507 Tax-Exempt Organizations and the Internet

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Kirstin L. Humann

Kirstin L. Humann is an in-house attorney with the American Cancer Society in Nashville, representing the Society and its 17 Divisions in charitable giving legal matters. Ms. Humann has over 11 years of experience in the areas of securities, insurance, real estate, and corporate transactions as well as tax-exempt organization and charitable gift planning.

Ms. Humann has been with the American Cancer Society for six years. Prior to her employment with the ACS, she practiced law for six years in private practice in Dallas. Her background includes representation of nonprofit organizations, publicly held insurance, and investment companies and individuals as well as small businesses. Ms. Humann has served on the board of directors of numerous charitable organizations.

Ms. Humann received her BA from the University of Washington and her JD from Baylor University School of Law.

Howard B. Jacobson

Howard B. Jacobson is a partner in the tax practice group of Akin, Gump, Strauss, Hauer & Feld, LLP in Washington, DC. Mr. Jacobson helps clients minimize or eliminate their tax burden through effective tax planning. He counsels businesses on related regulatory and transactional matters and advises exempt organizations, including public charities and private foundations. As hospitals have restructured, he has conducted internal audits to identify potential problems. He is also experienced in the tax implications of LLC agreements, mergers and acquisitions, and dispositions. He is a member of the firm's retirement committee and is chair of the firm's health insurance issues committee.

Prior to joining Akin Gump, Mr. Jacobson served as attorney-advisor for Chief Judge Theodore Tannenwald Jr. of the U.S. Tax Court, and also practiced with a tax specialty firm.

Mr. Jacobson is a member of the Exempt Organization and Partnerships Committees of the ABA Section of Taxation and has written and spoken before professional organizations on partnerships, structuring real estate investments, and the unrelated business tax aspects of real estate investments by exempt organizations. He is also active in community affairs and is a past president of the Epilepsy Foundation of the National Capital Area.

Mr. Jacobson received his AB with high distinction from the University of Michigan, and his JD *cum laude* from Harvard.

Suzanne Ross McDowell

Suzanne Ross McDowell is deputy general counsel of the National Geographic Society. She concentrates primarily on federal and state tax matters and domestic and international business transactions, including publishing, licensing, product development, custom software, and distribution agreements.

Prior to joining National Geographic, Ms. Ross McDowell was in private practice for seven years in Washington, DC. She also served as attorney-advisor and associate tax legislative counsel in the U.S. Department of the Treasury. She clerked for the late Judge Theodore Tannenwald, Jr. at the U.S. Tax Court.

She is a member of the advisory board of *The Exempt Organization Tax Review*, the board of advisors of the *Journal of Taxation of Exempt Organizations*, and the copyright committee of the Association of American Publishers. From 1997—2000, she was a member of the advisory board of New York University's National Center on Law and Philanthropy. She also has been active in the tax section of the District of Columbia Bar, serving on the steering committee, tax policy committee, and as chair of the exempt organizations committee. In the tax section of the ABA, she has served on the long range planning committee, and as chair of the tax policy task force and the subcommittee on unrelated business income tax of the exempt organizations committee.

She received her BA from Smith College and graduated with high honors from George Washington University National Law Center.

TAX EXEMPT ORGANIZATIONS AND THE INTERNET:

STATE REGULATORY ISSUES

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Charitable organizations have significantly increased their use of the internet as a means of fundraising in recent years. Additionally, the proliferations of cause related marketing or commercial co-ventures as a method of fundraising has also increased. Often commercial co-ventures have an internet promotion aspect. This session will address the application of state fundraising registration requirements to internet based fundraising appeals.

While there are often claims that the internet is not regulated, some jurisdictions have specifically adopted legislation that applies to internet based activities. For example, California has a new law related to raffles that specifically prohibits internet raffles. This could significantly impact non-California fundraising raffles that are arguably published in California as a result of the world wide web.

I. The Charleston Principles

The application of routine fundraising registration requirements to online charitable activities should be no different than the application of the law to other fundraising activities. The internet is merely another method of fundraising. This viewpoint is supported by the National Association of State Charities Officials ("NASCO"). In October 1999, nonprofit leaders met in Charleston, South Carolina to discuss charitable solicitations using the internet. The Charleston Principles reflect the informal, non-binding recommendation of the NASCO Board of Directors. The Principles attempt to define the activities that would require registration and legal compliance.

A. Registration Requirements

1. An entity that is domiciled within a state and uses the internet to conduct charitable solicitations in that state must register in that state whether the solicitation method is passive or interactive, maintained by itself or another entity with which it contracts or whether it conducts solicitations in any other manner.

2. An entity that is not domiciled within a state must register in that state if:
    a. its non-internet activities alone would be sufficient to require registration;
    b. the entity solicits contributions through an interactive* Web site; and
        Either the entity
            1. specifically targets persons physically located in the state for solicitation; or
            2. receives contributions from the state on a repeated and ongoing basis or a substantial basis through its Web site; or

3. the entity solicits contributions through a site that is not interactive, but either specifically invites further offline activity to complete a contribution, or establishes other contacts with that state, such as sending e-mail messages or other communications that promote the Web site.

See, NASCO *Charleston Principles*, Section II, III, B, http://www.nasconet.org/stories/storyReader$10

B. Definitions:

1. *Interactive Web site*: a site that permits a contributor to make a contribution, or purchase a product, by electronically completing the transaction, such as by submitting credit card information or authorizing an electronic funds transfer. A Web site is interactive if it has the capacity, regardless of whether donors actually use it.

2. *Targeting*: a specifically target persons physically located in the state for solicitation means to either (i) include an express or implied reference to soliciting contributions from that state; or (ii) to otherwise affirmatively appeal to residents or the state, such as by advertising or sending messages to persons located in the state (electronically or otherwise) when the entity knows or reasonably should know the recipient is physically located in the state.

3. *Repeated and ongoing basis*: means receiving contributions from the state on a repeated and ongoing basis or a substantial basis means receiving contributions within the entity's fiscal year, or relevant portion of a fiscal year, that are of sufficient volume to establish the regular or significant nature of those contributions.

Id.

C. An entity that solicits via e-mail into a particular state shall be treated the same as one that solicits via telephone or direct mail, if the soliciting party knew or reasonably should have known that the recipient was a resident of or was physically located in that state.

D. Commercial co-venturing shall be governed by the same standards as otherwise set out in these Principles governing charitable solicitations.

II. Basic Fundraising Registration Requirements

The Model Act Concerning the Solicitation of Funds for Charitable Purposes (the "Model Act"), Section 2 requires:

> "Every charitable organization, which intends to solicit in this state or have contributions solicited in this state on its behalf by other charitable organizations, commercial co-venturers, or paid solicitors shall, prior to any solicitation, file a registration statement…No charitable organization required to be registered under this section shall solicit prior to registration."

A. Definitions

While some states that have adopted a version of the Model Act vary slightly in definition language, most states generally follow the Model Act. Accordingly, this outline will utilize Model Act definitions. Please note that the State of Illinois and the State of California have broader definitions in some cases, and thus regulates more activities.

1. *Commercial Co-venturer*: "a person who for profit is regularly and primarily engaged in trade or commerce other than in connection with soliciting for charitable organizations or purposes and who conducts a charitable sales promotion."

2. *Charitable Sales Promotion:* "an advertising or sales campaign, conducted by a commercial co-venturer, which represents that the purchase or use of goods or services offered by the commercial co-venturer will benefit, in whole or in part, a charitable organization or purpose."

3. *Fundraising Counsel:* "a person who for compensation plans, manages, advises, consults, or prepares material for, or with respect to, the solicitation in this state of contributions for a charitable organization, but who does not solicit contributions and who does not employ, procure, or engage any compensated person to solicit contributions. No lawyer, investment counselor or banker who advises a person to make a contribution shall be deemed, as a result of such advice, to be a fundraising counsel. A bona fide salaried officer, employee or volunteer of a charitable organization shall not be deemed to be a fundraising counsel." Note: fundraising counsel does not solicit contributions and does not employ any compensated person to solicit contributions. Many states require that this person never have custody or control of contributions.

> 4. *Paid Solicitor/ Commercial Fundraiser:* "a person who for compensation performs for a charitable organization any service in connection with which contributions are, or will be, solicited in this state by such compensated person or by any compensated person he employs, procures, or engages, directly or indirectly to solicit. No lawyer, investment counselor or banker who advises a person to make a charitable contribution shall be deemed, as the result of such advise, to be a paid solicitor. A bona fide salaried officer employee or volunteer of a charitable organization shall not be deemed to be a paid solicitor."

In the absence of clear interpretation of whether the fundraising registration requirements apply to internet based activities, most charitable organizations are structuring activities based upon application of current laws to the internet as a method of publication or deliver. For example, a charitable organization might conduct an online raffle in Texas that meets the requirements of Texas law; however, in an attempt to not publish the raffle in other states the website might be structured as follows:

> "This is only a publication and offer to residents of the State of Texas."
>
> "Purchase online: Name: _____
> Address: _____
> City: _____
> Texas
> Zip Code _____

(Note: the website would be structured where no state other than Texas would be accepted) While this has not been tested in the courts, it would appear to be a reasonable method to deal with world wide web access beyond the states of the jurisdictions in with which the organization wants to comply with the law.

