

**INDEPENDENT SECTOR
Comments
In Response to
Announcement 2000-84**

America's "independent sector" is a diverse collection of more than one million charitable, educational, religious, health, and social welfare organizations. It is these groups that create, nurture, and sustain the values that frame American life and strengthen democracy. In 1980, a group of visionary leaders, chaired by the Honorable John W. Gardner, became convinced that if the independent sector was to continue to serve society well, it had to be mobilized for greater cooperation and influence. Thus a new organization, named to celebrate the independent sector's unique role apart from government and business, was formed to preserve and enhance and protect a healthy, vibrant independent sector.

Today, INDEPENDENT SECTOR ("IS") is a coalition of more than 700 national organizations and companies representing the vast diversity of the nonprofit sector and the field of philanthropy. Its members include many of the nation's most prominent nonprofit organizations, leading foundations, and Fortune 500 corporations with strong commitments to community involvement. This network represents millions of volunteers, donors, and people served in communities around the world. IS members work globally and locally in human services, education, religion, the arts, research, youth development, health care, advocacy, democracy, and many other areas. No other organization represents such a broad range of charitable organizations and activities.

INDEPENDENT SECTOR and the many charities it represents very much appreciate the opportunity to submit comments in response to IRS Announcement 2000-84. The Internet has the potential to benefit charities greatly by increasing their efficiency and their effectiveness in accomplishing their missions. Therefore, IS takes a keen interest in seeing that where appropriate, there is clear, consistent, and prompt guidance on the federal tax law implications of using this technology.

General Principles

Use of the Internet raises a wide variety of federal tax questions for charitable organizations in connection with their exempt status, the tax placed on unrelated trade or business activities, and the deduction for charitable contributions. Answering these questions requires the application of existing statutes and regulations to a dynamic technology that was not contemplated in almost all cases when those statutes and regulations were written. In many respects, the Internet is simply a new form of communications technology, meaning that the proper application can be determined by analogy to existing interpretations. However, in certain key respects, the Internet is unique, making analogies impossible. Understanding precisely how the Internet is the same and how it is different requires a detailed understanding of the technology and how it works. Therefore, we include in these comments a technical overview of the Internet and a description of how various Internet functions like e-mail, web sites, and hyperlinks, actually work. Our suggested answers to the questions posed in the Announcement

are grounded in this technical information, as we believe they must be to be valid. Furthermore, to ensure consistency of approach in answering questions that arise under so many different Code sections and in so many different potential factual contexts, IS has identified a number of key principles that it believes should guide the development of answers to all questions involving the Internet and tax-exempt organizations. Those principles are as follows.

- The laws and regulations remain the same. The statutes and regulations that establish the rules of conduct and standards for tax-exempt status, unrelated business income tax (UBIT) liability, deductibility of charitable contributions, and required notices and disclosures have not changed in response to the Internet. In answering the many questions raised, the IRS must interpret the same words and apply the same principles and policies that are reflected in their accumulated interpretative guidance and in case law. Deviations from those principles or policies need to be justified by fundamental differences between Internet technology and other communications technology that can be shown to be relevant to the statute or regulations, not just by differences of perception or differences that have no legal significance. Furthermore, to the extent existing guidance does not answer the same question as it arises with respect to non-Internet communications technology, the IRS must issue guidance that provides that context if it is also going to answer Internet-specific questions so that charities can know whether it is use of the Internet, the content of the communication, or other factors that produces a particular legal result.
- The Internet is fundamentally a communications technology, and the legal implications of its use should be analyzed accordingly. By creating a network of networks for transmitting digitized information, the Internet allows people and organizations that are far removed in space and time to communicate with each other. They can share text, graphics, audio and video messages, and they can reach a vast audience for a modest cost. They can also create remarkably fast and easy connections between otherwise unrelated messages. Although the speed, flexibility, economy and reach of the Internet may make it unique among current communications technologies, these distinctions for the most part are not legally relevant. Generally, charity communications using the Internet should be viewed for purposes of IRS analysis like any other charity effort to reach an audience with a message.
- In those instances where it is appropriate to provide guidance, and the IRS chooses to write rules, the IRS should use its authority to craft reasonable interpretations that resolve practical problems that would otherwise block or eliminate the potential gains in efficiency charities stand to gain from the Internet. Charities stand to benefit greatly from the cost savings and other efficiencies the Internet offers. The marginal cost savings for distributing communications are particularly valuable to small organizations with limited resources. Should the IRS develop any new rules of broad application for applying the tax-exempt organization provisions of the Code to activities that involve use of the Internet, every effort should be made to give reasonable and pragmatic interpretations that do not diminish the cost savings and other benefits of the Internet by imposing burdensome compliance requirements. In particular, special note should be taken of the following dimensions of cost.

- Electronic recordkeeping, though it can be considerably more efficient than keeping paper records, is not costless and can be intensely burdensome where charities are asked to keep huge volumes of information for years.
- The marginal cost of conveying a communication over the Internet is extremely modest. Rigid accounting rules applied without the benefit of safe harbors or reasonable alternatives could easily cause the costs of accounting with respect to sending a given communication over the Internet to exceed the costs of sending the communication, thereby eliminating efficiencies the charity stands to gain from using the Internet.
- Appropriate guidance should be issued now, even though the technology will continue to evolve. The IRS should *not* refrain from issuing guidance because of a concern that evolution of the technology will make the guidance obsolete. The protocols and software we will use to take advantage of the Internet will undoubtedly evolve over time, but its fundamental characteristics will not. It will always be a network of networks. It will always be decentralized and user-driven. And it will always allow one party to connect its information with information made public by a wholly unrelated party in a speedy and nearly seamless way. Therefore, answers provided to these questions right now that address the legal consequences of taking advantage of these fundamental aspects of the Internet will have enduring value. Furthermore, even if certain aspects of guidance become obsolete, use of current Internet technology has become so widespread, some amount of guidance is essential to provide for consistent application of the tax laws for the immediately foreseeable future.
- Guidance that addresses specific fact patterns should make clear that it illustrates the application of the law and does not provide an exhaustive view of all permissible or impermissible approaches. Given that many issues may be resolved based on facts and circumstances, and that the technology will evolve, it is important that exempt organizations and examining agents be put on notice that revenue rulings, regulatory examples, and other guidance addressing fact patterns does not and cannot address all possible situations. Activities conducted in keeping with the rules of the statute and regulations are permissible, even if they are not specifically included in guidance presenting the same legal issue.
- It is appropriate to provide answers in piecemeal fashion rather than one comprehensive guidance project, provided that there is a consistent approach to analyzing the features of the technology. The IRS has rightfully raised a wide variety of questions arising under many different Code sections and regulations. It would be extremely difficult to provide answers to so many different questions in a single guidance project. Furthermore, while the answers to some of these questions may best be addressed through amendments to the Treasury Regulations, useful guidance may be provided on many others through revenue rulings or even audit guidelines. As long as the various projects reflect consistent principles and a consistent understanding of the technology, any series of guidance projects that can publish items quickly should be beneficial to the charitable sector.

Technical Overview of the Internet

The Internet is a network of networks. It is not a monolith. It is not controlled by any central authority. And it is not any single piece of hardware or software that connects all users. At its edges, it may consist of a single unaffiliated computer user. That user is in turn connected to other users through some form of network. It may be a local area network operated by the user's employer or educational institution. It may be a network of users sharing a common Internet Service Provider (ISP) who use their telecommunications lines to contact the same host computers. That network may have direct access to the Internet or it may be part of a still larger network, but eventually, it will be connected to the very high speed telecommunications lines known as backbone that link the Internet at its core.

All networks have devices on them called routers that direct traffic. Messages travel into a router's input ports. Address information on the message is read and compared against routing tables that indicate how the message should be directed to move it closer to its ultimate destination. On a local area network, that may mean that the router takes a message from Employee A and directs it right to Employee B. On the Internet, that may mean that a message goes from a user, to his local area network, to the host computer at his Employer's ISP, to a router on the Internet backbone, to another router on the Internet backbone, to yet another router on the Internet backbone until it reaches a router that is connected to a network that is part of the address, to that network, and down progressively until it reaches the intended individual addressee.

The routing process is dependent on a centralized system for assigning Internet addresses. There is nothing about an Internet address that necessarily associates the address with any unique physical location.¹ Unlike an address on a piece of paper mail which describes a unique location and which can be routed by sending it north, south, east or west, an address on an Internet message is meaningful only if the routing table can associate the address with a location on a subsidiary network connected to the router or another point of presence on the Internet so that the router can determine how to move the message closer to its destination. Although there are informal conventions for assigning address extensions, historically, strict rules have not been enforced. Therefore, there are some nonprofit organizations with ".com" addresses, and some for-profit entities with ".org" or ".edu" addresses.

Another key element that makes it possible to pass messages back and forth over the Internet is a uniform set of protocols for formatting and addressing messages. Two key protocols, Internet Protocol and Transmission Control Protocol, allow computers with very

¹ The organization that oversees assignment of these names and numbers is the Internet Corporation for Assigned Names and Numbers (ICANN), a private nonprofit founded in 1998 to take over functions previously performed on a less systematic basis by the researchers and government officials who created the Internet. Historically, only one company, Network Solutions, has registered domain names (e.g., www.xyz.com). Recently, five other companies, including America Online, have been authorized to register domain names, and others will be added in the near future. There are three large regional associations for the entire world, APNIC (for Asia/Pacific), ARIN (for the Americas and sub-Saharan Africa) and RIPE (for Europe), that assign Internet Protocol addresses (addresses in numbers that the routers can use rather than the domain names people can remember).

different technical specifications, running different software on different technical platforms to communicate with each other.

A web site is a set of web pages, each with its own Uniform Resource Locator (“URL”), that have a subsidiary relationship to a single home page. The web site is stored on one or more computers called servers. 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 data center for its Web hosting, it can either 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, technically called a Uniform Resource Locator (“URL”), through the web browser software running on her computer. The browser formats the request so that it can be transmitted according to Hypertext Transfer Protocol. 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-high-speed 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 functions when the user clicks on it. The link 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 characteristics of the Internet that are relevant for purposes of tax analysis. The Center for Democracy and Technology (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. Compared with other communications media, the Internet is uniquely --

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 have 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, as Announcement 2000-84 makes clear, use of the Internet does raise some interesting questions about how that law applies when certain activities are conducted with the speed and flexibility that the Internet allows.

General Issues

1. Does a website constitute a single publication or communication? If not, how should it be separated into distinct publications or communications?

A web site should be considered a single publication or communication only if all the facts and circumstances support that characterization. In many instances, the facts and circumstances will indicate that it is more appropriate to treat a single site as containing multiple communications. There are many ways an organization can indicate that discrete portions of its web site should be viewed as separate communications. The separation may be clear from the nature of the content, from the division into multiple pages that are linked in particular ways, from the insertion of messages that appear when moving from one part of the site to another, or from other techniques. The IRS will need to look at a site in detail to determine whether and where these separations exist.

