation by e-mail will be treated the same as solicitation by direct mail. Offers to sell products that include a promise that a portion of the purchase price will go to charity are considered charitable solicitations. Contracting with a third party to provide on-line donation functionality is treated the same as providing that functionality directly.

The Principles try to add some rules of reason. For example, they provide that charities "operating on a purely local basis" that make it clear "in context" that they are focusing on fundraising from their local area are not required to register outside their area even if they happen to receive contributions from outside their area. They also provide that states should set numerical benchmarks to show the volume of contributions a charity would have to receive to be considered as receiving "repeated and ongoing contributions" from a state. (No specific suggestions is made to create consistency among the states.) Furthermore, operating a Web site that describes program services but makes no explicit request for donations does not trigger a registration requirement, even if Internet users send contributions in response to the site.

The Principles advance the discussion. However, as currently conceived, they may be problematic to apply. Unless a donor provides his or her street address in connection with a contribution, the charity will not know where the donor is located. The charity will not be able to determine the donor's location from his or her name, credit card number, or e-mail address. Thus, a charity will not know with any certainty whether it is receiving repeated and ongoing contributions from the residents of any one state. Similarly, if a charity has an e-mail list, and distributes a solicitation to all of the addresses on the list, it will not know whether it is targeting people in a particular state. Many of the problems charities now face with state registration would disappear if a simple single registration form were available on-line, and if a single annual filing would satisfy all of the states requiring an annual filing. NASCO deserves great credit for having recognized the advantages of these solutions and including a section in the Principles that express interest in using the Internet to streamline registration and annual reporting.

NASCO is careful to observe that the Charleston Principles, as they stand or as revised, have no standing as legal authority. They offer the states a model that could be incorporated into each state's laws to provide for consistency across the country. However, unless and until a state actually modifies its statutes and regulations on charitable solicitation, the Charleston Principles will not affect the states' requirements.

The Pennsylvania Attorney General's Office has sent a letter to at least one charity, Survivors and Victims Empowered, that had been raising funds with the help of an Internet company telling it that it and the Internet company might be in violation of Pennsylvania law for failing to register and submit certain materials. The charity wrote back asking for clarification of what makes someone a professional fundraiser and whether links between other charities' sites and this charity's site made those other charities professional fundrais-

[7]The Electronic Signatures in Global and National Commerce Act was signed into law as Public Law No. 106-229 on June 30, 2000. Section 104 of the law makes clear that it does not superseded the authority of any agency to require records to be filed in a specified format. None of the required statements discussed here must be filed with the IRS. As section 101 otherwise requires that records not be denied validity simply because they are in electronic form, it appears the statute will compel the IRS to accept these acknowledgments and disclosures in electronic form.

[8]A nifty way to see a review of the legal issues involved in regulation of Internet-based solicitation is to read a paper prepared by Paul Monaghan while a student at Yale Law School entitled Charitable Solicitation Over the Internet and State-Law Restrictions. It is available at http://www.bway.net/~hbograd/monaghan.html.

ers as well. Check the cyber-accountability listserv for updates on this issue.

D. Charity Malls and Other Shopping Opportunities Designed to Benefit Charity

A number of Web sites offer on-line shoppers the opportunity to provide support for their favorite charities at the same time that they make purchases. For example, www.charitymall.com allows users to shop with more than 100 on-line retailers and direct a commission earned on your purchases to the charity of your choice. An article from late last year in *The Chronicle of Philanthropy* summarized the Web sites that had appeared over the preceding months and explained what gets passed to designated charities when visitors use the sites to make purchases. Jennifer Moore and Grant Williams, "Ringing Up a New Way to Give," *The Chronicle of Philanthropy*, December 16, 1999, 1, 23-25. The goods and services purchased are generally sold on other sites, and the charitable contributions are funded by commissions the charity shopping sites receive for referrals.

Payments received from these sites should be treated from the charity's perspective as contributions and not royalties or UBTI provided that shoppers at the site initiate the direction to send the contribution to the charity and the organization does not become active in selling goods and services unrelated to its exempt purposes. However, the visitors to the sites who are making purchases may or may not have a charitable contribution from their perspective. The purchaser has made a charitable contribution only if the contribution is in excess of any quid pro quo received in return and only if he or she could have received the same merchandise for a lower price and has elected either to include an additional amount with the purchase price as a charitable contribution or has redirected to the charity a rebate on the purchase that he or she otherwise could receive. See *U.S. v. American Bar Endowment*, 477 U.S. 105 (1986); Chief Counsel Advisory 199939021 (October 1, 1999). Cf. PLR 962035 (March 8, 1996). Charities should be aware of the consequences for donors so that they provide contribution acknowledgments as appropriate. Donors who have made a charitable contribution of over $250 in connection with a purchase of any amount will need a written receipt that meets the requirements of section 170(f)(8) in order to take a charitable contribution deduction for the gift. Others who have made purchases from merchants who forwarded a portion of the purchase price to the charity but did not make a charitable contribution may deserve thanks but should not receive anything that suggests they have made a deductible contribution.