Similarly, commercial co-ventures and charitable sales promotions may have implications for business entities and typically the non-profit venturer is more familiar with the legal requirements. Pursuant to the Model Act, a commercial co-venturer shall disclose in each advertisement for the charitable sales promotion the dollar amount or percent per unit of goods or services purchased or used that will benefit the charitable organization or purpose. Additionally the commercial co-venturer would have to register with the applicable states. Presumably this would apply to internet based sales promotions - and it would apply if the Charleston Principles are officially adopted in a given state. A similar approach to the raffle solution might be a practical solution when faced with a non-nationwide commercial co-venture or charitable sales promotion that will be promoted on an internet site.

For a listing of all applicable state registration requirements and governing law provisions, please see http://www.nonprofits.org/library/gov/urs/o_appndx.htm

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2001 ACCA Annual Meeting
9:00-10:30 a.m.
Wednesday, October 17, 2001

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USE OF INTERNET BY EXEMPT ORGANIZATIONS

by

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Over the years, it has been difficult for exempt organizations to get meaningful and definitive guidance from the Internal Revenue Service (the "***IRS***") interpreting the tax laws applicable to them. The advent of the Internet has only exacerbated the issue. The IRS has stated that, in the context of exempt organization ("***EO***") use of computers, "the use of the Internet to accomplish a particular task does not change the way the law applies to that task." Cheryl Chasin, Susan Ruth & Robert Harper, *Tax Exempt Organizations and World Wide Web Fundraising and Advertising on the Internet*, CPE EO Technical Instruction Program for FY 2000. Now, not only do we have confusion regarding how the tax laws apply to EOs, we have the added uncertainty of how to apply those rules with respect to EO advertising, sponsorship, business activities, political and lobbying activities and fundraising over the Internet.

The IRS has recognized that the Internet raises a number of novel tax issues for exempt organizations and issued Announcement 2000-84, 2000-42 I.R.B. 385[1], to set forth a number of areas in which it is "considering the necessity of issuing guidance." Unfortunately, the IRS has not indicated whether it in fact intends to issue additional guidance, or whether it will claim to have satisfied its obligations to the exempt organization community by having highlighted a number of potential issues in the Announcement and, with the organizations having been placed on notice of potential problems, let the issues be resolved on audit and by the courts.

Without further guidance from the IRS, it is difficult to determine what parts of the current tax law apply in the Internet context and whether the law applies in the same fashion. Moreover, the limited pronouncements from the IRS fail to take into account that frequently there is no counterpart to the Internet activity in the non-Internet world. The nature of such activities, in scope or in essence, are different from the seemingly analogous activities in which the organizations historically have engaged. This paper will outline some of the issues facing EOs in using the Internet and suggest the proper application of the law to these situations.

The authors gratefully acknowledge the assistance of Francesca Ugolini.

[1] A copy of Announcement 2000-84 is attached as Exhibit A.

A. Advertising & Sponsorship on Websites

EOs are subject to the unrelated business income tax ("***UBIT***") on income derived from a separate trade or business regularly carried on if the business is not substantially related to the performance of the EO's exempt functions. Contributions or gifts received by an EO are not subject to UBIT. However, an activity (such as advertising) does not lose its identity as a separate trade or business merely because it is carried on within a larger complex of other endeavors related to the EO's exempt purposes. As part of the Taxpayer Relief Act of 1997, Congress added section 513(i) to the Code to exempt certain corporate sponsorship payments from UBIT.[2] Section 513(i)(1) provides that the term "unrelated related trade or business" does not include the activity of soliciting and receiving qualified sponsorship payments.

1. Corporate Sponsorship Statute and Proposed Regulations

EOs generally must pay tax on unrelated business taxable income ("***UBTI***"). UBTI is defined as the gross income derived by an organization from any unrelated trade or business ("***UTB***"), as defined in Section 513, regularly carried on by it, less the deductions that are directly connected with carrying on the trade or business. Section 512(a)(1).

UTB is defined as any trade or business the conduct of which is not substantially related (aside from the need of the EO for income or funds or the use it makes of the profits derived) to the exercise or performance by the EO of its exempt purpose or function. § 513(a). The term "trade or business" includes any activity carried on for the production of income from the sale of goods or the performance of services. Section 513(c).

(a) Acknowledgment v. Advertising

Qualified sponsorship payments ("***QSP***"), however, do not constitute UBTI. A QSP is a payment made by a person engaged in a trade or business with respect to which there is no arrangement or expectation that such person will receive any substantial return benefit other than the use or acknowledgment of the name or logo (or product lines) of the person's trade or business in connection with the EO's activities. Section 513(i).

Use or acknowledgment does not include advertising, and a single message that contains both advertising and an acknowledgment is advertising. Section 513(i)(2); Prop. Reg. § 1.513-4(c)(2)(iv). The proposed regulations state that use or acknowledgment may include (i) logos and slogans that do not contain qualitative or comparative descriptions of the payor's products, services, facilities or company, (ii) a list of the payor's locations, telephone numbers or Internet address, (iii) value-neutral descriptions including displays or visual depictions, of the payor's product-line or services, and (iv) the payor's brand or trade names and

[2] Unless otherwise indicated, all section references are to the Internal Revenue Code of 1986, as amended (the "***Code***") or the Treasury Regulations promulgated thereunder.

product or service listings. Prop. Reg. § 1.513-4(c)(2)(iii). The legislative history to Section 513(i) indicates that the use of promotional logos or slogans that are an established part of the sponsor's identity does not, by itself, constitute advertising. *See* H.R. Conf. Rep. No. 220, 105th Cong., 1st Sess. 476 (1997).

The proposed regulations define advertising as any message or other programming material which is broadcast or otherwise transmitted, published, displayed or distributed, and which promotes or markets any trade or business, or any service, facility or product. Advertising includes messages containing qualitative or comparative language, price information or other indications of savings or value, an endorsement or other inducement to purchase, sell or use a sponsor's facility, products or services. Prop. Reg. § 1.513-4(c)(2)(iv).

In a recent Technical Advice Memorandum, the IRS ruled that a pet food company that was a major sponsor of a pet show organized by a Section 501(c)(4) kennel club did not receive advertising services from the kennel club. In return for a yearly cash payment, the sponsor received two full-page ads in the show catalogue, the right to advertise its support of the show, the right to survey all "best of breed" winners for television commercials and print ads, the right to include its half-page logo and identification on the back cover of the premium list mailed to exhibitors, and product identification on the judging program envelope, benching numbers and armbands worn by exhibitors. The IRS stated that no language was used comparing the sponsor's product with the products of other manufacturers or claiming that it is rated best by veterinarians and that the identification logos were in the nature of acknowledgments rather than advertising. *See* TAM 9805001 (Oct. 7, 1997).

(b) Fragmentation Rule

In determining whether an activity is an unrelated trade or business for purposes of UBIT, an activity (such as advertising) does not lose identity as a trade or business merely because it is carried on within a larger aggregate of similar activities or within a larger complex of other endeavors which may, or may not, be related to the exempt purposes of the organization. Section 513(c); Treas. Reg. § 1.513-1(b). This rule is known as the "fragmentation rule."

Example: Activities of soliciting, selling and publishing commercial advertising do not lose identity as a trade or business even though the advertising is published in an EO's periodical that contains editorial matter related to the exempt purposes of the EO. Treas. Reg. § 1.513-1(b).

(c) *Periodicals*

The above rules regarding UBTI are modified in the case of periodicals. Two separate issues must be resolved in the context of periodicals. First, the special rules applicable to periodicals must be examined – both in terms of whether the website constitutes a periodical and whether any of the income

constitutes advertising income. Then, the computation and apportionment rules applicable to advertising income must be applied.

Most EOs would not consider their websites to be equivalent to a periodical. However, as discussed in Section 3, below, the IRS has suggested that an EO's website might constitute a periodical in certain situations.

The sponsorship payments rules explicitly carve out from the safe harbor for QSPs any payment which entitles the payor to the use or acknowledgment of the name or logo (or product lines) of the payor's trade or business in a periodical, which is "regularly scheduled and printed material published by or on behalf of the EO that is not related to and primarily distributed in connection with a specific event conducted by the EO." Section 513(i)(2)(B)(ii)(I). The statute does not, however, make such payments *per se* advertising income. Although special rules are provided in Treas. Reg. § 1.512(a)-1(f) to determine the UBTI derived from the sale of advertising in EO periodicals, the definition of "gross advertising income" might be read not to include certain sponsorship payments.[3]

Finally, if the advertising rules do apply, both advertising income and circulation income, and the direct advertising costs must be determined pursuant to the regulations in order to determine what portion of the income constitutes UBTI.

2. Application to Web

The preamble of the proposed Corporate Sponsorship regulations state that they "do not specifically address the Internet activities of EOs," but IRS and Treasury "are reviewing the application of existing tax laws governing EOs, including the UBIT rules, to Internet activities." The preamble requests comments on the application of the rules governing periodicals to an EOs website and on whether providing a link to a sponsor's website is advertising within the meaning of Section 513(i)(2)(A). *See* REG-209601-92; *see also* Ann. 2000-84, *supra*.

(a) Sponsor Lists and Sponsor Pages

An EO's website may contain a list of sponsors or individual sites or pages within the website that provide information about each sponsor.