Whether or not a single web site is considered to contain a single message or multiple messages will be a critical legal issue whenever a charity and a non-charitable organization, like an affiliated section 501(c)(4) organization or a taxable corporation, maintain a single web site. It is common to have such an arrangement where one entity has a well-known name that is part of the URL and the public finds the affiliated entities by starting with the best known party, e.g., Acme Corporation and the Acme Foundation. Section 501(c)(4) organizations are permitted to engage in some amount of political campaign intervention, an activity that is entirely forbidden to section 501(c)(3) charities, and other entities, like trade associations and corporations, may engage in a substantial amount of it. Furthermore, section 501(c)(4) organizations and many other entities that may be affiliated to a section 501(c)(3) charity are permitted to engage in an unlimited amount of lobbying while charities may devote only an insubstantial portion of their activities to influencing legislation. If a jointly maintained web site is considered a single communication or publication, then the charity may be treated as having partial responsibility for lobbying and political communications on the site, even if the charity and the other organization have been dutifully allocating expenses for building and maintaining the site.

This question as to whether a single site constitutes one or more communications also arises when a charity that has made the election under section 501(h) is calculating its lobbying expenditures. If a web site is a single publication, the expenses to be identified as lobbying expenditures will depend upon application of the “same specific subject rule” of Treas. Reg. § 56.4911-3(a)(2).² Under that rule, all expenses attributable to material in a single multipurpose communication that is on the same specific subject as the lobbying material must be included in lobbying expenditures. If a web site can be divided into multiple communications, then expenses attributable to material on the same site and on the same specific subject but contained in a different communication would not be included in lobbying expenditures. The existing examples under the regulation discuss multipurpose communications in the forms of pamphlets or newsletters where the edges of the paper define the boundaries of the communication. Therefore, they do not address the question raised here as to when one communication ends and another begins.

² This rule provides that in allocating expenses, the charity “must include all costs attributable to those parts of the communication that are on the same specific subject as the lobbying message.”

Given the infinite variety of ways in which web sites can be designed and presented, IS believes that whether a web site contains one or many communications must depend upon the facts and circumstances of the site in question. Although the different pages of a web site each have a distinct URL, the division into pages is at the discretion of the site designers. A web site is simply a collection of files residing on one or more servers. The technology does not demand that all of the information accessible from the starting point of a particular home page or URL be organized in any particular fashion or with any particular divisions. A designer can elect to include or not to include screens that appear warning users that they are leaving one site and going to another. Links between different pages or sites can be arranged as “framing links” that open a new copy of the browser with a smaller window on top of the existing site. Pages need not be of uniform length. And the “look and feel” of a page, which is often the chief indicator to a user of whether or not she has migrated to a different “site” – even if they continue to access information posted by the same organization on the same server under the same files headed by the same URL – is a matter of graphic design, not technological requirements. Each of these mechanisms gives the user a distinct indication of a separation between communications, but requiring organizations to separate communications by using a specific aspect of design or any other specific mechanism would be hard to justify as a legal and technological matter and could present a trap for the unwary.

If a section 501(c)(3) organization and a section 501(c)(4) organization can share office space, personnel, and other resources without necessarily triggering attribution, then it seems they should also be able to share a web site if they identify which organization is responsible for which material presented on the web site, and they allocate expenses carefully. IS recommends that the IRS confirm the broad application of this principle, in published guidance providing that material presented on a single web site can be divided into multiple discrete communications if the organization sponsoring the site provides graphic, textual and/or other signals showing where the discrete communications begin and end. (For these purposes, a web page would be defined as all the material retrieved by a web browser from a specific URL. A web site would be defined as a collection of web pages related to each other through their common subsidiary relationship with a home page.) An example in the guidance might discuss a corporation that maintains a web site that includes pages describing its company foundation. The pages that discuss the foundation are devoted solely to the foundation and its activities. They are accessible from other portions of the site through buttons labeled with the foundation’s name. The corporation’s site also contains material on its home page and other pages that discuss specific legislation and the corporation’s position on the legislation. Given that the site uses demarcations between pages and a clear labeling of the foundation as a subsidiary part of the corporate family, there is no reason to give the foundation any responsibility for the lobbying communications elsewhere in the web site. Another example could describe a section 501(c)(4) organization affiliated with a section 501(c)(3) organization that also maintains a separate segregated fund used to fund political activities. The section 501(c)(4) organization maintains a web site that contains pages devoted solely to the affiliated 501(c)(3) organization and pages devoted solely to the separate segregated fund, though users cannot link directly from the segregated fund pages to the section 501(c)(3) pages or vice versa. The example would conclude that under these circumstances, the communications by the section 501(c)(4) organization would be treated as separate from the communications by the section 501(c)(3) organization. In particular, the political activities of the

segregated fund would not be attributed to the section 501(c)(3) organization based on the fact that they shared this web site. The law permits a section 501(c)(4) organization to maintain relationships with both a section 501(c)(3) organization and a separate segregated fund, provided that expenses are allocated properly, and the section 501(c)(3) organization does not engage in impermissible political campaign intervention or contribute inappropriate assets to the segregated fund. The organization of the web site simply reflects the permissible legal structure. As was stated in the FY 1993 Continuing Professional Education Text, “So long as the organizations are kept separate (with appropriate record keeping and fair market reimbursement for facilities and services), the activities of the IRC 501(c)(4) organization or the PAC will not jeopardize the IRC 501(c)(3) organization’s exempt status.” Jack Reilly and Judith Kindell, “Election Year Issues,” Exempt Organization Technical Instruction Program for FY 1993, 439 (“Election Year Issues”).

Any guidance providing specific examples must take care to note that the examples are not exhaustive and that organizations may separate communications with a variety of techniques, not all of which are described in the guidance.

2. When allocating expenses for a web site, what methodology is appropriate? For example, should allocations be based on web pages (which, unlike print publications, may not be of equal size)?

Any reasonable methodology should be appropriate for performing this allocation.

The need to do allocation arises in connection with calculating UBIT and reporting lobbying expenditures. The current regulations on allocating expenses for facilities that are used both for exempt purposes and for unrelated trade or business activities provides as follows:

Where facilities are used both to carry on exempt activities and to conduct unrelated trade or business activities, expenses, depreciation and similar items attributable to such facilities (as, for example, overhead) shall be allocated between the two uses on a reasonable basis. Similarly, where personnel are used both to carry on exempt activities and to conduct unrelated trade or business activities, expenses and similar items attributable to such personnel (as, for example, items of salary) shall be allocated between the uses on a reasonable basis. Treas. Reg. § 1.512(a)-1(b).

This regulation does not specify a particular methodology, saying only that there must be a “reasonable basis” for the allocation. In Rensselaer Polytechnic Institute v. Commissioner, 732 F.2d 1058 (2d Cir. 1984), it was held that allocating expenses based on a fraction that puts total time for unrelated use in the numerator and total time for use in the denominator was an acceptable method. In an Action on Decision (AOD 1987-014, June 18, 1987) that concluded not to seek a writ of certiorari on this case, the IRS continued to object to the taxpayer’s position but acknowledged that the government risked losing the issue in litigation unless and until the section 512 regulations were modified. As there has been no change to section 512 or this regulation to limit the methodologies that may be used when allocating expenses for a web site as opposed to any other asset, clearly any methodology with a reasonable basis should be appropriate. When determining how to allocate costs associated with both an exempt organization periodical and other activities of the exempt organization, Treas. Reg. § 1.512(a)-

1(f)(6) requires the use of a “reasonable method of allocation.” The regulation provides that salaries may be allocated by time devoted to the relative activities, occupancy costs based on the space devoted to the relative activities, and depreciation based on the degree of use of the particular asset by the relative activities.

Similarly, a charity making the election to measure its lobbying activities as provided under section 501(h) must make a “reasonable allocation” between the amounts spent on lobbying and amounts spent on nonlobbying in its membership communications. Treas. Reg. §§ 56.4911-3(a)(2)(ii); 56.4911-5(f)(8). The examples in Treas. Reg. § 56.4911-3(b) that illustrate reasonable allocations are all based on lineage or pages. Examples 2, 3, and 8 under Treas. Reg. § 56.4911-3(a) all endorse allocation based on number of pages with lobbying communications as compared to number of pages without lobbying communications. Example 11 provides for allocation based on the number of lines in the document containing lobbying communications out of the total number of lines and concludes that such allocation is reasonable. Lineage is also mentioned in Treas. Reg. § 56.4911-5(e)(2) as the base to be used in allocating the mechanical and distribution costs for a communication directed to members that contains both direct lobbying and grassroots lobbying. Example 12 requires that where two letters “of equal length” are mailed in a single envelope, one containing a lobbying communication and the other not, half of the mailing costs must be allocated to lobbying, suggesting that the length of the textual communications is a reasonable basis for allocation. Example 7 also endorses allocation based on the length of articles. Example 10 says nothing about the methodology used to determine that one half the costs of a document can be attributed to a bona fide nonlobbying purpose, but it describes use of membership and nonsubscriber percentages to allocate the lobbying portion of the expenditures associated with the document. The example concludes that the allocation is reasonable. Again, as neither the statute nor regulations have changed to say that allocation of expenses related to web sites should be treated differently than any other allocation, electing charities should be able to use any “reasonable allocation” for determining what portion of web site expenses to treat as lobbying expenditures. If they wish to use lineage to make allocations, that should be their prerogative. However, as these are examples and not rules, a charity should be able to choose a different allocation method if it can justify it as reasonable.

An electing charity will have two types of web site expenses that it will have to allocate when reporting its lobbying expenditures: the fixed expenses of building the site and the marginal expenses for maintaining it and updating it over time. As the web site is an asset, the fixed costs for building it should be allocated as any other common cost would be. It is the marginal expenses that may be a bit more challenging. If the lobbying communication takes up only a portion of the site, then only a portion of the marginal expenses for maintaining the site, including the cost of the labor to make changes and the cost of maintaining an Internet connection to the server, should be allocated to lobbying expenditures, but determining how to calculate that proportion is not clear. IS recognizes that calculating a proportion based on pages with lobbying content will not work precisely on a web site, in part because pages on the web can be of dramatically different length, even if they include only text, and in part because the web allows for multimedia communications, meaning that a page that is relatively short in lineage may contain far more information than a longer page through use of audio or video clips,

or graphics.³ Charities often use time devoted to various functions by full-time equivalents as a basis for allocation, and that may work for these expenses as well. However, other options should be available.