E. Charity Auctions

The IRS has offered a somewhat peculiar comment on income derived from selling items at auction over the Internet. Some charities are turning to well-established Internet auction sites to help them sell donated items — like celebrity memorabilia — and raise funds. The FY00 CPE Text says, "Unless the [auction] event is sufficiently segregated from other, particularly non-charitable auction activities, and the exempt organization retains primary responsibility for publicity and marketing[,] the Service may be more likely to view income from such auction activities as income from classified advertising rather than as income derived from the conduct of a fundraising event." FY00 CPE Text, 141. The IRS also warns that the auction house may be viewed as a professional fundraiser subject to state regulation. The IRS is likely to be thinking of issues that have arisen with car donation programs, where the charity fails to ever take possession of the car and may be paid in a fashion that is not connected to the amount received from liquidating the automobiles. The income the exempt organization receives should still be income from sale of the article, not income from running an advertisement, provided that it accepts the items being auctioned and clearly owns them while they are being auctioned.

A number of Web sites will conduct fundraising auctions for a charity's benefit at little or no cost to the charity. (For an example, see www.Webcharity.com.) They may offer the option of a continuous rolling auction, where items come up for bid as they become available throughout the year. Assuming the items being sold are not related to the charity's exempt purpose, the charity will want to be conscientious about fitting into one of the UBIT exceptions that could protect the income from tax. The auction will be different for UBIT purposes from the once-a-year fundraising event the charity may traditionally have held because those events are so infrequent, the auction business is not considered "regularly carried on," meaning that the income is automatically exempt from UBIT. However, with a rolling auction, that argument would most likely not apply. Instead, the charity will be able to argue that the auction is not a trade or business — and the income not subject to UBIT — if (a) the work done to carry on the auction is performed without compensation or (b) the items being sold are received by the organization as gifts or contributions. See section 513(a)(1) and (3). Thus, on-line auctions can be an attractive fundraising activity provided that the charity is not paying for the auction Web site's services and is not trying to auction off merchandise it has purchased.

VI. Serving as an Internet Service Provider or Hosting Web Sites for Others

An Internet Service Provider (ISP)[9] is much like a local telephone or utility company. It provides service to a customer — often called an "end user" — that enables the customer to access the Internet. As you will remember for the Brief Technical Overview at the beginning of this outline, the end user needs to send communications, coded according to Internet protocol, through a pipe that understands the address being provided and how to direct the communication into the worldwide network that will allow it to travel to that address. (If you simply connected your computer to a telephone wire and pumped Internet communications into it, they wouldn't go anywhere.) The communications need to be sent to computers that know how to route Internet traffic based on the address information attached to the message.

Charities may elect to provide certain groups of end users with Internet access or to host Web sites for those end users.

[9]For the purposes of the Digital Millennium Copyright Act, H.R. 2281 *supra*, p. 21, an ISP may also include any entity that maintains an interactive Web site. See Section I.D. above.

The tax and other legal consequences will vary depending upon the group of end users being served and the context in which the services are offered. Interestingly, the IRS did not raise any questions about the implications of serving as an ISP in its recent notice even though it has discussed these questions in some previous CPE articles.

A. Qualifying for Tax-Exempt Status

Although there is no published guidance directly addressing these issues, the IRS did produce an article in the Exempt Organizations Technical Instruction Program for FY99 that discusses exemption for Internet Service Providers and gives some insight into its perspective on this subject. In the article, the IRS expresses the view that providing Internet access for a fee on a regular basis "is carrying on a trade or business for a profit." While that characterization seems fair, it does not necessarily mean that serving as an ISP is an unrelated trade or business. There is legal authority for how to determine whether an activity ordinarily carried on by commercial entities can be conducted exclusively for a charitable purpose. In *B.S.W. Group v. Commissioner*, 70 T.C. 352 (1978), the Tax Court held that a consulting firm that planned to serve only nonprofit clients and charge fees at or above cost failed to serve charitable purposes not simply because its consulting activities were the same as those typically found in a for-profit business, but also because: (a) the organization was funded entirely with market-rate fees and not at all by gifts or grants; (b) the clients included not only section 501(c)(3) nonprofit organizations but a larger unspecified group of nonprofit organizations; and (c) the organization failed to explain in detail how its consulting activities would further exclusively exempt purposes. The decision in B.S.W. Group implies that an ISP that served an exclusively charitable class composed either of disadvantaged individuals or other section 501(c)(3) organizations, attracted gifts and grants, charged fees below cost or no fees at all to a significant portion of its subscribers, and provided additional services, such as training or research, that furthered charitable and educational services could qualify as a section 501(c)(3) organization.