Under Section 513(i), merely listing the sponsor's name or providing information about the sponsor probably constitutes acknowledgement and not advertising. The proposed Corporate Sponsorship regulations state that use or acknowledgment may include logos and slogans that do not contain qualitative or comparative descriptions of the sponsor's products, services, facilities or company, value-neutral descriptions, including displays or visual depictions, of the sponsor's product-line or services, and the sponsor's brand or

[3] Treas. Reg. § 1.512(a)(-1(f)(3)(ii) defines "gross advertising income" as "all amounts derived from the unrelated advertising activities of an exempt organization periodical … ." The issue becomes whether the sponsorship payments are unrelated advertising activities or "educate" the reader.

trade names and product or service listings. Prop. Reg. § 1.513-4(c)(2)(iii). As long as sponsor descriptions do not include messages containing qualitative or comparative language, price information or other indications of savings or value, an endorsement, or an inducement to purchase, sell or use the sponsor's products, facilities or services, sponsor lists and pages should not be considered advertising.

Thus income received by an EO in exchange for listing a sponsor or creating a sponsor page as part of the EO's website probably qualifies as a QSP and not as UTB.

(b) Links to Corporate Site and Products Sites

Some EOs websites contain links that connect the user to sponsors' websites wherein the sponsors' products are advertised, marketed, sold, etc. There are two kinds of links commonly used. With respect to the first type of link, clicking on the link sends the user to an entirely new site such that the user must click on the "Back" button of her web browser to return to the EO site. With respect to the second type of link, called a "framing link," clicking on the link causes a new version of the web browser, containing the destination website, to open up as a new window on the computer screen with the EO's website open in the background. An important feature of links is that the user must take action to click on the link to be sent to the destination website. Without looking at the substance of the underlying sites, however, basing the tax status on direct links versus framing links is implementing a distinction without a difference.

The IRS has issued conflicting statements regarding whether links are advertising. First, in PLR 9723046 (June 6, 1997), the IRS stated in passing that "advertising spots differ from mere expressions of recognition in that they may contain additional information about an advertiser's product, services or facilities, or function as a hypertext link to the advertiser." More recently, though, the IRS has stated that "if the Web page shows merely a displayed link then it may not be advertising, but only if related to activities or purposes of the organization." Donna Moore and Robert Harper, *Internet Service Providers Exemption Issues Under IRC 501(c)(3) and 501(c)(12),* CPE EO Technical Instruction Program for FY 1999, p.64. The IRS reiterated this view in its 2000 CPE Text, but an IRS official who authored the text drew a distinction between direct links to a sponsor's informational homepage versus a link to a sponsor's "e-commerce server." *See IRS's Harper Discusses EOs and Internet,* 1999 TNT 231-5 (Dec. 1, 1999). As mentioned above, the IRS has specifically requested comments regarding whether providing links to corporate sponsor websites is advertising.

The rule of thumb is that a link that carries the user to a sponsor page *within* the EO's website probably does not constitute advertising. Additionally, a direct link on an EO's website to the general homepage of a sponsor's website (outside of the EO's website) also should not constitute advertising, as the homepage usually does not contain product information. However, it is unclear whether a link on an EO's website that carries the user *directly* to a "product page" within a sponsor's website that advertises the sponsor's products constitutes advertising. In that case, the rule of thumb is that such a link is more like advertising than the other links described above.

Commentators that have responded to the IRS's request have emphatically argued that a link is an acknowledgment and not advertising.

- First, the proposed Corporate Sponsorship regulations state that use or acknowledgment may include a list of the sponsor's locations, telephone numbers or *Internet address*. Prop. Reg. § 1.513-4(c)(2)(iii) (emphasis added). Commentators argue that a link is a method of contacting the sponsor for more information and is analogous to making a telephone call or sending a written inquiry, and the mode by which an individual chooses to make contact with the sponsor should not affect the tax law analysis. In this regard, it is significant that an individual must initiate contact with the sponsor by clicking on the link. Also, a link is akin to a telephone number or address because it is not a message that contains any descriptive information about the sponsor or that promotes or markets something. *See DC Bar's EO Committee Asks IRS for Clarity in EO Internet Guidance*, 2001 TNT 34-65 (Feb. 13, 2001); *Unofficial Transcript of IRS Hearing on Proposed Corporate Sponsorship Regs*., 2000 TNT 129-15 (June 21, 2000).

- Second, even if an EO provides a link to a sponsor's website that uses the sponsor's name and logo and also contains language encouraging people to buy goods or services, if the promotional service is related to the EO's exempt purpose, the payment should not be subject to UBIT. Example: If the sponsor is an enterprise being built by former welfare recipients who are learning to become self-sufficient, then sending traffic to the sponsor's website may be viewed as part of an effort to relieve poverty and promote economic development for the underprivileged. *See Use Existing EO Rules to Resolve EO Internet Issues, Says Independent Sector*, 2001 TNT 31-27 (Feb. 13, 2001).

If the IRS ultimately determines that whether links constitute advertising will be based on the content of the linked site, then EOs will need to respond in monitoring links. By analogy to one of the leading cases involving advertising in periodicals, they may need to consider whether to screen links for the content of the destination website so that the link displays only information that furthers the EO's exempt purpose. *See US v. American College of Physicians*, 475 U.S. 834 (1986).

(c) Banners

An EO's website may also contain graphically displayed links (as opposed to simple text links), called banners or moving or graphic image links.

The IRS has informally stated that "in determining what on a Web page is advertising, a rough rule of thumb is that if it is an active or passive placard, or a running banner and income is being derived, it is advertising. If the Web page shows merely a displayed link then it may not be advertising, but only if related to activities or purposes of the organization." 1999 CPE Text, p.64; *see also* 2000 CPE Text, p. 132.

Commentators argue that under § 513(i) and the proposed regulations thereunder, as long as banners do not include any messages containing qualitative or comparative language, price information or other indications of savings or value, endorsements or inducements, then they should not be considered advertising merely because the acknowledgment draws more attention from the user than an ordinary corporate logo. *See* Prop. Reg. § 1.513-4(c)(2)(iii); *DC Bar EO Committee*, 2001 TNT 34-65. They point to the fact that, in the non-Internet context, sponsor logos are flashed across scoreboards and television screens without converting the sponsorship arrangement into advertising. *See* Prop. Reg. § 1.513-4(f), *Examples 2, 3, 4.*

If there is concern that a banner on an EO's website may constitute advertising, the EO could apportion part of the income received from the corporate sponsor to advertising and include it in the EO's UBTI. Absent additional guidance from the IRS, banners that are part of an overall sponsorship and not direct unrelated product advertising should not be apportioned to advertising.

(d) Periodical Issue – Announcement 2000-84

In Ann. 2000-84, *supra*, the IRS stated that it is considering the necessity of issuing guidance that would clarify the application of the Code to use of the Internet by EOs and asked various questions concerning Internet applications. Regarding the issue of whether websites may constitute periodicals, the IRS posed the following questions:

> Does a website constitute a single publication or communication? If not, how should it be separated into distinct publications or communications?
>
> When allocating expenses for a website, what methodology is appropriate? For example, should allocations be based on webpages (which, unlike print publications, may not be of equal size)?
>
> Unlike, many other publications of an [EO], a website may be modified on a daily basis. To what extent and by what means should an [EO] maintain the information from prior versions of the organization's website?

These issues are discussed in more detail in the following section.

3. Application of Periodical Rules

As mentioned above, the safe harbor for a QSP does not include any payment which entitles the payor to the use or acknowledgment of the name or logo (or product lines) of the payor's trade or business in a *periodical*, which is "regularly scheduled and printed material published by or on behalf of the EO that is not related to and primarily distributed in connection with a specific event conducted by the EO." Section 513(i)(2)(B)(ii)(I). Instead, special rules are provided in Treas. Reg. § 1.512(a)-1(f) to determine the UBTI derived from the sale of advertising in EO periodicals. Thus if an EO's website is determined to constitute a periodical, then payment that the EO receives for corporate sponsor acknowledgment on the website will not be a QSP. The IRS has requested comments on how the special rule for periodicals should apply to websites.

Most EOs would probably not consider their websites to be periodicals. However, based on the IRS's informal guidance, e-newsletters and websites that are updated regularly could be considered "periodicals" subject to the special rules.

The IRS has acknowledged that "most of the materials made available on EO websites are clearly prepared in a manner that is distinguishable from the methodology used in the preparation of periodicals." 2000 CPE Text, p.135. The IRS further stated that

> In considering how to treat potential income from website materials for income tax purposes the Service will look closely at the methodology used in the preparation of the website materials. The Service will be unwilling to allow the EO to take advantage of the specialized rules available to compute UBI from periodical advertising income unless the EO can clearly establish that the on-line materials are prepared and distributed in substantially the same manner as a traditional periodical.
>
> This is not to say that there cannot be an on-line publication that can be treated as a periodical. While some periodicals have on-line editions and some print publications are reproduced on-line, sometimes on a subscription basis, or in a members-only access portion of a website, such materials should be and generally are, sufficiently segregated from the other traditional website materials so that the methodology employed in the production and distribution methods are clearly ascertainable and the periodical income and costs can be independently and appropriately determined. Presumably such genuine periodicals would have an editorial staff, marketing program and budget independent of the organization's webmaster.

2000 CPE Text, p. 135.

Commentators have said that under this view, most EO websites would probably not be viewed as periodicals, although the IRS view represents a departure from Section 513(i)(2)(B)(ii)(I), which makes no mention of process or methodology. They argue that the special periodical rules should apply to items that are "printed electronically" only if

they are published on a regularly scheduled basis in a consistent format, as provided in Section 513(i)(2)(B)(ii)(I), and the fact that Internet technology enables EOs to frequently update their websites, which function effectively as brochures, overviews or educational texts, should not cause the website to be treated as a periodical.