In recognition of the current legal standard in both the UBIT and lobbying areas, which allows the charity to use any reasonable method, and in recognition of the difficulty of identifying sensible content-driven methodologies for allocation when the content of the site is constantly shifting, the IRS would be encouraging compliance and streamlining enforcement efforts for agents in the field if it endorsed one or more reasonable methods for allocation. For example, it could allow charities making the election under section 501(h) to allocate the marginal costs of conveying a lobbying communication over a web site in the following fashion. Electing charities already have to record all of the direct costs of preparing the content of the lobbying message that will appear on the web site. (They have to record this time regardless of whether the lobbying message is going out over the web. As it is very likely they will use the same content in more than one form, this should not require them to track an item they do not currently track.) If they were also to record the direct costs of preparing all of the other content posted on the web site – this would most likely be a new item for them to record, but could be captured -- they could compose an allocation fraction with the direct costs of preparing lobbying material that goes on the web site in the numerator and the direct costs of preparing *all* content that goes on the web site in the denominator. This allocation fraction could then be used to identify the proportion of the marginal costs of maintaining the web site, such as the cost for the webmaster's time, the cost for bandwidth connecting the site to the Internet, and the cost of web hosting, where applicable, that should be treated as lobbying expenditures. IS again stresses that the applicable legal standard should allow for any reasonable method of allocation. We recommend publishing guidance that endorses this method as one safe harbor for administrative convenience and to encourage compliance. As always, any guidance that describes a safe harbor needs to emphasize that there are many other options for meeting the applicable legal standard.

3. Unlike other publications of an exempt organization, a web site may be modified on a daily basis. To what extent and by what means should an exempt organization maintain the information from prior versions of the organization's web site?

There is no specific statutory provision requiring charities to keep an archive of all of their publications. Section 6001 states 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 permanent 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. §§ 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.

³ Allocation across a base determined by the memory storage needed for one communication as against another might be a theoretically purer model, but it would be thoroughly impractical. Memory demands can differ based on decisions made by a programmer structuring the web site that have nothing to do with the volume of content, and parsing these memory demands finely to compare what it takes to store some lines of text on one page and a video clip with graphics and text on another would be very time consuming and not perfectly accurate. Furthermore, such a method does not solve the problem of a constantly changing allocation percentage as changes are made to the site.

To create a recordkeeping requirement specifically targeted to web sites maintained by tax-exempt organizations would be arbitrary unless the IRS simultaneously created a comparable requirement for all publications created by tax-exempt organizations, in whatever form, or the IRS imposed a comparable requirement for all web sites whether maintained by tax-exempt or taxable organizations. If the reason for such a new recordkeeping requirement is the special relevance of publications in determining whether a tax-exempt organization meets the activity-based requirements for exemption in provisions like section 501(c)(3), then there is no basis for distinguishing between web sites and publications in other forms. The IRS has never seen fit to write a regulation imposing such a requirement for a comprehensive archive of publications, presumably because it has recognized that it would be unreasonably burdensome and would ultimately work at cross purposes with enforcement. At a certain point, an agent can be flooded with so much information that cannot be searched in any systematic fashion that the relevant information is buried and, as a practical matter, cannot be found. If the reason for the requirement is that web sites are particularly ephemeral – a hard argument to make when telephone calls leave even less of a trace and have not been the subject of any particular recordkeeping concern – then that concern should apply equally to web sites maintained by taxable organizations that may well contain vital information. In fact, given that taxable organizations are barred under section 162(e) from deducting certain lobbying and political expenditures, the IRS could have as much reason to want to review a taxable organization's web site for lobbying or political material as it would to review a section 501(c)(3) organization's web site for the same content. Again, the IRS has not suggested that it is interested in imposing such a sweeping and burdensome requirement on both taxable and tax-exempt organizations. In light of the potential for serious inconsistencies that would arise, IS believes that the IRS would be making an unreasonable and arbitrary use of its authority were it to impose any new specific recordkeeping requirements targeted only to web sites maintained by tax-exempt organizations.

From a practical perspective, IS notes that it would be incredibly burdensome for a charity to have to retain a copy of every version of its web site ever posted. Particularly for large universities and research institutions that maintain hundreds of sites and web pages, ensuring compliance would be daunting and would consume substantial resources with no demonstrated benefit for tax enforcement.

IS recognizes that agents typically begin an audit by requesting certain standard information, including copies of all of an organization's publications. There is no reason that use of web sites needs to change what the agents request, and it is reasonable to expect that the agent will be referred to an organization's web site, if it has one, in response to such a request. Software used in building and maintaining web sites and the servers that host them typically creates logs showing a history of the changes made to a web site. If an agent has a reason to be concerned about an organization's web site as it existed during a prior period, the agent can certainly inquire as to whether that version of the site can be reconstituted and produced. It may well be possible to do. However, it should also be made clear to agents that no negative inference is to be drawn from the fact that an organization does not have a comprehensive archive showing all the incarnations of all of its web sites. To avoid misunderstandings, IS recommends that guidance be issued to agents through the Internal Revenue Manual making clear (a) what kind of requests for web site information they may have a reasonable expectation

of having satisfied in the course of an audit and (b) no negative inferences are to be drawn if a request for web site information does not produce a comprehensive archive of everything the organization has ever posted on the web, or does not produce a site as it existed on a specified date or range of dates.

4. To what extent are statements made by subscribers to a forum, such as a listserv or newsgroup, attributable to an exempt organization that maintains the forum? Does attribution vary depending on the level of participation of the exempt organization in maintaining the forum (e.g., if the organization moderates the discussion, acts as editor, etc.)?

A tax-exempt charity should not be held responsible for statements made by individuals who are not authorized to speak on the charity's behalf, including individuals who participate in on-line exchanges sponsored by the charity. Furthermore, the answer should not change, and no attribution should arise if the charity monitors the on-line exchange to protect against libel, watch for infringements of intellectual property rights, ensure civil debate, or enforce other content-neutral standards.

The presentation of public lectures, forums, or debates is an established method of educating the public. Rev. Rul. 66-256, 1966-2 C.B. 210. When broadcasting over the radio, 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 fact that a forum or debate is presented over the Internet rather than in person or through broadcast media should not affect its fundamentally educational nature if it otherwise meets the criteria established in this ruling. IS emphasizes the second of the general principles articulated at the beginning of these comments. The Internet is fundamentally a communications technology, and the legal implications of its use should be analyzed accordingly. Thus, the fact that the Internet makes it possible for individuals in remote locations to exchange views, not necessarily in real time, should not trigger a harsher rule on attribution than applies to discussion, forums and exchanges conducted in person. The nature of the communications has not changed even though they can take place with greater ease and flexibility. Furthermore, existing guidance provides that a charity is not held responsible for the content of lobbying or political communications produced using facilities the charity has provided. The IRS has 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 without violating the restrictions of section 501(c)(3). See Rev. Rul. 72-512, 1972-2 C.B. 246; Rev. Rul. 72-513, 1972-2 C.B. 246.⁴ None of these rulings requires the charity to engage in any type of censorship. The software and server capacity needed to support on-line chat, list-serves

⁴ It may be instructive 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 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."

and other on-line exchanges should be understood as just another facility. If a charity makes the facilities available and does not favor or discredit any particular view, the charity should not be forced to take any more responsibility for the communications produced than it receives when it provides an office and computers to a student newspaper.

The IRS's own discussion of attribution of acts of individuals to section 501(c)(3) organizations in training materials for agents states as follows:

As in other situations where the political campaign prohibition is concerned, the determination of whether the act of an individual will be attributed to an IRC 501(c)(3) organization is based on relevant facts and circumstances.

See "Election Year Tax Issues," 435. The materials go on to say that with respect to individuals who are not officials but may be employees or members, "There must be real or apparent authorization by the IRC 501(c)(3) organization of the actions of the individuals other than officials before the actions of those individuals will be attributed to the organization." Id. at 436.

In Rev. Rul. 74-574, a charity operating a broadcast station aired a candidate forum and provided explicit on-air disclaimers to the audience that the views expressed are strictly those of the candidates. Given that attribution requires real or apparent authority to speak for the organization, the disclaimer has the effect of nullifying any apparent authority the speaker may have. The IRS could incorporate a comparable fact pattern into new guidance for on-line forums, specifying that where the charity sends a statement to new subscribers informing them that views posted in the on-line exchange represent the views of the individuals posting them and do not in any way represent the views of the charity sponsoring the on-line exchange, the participants' views will not be attributed to the charity.

Any guidance that is issued addressing on-line exchanges should also make clear that no attribution occurs as a result of the charity monitoring the chat or list-serve or moderating the on-line forum for purposes of maintaining civility, keeping discussions on topic, protecting intellectual property rights, or otherwise enforcing content-neutral standards. Although it is possible to exhibit bias when exercising this kind of editorial authority, for purposes of publishing a ruling, charities should be assumed to be using such authority in good faith and in a way that does not discriminate based on a speaker's point of view. Rev. Rul. 86-95 specifically states that "[A] forum held for the purpose of educating and informing the voters, which provides fair and impartial treatment of candidates, and which does not promote or advance one candidate over another, would not constitute participation or intervention in any political campaign on behalf of or in opposition to any candidate for public office." The ruling specifically blesses a forum with moderators selected by the charity who are "nonpartisan and independent," do not comment on the questions and do not imply approval or disapproval of the candidates. The same principle should apply to permit charities to serve as neutral moderators without triggering attribution of the statements of participants to the charities regardless of whether the discussion being moderated takes place in person or over the Internet. A charity that could be shown to be using editorial authority to favor a particular point of view would not be protected by the ruling.

Finally, although the existing published guidance discusses attribution of statements only as related to lobbying or political candidates, the same principles should apply generally in determining whether a statement should be attributed to a charity. Thus, charities should not be given responsibility for comments made in on-line exchanges that could cause a corporate sponsorship payment to be recharacterized as a payment for advertising or that could otherwise cause the charity to be viewed as improperly benefiting private interests. Views expressed in on-line exchanges should be treated as the unique responsibility of the individual posting them and the organizations on whose behalf they are authorized to speak and not of the charity providing the facility for the on-line exchange.

Political and Lobbying Activities

1. What facts and circumstances are relevant in determining whether information on a charitable organization's website about candidates for public office constitutes intervention in a political campaign by the charitable organization or is permissible charitable activity consistent with the principles set forth in Rev. Rul. 78-248, 1978-1 C.B. 154, and Rev. Rul. 86-95, 1986-2 C.B. 73 (dealing with voter guides and candidate debates)?

The determination should take account of all relevant facts and circumstances that affect whether information is being presented in an impartial fashion that educates voters and does not endorse or oppose any candidate. Permissible voter education should occur not only under the circumstances already addressed in Rev. Rul. 78-248 and Rev. Rul. 86-95 but also under additional circumstances not addressed by those rulings but that satisfy the criteria for impartiality.

