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COMMITTEE ON WAYS AND MEANS
U.S. HOUSE OF REPRESENTATIVES

# WRITTEN COMMENTS

ON

# JOINT COMMITTEE ON TAXATION DISCLOSURE STUDY

**MAY 19, 2000**

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COMMITTEE ON WAYS AND MEANS

BILL ARCHER, Texas, *Chairman*

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# *ADVISORY*

## FROM THE COMMITTEE ON WAYS AND MEANS

FOR IMMEDIATE RELEASE CONTACT: (202) 225–1721
February 3, 2000
No. FC–18

# Archer Announces Request for Written Comments on Joint Committee on Taxation Disclosure Study

Congressman Bill Archer (R–TX), Chairman of the Committee on Ways and Means, today announced that the Committee is requesting written public comments for the record from all parties interested in the study and recommendations released on January 28, 2000, by the Joint Committee on Taxation concerning disclosure of Federal tax returns and return information, including disclosures relating to tax-exempt organizations.

**BACKGROUND:**

The Internal Revenue Service Restructuring and Reform Act of 1998 (P.L. 105–206 ) required the Joint Committee on Taxation and the U.S. Department of the Treasury to conduct separate studies on the present-law provisions regarding disclosure of Federal tax returns and return information, including whether the public interest would be served by greater disclosure of information relating to tax-exempt organizations. The studies were to include legislative and administrative recommendations and were due on January 22, 2000. On January 28, 2000, the Joint Committee on Taxation released its three volume analysis, Study of Present-Law Taxpayer Confidentiality and Disclosure Provisions, JCS–1–00, which includes numerous recommendations concerning both general disclosures and disclosures relating to tax-exempt organizations. That study is available at the Joint Committee's internet site at http://www.house.gov/jct or may be purchased at the Government Printing Office. The Committee anticipates requesting further comment once the U.S. Department of the Treasury has submitted its required study.

**DETAILS FOR SUBMISSION OF WRITTEN COMMENTS:**

Any person or organization wishing to submit a written statement for the printed record should submit six (6) single-spaced copies of their statement, along with an IBM compatible 3.5-inch diskette in WordPerfect or MS Word format, with their name, address, and comments date noted on label, by the close of business, Wednesday, March 15, 2000, to A.L. Singleton, Chief of Staff, Committee on Ways and Means, U.S. House of Representatives, 1102 Longworth House Office Building, Washington, D.C. 20515.

**FORMATTING REQUIREMENTS:**

Each statement presented for printing to the Committee by a witness, any written statement or exhibit submitted for the printed record or any written comments in response to a request for written comments must conform to the guidelines listed below. Any statement or exhibit not in compliance with these guidelines will not be printed, but will be maintained in the Committee files for review and use by the Committee.

1. All statements and any accompanying exhibits for printing must be submitted on an IBM compatible 3.5-inch diskette in WordPerfect or MS Word format, typed in single space and may not exceed a total of 10 pages including attachments. Witnesses are advised that the Committee will rely on electronic submissions for printing the official hearing record.

2. Copies of whole documents submitted as exhibit material will not be accepted for printing. Instead, exhibit material should be referenced and quoted or paraphrased. All exhibit material not meeting these specifications will be maintained in the Committee files for review and use by the Committee.

3. A witness appearing at a public hearing, or submitting a statement for the record of a public hearing, or submitting written comments in response to a published request for comments by the Committee, must include on his statement or submission a list of all clients, persons, or organizations on whose behalf the witness appears.

4. A supplemental sheet must accompany each statement listing the name, company, address, telephone and fax numbers where the witness or the designated representative may be reached. This supplemental sheet will not be included in the printed record.

The above restrictions and limitations apply only to material being submitted for printing. Statements and exhibits or supplementary material submitted solely for distribution to the Members, the press, and the public during the course of a public hearing may be submitted in other forms.

Note: All Committee advisories and news releases are available on the World Wide Web at 'HTTP://WWW.HOUSE.GOV/WAYS__MEANS/'.