The article acknowledges another scenario under which an ISP could qualify as a section 501(c)(3) organization. The ISP could function as an integral part of another section 501(c)(3) organization or of a state or local government entity. The example given is a separately incorporated ISP formed and controlled by a university that is exempt under section 501(c)(3). The ISP provides free service to the university's students and service at a "substantially reduced fee" to others in the community where it is located, including elementary and secondary public school students, the community's library and the community's government offices. The theory here is that the activities of the ISP further the university's exempt purposes and could be conducted directly by the university without affecting its tax-exempt status or constituting an unrelated trade or business. As long as the university controls the ISP entity, it should qualify for exemption on the same basis as the university itself.[10] A similar rationale would logically apply to a museum that created a nonprofit subsidiary to function as an ISP.

B. UBIT

Whether or not income generated by serving as an ISP or Web site host for members — or others for that matter — will be subject to UBIT depends upon whether those services are related to the basis for the charity's tax-exempt status. Providing a service simply for the convenience of members is not necessarily related to furthering an organization's exempt purpose. See *Professional Insurance Agents of Michigan v. Commissioner*, 726 F.2d 1097 (6th Cir. 1984); *Long Island Gasoline Retailers Association v. Commissioner*, 43 T.C.M. 815 (1982). The Sixth Circuit has said that "[a] product or service that seeks to accomplish a truly tax exempt purpose does not assure the member that he will receive benefits directly proportional to the fees he pays." 726 F.2d at 1104. If providing Internet access can be analogized to providing individual insurance coverage, then these cases make it likely that earning a profit from providing Internet access to members may constitute an unrelated trade or business. (Obviously, if service is provided at or below cost, it will not constitute a trade or business, and UBIT will not be a concern.)

VII. Disclosing Required Tax Information on the Worldwide Web

Since 1987, tax-exempt organizations that file an annual information return (Form 990) have been required to make their three most recent returns as well as their exemption applications available for public inspection at their principal offices during their regular business hours. See section 6104(e). (Organizations that are not required to file annual information returns, such as churches, have no responsibility for compliance with these rules.) The filing requirement applies to most organizations that are exempt under section 501(a). See section 6033. With the 1996 enactment of intermediate sanctions for section 501(c)(3) and 501(c)(4) organizations, Congress expanded the disclosure rules to require tax-exempt organizations to provide copies of the their three most recent information returns and/or their exemption applications in response to requests made in person or in writing. See *id*. The statute relieves organizations of the duty to fulfill individual requests if they have already made the documents "widely available." Section 6104(e)(3). Organizations are permitted to charge a reasonable fee to cover the costs of copying and mailing the documents requested. In 1998, the statue was further modified to make the disclosure rules for private foundations essentially the same as for public charities.

[10] Integral part arguments generally rely on Treas. reg. section 1.502-1(b), which provides that an organization that is an "integral part" of its parent can derive a profit from its dealings with its parent and remain exempt, but it may not have as its primary purpose the carrying on of an unrelated trade or business. Recent case law [Geisinger] may have confused the understanding of what can qualify as an integral part by suggesting that to be an integral part, an organization must provide a "boost" to its parent's ability to accomplish exempt purposes in order to qualify. *See Geisinger Health Plan v. Commissioner*, 30 F.3d 494 (3d Cir. 1994). It is unclear how such a boost is achieved.

Treasury issued final regulations implementing these requirements for all organizations except private foundations on April 8, 1999. See Treas. reg. section 301.6104(d)-3, -4, -5 (as amended by T.D. 8818). The new requirements for providing copies went into effect June 8, 1999 (60 days after the final regulations were issued). The regulations implementing the requirements for private foundations were issued in August of 1999 and finalized in January of 2000. Many organizations feel uncomfortable with this required disclosure, particularly because it makes public details about the compensation paid to the five most highly compensated individuals in the organization. See Treas. reg. section 301.6104(e)-1(b)(4). However, the requirement for disclosure of the Form 990 information, including compensation, is quite clear. Penalties are imposed for failure to comply with these requirements. See Section 6652. One of the few exceptions permits organizations that are not private foundations to leave off the lists of contributors that they otherwise provide to the IRS. Section 6104(e)(1)(C).

The regulations also provide that an organization will have made the documents widely available "by posting the application or return on a Worldwide Web page that the tax-exempt organization establishes or maintains or by having the application or return posted, as part of a database of similar documents of other tax-exempt organizations, on a Worldwide Web page established and maintained by another entity." Treas. reg. section 301.6104-2(b)(2). The organization must have procedures for ensuring the reliability and accuracy of the information on the Web page to protect against its unauthorized alteration.