In both Rev. Rul. 78-248 and Rev. Rul. 86-95, the IRS has described the law as looking to all relevant facts and circumstances to determine whether a section 501(c)(3) organization has intervened in a political campaign.⁵ Each ruling then holds that specific voter education activity conducted in a thoroughly nonpartisan manner does not constitute campaign intervention. Rev. Rul. 78-248 concludes that preparing voting records of all members of Congress or all candidates for a particular office on a wide variety of issues does not constitute campaign intervention. Conversely, it holds that preparing a voter guide by administering a biased candidate questionnaire or issuing a voter guide that compiles voting records on a select group of issues does constitute campaign intervention. Rev. Rul. 86-95 holds that hosting a public candidate forum that includes all legally qualified candidates with a neutral moderator and a panel of knowledgeable independent persons to ask questions does not constitute campaign intervention. The fact that a charity publishes a voter guide or hosts a candidate forum on its web site rather than on paper or in person should not affect the application of the analysis or conclusions from these rulings. It is the content of the voter guide, not its means of delivery that makes it nonpartisan voter education according to Rev. Rul. 78-248. Similarly, and as discussed in our

⁵ Rev. Rul. 80-282, 1980-2 C.B. 178 does not directly address voter education activities. However, it does apply a facts and circumstances test for identifying campaign intervention. The ruling holds that an organization can present legislative voting records in combination with the organization's views on the issues that were the subject of votes without engaging in campaign intervention, provided it gives the material limited distribution and does not time its release to coincide with an election campaign.

response to question 4 in the General Issues section, it is the roster of candidates, impartial moderator, and independent questioners that cause a forum to be nonpartisan voter education. Therefore, the fact that the audience views the forum over the web rather than in person should not affect the forum's treatment as nonpartisan voter education.

IS further believes that charities can provide candidate information on the web in additional formats that may not be directly comparable to the permissible cases described in Rev. Rul. 78-248 and Rev. Rul. 86-295 but that nonetheless constitute nonpartisan voter education consistent with the legal analysis presented in those rulings. In other words, the situations approved as nonpartisan voter education in those rulings do not comprise an exhaustive list of all the ways charities can do nonpartisan voter education. For example, the incorporation of links into voter guides or candidate forums that allow users to go to the candidates' own web sites to see what they have said about particular issues does not affect the quality of the material as nonpartisan voter education, provided that all candidates are given an equal opportunity to supply a link, all links are displayed and function in the same way, and the links are presented in a neutral order, e.g., alphabetical, that does not imply more favorable treatment for some rather than others. The candidates would be shaping the communications reached by activating the links as they would when responding to questions posed by a neutral moderator at a forum, or in a questionnaire. That their statements appear on a different site with a different appearance provides a visual cue to the viewer that the communications are coming from a source other than the charity. The charity serves simply as a neutral assembly point for information, putting the links together in one place to educate voters by giving them a convenient way to learn about competing candidates and compare them. We emphasize that the links, in and of themselves, do not cause the candidate communications to be attributed to the charity. (See a more detailed analysis of links in response to Question 2 in this section.) Again, the relevant facts and circumstances are not exclusively those identified in Rev. Rul. 78-248 and Rev. Rul. 86-295, but any and all facts and circumstances that bear on whether the charity is educating the public in an impartial fashion that does not express or imply endorsement of or opposition to any particular candidate for public office.

IS also believes that current law permits charities to include on their web sites messages from individuals who are also candidates, provided that it is made clear the individual is speaking in his or her individual capacity or capacity as an officeholder, but not a candidate, and the message does not discuss the individual's candidacy. This position is consistent with TAM 20004438, in which the Service suggests that charities may call on a candidate for public office to speak in his or her individual capacity, provided that the organization "ensure[s] that the candidate only speaks in his or her individual capacity and that no campaign activity occurs in connection with the event." Indeed the "Election Year Issues" article in the FY 93 CPE Text expresses the same conclusion with respect to live events. The fact that the candidate is appearing in text or a video or audio clip conveyed over the Internet rather than in person or on paper should not affect the legal analysis. Thus, the way in which an individual is identified, and what is said, or, more importantly, not said about his or her candidacy for office are relevant facts and circumstances in determining whether information posted on a charity's web site about someone who happens to be a candidate constitutes campaign intervention.

2. Does providing a hyperlink on a charitable organization’s website to another organization that engages in political campaign intervention result in *per se* prohibited political intervention? What facts and circumstances are relevant in determining whether the hyperlink constitutes a political campaign intervention by the charitable organization?

The answer to the first question is an emphatic “no.” Political campaign intervention should not arise from any link, *per se*, regardless of whether the link is to another organization engaged in political campaign intervention or to a page maintained by a candidate or political party.

A link is nothing more than a URL for a web page combined with a small software routine that automatically directs the web browser software to call up that page. The software routine is activated by the user. More importantly, the originating site that contains the link does not have to have *any kind of relationship* with the destination site to establish the link. Unless the originating site is using words or images to display the link that are protected by copyright or trademark laws, it does not need any permission from the destination site to create the link. The sites are very likely to reside on different servers that could be located on different sides of the globe. The people programming the link may never have talked to the people responsible for the destination site. The destination site may look one way on the day the originating site establishes a link to it and look entirely different a day or a month or a year later. Any changes are entirely at the discretion of the destination site unless they have made a specific agreement with the originating site to the contrary or both sites are under common control.

Even where the link connects two sites that are under common control, such as where a section 501(c)(3) organization and an affiliated section 501(c)(4) organization maintain separate sites, the link does not erase the clear legal boundaries between the two organizations. If, as discussed in the answer to the first question in the General Issues section, an affiliated section 501(c)(3) organization and section 501(c)(4) organization can share office space, personnel, a name, and a single web site without violating the requirements that apply to the respective organizations, they clearly can create a link between their separate web sites without triggering an automatic violation of the ban on political campaign intervention for the section 501(c)(3) organization.

In the Announcement, the IRS observes as follows, “The ease with which different web sites may be linked electronically (through a “hyperlink”) raises a concern about whether the message of a linked web site is attributable to the charitable organization.” IS strongly disagrees with the premise of this observation. There is nothing in the statute or regulations to suggest that attribution should arise because technology makes it far easier and more efficient for a charity to give people access to wholly unrelated parties and their communications. An individual can use the telephone to reach another party far more efficiently than regular mail or a personal visit, but the IRS has never ruled that a charity risks attribution of statements made by a wholly unrelated party if it provides the public with that other party’s telephone number. In fact, quite to the contrary, Example 8 in Prop. Reg. § 1.513-4(f) (the proposed regulations on corporate sponsorship payments) specifically permits a charity to provide a corporate sponsor’s street address and telephone number as part of an acknowledgment. According to this example, providing basic contact information does not, in and of itself, cause the charity to be treated as

promoting, endorsing, or otherwise adopting the activities or communications made by the party to be contacted. The identical principle is at issue when a charity provides a link on its web site to another party's site, and the proposed corporate sponsorship regulations got it right.

A similar principle also applies in answering the fourth question from the General Issues section that asks when communications offered as part of an on-line exchange should be attributed to the charity that provides the electronic facilities for the exchange. As discussed at length in the answer given above and consistent with the current guidance (both published and unpublished) cited therein, no attribution should occur if the charity has made clear to the participants that all statements offered on the exchange are those of the participants and not of the charity, and any monitoring or editing that the charity conducts does not discriminate for or against particular points of view. In keeping with this approach, if a charity provides a set of links intended to offer users an opportunity to review the full range of points of view being presented in a debate on an issue or the full range of major party candidate positions on a topic, and the charity scrupulously ensures that the presentation does not favor or discriminate against any of the points of view, the fact that users can engage the links to review positions expressed by others should not cause those third party views to be attributed to the charity nor should the links imply that the charity endorses any of the candidates or positions expressed on those other sites.

As for the second question, the relevant facts and circumstances are those establishing the purpose the charity is trying to accomplish with the link. For example, a charity may assemble a list of sites with useful information on a particular subject and offer it to site users or e-mail recipients with a clear statement that it is recommending the sites and providing links for the quality of their information on a substantive topic. Some of these sites may contain multiple communications, including both the information the charity recommended and statements in support of or in opposition to particular candidates for public office. If the charity has provided the link as an educational resource, the existence of campaign intervention on the linked site should not affect the linking charity's compliance with section 501(c)(3) requirements, assuming the overall pattern of the charity's links does not show an implicit effort to convey a position on a candidate. As discussed in response to the previous question, if a charity provides a set of links to candidate web sites or party web sites, and the charity states that the goal of offering the links is voter education, and the links are presented in an impartial fashion that shows no bias in favor or against any candidate, the links should be viewed as furthering a charitable purpose and not as campaign intervention. The context that the charity creates is what matters. The communications found on the destination site on the other side of the link should be relevant facts and circumstances only if they are under the charity's control or the charity has indicated that the link is intended to give the user access to specific communications on the other site. The existence of political campaign intervention cannot depend solely or even predominantly on what appears on a linked site the charity does not control. Because no charity could be diligent enough to monitor what appeared on linked sites at all times, charities would sacrifice the benefits of links for the sake of protecting against unintentional and otherwise uncontrollable campaign intervention.

3. For charitable organizations that have not made the election under section 501(h), what facts and circumstances are relevant in determining whether lobbying communications

made on the Internet are a substantial part of the organization's activities? For example, are location of the communication on the website (main page or subsidiary page) or number of hits relevant?

Since the adoption of section 501(h) and the regulations under section 4911 defining lobbying for electing organizations and providing a method for determining whether the lobbying is substantial, there has been no guidance of practical value from the IRS telling non-electing organizations what facts and circumstances are relevant in determining whether they have engaged in substantial lobbying in violation of the requirements of section 501(c)(3). In order to ensure that treatment is consistent regardless of the communications technology being used, the IRS would need to issue guidance on the facts and circumstances relevant in determining whether *any* communications and not just Internet communications constitute a substantial part of an organization's activities. Guidance addressing only Internet communications could lead to the erroneous conclusion that use of the Internet creates or eliminates a risk of lobbying activity, thereby causing non-electing charities to gravitate to Internet communications or to avoid them obliquely.

As for determining when Internet-based lobbying activities become substantial for non-electing charities, GCM 36148 (Jan. 28, 1975) identifies factors to be taken into account generally in measuring substantiality of lobbying. These include the amount of money expended for lobbying, the amount of volunteer time devoted to lobbying, the amount of publicity assigned to lobbying, and whether the lobbying is continuous or intermittent as the relevant factors for determining whether a non-electing charity's lobbying activity is substantial. IS believes the GCM can offer sound reasoning for non-electing charities – it predates the adoption of section 501(h) and therefore applies to charities that not only did not but also could not elect to measure the substantiality of their lobbying solely by expenditures -- and that the use of the Internet should not affect it. The cost savings the Internet makes available do not diminish the value of the expenditures factor in determining whether lobbying activity is substantial. The charity will have the opportunity to choose how to use the amounts saved. If they are spent on something other than lobbying, the percentage of total resources spent on lobbying will shrink, signaling that lobbying overall is a less significant activity.