For example, bulletins distributed by email on an occasional basis should be treated as periodicals only to the extent that they would be treated as such if distributed in hard copy through the mail. Furthermore, portions of a website containing discrete factual information, such as the date or important new items, that are updated on a regularly scheduled basis should not be treated as periodicals if the bulk of the website's content does not change on a regularly scheduled basis. However, a website may be more likely to be considered a periodical if it contains an on-line publication and changes all of the content on a regularly scheduled basis.

See Catherine E. Livingston, *Tax-Exempt Organizations and the Internet: Tax and Other Legal Issues*, 2001 TNT 137-30 (Mar. 1, 2001); *Independent Sector Recommends Changes to Proposed Regs. On EO Income from Corporate Sponsorship*, 2000 TNT 130-29 (June 5, 2000); *Unofficial Transcript of IRS Hearing*, 2000 TNT 129-15.

If it is determined that a website (or a portion of a website) constitutes a periodical, the next step is to determine what income from the site constitutes gross advertising income (as opposed to non-safe harbor sponsorship income or other types of income) and how to apply the apportionment rules under the UBTI periodical regulations, in order to determine what portion, if any, of the income constitutes UBTI.

B. E-Commerce and Exempts

1. Introduction to UBTI (Offline Activities)

(a) Related v. Unrelated Activities

As mentioned above, UTB means any trade or business the conduct of which is not substantially related (aside from the need of the EO for income or funds or the use it makes of the profits derived) to the exercise or performance by the EO of its charitable, educational or other purpose or function constituting the basis for its exemption under § 501. § 513(a).

The regulations state that the "substantially related" requirement necessitates an examination of the relationship between the business activities which generate the particular income in question – the activities, that is, of producing or distributing the goods or performing the services involved – and the accomplishment of the EO's exempt purposes. Treas. Reg. § 1.513-1(d)(1). Trade or business is "related" to exempt purposes only where the conduct of the business activities has causal relationship to the achievement of exempt purposes (other than through the production of income), and it is "substantially related" only if the causal relationship is substantial. Thus, for the conduct of trade or business from which a particular amount of gross income is derived to be substantially related to exempt purposes, the production or distribution of the goods or the performance of the services from which income is derived must contribute

importantly to the accomplishment of those purposes. Where the production of distribution of goods or the performance of services does not contribute importantly to the exempt purposes of an EO, the income derived therefrom does not derive from the conduct of related trade or business. Treas. Reg. § 1.513-1(d)(2).

In determining whether activities contribute importantly to the accomplishment of an exempt purpose, the size and extent of the activities involved must be considered in relation to the nature and extent of the exempt function which they purport to serve. Thus, where income is realized by an EO from activities which are in part related to the performance of its exempt functions, but which are conducted on a larger scale than is reasonable necessary for performance of such functions, the gross income attributable to that portion of the activities in excess of the needs of the exempt functions constitutes gross income from the conduct of unrelated trade or business. Such income is not derived from the production or distribution of goods or the performance of services which contribute importantly to the accomplishment of any exempt purpose of the EO. Treas. Reg. § 1.513-1(d)(3).

Whether the "substantially related" requirement is met depends in each case upon the facts and circumstances involved. Treas. Reg. § 1.513-1(d)(2).

Example: A museum exempt under § 501(c)(3) maintains a museum shop and sells items through mail-order catalogs. The museum's exempt purposes include maintaining and exhibiting collections of works of art and providing instruction in the fine arts. Merchandise sold includes books on art, printed and photographic reproductions of works of art, slides of art works, postcards, greeting cards, stationery, reproductions of sculpture, jewelry, glassware, ceramics and other objects including fabrics, desk accessories, puzzles, games and other items for children. The museum shop also sells umbrellas, tote bags, scarves, dishes and neckties with the museum's logo displayed. Because of the diversity and magnitude of the museum's collection, it may sell a broader and more diverse range of items consistently with its exempt purpose. Almost all of the museum's sales of education printed material addressing art, history and culture is substantially related to the museum's exempt purpose. Reproductions of artwork and adaptations of artistic utilitarian items in the museum's collection are "substantially related" because they are imprinted with or accompanied by literature describing their artistic, cultural or historical connection with the museum's exhibits. In addition, children's jigsaw puzzles, kites, games, and other interpretive teaching items featuring artistic themes are in furtherance of the museum's educational purposes. However, souvenir scarves, tote bags, spoons, dishes, umbrellas and neckties are not related to the museum's exempt purposes, even though they bear the museum's logo. *See* PLR 8326003 (Nov. 17, 1982); TAM 9720002 (Nov. 26, 1996); Rev. Rul. 73-104, 1973-1 C.B. 263.

(b) Section 513(a) Exemptions

UTB does not include any trade or business

(1) in which substantially all the work in carrying on such trade or business is performed for the organization without compensation;

(2) which is carried on, in the case of an organization described in § 501(c)(3) or in the case of a college or university described in § 511(a)(2)(B), by the organization primarily for the convenience of its members, students, patients, officers or employees, or, in the case of a local association of employees described in § 501(c)(4) organized before May 27, 1969, which is the selling by the organization of items of work-related clothes and equipment and items normally sold through vending machines, through food dispensing facilities, or by snack bars, for the convenience of its members at their usual places of employment; or

(3) which is the selling of merchandise, substantially all of which has been received by the EO as gifts or contributions.

2. Direct Sales on the Web

(a) Related Business

EOs may be engaged in direct sales of merchandise through an on-line storefront on their websites. Maintaining an on-line storefront requires that the EO construct and maintain a website that sells products, accept and process orders, including credit card transactions, and fulfill orders by sending the purchased goods to the buyer.

The IRS has informally stated that "while the Service has yet to address any cases specifically addressing on-line merchandising issues it is useful to review how the Service has traditionally addressed sales activities of EOs" and referred to the treatment of museum gift shops sales in the 1997 CPE Text, p.257, 1999 CPE Text, p.286, and TAM 9720002. The IRS further stated, "Accordingly, in addressing Internet merchandising cases it is reasonable to use the same analysis that the Service would apply in sales made through stores, catalogues or other traditional vehicles. Merchandise will have to be evaluated on an item-by-item basis to determine whether the sales activity furthers the accomplishment of the association's exempt purposes or is simply a way to increase revenues." 2000 CPE Text, p.137. Accordingly, the initial test is whether the items sold would constitute exempt function income if sold in a physical store or by mail order. Some organizations operate their own website and fulfillment operations, while others use fulfillment houses for Web, mail and phone orders, relying upon the distinctions drawn by the IRS for excluding the income from UBTI.

If the items sold might not be exempt under the foregoing test, the EO should determine whether any of the exemptions under Section 513(a) apply. Although the IRS has not addressed on-line storefronts, the exemption in Section 513(a)(1) could apply in theory if

substantially all of the work required in building and maintaining the website and fulfilling orders is performed by volunteers. However, unless the EO's staff contains individuals experienced in website design and maintenance, the EO will most likely have to pay for such services. Furthermore, the exemption in Section 513(a)(3) could apply if the merchandise sold through the website was donated to the EO. Ultimately, due to the inordinate amount of work required to establish and maintain an on-line storefront, it is unlikely that most EOs will be able to meet any of the exemptions in Section 513(a) if the items sold do not further the accomplishment of the organization's exempt purposes.

(b) Unrelated Business

If an EO sells merchandise directly through its website that would be considered unrelated to its exempt purposes if sold through a physical store or mail-order catalogue, then the website sales activities will probably constitute UTB under the general rules of Section 513.

3. Relationship Sales

(a) Royalty v. Services

EOs may receive income in exchange for creating links to Internet vendor sites, licensing the use of the EO's name or logo on such sites, or otherwise forming alliances with Internet vendors to promote the vendors' websites. An EO may receive a "per hit" or percentage fee for purchases sold by an Internet vendor through a link to the vendor's website that is posted on the EO's website.

The critical tax question raised in this context is whether the EO is receiving payment for services it performs for the vendor (which is *included* in UBTI) or royalties in exchange for occupying the EO's website space or licensing the use of its name (which is *not* included in UBTI). Section 512(b)(2) provides that "all royalties (including overriding royalties) whether measured by production or by gross or taxable income from the property, and all deductions directly connected with such income" is excludable from UBTI. The term "royalty" is not defined in the Code or the regulations, so the question of whether an item of income constitutes a royalty is determined from the facts and circumstances of a particular case. The IRS provided some guidance regarding royalties in Rev. Rul. 81-178, 1981-2 C.B. 135, which held that payments received by an EO from various businesses for use of the EO's name, logo and other intangible assets are royalties under Section 512(b)(2).