ALABAMA POLICY INSTITUTE
BIRMINGHAM, AL 35223
*March 7, 2000*

A.L. Singleton, Chief of Staff
Committee on Ways and Means
U.S. House of Representatives
*1102 Longworth Bldg.*
*Washington, DC 20515*

Dear Mr. Singleton,

This letter is to oppose the Joint Committee on Taxation Staff Proposals, JCS–1–00 (January 28, 2000) concerning the further regulation of tax exempt organizations.

The Joint Committee on Taxation staff has prepared a report entitled "Study of Present Law Taxpayer Confidentiality and Disclosure Provisions as Required by Section 3802 of the Internal Revenue Service Restructuring and Reform Act of 1998." Volume II deals with the disclosure provisions related to Tax-Exempt Organizations.

The report contains recommendations in three major areas which are of concern to us. The proposals would require tax-exempt organizations:

1. To provide detailed narrative descriptions of their lobbying activities on their 990 forms,
2. To track and report amounts spent on self-defense lobbying, and
3. To track and report the amounts spent on nonpartisan research which includes an "indirect" call to action.

The first item is overreaching and goes beyond the intent of Congress to simplify, not complicate tax code compliance. The second item would require an inordinate amount of staff time and expense for organizations which depend primarily upon multiple small donations for their existence, as well as complicating their Form 990 tax reporting. The third item not only has the problems of items number one and two, but is in fact impossible to achieve except on the most subjective of standards. This creates a non-compliable standard for research and education organizations whose purpose is to educate about issues of general public interest.

As proposed, the regulations will intimidate nonprofit organizations from exercising First Amendment rights on politically sensitive issues. This would substantially censor healthy and robust dialogue on matters of national, state and local import as intended by the Framers of the Constitution, and consistently supported by the United States Supreme Court.

Under the current regulations, as the above mentioned report also concedes, a nonprofit organization may provide nonpartisan analyses of issues and be excepted from the lobbying reporting requirement even if a particular analysis includes a limited or implicit "call to action" based on the fair and balanced weighing of both sides of an issue. In every case the regulations have been held to permit exempt organizations to communicate to their constituents a view on legislation which does not include a specific call to action, and such communication does not constitute lobbying.

The staff report would add the onerous burden of reporting all communications which identify a legislator and his or her positions on an issue, the relation of the legislator to the elector, or the relation of a legislator to a committee or subcommittee considering legislation on the issue. None of these activities are currently considered lobbying, a fact acknowledged by those who compiled the report. (Staff Report, Vol. II, p. 119) Consequently, there is no substantial reason to add such a burden to nonprofit organizations.

In short, as proposed, the recommendations are bad because they: complicate the reporting requirements of nonprofits in contradiction to the move of Congress toward tax simplification; extensively increase needless regulatory control over nonprofits; produce heavy new economic burdens on nonprofits; substantially cloud the standard by which nonprofit lobbying activity is judged with vague and overbroad definitions; intimidate and curtail free speech in an illegitimate manner; irresponsibly increase needless paperwork and record keeping by nonprofits; complicate the ability of nonprofit organizations in trying to determine which, if any, of their policy studies are reportable as lobbying and which are not; and, such changes would confuse the public as to the actual lobbying activities of an organization, rather than clearly informing the public of the organization's lobbying activities.

If Congress wishes to pursue more regulatory control over the activities of nonprofit corporations in regard to lobbying activity, it should focus those efforts toward nonprofit organizations that are funded with taxpayer dollars. Organizations that receive a substantial part of their funding from state and, particularly, federal grants should be viewed differently than other nonprofits that raise their funds from the private sector whose purpose is education rather than advocacy.