The factors mentioned in the GCM focus on the effort and resources expended by the charity, not the reception it gets to its advocacy activities. The charity cannot control how many people view its publicly accessible web site. Therefore, in response to the specific question the IRS has posed, the number of people seeking to review a lobbying communication posted on a web site as signaled by the number of hits to the site, should not be relevant in determining whether the charity's lobbying activity is substantial.⁶ Returning, as always, to technical

⁶ The question of whether the organization's or the audience's motive is relevant was involved when the IRS was considering the appropriate treatment of associate member dues. Two technical advice memoranda (TAM 9416002 and TAM 9345004) and the FY 95 Exempt Organizations Technical Instruction program looked to whether or not the individuals joining the organization as associate members were "bona fide members in a manner similar to other members or whether they joined the association to obtain benefits that are not substantially related to the organization's purposes." See Sadie Copeland and Gerald V. Sack, "Limited Member Dues As Unrelated Business Income," Exempt Organizations Continuing Professional Education Technical Instruction Program for FY 95, 67. The guidance that was ultimately published, Rev. Proc. 95-21, 1995-1 C.B. 686, concluded that the treatment of the dues payments depended upon the organization's purpose for creating an associate member class, not the reason the

fundamentals, we also note that it may be impossible to determine whether users visiting the site are looking at the lobbying communication unless it is the only material presented on certain web pages.

The placement of a lobbying communication on a web site may give some suggestion of its prominence on an organization's overall agenda, but that is all it can do. Whether the lobbying activities are substantial is measured by all the factors showing the proportion of overall resources the organization devotes to them, not on the depth of its concern about the issue being addressed. An organization can care greatly about an issue and still elect to limit the resources it will expend to lobby on legislation affecting the issue. Finally, the Internet offers charities a highly economical means for conveying messages that can allow the charity to create a significant impact in return for a modest expenditure of resources. Again, in keeping with the analysis in the GCM, the substantiality depends upon a range of factors showing the activity's relative importance, including the resources expended and not including the response received. There has been no change in the statute or regulations. Therefore the IRS has no basis for abandoning the position taken in the GCM, which is in turn based on numerous cases, nor for measuring the substantiality of Internet-based lobbying activities differently because of their potential impact. In keeping with our third general principle, the IRS should avoid interpretations of law that would block or eliminate the potential gains in efficiency charities stand to gain from the Internet.

4. Does providing a hyperlink to the website of another organization that engages in lobbying activity constitute lobbying by a charitable organization? What facts and circumstances are relevant in determining whether the charitable organization has engaged in lobbying activity (for example, does it make a difference if lobbying activity is on the specific webpage to which the charitable organization provides the hyperlink rather than elsewhere on the other organization's website)?

The answer to the first question is clearly no. As discussed in detail in response to question 2 in this section, a link is a mechanism that allows a user to trigger a short software routine that will command the user's web browser to call up a specific web site address associated with the link. A link can be established unilaterally on the origin site without the permission of the destination site. Unless the origin and destination site are controlled by the same people, the origin site can never be certain what content will appear on the destination site. Its content may change drastically day to day. Also as discussed above, providing a link is simply providing an address in cyberspace, a means of contacting another party. If a charity can provide the street address or telephone number of a corporate sponsor without implicitly endorsing the sponsor, as the proposed regulations on corporate sponsorship clearly permit, then the charity should also be able to provide a link to another site for a clearly identified non-

associate members elected to join. The revenue procedure implicitly recognizes that the organization can shape an associate member class to serve a purpose but cannot control what ultimately motivates the individuals who elect to become associate members. Similarly, a charity can control the content and placement of a communication to achieve its intended purpose but it cannot control how its audience will react. Compliance with section 501(c)(3) should not depend upon facts and circumstances beyond a charity's control.

lobbying purpose and not have the link cause the lobbying conducted on the other side to be attributed to the charity.

Also as discussed in the response to question 2, a link between sites maintained by a section 501(c)(3) organization and a related organization does not automatically cause the section 501(c)(3) organization to be engaged in any lobbying that may be conducted through the affiliated organization's site. If a section 501(c)(3) organization can share a name, an office, a staff, and many other facilities, including a web site, with an affiliated organization without violating the requirements of section 501(c)(3), as the IRS has acknowledged that it can, it certainly should be able to offer the public a convenient tool for moving from the section 501(c)(3) organization's web site to the section 501(c)(4) organization's web site.

As for the second question, the relevant facts and circumstances are again those establishing the purpose the charity is trying to accomplish with the link. For example, if a web site is established by a charity for the specific purpose of educating other 501(h) electing charities about the lobbying regulations under section 4911, and the educational site contains links to several sample sites to illustrate the difference between lobbying communications and communications that are not lobbying because they make no reference to specific legislation, it would be illogical to conclude that the charity running the educational site is engaged in lobbying. It is offering the links to illustrate a point that has nothing to do with the content to be found at the destination sites. If a private foundation presents links to sites maintained by each of its grantees, it should not be held responsible for any lobbying activity conducted on the grantee sites. By identifying the site as belonging to a grantee, the private foundation is not saying it endorses all of the grantee's communications. It is simply telling the public that the foundation has elected to provide support to the charity for some portion of its activities and then offering the public a way to find out how the grantee describes itself. Exactly what appears on the destination side of the link should not be given weight in determining whether there has been a lobbying communication unless the origin and destination sites are under common control. Any other rule would present an insurmountable barrier to use of links because a charity could never be sure what content would be posted at the destination site when the charity wasn't looking.

5. To determine whether a charitable organization that has made the election under section 501(h) has engaged in grass roots lobbying on the Internet, what facts and circumstances are relevant regarding whether the organization made a "call to action"?

Treas. Reg. § 56.4911-2(b)(2)(iii), specifically identifies the four circumstances under which a communication will be considered to include a "call to action." Communications contain a call to action if they (a) tell the audience to contact the legislature or government officials involved in the legislation; (b) give the address, telephone number, or similar information for a legislator or employee of a legislative body; (c) give a tear-off postcard or similar material for communicating with a legislator or government official working on the legislation; or (d) identify legislators as for or against the proposal, as representatives of the recipient or as serving on a committee that will vote on the legislation. As the Internet is simply another form of communication, and these four versions of a call to action are all based on the content of the communication and not its form of transmittal, there is no reason to vary from this

definition when the communication is made over the Internet rather than by regular mail, telephone, fax, newsletter, or other hard copy publications.

IS recognizes that to be consistent in this approach, a legislator's e-mail address should be treated as the equivalent of his or her street address or telephone number for purposes of applying this rule. Therefore, if an Internet communication urges the recipient to send e-mail to legislators, gives e-mail address information for legislators, or provides a mechanism for sending e-mail with prescribed content to legislators, it should be treated as containing a call to action.

For a response with respect to the special rule for paid advertising in mass media communications, please see our response to question 6, below.

6. Does publication of a webpage on the Internet by a charitable organization that has made an election under section 501(h) constitute an appearance in the mass media? Does an e-mail or listserv communication by the organization constitute an appearance in mass media if it is sent to more than 100,000 people and fewer than half of those people are members of the organization?

Although a discrete number of web sites may have the characteristics to be considered mass media, most charity web sites should not be considered mass media, and a charity posting a web page should not be considered a mass media publisher. In addition, an e-mail or e-mail list communication should not constitute a mass media communication, irrespective of how many people receive it.

Generally, a communication must contain an explicit call to action in order to constitute a grassroots lobbying communication. The section 4911 regulations create an exception for communications in the form of paid advertising that appears in the mass media and addresses highly publicized legislation within two weeks of a scheduled vote. The regulations presume that such a communication contains a call to action even if no explicit call to action is present. (The presumption can be rebutted with appropriate facts.) See Treas. Reg. § 56.4911-2(b)(5)(ii). The regulations define mass media as "television, radio, billboards and general circulation newspapers and magazines." See Treas. Reg. § 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 of the publications that are advertising paid for by someone else. See id.

Under the existing regulations, the web is clearly not a form of mass media. Unless the definition of mass media is changed by regulations, a communication posted on a web page will not be a mass media communication, and communications appearing on web pages will be grassroots lobbying communications *only if* they contain explicit calls to action. The IRS could use its authority to amend the regulations to expand the definition of what constitutes mass media. Given that the current definition for print media does not include all printed matter but only newspapers and magazines with "general circulation," the IRS should seek consistency in any expansion of the definition and include only those web sites that have a comparable level of visibility. If a site is maintained by an electing charity, it should be subject to a test comparable to the circulation test that applies for newspapers and magazines published by charities. An

analogy between a web site and a print publication would be more apt than an analogy to a broadcast station given that there can be an infinite number of web sites but only a strictly rationed number of broadcast stations because of the size of the broadcast spectrum and licensing limitations. Thus, even if the regulations were amended to include some web sites as mass media, the substantial majority of charity web sites could expect not to be mass media.

Even if the IRS were to disagree and choose to include far more web sites in its definition of mass media, communications that charities post on their own web sites should still not fall within the mass media presumption because the charities should not be considered publishers. By its terms, the mass media rule applies only to paid advertising or material a mass media publisher puts in its publications. The vast majority of communications about specific highly publicized legislation that charities post are not in the form of paid advertising currently. Under the current regulations, to be publishers, charities need to own television or radio stations, or newspapers or magazines with circulation of 100,000 or more. 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, simply sponsoring a web site that is freely available to all Internet users should not make a charity a publisher, even if the site attracts a substantial amount of traffic.⁷

If a charity posting a freely accessible web site were considered a publisher, whether or not its site would be considered to have a circulation of 100,000 or more would not be knowable in advance. Charities have no control over how many “hits” they get on their web sites, and if there is a problem with domain registration, they may get a significant number of unintentional hits from users looking for an organization with a similar name but a different address extension. (Consider www.nrdc.org and www.nrdc.com.) They are not in the same position as a newspaper publisher that knows how many paying subscribers it has before it puts the paper up on the press. To treat them like radio or TV broadcasters or billboard owners also would be unfair as some web sites attract a very limited number of users, far lower than the listeners or viewers a broadcaster can expect to have or a billboard can expect to attract.

In response to the question of whether an e-mail list 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 is inconsistent and 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. § 56.4911-2(b)(5)(iii) in connection with saying that general circulation newspapers and magazines published by electing charities do not become mass media until their circulation exceeds 100,000, and fewer than half the recipients are

⁷ If the web site functions as a periodical, and individuals must pay to subscribe but are not otherwise members of the organization, and if the site has 100,000 or more subscribers, then it may be reasonable to consider the organization sponsoring the site and receiving the subscription fees as a mass media publisher, because producing the same information in hard copy rather than on the site would make the organization a mass media publisher under the current regulations.