In a long line of cases, courts addressed the issue of whether payments received by an EO for the use of the EO's name or logo on an affinity credit card constitute payments for services or a royalty. *See Oregon State Univ. Alumni Assoc. v. Com'r*, 193 F.3d 1098 (9th Cir. 1999); *Sierra Club, Inc. v. Com'r*, 86 F.3d 1526 (9th Cir. 1996); *Mississippi State Univ. Alumni, Inc. v. Com'r*, T.C. Memo 1997-397 (Aug. 28, 1997); *see also Planned Parenthood v. Com'r*, T.C. Memo 1999-206 (June 22, 1999); *Common Cause v. Com'r*, 112 T.C. 332 (June 22, 1999). The IRS had long asserted that such income is UBTI, contending that the EO did more than merely license the right to use its name and

logo in return for a royalty payment. However, the Tax Court consistently held for the EOs, ruling that limited services provided in connection with the affinity credit card agreement do not make the royalty exception unavailable. Recently, the IRS decided to stop litigating affinity credit card cases, stating that "[w]hile we believe that in certain cases the income represents a payment for services provided by the [EOs], and the use of intangible property (the organization's name and membership), it is now clear that courts will continue to find the income to be excluded royalty income unless the factual record clearly reflects more than unsubstantial services being provided." It noted that in the cases decided in favor of the taxpayer, the involvement of the EO was relatively minimal, and the EOs generally hired outside contractors to perform most services associated with the use of the intangible property. *See IRS Memorandum to Area Managers on Affinity Card Cases*, 2000 TNT 46-19 (Dec. 16, 1999). Nonetheless, the IRS has reportedly continued to challenge EOs on this issue, claiming that part of the payment should be allocated to services.

Similar issues arise in connection with the use of a website. If instead of using direct mail to an EO's members or mailing list, a company pays to place a link on an EO's website to market the company's goods or services, is the payment merely a royalty because the EO has provided no substantial services, or is the nature of the Internet such that distribution or advertising services should be considered to have been provided? Commentators argue that payments to EOs by Internet vendors for intangible property rights, such as the right to use the EO's name and logo on the vendor's website, the right to sell goods or services to the EO's website users, the right to gain access to the EO's website users and related identifying information, and the right to have a link on the EO's website to transfer users to the vendor's website, should be treated as royalty payments. In such instances, the Internet vendor carries out all of the main activities, including recordkeeping, sale and shipment of the product, accounting and payment of fees, and thus the EO arguably does not provide services to the vendor, aside from the few minutes required to add a link to its website. *See DC Bar EO Committee*, 2001 TNT 34-65. However, this view may oversimplify the significant amount of work required of the EO to provide a link or website space to an Internet vendor. If an EO ends up dedicating a substantial amount of time to providing such Internet space, it could arguably be viewed as providing services to the Internet vendor, and fees received from the vendor would be included in UBTI.[4] In that case, the EO may consider apportioning part of the fees received from vendors to services to avoid uncertainty.

(b) Cost-Effective Backroom

Many EOs form alliances with Internet vendors to sell products rather than directly selling merchandise over the EO's website. As discussed in Section 2(a), above, maintaining an on-line storefront requires that the EO construct and maintain a website that sells products, accept and process orders, including credit card transactions, and fulfill orders by sending the purchased goods to the buyer. As these activities can be time-consuming and costly for EOs that are not equipped to engage in electronic

[4] Even if adding the link or banner does not constitute a significant amount of work, the nature of the link as advertising income may be an issue resulting in UBTI.

commerce, particularly fulfilling orders, EOs may desire to associate with an established Internet vendor to handle on-line merchandise sales. For example, rather than selling books directly through the EO's website, the EO may form an alliance with an Internet vendor, such as Amazon.com, to accept and fulfill book orders. Similarly, private schools may use a vendor, such as Varsitybooks.com, to supply textbooks.

Is this any different than using fulfillment houses for mail and phone order services? Clearly, an EO may hire a company to provide its fulfillment services for mail and phone orders. Web orders should be no different, as long as the scope and nature of the activity does not materially change.

Furthermore, commentators argue that, because an EO may engage in direct sales of materials that are related to its exempt purposes, then collaboration with an Internet vendor to sell such products should not affect the tax analysis, as an EO would probably have to pay an Internet vendor, such as Amazon.com, to perform many of the tasks required if the EO undertook direct sales. The issue becomes how "substantial" is the activity. A series of cases and rulings provide guidance in defining "substantiality" for this purpose. The IRS has ruled on several occasions that EOs may engage in publishing activities that are related to their exempt purpose so long as the activities are not operated in an ordinary commercial manner.[5] Where the publishing activities are substantial, courts have found that the activities are conducted in a commercial manner, with exempt purposes incidental, even though the published materials are related to the EO's exempt purpose.[6] For example, one court held that, where a religious organization published and sold religious literature to upgrade the quality of teaching materials for Bible instruction in Sunday schools, the fact that the EO derived "very substantial" profits from the publishing activities indicated a commercial character.[7]

The argument that collaboration with an Internet vendor should be permissible is bolstered by the fact that the costs of referring users to an Internet vendor versus maintaining an e-commerce site is more efficient. Rather than losing money on each sale, the entity can "break even" or make money, although the income may be UBTI if the materials sold are unrelated to the EO's exempt purpose. Thus association with an Internet vendor that has the resources and capacity to take orders, collect payment and deliver merchandise simply maximizes efficiency. *See* Livingston, 2001 TNT 137-30.

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[5] *See* Rev. Rul. 68-306, 1968-1 C.B. 257 (EO prepared, published and distributed a monthly newspaper carrying regional church news of interdenominational interest; not operated in an ordinary commercial manner and revenue from operation did not cover costs); Rev. Rul. 74-615, 1974-2 C.B. 165 (EO formed to educate public as to the accuracy of media news coverage periodically published results of its studies); *c.f.* Rev. Rul. 69-430, 1969-2 C.B. 129 (EO owned publication rights to a book unrelated to its exempt purposes; EO's activities in connection with publication of the book constitute UTB, but if the EO had transferred the publication rights to a commercial publisher in return for royalties, would have been excluded from UBIT).

[6] *Scripture Press Found. v. US*, 285 F.2d 800 (Ct. Cl 1961); *Saint Germain Found. v. Com'r*, 26 T.C. 648 (1956); *Fides Pub. Ass'n v. US*, 263 F. Supp. 924 (N.D. Ind. 1967); c.*f. A.A. Allen Revivals, Inc. v. Com'r*, T.C. Memo 1963-281 (1963); *The Golden Rule Ass'n v. Com'r*, 41 T.C. 719 (1964); *Elisian Guild, Inc. v. US*, 292 F. Supp. 219 (D. Mass. 1968), *rev'd* 412 F.2d 121 (1st Cir. 1969).

[7] *Scripture Press Found.*, 285 F.2d 800.

The distinction between this situation and a classic fulfillment house scenario (assuming that the activities are not substantial or conducted in a commercial manner,) is that the company providing the fulfillment services becomes visible to the consumer and may be viewed as the merchant, rather than the EO. Thus, payments to the EO by the merchant may be perceived as referral fees or other items that may constitute UBTI. Should a different result obtain if the fulfillment provider is invisible to the consumer, who believes it is dealing with the EO?

(c) Referral Fees

When an EO collaborates with an Internet vendor, the vendor may pay the EO a referral fee for each customer that is sent to the vendor's website through the EO's website and makes a purchase. If the EO receives these fees for referring customers to vendor websites where they can purchase goods or services that are related to the EO's exempt purposes, then it is arguable that the referral fees constitute related income and not UBTI. It would be inconsistent for an EO that funded work that is published in various books to be subject to UBIT if it receives a referral fee for instructing customers to purchase such books from an Internet vendor; because the EO would probably have to pay an Internet vendor to assist the EO in making direct on-line sales, the referral fee arrangement should be viewed as if the EO receives from the Internet vendor the retail price of the book minus the costs of using the vendor's services.

If the EO receives a referral fee based on sales by the Internet vendor of goods or services that are not related to the EO's exempt purposes, then the EO may be able to argue that the referral fee represents a royalty payment, as discussed in Section 3(a), above. Even if the referral fee is based on a percentage of the vendor's sales, the IRS has indicated that a payment for the use of intangible property calculated as a percentage of sales is to be treated as a royalty just as a flat payment. *See* GCM 38083 (Sept. 11, 1979). The use of the EO's list or website might be viewed as an intangible for this purpose. However, as mentioned above, if the EO engages in a substantial amount of work to make referrals, the IRS may view the EO as providing services, and part of the referral fees may constitute UBTI.

(d) Related Sales – Organization Receives a Percentage of Sales

When an EO collaborates with an Internet vendor to sell merchandise related to the EO's exempt purpose, the EO may receive a percentage of the sales.

Under the proposed Corporate Sponsorship regulations, a QSP does not include any payment the amount of which is contingent, by contract or otherwise, upon the level of attendance at one or more events, broadcast ratings or other factors indicating the degree of public exposure to the sponsored activity. Prop. Reg. § 1.513-4(e)(2). Because a percentage-of-sales arrangement with an Internet vendor may be construed as contingent upon an event (such as, sending the EO website visitor to the vendor's website, or the purchase of a product), a percentage-based fee probably will not constitute a QSP.

However, percentage-based fees for sales of products related to an EO's exempt purposes are arguably related income, or they may be characterized as royalty payments, as discussed in the previous section. If there is uncertainty as to whether a percentage-based fee is related income or a royalty, an EO could apportion a small portion of the fee to UBTI.

Moreover, if an EO accepts a percentage-based fee arrangement, the EO should carefully evaluate the collaboration to make sure that the EO is not operating for the private benefit of the vendor, as the vendor may benefit significantly more than the EO from the collaboration. The EO should scrutinize promised payments or insist on a minimum payment if the vendor is permitted to use the EO's name or logo.

If a vendor gives a percentage of sales to an EO without requiring any agreement from the EO, the payment to the EO would be considered a gift.