Sincerely,

CHRISTIAN S. SPENCER, ESQ.
*General Counsel*

cc: Joint Committee on Taxation: Sen. William V. Roth, Jr. Chairman, Rep. Bill Archer, Texas, Chairman, Sen. Charles E. Grassley, Rep. Philip M. Crane, Sen. Orin G. Hatch, Rep. William M. Thomas, Sen. Daniel Patrick Moynihan, Rep. Charles Rangel, Sen. Max Baucus, Rep. Fortney Pete Stark, Hon. Lindy L. Paull, Chief of Staff, Hon. Bernard A. Schmitt, Deputy Chief of Staff, Hon. Mary M. Schmitt, Deputy Chief of Staff, Hon. Richard A. Grafmeyer, Deputy Chief of Staff

Alabama Delegation: Sen. Richard C. Shelby, Rep. Sonny Callahan, Sen. Jeff Session, Rep. Terry Everett, Rep. Bob Riley, Rep. Robert B. Aderholt, Rep. Robert E. Cramer, Jr., Rep. Spencer Bachus, Rep. Earl Hilliard

AMERICAN FAMILY ASSOCIATION
TUPELO, MS 38803
*March 14, 2000*

A. L. Singleton, Chief of Staff
Committee on Ways and Means
U.S. House of Representatives
*1102 Longworth House Office Building*
*Washington, D.C. 20515*

Ref: Study of Disclosure Provisions Relating to Tax-Exempt Organizations

Dear Mr. Singleton:

The Committee's recommendation that public charities disclose expenditures for nonpartisan study, analysis, and research that includes an "indirect" call to action, would implicitly expand the definition of grassroots lobbying and chill the free speech rights of educational organizations that study and teach about society and current events from a particular viewpoint, such as a Biblical worldview, or a feminist perspective. When such study, analysis and research teaches citizens how to consistently make choices that apply their principles, the study could easily be interpreted as including an "indirect" call to action, if government happened to be addressing related issues at the same time. The effect of expanding the definition of lobbying to include an "indirect" call to action, would be that no "substantial part of the activities" of a public charity could address subjects that the government chose to address. The free speech rights of public charities clearly outweigh any public interest in expanding the definition of lobbying.

The recommendation that small charities (below the filing threshold for Form 990–EZ) be required to file an annual IRS report will either throw thousands of small organizations into noncompliance, or force them to shut down out of fear of the IRS. It is in the public interest that small charities be allowed to focus on their exempt purpose, unencumbered by bureaucratic paper work.

In 1998, Congress passed legislation to simplify the tax scheme. The Committee's proposals appear contrary to the direct intent of Congress and would prove costly and burdensome to charitable organizations.

Sincerely yours,

PATRICK J. VAUGHN
*Assistant General Counsel*

**Statement of American Hospital Association**

The American Hospital Association (AHA) represents nearly 5,000 hospital, health system, network and other health care providers. This statement comments on the Study of Disclosure Provisions Relating to Tax-Exempt Organizations (the "Joint Committee Study") published by the staff of the Joint Committee on Taxation on January 28, 1999. The Joint Committee Study was required by section 3802 of the Internal Revenue Service Restructuring and Reform Act of 1998.

GENERAL PRINCIPLE GOVERNING DISCLOSURE

The Joint Committee staff recommends that "the general principle governing disclosure of information regarding tax-exempt organizations is that such information should be disclosed unless there are compelling reasons for nondisclosure that clearly outweigh the public interest in disclosure." This proposed standard would establish a presumption that all return information of tax-exempt organizations should be publicly disclosed, unless this presumption can be overcome by compelling policy reasons for nondisclosure. While the AHA acknowledges that many special policy considerations apply to tax-exempt organizations, a general presumption in favor of public disclosure of all return information is not appropriate.

The Joint Committee staff properly acknowledges that many policy considerations weigh towards confidentiality. These considerations include respect for privacy rights, encouragement of voluntary compliance, and the avoidance of imposition of additional administrative burdens on exempt organizations. The AHA acknowledges that other considerations weigh towards public disclosure, including public oversight of the activities of exempt organizations. We submit that it is appropriate for Congress to impartially weigh these policy considerations in determining the extent of required public disclosure, but that it is not helpful or appropriate to begin with the premise that public disclosure of all information gathered by the IRS is presumptively the better policy.

The Joint Committee staff appears to assume that exempt organizations have no significant legitimate "privacy rights." We acknowledge that exempt organizations may not have privacy rights in exactly the same sense and to the exactly the same degree as individuals. Exempt organizations do, however, have a legitimate interest to be free from excessive regulatory intrusion by the federal government. For example, the prospect of public disclosure of all material contract terms could adversely affect exempt organizations in negotiating with providers of goods and services which, for bona fide business reasons, prefer not to make all terms of their contracts public. The approach of the Joint Committee staff appears to disregard this legitimate interest, and instead in effect posits a presumption in favor of increased regulation.