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. An e-mail list is simply a convenient mechanism an individual can use to send a mass mailing to other people who have volunteered to receive mail on a particular topic. Neither a single e-mail message nor the collection of messages sent through a list has the coordinated editing and article selection, nor the regular publication schedule of a periodical.⁸

7. What facts and circumstances are relevant in determining whether an Internet communication (either a limited access website or a listserv or e-mail communication) is a communication directly to or primarily with members of the organization for a charitable organization that has made an election under section 501(h)?

Messages posted on password-protected portions of a web site accessible only to members with passwords and messages sent to e-mail addresses that the members provide for themselves should be considered communications directly to or primarily with members of an organization.

Where a charity that makes the election under section 501(h) sends communications exclusively or primarily to members, more generous rules apply for purposes of calculating the direct and grassroots lobbying expenditures associated with the communications. If the communication goes exclusively or primarily to members, expenditures for getting the message to members are treated as either 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. § 53.4911-5. Furthermore, if a communication goes to members only, and it 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 at all. The regulations define a member as a person who “(i) pays dues or makes a contribution of more than a nominal amount, (ii) makes a contribution of more than a nominal amount of time, or (iii) is one of a limited number of ‘honorary’ or ‘life’ members who have more than a nominal connection with the electing public charity and who have been chosen for a valid reason . . . unrelated to the electing public charity’s dissemination of information to its members.” Treas Reg. § 56.4911-5(f)(1). In addition, an electing public charity can treat others who fall outside this definition as members if they show a good reason for not meeting the requirements and show that their membership requirements do not operate to permit abuse of the lobbying rules. Treas. Reg. § 56.4911-5(f)(2).

⁸ As noted in the immediately preceding footnote, it is possible to produce a mass circulation periodical that is distributed entirely over the Internet. However, to come under the same rules as the hard copy equivalent, it must have the requisite number of paying subscribers. It would be imprecise and overbroad as a technical matter to produce guidance addressing the consequences of sending e-mail or list messages without specifying considerably more about their content. They may be better analogized to a letter or better analogized to a periodical.

IS recommends that the IRS treat communications sent over the Internet as being made exclusively with members if the organization has taken reasonable precautions to ensure the communication is available only to members, as that term is defined in Treas. Reg. § 56.4911-5(f), and not to the general public. Guidance should be issued confirming that an organization has taken reasonable precautions and will have directed an Internet communication exclusively to members under the following three specific categories of circumstances:

- (a) The charity has addressed the communication to a list of specific e-mail addresses all of which are addresses for members that were provided by the members,
- (b) The charity has posted the communication in an on-line exchange (including, but not limited to, a chat room or list-serve) to which only members can subscribe, or
- (c) The charity has placed the communication exclusively on a password-protected part of the charity's web site and provided passwords only to staff and members.

Outside the context of electronic communication, the recipients of a message are considered to be its addressees. Cf. Treas. Reg. § 56.4911-3(b) *Examples* 10 and 13. As stated in our first general principle, the law and regulations remain the same. The fact that a charity may be using e-mail addresses rather than street addresses should not affect this interpretation of the law. An e-mail address still describes a unique location. In fact, it may be more precise in that an e-mail address is usually assigned to a single individual whereas multiple people can share a street address. There is just as much risk, if not more, that an unintended recipient will receive or read a communication sent by regular mail as there is that an unintended recipient will read an e-mail message or see a password-protected section of a web site. For example, where one member of a family is a member of a charity, and the charity's monthly newsletter is delivered, it is highly likely that other members of the family, who are not members, will skim or read the newsletter. Furthermore, there is nothing in the regulations that bars a charity from taking advantage of the rule in Treas. Reg. § 56.4911-5(e)(1) if a child in the family takes the newsletter to school and shares it with classmates as part of a report or project. If those risks do not affect the application of the rule treating communications as made primarily to members when made by regular mail, comparable risks of misdelivery or broader dissemination should not affect the application of the same rule to Internet communications. The risks of further dissemination are not under the charity's control. As long as the charity has taken conscientious steps that are under its control, such as the measures described in categories (a), (b), and (c), it should come within the scope of the current regulation and be treated as sending a communication exclusively to members.

Furthermore, charities should remain free to take advantage of the full scope of the rule. The current regulations provide that if more than half of the recipients of a communication are members, it will be treated as a communication primarily with members. See Treas. Reg. § 56.4911-5(e). If the charity can verify that more than half the addresses to which an e-mail is sent are member addresses, or if it can develop a method for ensuring that more than half the subscribers to an on-line exchange or more than half the password holders for a password protected portion of its web site are members, then the special rules of Treas. Reg. § 56.4911-5 should apply to communications made through those media. We request guidance confirming the treatment of these three circumstances specifically not because they are the only cases IS believes can qualify as adequate precautions to ensure communications are primarily or

exclusively with members, but because they are common and easy to administer and may attract needless concern from charities and attention from agents if not addressed in guidance.

Advertising and Other Business Activities

1. To what extent are business activities conducted on the Internet regularly carried on under section 512? What facts and circumstances are relevant in determining whether these activities on the Internet are regularly carried on?

According to Treas. Reg. § 1.513-1(c)(1), whether an organization's activities are regularly carried on depends on whether they are conducted with a duration and frequency and in a manner comparable to the commercial activities of taxable businesses. The regulation further provides that activities typically conducted year-round by businesses are not regularly carried on if an exempt organization conducts them for a few weeks during the year. Treas. Reg. § 1.513-1(c)(2)(i). Activities that are conducted periodically and not on a continuous basis are regularly carried on if “they are conducted with the competitive and promotional efforts typical of commercial endeavors.” Treas. Reg. § 1.513-1(c)(2)(ii). Certain income-producing activities can be conducted so infrequently that they simply do not constitute a trade or business that is regularly carried on. Examples would include fundraising events lasting a short period of time, even if they are repeated annually. Treas. Reg. § 1.513-1(c)(2)(iii). In NCAA v. Commissioner, 914 F.2d 1417, the court applied this standard to the NCAA’s distribution of a program containing advertisements over the three week period of the NCAA’s annual basketball tournament and concluded the distribution was for such a brief period and was so infrequent that it fell within the exception in Treas. Reg. § 1.513-1(c)(2)(iii). The IRS has not acquiesced in this decision, see A.O.D. 1991-015, (Sept. 20, 1990), for two principal reasons: the court failed to include preparatory time in evaluating the duration of the activity, and the court did not view the publication schedule for these programs as being comparable to the seasonal publication of programs in commercial ventures like professional sports. The standard expressed in the regulations remains intact, regardless of the IRS’s disagreement over its application to these particular facts.

The standard for determining when a trade or business is regularly carried on does not change because the business activity is conducted with the aid of the Internet. The duration, frequency and manner with which the activity is conducted are still the dispositive factors.

Because web sites are typically accessible to the public at large 365 days a year, on a twenty-four hour basis, if a charity creates a portion of a web site that offers goods or services for sale and leaves it up for an unlimited period of time, the IRS may consider the sales activity to meet the frequency and duration prongs of the test for whether the activity is regularly carried on. (We note that on-line business activities can also be so intermittent or infrequent as not to be regularly carried on as provided in Treas. Reg. § 1.513-1(c)(2). The fact that an on-line sale may be available 24 hours a day should not affect the analysis if it is offered over the Internet for a limited number of days or weeks.) However, that is not the end of the inquiry. Treas. Reg. § 1.513-1(c)(1) looks not only to frequency and duration of the activities, but also the “manner in which they are pursued.” That manner must be “generally similar to comparable commercial activities of nonexempt organizations.” Relevant facts would include, but not be limited to, how

the activity is marketed and the extent of sales it generates. If the rest of the charity's site does not promote the sale of the goods or services, and there is no effort to seek links from outside organizations, place advertising, or otherwise generate public attention for the sales function, there would be a strong distinction between how these sales are conducted and how a commercial operation would be conducted. Thus, conducting an unrelated trade or business operation over a web site does not necessarily mean that the operation is regularly carried on.

If a charity is selling goods and services on-line as a counterpart to selling goods and services through a catalogue or a shop, then the frequency, duration, and manner of all the sales activities must be taken into account in determining whether the business is regularly carried on.

2. Are there any facts and circumstances under which the payment of a percentage of sales from customers referred by the exempt organization to another website would be substantially related under section 513?

To start, IS states its strong view that the mere existence of a link to a business web site where items are sold does not imply an endorsement or an inducement to purchase. Accordingly, the law allows a charity to provide a link to a sponsor's web site as part of an acknowledgment of a sponsor's contribution without affecting the charity's ability to treat the sponsor's payment as a qualified sponsorship payment that is excluded from UBTI under section 513(i). The fact that a payment to a charity from a business is structured as a percentage of sales from customers referred to the business using a link on the charity's web site or other Internet tools belonging to the charity does not necessarily mean that the payment is subject to UBIT. The UBIT analysis depends upon what the business receives in return for access to the charity's Internet tools, such as a link on the charity's site, use of a charity's e-mail list, or use of the charity's name or logo by the business on the web.

If the charity is exchanging an e-mail address list for cash, it should be entitled to treat the payments as royalties in keeping with the decisions about rentals of postal address lists. 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). The method of calculating the amount to be paid in return, whether it is a flat amount or an amount that varies with the amount of use made of the intangible, does not affect the conclusion. See id.; G.C.M. 38083 (September 11, 1979). There is nothing in the statute or regulations that would justify treating a list differently where it gives e-mail addresses rather than street addresses, and the courts have made clear that the rental transaction is distinguishable from providing the service of referring customers.

If the charity is posting a corporate sponsor's logo with a hyperlink on the charity's web site in return for a contribution from the sponsor, section 513(i) protects the contribution from UBIT. Section 513(i) clearly provides that an acknowledgment can include the sponsor's name and logo."⁹ As discussed above, Example 8 in Prop. Reg. § 1.513-4(f), specifically permits a

⁹ 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

charity to provide a corporate sponsor's street address and telephone number as part of an acknowledgment. IS reiterates the point it made in its comments on these proposed regulations: providing basic contact information does not, in and of itself, cause the charity to be treated as promoting or endorsing the corporate sponsor. Giving a location in cyberspace should be treated no differently than giving a street address or telephone number. The statute does say that payments that are "contingent upon the level of attendance at one or more events, broadcast ratings, or other factors indicating the degree of public exposure to one or more events" cannot be qualified sponsorship payments that are excluded from UBTI. See IRC § 513(i)(2)(B)(i). The proposed regulations under section 513(i) change the language to say that the payment cannot depend upon the degree of public exposure to "the sponsored activity." See Prop. Reg. § 1.513-4(e)(2).¹⁰ Neither the statutory limitation nor its revised regulatory counterpart would affect the treatment of payments based on a percentage of sales. The sponsored event or sponsored activity is the event or activity conducted by the charity. Exposure to those events or activities is not measured by the number of people who make purchases from the sponsor. Exposure to those events or activities is not even measured by the number of people who click on the link. Exposure to events or activities on the charity's site would have to be measured by something like hits on the charity's site – and even that would be imprecise because of the number of people who arrive at sites unintentionally. For the sake of eliminating the difficult line-drawing between acknowledgments and advertisements, section 513(i) provides a clear safe harbor. Charities are entitled to benefit from the terms of the statute, and nothing in the statute prevents a qualified sponsorship payment from being based on the sales a sponsor makes to customers who find the business because of their interest in the charity.