4. Online Auctions

EOs may conduct their own online auctions of goods or engage an outside service provider to conduct an auction for them. The IRS has noted that, whereas conducting an auction through an outside service provider provides a larger audience than might be available if the auction were conducted on the EO's website and enables the EO to avoid credit card fraud problems, engaging an outside service provider may have tax implications. The IRS has stated that

> In analyzing such cases one must consider how much control the charity will continue to exercise over the marketing and conduct of the auction. Unless the event is sufficiently segregated from other, particularly, non-charitable auction activities, and the EO retains primary responsibility for publicity and marketing the Service may be more likely to view income from such auction activities as income from classified advertising rather than as income derived from the conduct of a fundraising event. In addition, the relationship with the individual service provider should be closely scrutinized, particularly in view of the fact that the on-line organization is working in a multi-state arena and regulatory arena. In this regard, these service providers are essentially professional fundraisers and their functions and fees should be scrutinized using the traditional inurement and private benefit principles.

2000 CPE Text, pp. 137-38.

If an EO sells items through an on-line auction that are not related to the charity's exempt purposes, then the EO should determine whether one of the § 513(a) exceptions from UTB applies, *i.e.*, substantially all the work in carrying on the auction is performed for the EO without compensation, or substantially all of merchandise has been received by the EO as gifts or contributions.

Furthermore, if the auction is not considered "regularly carried on," then the income from the auction should be exempt from UBIT. *See* Section 512. However, if items are auctioned off

on a rolling or continuous basis, such as once the items become available, then the auction may be considered to be regularly carried on.

5. Directories – Display Ads v. Listings

An EO may receive income in exchange for providing business listings in its on-line directory.

The IRS has considered on several occasions whether income received in exchange for listings in an EO's print directory constitutes UBTI. In Rev. Rul. 76-93, 1976-1 C.B. 170, the IRS held that firms that paid to be listed in an EO's journal, which was published six times annually and distributed without charge to dues-paying members, did not expect or receive more than an inconsequential benefit from being listed along with 59 or more firms on a single page in the journal. Thus income received by the EO in exchange for the listings did not constitute UBTI. However, firms that purchased "blocked-in" spaces and full pages of the journal reasonably expected and received some consequential amount of commercial benefit from their payments to the EO, and, as a result, the payments constituted UBTI. *C.f.* Rev. Rul. 74-38, 1974-1 C.B. 144. In Rev. Rul. 79-370, 1979-2 C.B. 238, the IRS held that an EO's sale of its membership directory did not constitute UTB because it merely listed the members in the same non-commercial format, without advertising (*i.e.*, name, address and area of expertise), and because the directory was not distributed to the public, its sale did not confer a private commercial benefit on the members.

With respect to on-line directories, EOs should be able to receive income in exchange for listings subject to the same principles discussed in the Revenue Rulings regarding print directories. The analysis may be affected, however, by the fact that the Internet is accessible by the general public, and thus the listings in an on-line directory may arguably confer more than an inconsequential benefit upon the businesses listed. UBIT could be avoided where the on-line listings are primarily for the convenience of the EO's target audience and provide basic contact information in a uniform format for all entries, rather than offering the businesses an opportunity to promote their goods and services in a form that may vary depending upon the amount paid. For now, EOs appear to be following the old rules applicable to print directories.

C. Evolving Statutory Law

An EO may be required under some state laws to collect state and local sales tax on merchandise sold via the Internet if a "substantial nexus" exists between the EO and the state in which the sale is made. *See Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). As a practical matter, there is considered to be a substantial nexus if a vendor has a physical presence in a state, but there is significant confusion as to what constitutes a substantial nexus. As a practical matter, merchants collect sales tax where they have a physical presence by virtue of offices or other permanent places from which they conduct activities, where they (or their agents) have call or fulfillment centers used for its sales, or where they have sales personnel physically present. Some states have suggested a more expansive view of physical presence.

1. Domestic (Federal) -- Internet Tax Freedom Act

In 1998, Congress enacted the Internet Tax Freedom Act, which imposes a three year moratorium that expires on October 21, 2001, on any tax that discriminates against e-commerce

or that is imposed on Internet access. *See* Pub. L. No. 105-277, § 1101, 112 Stat. 2681-719 (1998). However, the Act does not modify, impair or supercede any state or local taxation schemes otherwise permissible under the Constitution that were in effect as of 1998.

At the time of this writing, a number of bills have been presented regarding the future of the Act and e-commerce taxation generally, and Congress is currently deciding whether to extend the moratorium. The House Judiciary Commercial and Administrative Law Subcommittee approved a bill, H.R. 1552, that would extend for five years the existing moratorium on Internet access or new, multiple and discriminatory taxes on the Internet. The full committee will consider H.R. 1522 in September 2001. Other proposals presented include a bill that would permanently bar the taxes at issue (H.R. 1675), a bill that would authorize, unless specifically voted down by Congress, a state compact to collect sales and use taxes on retail sales made by remote sellers over the Internet (H.R. 1410), and a bill that would combine a moratorium extension with a set of simplification requirements for states seeking collection authority (S. 512). *See House Judiciary Panel Approves Unchanged Five-Year Internet Tax Moratorium Extension*, 149 DTR G-8 (Aug. 3, 2001); *Senate Finance Asserts Internet Jurisdiction; House Panel to Act on Moratorium Extension*, 148 DTR G-6 (Aug. 2, 2001); *see also* http://www.house.gov/chriscox/nettax.

2. Domestic (State) -- Sales Tax

As discussed above, EOs may be required to collect state and local sales tax on their Internet sales under *Quill*. Sales tax reform (and the imposition of sales taxes on sales made on the Internet) should be distinguished from the Internet Tax Freedom Act. The Streamlined Sales Tax Project (discussed below) addresses state and local sales taxes, while the Internet Tax Freedom Act addresses taxes on access to the Internet. The Streamlined Sales Tax Project has been considered in conjunction with the Internet Tax Freedom Act due to the similarity in subject matter and political implications. However, logically, the two projects are not related.

Due to the uncertainty regarding the application of the "substantial nexus" test in the context of Internet sales and because of the problems raised by the lack of consistency regarding sales tax among the states[8], many states have joined a project called the Streamlined Sales Tax Project. The goal of the project is to study problems related to coordinating and automating sales tax collection and formulating model sales tax legislation. The issue extends well beyond the Internet (including mail and phone orders and deliveries across state lines). It has become a source of tension between the states and the Federal government. During 2000, a group of representatives from over 35 states met to create a Model Act and Agreement for a uniform and simplified sales and use tax system. The language of the Model Act was approved by participating states in December 2000, and at present, over one-half of state legislatures have introduced or passed model sales tax legislation, entitled the Uniform Sales and Use Tax Administration Act. *See* 62 CCH State Tax Review No. 30, 5 (July 23, 2001); Annette Nelson, *Challenges and Opportunities of the SSTP Proposal*, 20 ABA Tax'n Newsletter No. 4, p.9 (Summer 2001); http://www/geocities-com/streamlined2000/index.html.

[8] Presently, some states exempt sales by EOs from sales tax entirely, some exempt only certain sales, and others treat sales by EOs as ordinary commercial sales.

Recently, the Multistate Tax Commission urged Congress to take a moderate approach to the extension of the existing Internet tax moratorium, and to respect state sovereignty on the question of business activity taxing nexus within that context. It recommended that the moratorium be extended for no more than five years and that federal lawmakers authorize states to require collection of sales tax by remote sellers who exceed a de minimis sales threshold. In addition, the Commission said that Congress should: (i) provide equal tax treatment to all forms of commerce, whether conducted over the Internet or through other means, (ii) ensure sellers with taxing nexus in a state that they cannot avoid a tax collection obligation through affiliates, (iii) refrain from requiring specific nexus standards for other types of state and local taxes, and (iv) provide that collection and remittance of sales and use taxes, in and of itself, would not be considered a factor in determining nexus for other state and local taxes. The Commission also said that it opposes any proposed nexus standard based on physical presence. *See MTC Urges Moderation on Internet Tax Ban, Restraint on Business Activity Nexus*, 157 DTR G-3 (Aug. 15, 2001). In addition, the National Conference of State Legislatures unanimously approved at its 2001 annual meeting a resolution calling on state legislatures to oppose an extension of the Internet tax moratorium of more than four years and a resolution to support federal legislation that would give states the authority to require remote sellers to collect a state's sales and use tax upon the state's compliance with provisions of an interstate agreement developed by the governing states of the Streamlined Sales and Use Tax System. *See NCSL Approves Resolution to Oppose Extension of Internet Tax Moratorium*, 158 DTR G-1 (Aug. 16, 2001); *see also Governors to Ask Lawmakers to Address Internet Tax Ban, Sales Tax Issues Together*, 158 DTR G-2 (Aug. 16, 2001).

In addition, California has responded by enacting a moratorium on taxation of Internet access and on-line computer services as it determines how to address e-commerce taxation issues. *See California Internet Freedom Bill Moves Forward With Amendments*, 2001 STT 144-4 (July 25, 2001); http://www.sen.ca.gov.

3. International – OECD Proposals

EOs may receive income from foreign sources as a result of Internet sales. It is unclear whether foreign countries have jurisdiction to tax income from e-commerce conducted within the U.S. by domestic EOs, and the Organisation for Economic Coordination and Development ("OECD") has commenced an e-commerce taxation study to determine what principles and practices should apply in this context.