The Joint Committee Report discusses the tax benefits provided to exempt organizations at some length, listing the exemption of income from business level income taxes, the tax deductibility of charitable contributions, and access to tax-exempt financing. We question whether the level of tax benefits provided to tax-exempt organizations is a factor that is appropriate to consider in determining whether public disclosure is appropriate. Many industries (e.g., oil and gas, timber and pharmaceutical) effectively receive significant tax expenditures and other tax benefits under the Internal Revenue Code; in other contexts, magnitude of tax benefits is not taken into account in distinguishing the level of public disclosure required of different types of taxpayers. Instead, we believe that Congress should focus on whether increased public disclosure will enhance tax compliance, and whether the improvement in tax compliance is sufficiently significant to outweigh the policy reasons for preserving confidentiality.

In general, we believe that the starting point of the Joint Committee staff—that public disclosure of all information is presumptively the better policy—leads to certain recommendations in the Joint Committee Study that are overreaching.

DISCLOSURE OF AUDIT RESULTS AND CLOSING AGREEMENTS

The recommendations of the Joint Committee staff that are most objectionable to exempt healthcare organizations concern disclosure of return information related to IRS examinations and closing agreements.

In general, we believe that the Form 990 is a more appropriate vehicle for meaningful disclosure to the public. Consideration of refinements to that form to make it more user-friendly would be more appropriate than wholesale disclosure of all information gathered by the IRS.

We fully acknowledge that it is appropriate for the IRS to disclose to the public a change or revocation in the exempt status of an exempt organization. This disclosure is in general permitted under existing law. The Joint Committee staff, however, recommends required disclosure that reaches far beyond core concerns about whether an organization qualifies as an exempt organization. Many exempt health care organizations have varied and complex operations. It will commonly be the case that, at the conclusion of an IRS examination of an exempt health care organization, some technical adjustments are made but the exempt status of the organization will be maintained; such an organization will then be in compliance with the requirements of the Internal Revenue Code. It is difficult to see how the additional disclosure recommended by the Joint Committee staff will assist the public in the core concern of knowing whether an organization qualifies as an exempt organization.

Both Congress and the IRS Commissioner have emphasized the need for the IRS to adopt measures that will enhance voluntary compliance of stakeholders. We believe that the disclosure of the results of an IRS examination will in many instances discourage exempt health care organizations from cooperatively and flexibly resolving disputes with the IRS. We concur with the views expressed by other commentators that the publication of such information in many cases will lengthen the examination process because both sides will negotiate with a view towards what information will ultimately become public.

We in particular believe that disclosure of closing agreements is inconsistent with the policy of encouraging voluntary compliance. We note that in recent years the IRS has instituted a number of innovative programs that in effect foster voluntary compliance by encouraging stakeholders to voluntarily enter into closing agreements with the IRS to resolve disputes. We have no doubt that the viability of such approaches would be compromised if the recommendation of the Joint Committee staff on disclosure of closing agreements is enacted.

Moreover, in general, the Joint Committee staff recommends that closing agreements should not be publicly disclosed because they are not an effective means to provide guidance to taxpayers regarding the law. The Joint Committee staff acknowledges that closing agreements are negotiated, and do not necessarily represent the IRS view of the law. Because closing agreements are fact specific and may not contain all relevant information, they may be misleading if relied upon by others. The Joint Committee staff proposes, however, that disclosure of the closing agreements entered into by an exempt organization is appropriate, because the general public, including potential contributors, have an interest in full disclosure about all of the activities of an exempt organization. We concur with the view that closing agreements are potentially misleading to taxpayers because they often represent compromise positions and do not purport to state all the relevant facts. For these reasons, disclosure of closing agreements can be misleading to potential contributors and the general public as well as to other similarly situated exempt organizations.