A message in connection with a link to a business web site that contains qualitative or comparative language, price information, or other indications of savings or value, an endorsement, or an inducement to purchase or use the business's products or services cannot qualify as an acknowledgment under section 513(i). See IRC § 513(i)(2)(A). Even so, the income received in exchange for providing the link is not necessarily subject to UBIT. The link combined with the promotional message may be advertising, but it is important that the analysis consider the possibility that the referral services are related to the charity's exempt purpose. For example, if the business is an enterprise being built by former welfare recipients who are learning to become self-sufficient, then sending traffic to the site may be viewed as part of an effort to relieve poverty and promote economic development for the underprivileged. If the business is selling books or other educational materials, and the charity is promoting purchases of books it has authored or has recommended as having strong educational value, then encouraging those sales would be related to the charity's educational purpose. Only if a charity

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.

¹⁰ IS believes that the proposed regulation adopts an overbroad scope in this regard that is not authorized by the statute. The legislative history does refer to section 513(i) as being intended to cover sponsorship of events and ongoing activities, but the exclusion is written with great precision. To broaden it through regulations thereby denying charities part of the protection Congress intended to offer them is not justified.

provides a link to a business web site that not only uses the business's name and logo, but also contains language encouraging people to buy goods or services, and the promotional service is unrelated to the charity's exempt purpose should the payment be characterized as made in exchange for a marketing or advertising service. Even then, depending upon the size of the payment relative to the value of the advertising, the payment may be only partially a payment for services with the balance being a contribution. The advertising activity would also have to be regularly carried on for UBIT to apply.

3. Are there any circumstances under which an online “virtual trade show” qualifies as an activity of a kind “traditionally conducted” at trade shows under section 513(d)?

Yes, there should be. Section 513(d) provides that certain “qualified convention and trade show activity,” conducted by a section 501(c)(3), (4), (5) or (6) organization does not constitute an unrelated trade or business. The definition of qualified convention and trade show activity appears in section 513(d)(3)(A) and requires that it be 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.

Section 513(d)(3)(B) states that the activity must be conducted in conjunction with a national, State, regional or local convention, annual meeting, or show conducted by the organization. Both sections 513(d)(3)(A) and 513(d)(3)(B) require that the activity be of a kind intended to stimulate interest in industry products or services or to educate persons in attendance about new developments, products or services in the industry. Section 513(d)(3)(B) states specifically that if the show is intended to achieve the latter educational purpose, it must do so through the “character of the exhibits and the extent of the industry products displayed.”

The regulations further provide that the exception applies only to an organization that “regularly 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. § 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*.

Payments received in connection with any qualified convention or trade show activity can be excluded from UBTI under section 513(d), but they cannot be excluded from UBTI as qualified sponsorship payments under section 513(i). This means that whether the payment is subject to UBIT does not depend upon whether the payor gets advertising in return. Furthermore, it means that amounts that suppliers pay to rent space at a live qualified convention

or trade show can be excluded from unrelated trade or business income even though the suppliers are permitted to sell products or solicit orders at the show. See Treas. Reg. § 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. Independent Sector offered comments in response to that question. We said there and repeat now that 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. The quality and utility of the accompanying trade show can be equivalent – if not better -- when delivered over the Internet as it would be in person. The use of chat functions and e-mail allow those in attendance at a virtual trade show to ask questions and receive answers as they would at the show’s in-person equivalent. In sum, an on-line trade show is equally capable of meeting the requirements of section 513(d)(3). We now address the requirements one at a time.

First of all, if offered over a web site maintained by a section 501(c)(3), (4), (5) or (6) organization and identified as such, the on-line trade show will be offered by a qualifying organization as section 513(d)(3)(C) and Treas. Reg. § 1.513-3(c)(1) require. As long as the organization has a history of conducting shows with a comparable purpose and content, regardless of the medium through which they reached their audiences, or a new organization has the intent to offer such shows – on-line or in-person – on a regular basis, it should be treated as having the met the requirement that it “regularly” offer trade shows as a substantial exempt purpose.

According to Treas. Reg. § 1.513-3(c)(4), on-line trade shows offer activities that are “traditionally conducted” if they are:

- (i) Activities designed to attract to the show members of the sponsoring organization, members of an industry in general, and members of the public, to view industry products or services and to stimulate interest in, and demand for such products and services; (ii) activities designed to educate persons in the industry about new products or services or about new rules and regulations affecting the industry; and (iii) incidental activities, such as furnishing refreshments, of a kind traditionally carried on at such shows.

Organizations can use the Internet to attract individuals to “view” industry products and to stimulate interest in such products. In fact, it may do it more effectively than an in-person show because individuals do not need to incur travel costs to examine the products. Organizations can also use the Internet to educate people about products, services, rules, and regulations. Education is functionally about an exchange of information, and that is exactly what the Internet is designed to do. Visitors to a virtual trade show can see the products, and see video demonstrations of them. In some cases, they can even use them, such as where the products or services involve computer technology or material to be read. Thus, under the definition provided by the regulations, trade show activities conducted over the Internet can be “traditionally conducted” activities.

The regulations provide no further interpretation of what it means for a trade show to be presented “in conjunction with” a convention, meeting or show. For in-person shows, this has been understood to mean that the trade show is held at the same location and over the same period of time as the convention, meeting or show. See Treas. Reg. § 1.513-3(e) Exs. 1, 2 and 3. An on-line show ought to be able to establish a connection that meets the statutory requirement by being timed to begin and end in close proximity to the beginning and ending of such an event, or by being made available exclusively as a benefit of registering to attend such an event or by some other means that ensures those attending the on-line show are also being exposed to the educational activities conducted at the meeting. Given the constant improvements in speed and quality of Internet real-time audio and video connections, it is also realistic to believe that an organization might hold both its meeting and its trade show entirely on-line, avoiding travel costs for everyone. The “in conjunction with” requirement should still be met as long as a meeting or show is being held, regardless of whether the entire operation is on-line.

An on-line trade show should also meet the requirement that it either educate its members or stimulate interest in and demand for the products and services of the industry. Section 513(d)(3)(B) and Treas. Reg. § 1.513-3(c)(2)(iii) require that educational purposes be achieved through the character of “a significant portion of the exhibits or the character of conferences and seminars held at a convention or meeting.” As discussed above in connection with the definition of “traditionally conducted” activities, Internet technology is well-suited to accomplish educational purposes, and its ability to deliver information in text, graphic, video, or audio form means that it can reproduce an exhibit as it would exist in person. Furthermore, the Internet is an excellent mechanism for promoting interest in and demand for an industry’s products and services because it can reach a vastly larger audience of potential customers than a live trade show can. Therefore, an on-line trade show should be able to meet the last of these requirements and qualify for the special exemption from the definition of unrelated trade or business activity made available under section 513(d).

We note that in the FY 2000 CPE text, the IRS raised a concern about on-line trade shows that are conducted on an ongoing basis and not coordinated with specific conferences or events. In response, we believe the IRS should consider its own G.C.M. 39374 (May 24, 1988), which concludes that a trade association whose sole activity is operation of a business technology trade show meets the requirements of section 501(c)(6). The association sponsored no seminars or meetings in connection with the show. Some exhibitors presented educational programs. Products and services were displayed, but no sales were made at the show.¹¹ The GCM concludes that the purpose of the show is the promotion of interest in and demand for the products and services of the industry. Given the development of business technology, it is easy to conceive of such a show being conducted entirely on-line and continuing over a period of months or even year-round. The same reasoning ought to apply so that the organization sponsoring such an on-line show will be treated as furthering its exempt purpose. The fact that potential customers are able to visit the show year-round rather than for a limited period of time in no way detracts from, and, in fact, reinforces the show’s ability to promote the industry.

¹¹ Rev. Rul. 85-123 makes clear that the fact that a trade show at which products are sold can qualify under section 513(d).

Even if such shows do not come under section 513(d), the income generated by them is not necessarily income from an unrelated trade or business. Such shows may be offering members a reference resource, and depending upon how listings are presented, they may not be considered advertising. 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 constitute unrelated trade or business income. Where listings are provided in an exempt organization's journal 60 to a page, and the journal is primarily for intermembership circulation, 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. See also, PLR 8640007 (June 20, 1986) (Publishing an equipment directory with photographs and product information is related to trade association's exempt purpose). 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 alphabetic 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 listings an opportunity to promote their goods and services in a form that may vary depending on the amount paid.

And finally, a trade show offered by a trade association that simply displayed industry products without adding education about quality standards is considered to be a related activity under Treas. Reg. § 1.513-1(d)(4) ex. 3. Thus, even if a trade show cannot meet all of the requirements of section 513(d), it will not necessarily be treated as an unrelated trade or business. The application of objective standards to select items to be displayed or sold and the education of those in attendance about those standards also cause a trade show to be related. See GCM 38300 (March 6, 1980) (show and sale of special cattle breeds by an agricultural organization, though not qualified trade show activity, is related to furthering its exempt purpose). Thus, income received in exchange for including a link to a business web site in a collection of links can plausibly be income from a related activity and not be subject to UBIT.

Solicitation of Contributions

All three of the questions raised in this area involve the core issue of whether Internet-based communications should be considered written communications for purposes of statutory requirements for notices or receipts either triggered by a written communication or that require a written communication for compliance. With respect to the general policy toward the treatment of electronic communications in the tax system, Congress specifically directed, in the IRS Restructuring and Reform Act of 1998, as follows:

It is the policy of Congress that (1) paperless filing should be the preferred and most convenient means of filing Federal tax and information returns, (2) it should be the goal of the Internal Revenue Service to have at least 80 percent of all such returns filed electronically by the year 2007....

Pub. L. 105-206, 105th Cong., 2d Sess., Sec. 2001(a).

To facilitate accomplishment of this goal, Congress also gave the IRS the authority to specify alternative methods for signing an electronic return so that such a return could meet the statutory signature requirements. See id., Sec. 2003(b). Thus, Congress has articulated a clear policy preference in favor of accepting electronic documents to meet tax law requirements. Moreover, Congress reinforced that preference when it passed the Electronic Signatures in Global and National Commerce Act, Public Law No. 106-229 (“Electronic Signatures Act”) on June 30, 2000, which applies to electronic signatures and documents, not only as used in connection with the federal tax system, but also as used in connection with all federal government agencies and in private commerce as well. Section 101 of this Act requires that records not be denied validity simply because they are in electronic form.