The OECD's Committee on Fiscal Affairs has developed Taxation Framework Conditions that set forth suggested guidelines and adhere to the key conclusion that taxation principles that guide governments with respect to traditional commerce should apply in the context of e-commerce. The Taxation Framework addresses four areas: tax treaties, consumption taxes, tax administration and taxpayer service. With respect to tax treaties, the framework provides that the current international norms are capable of being applied to e-commerce but that some clarifications are necessary, particularly with respect to whether a website or server can constitute a permanent establishment giving rise to tax jurisdiction. With respect to consumption taxes, the framework provides that taxation should occur in the jurisdiction where consumption takes place and that the supply of digitized goods should not be treated as a supply of goods. With respect to tax administration, the framework indicates that the information reporting

requirements and tax collection procedures being developed must be neutral and fair and comparable to what is required for traditional commerce. With respect to taxpayer service, a number of options for using new technologies to improve service have been identified. *See* http://www.oecd.org/daf/fa/e_com/e_com.htm.

D. Political Issues

EOs described in § 501(c)(3) may not intervene in political campaigns and may only attempt to influence legislation as an insubstantial part of their activities. If an EO makes an election under § 501(h), an expenditure test is applied to determine whether the EO has engaged in substantial lobbying activities.

Based on Ann. 2000-84, the IRS seems to be most concerned with whether advocacy on the Internet amounts to the conduct of political or lobbying activity and the implications of links on EO websites to websites of other organizations engaged in lobbying and political intervention. The IRS has requested guidance on (i) how to determine whether information on an EO's website about candidates for public office constitutes intervention in a political campaign or is permissible charitable activity pursuant to Rev. Rul. 78-248, 1978-1 C.B. 154 and Rev. Rul. 86-95, 1986-2 C.B. 73 (regarding voter guides and candidate debates): (ii) whether providing a link on an EO's website to another organization that engages in political campaign intervention is per se prohibited political intervention; (iii) how to determine whether lobbying communications made on the Internet are a substantial part of the EO's activities (for EOs that have not made a § 501(h) election); (iv) whether providing a link on an EO's website to another organization that engages in lobbying activity constitutes lobbying activity by the EO; and (v) numerous issues relating to § 501(h).

E. Form 990 Disclosure

With some exceptions, every EO exempt from taxation under § 501(a) must file an annual information return on Form 990. § 6033. In the case of an organization described in § 501(c) or (d) and exempt from tax under § 501(a) or § 527(a), a copy of its Form 990 and exemption application must be made available for public inspection and, upon request of an individual, a copy of its Form 990 and exemption application must be provided to the individual without charge, other than a reasonable fee for reproduction and mailing costs. § 6104(d)(1). This disclosure requirement applies to the EO's three most recent Form 990's. § 6104(d)(2).

The requirement to provide a copy of Form 990 upon request does not apply to any request if, in accordance with the regulations under § 6104, the EO has made the requested documents widely available. § 6104(d)(4).

1. Posting on Web

As mentioned above, an EO's obligation to provide a copy of its Form 990 upon request does not apply if the EO has made its Form 990's widely available. An EO makes its Form 990 widely available if it complies with the requirements specified in Treas. Reg. § 301.6104(d)-2(b)(2) (regarding Internet posting) and (d). Treas. Reg. § 301.6104(d)-2(b)(1).

Treas. Reg. § 301.6104(d)-2(b)(2) states that an EO can make its Form 990 widely available by posting it on a World Wide Web page that the EO establishes and maintains or by having the document posted as part of a database of similar documents of other EOs on a World Wide Web page maintained by another entity. The document will be considered widely available only if –

(A) the World Wide Web page through which it is available clearly informs readers that the document is available and provides instructions for downloading it;

(B) the document is posted in a format that, when accessed, downloaded, viewed and printed in hard copy, exactly reproduces the image of the Form 990 as it was originally filed with the IRS, except for any information permitted by statute to be withheld from public disclosure; and

(C) any individual with access to the Internet can access, download, view and print the document without special computer hardware or software required for that format (other than software that is readily available to members of the public without payment of any fee) and without payment of a fee to the EO or to another entity maintaining the World Wide Web page.

For a document to be widely available through an Internet posting, the entity maintaining the World Wide Web page must have procedures for ensuring the reliability and accuracy of the document that it posts and must take reasonable precautions to prevent alteration, destruction or accidental loss of the document when posted on its page.

Furthermore, if an EO has made its Form 990 widely available, it must notify any individual requesting a copy where the documents are available (including the address on the World Wide Web, if applicable). If the request is made in person, the EO must provide such notice to the person immediately, and if the request is in writing, the EO must provide notice within seven days. Treas. Reg. § 301.6104(d)-2(d).

2. Ability to Exclude Information

Under § 6104(d)(3), an EO that is not a private foundation (under § 509(a)) or a political organization (under § 527) is not required to disclose the name or address of any contributor to the EO. Furthermore, an EO is not required to disclose information if the Secretary withheld such information from public inspection under § 6104(a)(1)(D) (regarding withholding of certain other information upon request). § 6104(d)(3).

Otherwise, an EO is required to make available an "exact copy of any return" filed by it pursuant to § 6033. Treas. Reg. § 301.6104(d)-1(b)(4)(i). Each copy of the a return must include all information furnished to the IRS on the return, as well as all schedules, attachments and supporting documents. *Id.*

An EO may be wary about posting certain personal information contained in its Form 990, such as social security numbers, signatures and addresses, on the Internet. An EO is allowed to use

business addresses and telephone numbers for individuals in lieu of their residential addresses and telephone numbers. With respect to social security numbers, the IRS permits tax preparers to list an alternative identification number (applied for with Form W-7P) instead of their social security numbers. Treas. Reg. §§ 1.6109-2 & 1.6109-2T. Otherwise, social security numbers and signatures are not permitted to be redacted. Consequently, an EO that is uncomfortable posting this information on the Internet may post a redacted version, but the IRS will probably not treat the posting as making the Form 990 widely available. In that case, the EO will have to produce exact, unredacted copies upon request in order to comply with § 6104(d).

See also Evelyn Brody, *Troubling Lessons from Bishop Estate Settlement for Administering the New Intermediate Sanctions Regime*, 2001 TNT 128-41 (June 1, 2001) (on conflicting policies of protecting individual privacy and disclosing an EO's activities in the context of excess benefit transactions).

3. Ability to Link to Other Websites (i.e., GuideStar)

As mentioned in Section G(1), above, the regulations under § 6104(d) allow an EO to make its Form 990 widely available by having the document posted as part of a database of similar documents of other EOs on a World Wide Web page maintained by another entity. The ability to make documents widely available through this alternative relieves EOs of the administrative burdens that may arise in complying with the disclosure requirements of Section 6104(d).

An example of an organization that maintains a database of EO documents on the Internet is GuideStar, at http://www.guidestar.org. GuideStar will redact certain personal information contained in a Form 990 upon request by the EO.

If an EO chooses to post its Form 990 through GuideStar, or a similar entity, it should ensure that the entity is complying with all of the requirements of Treas. Reg. § 1.6104(d)-2(b)(2) so that the document is in fact considered widely available.

EXHIBIT A

Announcement 2000-84
2000-42 I.R.B. 385

The Internal Revenue Service is considering the necessity of issuing guidance that would clarify the application of the Internal Revenue Code to use of the Internet by exempt organizations. Accordingly, the Service is soliciting public comment concerning the application of Code provisions governing exempt organizations to activities they conduct on the Internet. The Service has made no final decision concerning the need for additional guidance of general applicability and may conclude no further action is necessary.

BACKGROUND

Exempt organizations, like other organizations, are increasingly turning to the Internet to carry on their activities. By publishing a webpage on the Internet, an exempt organization can provide the general public with information about the organization, its activities, and issues of concern to the organization, as well as immediate access to websites of other organizations. An exempt organization can provide information to subscribers about issues of concern to the organization as well as enable people with common interests to share information via the Internet through a variety of methods (such as mailing lists, news groups, listserves, chat rooms, and forums).

GENERAL ISSUES

Exempt organizations use the Internet to carry on activities that otherwise can be conducted through other media, such as radio or television broadcasts, print publications, or direct mailings. The growing use of the Internet by exempt organizations raises questions regarding whether clarification is needed concerning the application of the Code to Internet activities. The questions include the following:

> Does a website constitute a single publication or communication? If not, how should it be separated into distinct publications or communications?
>
> When allocating expenses for a website, what methodology is appropriate? For example, should allocations be based on webpages (which, unlike print publications, may not be of equal size)?
>
> Unlike other publications of an exempt organization, a website 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 website?
>
> 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 discussion, acts as editor, etc.)?

POLITICAL AND LOBBYING ACTIVITIES

Charitable organizations described in section 501(c)(3) may not intervene in political campaigns and may only attempt to influence legislation as an insubstantial part of their activities. If the charitable organization makes an election under section 501(h), an expenditure test is applied in determining whether the organization has engaged in substantial lobbying activities, with different limits applicable for direct and grassroots lobbying.

When a charitable organization engages in advocacy on the Internet, questions arise as to whether it is conducting political or lobbying activity, and if so, to what extent. This situation is further complicated by the affiliation of charitable organizations with other organizations engaging in political or lobbying activities on the Internet. The ease with which different websites may be linked electronically (through a "hyperlink") raises a concern about whether the message of a linked website is attributable to the charitable organization. The Service is considering whether clarification is needed on how to apply the prohibition on political campaign intervention and substantial lobbying activity for charitable organizations engaging in activities on the Internet. Questions include the following:

> 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)?
>
> 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?
>
> 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?
>
> 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)?
>
> 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"?
>
> 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 email 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?