The documents may be posted using any format that "when accessed, downloaded, viewed and printed in hard copy, exactly reproduces the image of the application for tax exemption or annual information return as it was originally filed with the Internal Revenue Service, except for any information permitted by statute to be withheld from public disclosure." Treas. reg. section 301.6104(d)-1(b)(2)(i). Portable Document Format (PDF) is capable of meeting these criteria; HTML may not be. Finally, members of the public must be able to download the information for free. *Id*. at (iv). If an organization elects to make its documents widely available, it must give the exact address of the site where they are posted to anyone who asks for it. Treas. reg. section 301.6104(e)-2(b)(3).

While disclosure requirements are not new, organizations understandably may be concerned about the effect of the new regulations combined with the increased availability of documents posted on the Internet. A publicly available return or exemption application posted on the Internet is for all intents and purposes much more widely available than the same publicly available document on file at a state Attorney General's office or the IRS. Nevertheless, the Internet offers many tax-exempt organizations a way to comply with these new disclosure requirements that avoids the administrative burdens that may arise if individual staff members are required to fulfill an unknown number of individual requests for copies. At least one organization, Philanthropic Research, Inc., has established a Web site called GuideStar (www.guidestar.org) that contains a great deal of information about nonprofits. GuideStar has begun including Form 990 and Form 990-PF information on the site through a cooperative agreement with the IRS and the National Center for Charitable Statistics, and it can assist organizations that cannot or do not want to do their own Internet postings.

Some tax-exempt organizations are reluctant to include unnecessary personal information about officers, directors, and others whose names must appear on the form. An organization is permitted to use business addresses and telephone numbers for individuals listed on the return rather than home addresses and telephone numbers. Some organizations, particularly private foundations, have been concerned about public dissemination of signatures and Social Security Numbers that appear on certain returns. Social Security Numbers are generally not required anywhere on the returns for any of the individuals listed. However, some organizations elect to provide them in some instances. Recently, the IRS instituted a program of providing alternative identification numbers for tax preparers. See Treas. reg. section 1.6109-2 and -2T, they were required. Return preparers can use Form W-7P to apply for these alternative preparer identification numbers. Before these numbers became available, tax preparers were required to include their Social Security Numbers on returns that they signed. Signatures are obviously required on all returns, and certain individuals are uncomfortable providing their signature to members of the public who might misappropriate it. In response to these concerns, Guidestar redacts this information in some instances. Where this information has been redacted from the documents the organization has posted on the Internet, it appears the IRS will not treat the organization as having made the necessary documents widely available through its Internet posting. The statute is quite specific in listing the information that is not required to appear in the publicly available copy even though it appears in the copy that is filed with the IRS, and neither Social Security Numbers nor signatures are on the list of items that may be redacted. As a practical matter, it is highly unlikely that anyone with a good faith interest in the return information is going to insist on having an unredacted copy of the return as the law would apparently allow. Nevertheless, organizations that redact their documents in this fashion should be aware that they may still be required to produce the unredacted document to avoid penalties.

VIII. Recordkeeping for Your Web Site

There is one question posed in the recently issued IRS notice that does not fit neatly into any of the other categories in this outline. That question asks whether organizations should be required to maintain an archive containing all of the information that it has ever posted on its Web site. The notice observes that sites can change daily, meaning that a review of a site today will not tell you definitively what the site may have said in the past. There is no specific statutory provision requiring charities to keep an archive of all of their publications. Section 6001 does state that an organization must keep such records as the IRS may require. The IRS has the discretion to require such records as the IRS believes are needed to show whether or not a taxpayer is liable for a tax. The regulations require an exempt organization to keep per-

manent books and records to substantiate how it has calculated any UBIT liability it might have as well as sufficient records to substantiate the items it is required to report on its Form 990. See Treas. reg. sections 1.6001-1(a) and (c), 1.6033-2. There is no specific reference in the regulations to any requirement for keeping an archive of publications.

The IRS is asking this question most likely because it is common practice for agents to begin an audit by asking a charity to provide copies of all of its publications. As organizations shift to using the Web and electronic technology rather than paper and ink, the IRS wants to be able to review publications as it always has. However, it would be incredibly burdensome for a charity to have to retain a copy of every version of its Web site ever posted, particularly if it makes small changes on an almost daily basis. Creating a record-keeping requirement may have the unfortunate consequence of deterring charities from using the Web. Fortunately, the IRS is soliciting input before creating any such requirement giving charities an opportunity to consider suggestions they can make to the IRS for minimizing burdens while retaining the ability to do meaningful enforcement.