In implementing this policy, the IRS has been willing to accept electronic equivalents of paper documents in a number of circumstances. For example, a retirement plan may provide various notices and accept certain consents that are required by law – and are never filed with the IRS – in a paperless fashion, though they must provide hard copy to an employee receiving such a notice who requests hard copy. See Treas. Reg. §§ 1.402(f)-1 Q&A 5, Q&A 6; 1.411(a)-11(f); 35.3405-1, D-35 and D-36. Thus, there is clear precedent for accepting an electronic record to meet Code requirements for issuance or collection of certain documents containing information from a third party who is not the taxpayer and that at least in some cases are never filed with the IRS. In addition, the IRS has already begun to accept electronic information submissions made to the IRS by tax-exempt organizations. Form 8871, the form that certain section 527 organizations must file to notify the IRS of their existence as required by section 527(i)(1)(A), must be filed both electronically and on paper. (The statute requires that it be filed in both forms.)

Although notices and receipts that a tax-exempt organization is required to provide in connection with solicitation and/or receipt of contributions are not returns that must be signed and filed with the IRS, they are documents required by statute. Failure to produce the notices required under sections 6113 and 6115 can result in penalties for the tax-exempt organization comparable to penalties imposed for failure to provide required information returns to taxpayers. See IRC §§ 6710, 6714. Failure to provide the receipt required under section 170(f)(8) results in the donor’s loss of his charitable contribution deduction for the amount contributed that should have been reflected in the receipt. In light of the similarities between these notices and the retirement plan notices that the IRS has authorized to be provided in electronic form, and Congress’ clear policy preference, the IRS should follow the precedents it has already established for certain retirement plan notices, and allow charities to satisfy their notice and receipt requirements under sections 6113, 6115, and 170(f)(8) with electronic documents supplied to the donor by e-mail or over the web.

- 1. Are solicitations for contributions made on the Internet (either on an organization’s website or by e-mail) in “written or printed form” for purposes of section 6113? If so, what facts and circumstances are relevant in determining whether a disclosure is in a “conspicuous and easily recognizable format”?**

Yes, solicitations for contributions made on a web site or by e-mail should be treated as made in written or printed form for purposes of section 6113. As for determining what makes the notice conspicuous and in easily recognizable form as section 6113 requires, Notice 88-120, 1988-48 I.R.B. 10, provides guidance, including safe harbors for printed communications, radio broadcasts, and television broadcasts. The guidance, including the safe harbors, can and should be updated to apply to Internet-based communications.

If e-mail or web site messages are to be considered written communications for purposes of providing mandatory notices and disclosures, as advocated in the introduction to this section, consistency demands that solicitations transmitted through e-mail or over a web site also be treated as being in written or printed form. The fact that these Internet communications may include not only text and graphics but also audio and video clips should not affect their status as written solicitations. The Federal Rules of Evidence treat audio and video recordings in the same way as written documents, making them discoverable and disclosable on the same basis as a piece of text. See Fed. R. Ev. 1001(1).

Obviously, a notice provided in an e-mail or web site solicitation must be in conspicuous and easily recognizable format to meet the requirements of section 6113. There are no regulations or rulings interpreting what constitutes "conspicuous and easily recognizable format" for a disclosure. There is, however, a notice addressing this issue, Notice 88-120. Section I of Notice 88-120, provides certain "safe harbor" guidelines to determine whether an organization is in compliance with Code section 6113. With respect to notices provided in print medium, the notice will be in conspicuous and easily recognizable format and otherwise satisfy section 6113 if it meets the following four requirement set forth in section I.A.:

A. PRINT MEDIUM. In the case of a solicitation by mail, leaflet, or advertisement in a newspaper, magazine or other print medium, the following four requirements are met:

1. The solicitation includes whichever of the following statements the organization deems appropriate: "Contributions or gifts to (name of organization) are not deductible as charitable contributions for Federal income tax purposes," "Contributions or gifts to (name of organization) are not tax deductible," or "Contributions or gifts to (name of organizations) are not tax deductible as charitable contributions";
2. The statement is in at least the same size type as the primary message stated in the body of the letter, leaflet or ad;
3. The statement is included on the message side of any card or tear off section that the contributor returns with the contributions; and
4. The statement is either the first sentence in a paragraph or itself constitutes a paragraph.

Sections I.C. and I.D. provide safe harbors for communications made by television and radio respectively.

Section III of Notice 88-120 provides that if an organization makes a solicitation to which section 6113 applies and the solicitation does not comply with the safe harbors, the Service will evaluate all the facts and circumstances to determine whether the solicitation contained an express statement (in a conspicuous and easily recognizable format) that contributions or gifts to such organization are not deductible as charitable contributions for Federal income tax purposes. A good faith effort to comply with the requirements of section 6113 will be an important factor in the evaluation of the facts and circumstances. However, disclosure statements made in fine print will not be considered to be in compliance with the statutory requirement.

IS recommends that Notice 88-120 be updated so that it explicitly applies to web-based communications. The general facts and circumstances test set forth in Section III would not need modification. The safe harbor for the print medium would apply to communications made using text or graphic images by e-mail or on a web site. The requirements with respect to point size, form of the statement, and appearance in a separate paragraph or as the first sentence of a paragraph can certainly be met as easily in electronic communications as in hard copy ones. The only aspect of the safe harbor that does not readily transfer to these electronic media is the third element, which requires the disclosure to be “on the message side of any card or tear off section that the contributor returns with the contributions.” The policy behind this element seems to be to ensure the disclosure is treated as information the donor should have before he or she is invited to make a gift by completing a response form. These same goals could be accomplished by requiring that the disclosure be provided in the primary message and on the web page where the donor responds to the solicitation, if those are separate pages. Notice 88-120 should also be modified so that the safe harbors for solicitations made by television and radio can apply to solicitations made over the Internet using video or audio clips.¹²

We note as a technical matter that section 6710(d)(3), the section that applies a penalty for failure to comply with section 6113, provides specifically when a solicitation is deemed to have occurred. Guidance will be needed confirming that solicitations sent by e-mail will be treated as occurring on the date sent, as is the case for regular mail. Furthermore, guidance will be needed as to when solicitations sent over a web site will be treated as occurring. Presumably, the answer would be on the date they are posted.

2. Does an organization meet the requirements of section 6115 for “quid pro quo” contributions with a webpage confirmation that may be printed out by the contributor or by sending a confirmation e-mail to the donor?

Yes, a web page or e-mail confirmation for quid pro quo contributions meets the requirements of section 6115.

¹² Section I. C. of Notice 88-120 provides the safe harbor for statements made in connection with television solicitations. The safe harbor requirements are that the solicitation include the same language as in the written or printed version, and if spoken, it is in “close proximity to the request for contributions,” and if appearing as text on the screen, “it is in large easily readable type appearing on the screen for at least five seconds.” Section I. D. provides the safe harbor for radio solicitations. Its requirements are that the statement include the same language as in the written or printed solicitation, and that it be made in close proximity to the request for contributions during the same radio solicitation announcement.

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 provide “a written statement” informing the donor that only the amount of the payment in excess of the goods or services given in return for the contribution is deductible and giving a good faith estimate of the value of the goods and services provided to the donor. IRC § 6115. In the absence of language in either the statute or the regulations prohibiting use of electronic transmissions for providing a “written statement,” and in keeping with the general policy of the IRS Restructuring Act and perhaps even the mandate of the Electronic Signatures Act,¹³ IS believes that under current law, a charity meets the requirements of section 6115 with a written statement sent by e-mail or available on a web site and appearing in connection with either a solicitation for the quid pro contribution or a confirmation of receipt of such a contribution. IS also believes that it is incumbent on the IRS to issue guidance confirming this result. Congress has made it clear that it wants the IRS to encourage all taxpayers – and for these purposes tax-exempt organizations are taxpayers -- to use electronic communications to improve the efficiency of tax administration. Furthermore, the IRS has already issued guidance accepting electronic notices in highly analogous circumstances involving qualified retirement plans. Like the sponsors of qualified retirement plans, charities face penalties if they fail to provide the required notices. Charities deserve equal attention and consistent treatment. Therefore, IS recommends that guidance be issued confirming that charities will be complying with the law and will not be liable for penalties if they use the Internet to deliver section 6115 notices.

For the sake of clarity, IS notes that the question contains a faulty premise. It asks about whether the requirements of section 6115 can be satisfied with a web page or e-mail “confirmation.” The statutory requirement is satisfied with a notice containing the proper content provided “in connection with the *solicitation or receipt* of the contribution....” Therefore, it should be possible to satisfy the requirements of section 6115 by placing the appropriate language on a web page or in an e-mail that solicits a contribution. It should not be necessary to provide the language again or exclusively as “confirmation” to parties who actually make contributions.

3. Does a donor satisfy the requirement under section 170(f)(8) for a written acknowledgment of a contribution of \$250 or more with a printed webpage confirmation or copy of a confirmation e-mail from the donee organization?

Yes, a donor satisfies the requirement under section 170(f)(8) for a written acknowledgment by obtaining a written confirmation transmitted through a web page or by e-mail. This answer is supported by the same reasons given in the introduction to this section of comments and in response to the question about disclosures required under section 6115.

¹³ Although section 104 of the Electronic Signatures Act states that the new law does not supersede the authority of any agency to require records to be filed in a specified format, the written statement required by section 6115 is not a record that is required to be filed. The Code simply requires that the charity provide such a statement to the donor, and there is no requirement that the donor file the statement with his, her or its return. Therefore, arguably, the IRS cannot supersede the legislative directive with respect to these particular disclosures.

Having guidance that specifically confirms this interpretation of section 170(f)(8) is of great importance to charities. Many charities agree that a fair interpretation of section 170(f)(8) allows their donors to rely on a written substantiation transmitted electronically. Moreover, Publication 1771, which is sent to every new charity along with its IRS determination letter, says that “computer-generated forms” are an acceptable format for acknowledgments required under section 170(f)(8). Publication 1771 was written in 1993 before Internet usage was widespread and appears not to have been revised since that time, but some charities are reading “computer-generated forms” to include forms provided over the Internet. However, there is no published guidance from the IRS confirming this reading of section 170(f)(8). If an individual agent examining a donor’s return were to disagree with this interpretation and insist that substantiation be provided by paper and ink, the donor would have to invest time and resources disputing the result or be denied the deduction. Many charities are unwilling to risk the adverse donor relations that such a dispute could spawn, even if such a scenario is highly improbable. IS recommends that the IRS publish guidance immediately confirming that e-mail and web page confirmations containing the appropriate content satisfy the requirements of section 170(f)(8) so that charities can be confident they are meeting their donors’ needs while eliminating what can become very substantial expenses for postage and materials that they now incur in providing substantiation on paper. The resources being spent on this purely administrative burden could be put to far more productive use in pursuing charitable goals. We return to the fifth general principle articulated at the beginning of this document. Where appropriate, guidance should be issued now. IS would welcome the issuance of a revenue ruling or revenue procedure in the very near future that addressed the section 170(f)(8) issue.