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

ADVERTISING AND OTHER BUSINESS ACTIVITIES

Many exempt organizations receive payment from companies to display advertising messages on the organization's website. Some exempt organizations have banners on their websites containing information about and a link to other organizations in exchange for a similar banner on the other organizations' website.

Exempt organizations may also provide hyperlinks on their websites to companies that sponsor their activities. Some organizations receive payments based upon a percentage of sales for referring customers to another website, while others receive payments based upon the number of persons who use the hyperlink to go to the other webpage. In addition, a number of exempt organizations use the Internet as another outlet for their own sales activity.

Some organizations operate "virtual trade shows," an attempt to replicate trade shows on the Internet. Some of these virtual trade shows simply consist of hyperlinks to industry suppliers' websites, while others also include displays with educational information.

The Service is considering whether clarification is needed regarding whether the income received from these activities is subject to the unrelated business income tax, and if so, how the income and expenses related to the activity are calculated. Questions include the following:

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?

Are there any 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?

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)?

Comments concerning the application of section 513(i), which governs the treatment of qualified sponsorship payments, to Internet activities were requested in connection with the Notice of Proposed Rulemaking (REG-209601-92) published in the Federal Register on March 1, 2000.

SOLICITATION OF CONTRIBUTIONS

There are numerous Code provisions regulating the solicitation and receipt of charitable contributions. For example, exempt organizations not eligible to receive tax-deductible charitable contributions are required under section 6113 to disclose in certain solicitations for contributions

that such contributions are not deductible for federal income tax purposes as charitable contributions. Charitable organizations that receive certain "quid pro quo" contributions in excess of $75 are required under section 6115 to provide a written statement to the donor that indicates that the charitable deduction is limited to the amount paid by the donor in excess of the value of the goods or services provided by the organization and that provides a good faith estimate of that value. Under section 170(f)(8), donors making contributions of $250 or more to a charitable organization must substantiate the contribution with a contemporaneous written acknowledgement from the charitable organization in order for the deduction to be allowed.

An increasing number of exempt organizations solicit contributions on the Internet. In some instances, the organization's website merely indicates where to send contributions to the organization. In other cases, the organization is able to accept contributions on the Internet, either directly or through a third party that provides a secure connection for credit card transactions. The Service is considering the need for clarification regarding such activities, including the following:

> Are solicitations for contributions made on the Internet (either on an organization's website or by email) 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"?
>
> 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 email to the donor?
>
> 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 email from the donee organization?

REQUEST FOR PUBLIC COMMENT

The Service is soliciting public comment regarding the need for additional guidance clarifying the application of the Code to exempt organizations' Internet activities. The Service requests comments not only on the situations described above, but also on any other issues concerning application of provisions of the Code in a fair and neutral manner to exempt organizations' Internet activities.

Public comments should be submitted in writing on or before February 13, 2001. Comments should be sent to the following address:

> Internal Revenue Service
> 1111 Constitution Ave, NW
> Washington, DC 20224
> Attn: Judith E. Kindell
>
> T:EO

Comments may also be sent electronically via the Internet to *TE/GE-Exempt-2@irs.gov.

DRAFTING INFORMATION

The principal author of this announcement is Judith E. Kindell of Exempt Organizations. For further information regarding this announcement contact Judith E. Kindell at (202) 622-6494 (not a toll-free call).

SUPPLEMENTARY MATERIALS

TAX EXEMPT ORGANIZATIONS AND THE INTERNET FUNDRAISING LEGAL ISSUES

American Corporate Counsel Association
2001 Annual Meeting

Kirstin L. Humann, Esq.
National Charitable Giving Counsel
American Cancer Society, Inc.
National Home Office
315 Deaderick Street, Suite 1545
Nashville, TN 37238

1. Electronic "Receipts" or Donation Tax Acknowledgments

If a charitable organization solicits quid pro quo gifts of $75 or more, it is required to provide a statement, as part of the solicitation or acknowledgment of the gift, informing the donor 1) that the deduction is limited to the excess of any money or value of property contributed over the value of the goods or services provided by the charitable organization and 2) with a good faith estimate of of the value of the goods or services provided in exchange for the contribution. IRC §6115(a). Failure of a charitable organization to provide this statement results in a penalty of $10 for each non-complying contribution, with a maximum of $5000 per fundraising event or mailing. IRC §6714. See also, T.D. 8690, 12/13/96.

If the Internal Revenue Service (the "IRS") questions a charitable tax deduction, the donor is required to substantiate charitable donations of $250 or more by a contemporaneous written acknowledgment from the charity. IRC §170(f)(8). The acknowledgment must include: 1) the amount of the cash contribution or the description (but not value) of other property contributed; 2) whether the charity provided any goods or services in exchange for the contribution; 3) a description and good faith estimate of the value of goods or services provided. If a donor does not obtain a substantiation statement from an exempt organization for a $250 or more gift that would be tax deductible, the deduction will be denied. Congress did not impose a penalty on charitable organizations for failure to furnish the statement required by IRC §170(f) because the belief was that donors would punish the charity by not giving to the charity in the future. See, IRS, CPE EO Text FY 2000.

Reg. §1.170A-13(a)(1)(ii) requires a charitable organization's receipt to state the date of the contribution. The regulations and the IRC do not require the donor's name to be on the receipt but a court has disallowed a charitable deduction when the donor's receipts did not contain the charitable organization's name and the dates of the contributions. *Burrell, Jr.,* T.C.M. 1994-574.

This supplement will not address the different situations and legal implications of the various receipt and acknowledgement requirements but rather addresses the issue of whether an electronic receipt is "written" for purposes of these sections. For an excellent discussion of the details of these rules and examples see Teitell, *Outright Charitable Gifts: Explanation, Substantiating, Forms* (2000).

The IRS recognizes that the Internet raises a number of practical issues with legal implications for exempt organizations. It issued Announcement 2000-84, 2000-42 I.R.B. 385 setting forth a number of questions for which it solicited comment. Two of these questions were:

> "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?

> 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 a copy of a confirmation e-mail from the donee organization?"

The IRS has also stated that for exempt organizations "the use of the Internet to accomplish a particular task does not change the way the law applies to that task." Cheryl Chasin, Susan Ruth & Robert Harper, Tax Exempt Organizations and World Wide Web Fundraising and Advertising on the Internet, CPE EO Technical Instruction Program for FY 2000. Without further guidance the exempt organization community and donors to exempt organizations are left with issues which will likely be resolved upon audit and in the tax courts.

Exempt organizations could considered the following in analyzing possible actions taken with regard to electronic receipting:

a. In all of its requests for public comment, the IRS states: "Alternatively, send written comments electronically via the Internet to the IRS Internet site at…."

b. The IRS promulgated regulations related "New Technologies in Retirement Plans", 65 FR 6001-01 which specifically distinguish between mailed delivery of notices and electronic delivery of a notice by e-mail or a confirmation page.

c. The Electronic Signatures in Global and National Commerce Act, 15 U.S.C. §§7001-7031, (the "E-Sign Act") was adopted in July 2001 specifically allowing for electronic communication in signed documents for transactions within interstate or foreign commerce. While charitable contributions may not fit the definition of "commerce", an exempt organization may wish to follow the requirements of the E-Sign Act if it chooses to issue donation receipts or tax acknowledgments electronically.

While there cannot be a definitive answer on the subject of whether an electronically transmitted receipt will satisfy the requirements of IRC §§ 170(f)(8) and 6115, charitable organizations could consider a dual approach. If a charitable organization wanted to provide electronic receipts, it could consider a tiered approach. Since the donation threshold for charitable organizations is $75, in terms of penalties, the charitable organization could act cautiously by sending written receipts through the mail for gifts of $75 or more and provide electronic receipts for gifts under $75. On the other hand, given all of the statements of the IRS, other than the pension plan rules, the IRS would be hard pressed to treat an electronic receipt as anything other than written.

2. Timing of Online Contributions

Online contributions are made by credit card. The traditional credit card rules regarding date of gift apply. This impacts the date that the charitable organization provides to the donor on the receipt. The date of a gift given by credit card is the date that the gift is actually charged. Rev. Rul. 78-38, 1978-1 CB 67. This is the date processed because it is the date when the cardholder could not prevent the charitable organization from receiving payment.

Tax-Exempt Organizations and the Internet
2001 ACCA Annual Meeting
Wednesday, October 17, 2001, 9:00 – 10:30 AM

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Tax–Exempt Organizations And the Internet

2001 ACCA Annual Meeting
9:00 –10:30 a.m.
Wednesday, October 17, 2001

Illustrative Internet Sites

ACCA	www.acca.com
American Bar Association	www.abanet.org
American Cancer Society	www.cancer.org
American Red Cross	www.redcross.org
Charity Mall	www.charitymall.com
Children's Defense Fund	www.childrensdefense.org
Children's Television Workshop	www.sesame.org
Christian Coalition	www.cc.org/becomeinvolved
Guidestar	www.guidestar.org
Metropolitan Museum of Art Store	www.metmuseum.org/store
National Wildlife Federation	www.nwf.org
New York Public Library	www.nypl.org
Online Auction	www.webcharity.com
Public Citizen	www.citizen.org
Rewards for Justice Fund	www.rewardsfund.org
Susan G. Komen Breast Cancer Foundation	www.komen.org
University of Michigan Athletic Dept.	www.mgoblue.com