The Joint Committee staff recommends that "the IRS disclose the documents reflecting the results of an audit at the conclusion of the administrative examination process (i.e., after the audit is closed and the time for filing an administrative appeal has expired)." The basis for this recommendation is that "information regarding the outcome of an audit would assist the public in determining whether the organization is in compliance with the law and how the organization is using funds."

Disclosure of the results of an IRS examination may be misleading for the same reasons that disclosure of closing agreements may be misleading. As a practical matter, the results of an IRS examination may often reflect compromise positions and the results of the examination presented to the public may not state all relevant facts.

One implicit justification for the recommended additional disclosure appears to be that it arguably could assist the public in determining whether an organization is in compliance with laws other than the Internal Revenue Code. Although Congress may choose to expand public disclosure of federal tax return information in the Internal Revenue Code to facilitate compliance with other laws, we suggest that it should do so only for the most compelling policy reasons; in general, the presumption should be against increased regulation in the Internal Revenue Code to speculatively facilitate compliance with state and local laws. The Joint Committee staff makes other recommendations that would appear to adequately address the objective of greater federal and state coordination of oversight of exempt organizations. For example, the Joint Committee staff recommends that the IRS should be able to disclose to Attorneys General and other state officials audit and examination information concerning tax-exempt organizations. Although compelling policy reasons may justify such sharing of information with state officials, the policy reasons for public disclosure of all information gathered by the IRS are not as compelling.

There are two other recommendations on which we would like to comment. The Joint Committee staff recommends that determinations be disclosed without redaction. If the name of the exempt organization and others with whom it does business are made public, it will adversely affect the ability of exempt organizations to find business partners and significantly limit the opportunity for exempt organizations to seek IRS guidance on business activities and relationships they are contemplating. In the spirit of furthering tax compliance, it does not make sense to require unredacted disclosures when that will have a chilling effect on seeking advance guidance.

With respect to the recommendation that the tax return of a taxable affiliate of an exempt organization be publicly disclosed, we do not see a sufficient public policy basis for doing so. Presently, the tax returns of taxable organizations are not subject to public disclosure. Merely being an affiliate of a tax-exempt organization should not deny the company the typical and traditional confidentiality protections.

AMERICAN SOCIETY OF ASSOCIATION EXECUTIVES
WASHINGTON, DC 20005–1168
*March 15, 2000*

The Honorable Bill Archer, Chairman
Committee on Ways and Means
United States House of Representatives
*Room 1102*
*Longworth House Office Building*
*Washington, DC 20515*

Dear Chairman Archer:

The American Society of Association Executives ("ASAE") is a Washington, D.C.-based association comprised of more than 25,000 professionals who manage approximately 11,000 trade, individual, and voluntary organizations. Almost all the associations represented by ASAE's membership are exempt from taxation under section 501(c)(3), 501(c)(4) or 501(c)(6) of the Internal Revenue Code.

ASAE welcomes this opportunity to comment on the Joint Committee on Taxation ("JCT") Staff Study on Disclosure by Tax-Exempt Organizations, issued January 28 of this year, pursuant to the 1998 IRS Restructuring and Reform Act.

## I. INTRODUCTION

ASAE is a strong believer that reasonable disclosure requirements for the tax-exempt community are beneficial. Disclosure can be an effective tool for ensuring public trust in the exempt community. In fact, ASAE was among the organizations that supported the tax law change included in the 1996 Taxpayer Bill of Rights 2 legislation (Public Law 104–168) that brought about the rule requiring exempt organizations to provide copies of certain exempt organization documents to requesters.

Still, ASAE does not support disclosure for disclosure's sake, especially when disclosure requirements are overly burdensome and offer little to benefit the public. A number of the disclosures called for in the JCT report will indeed help better inform the public without undue burden on the exempt community. But, many of the recommendations offer little benefit compared to the paperwork and other compliance difficulties placed on the exempt community.

These comments seek to point out those areas where ASAE agrees with the JCT Staff report, as well as those areas where ASAE takes issue. Not all recommendations by the JCT Staff are addressed in these remarks. The fact that ASAE does not discuss some recommendations should not be an indication of support or lack of support for those particular items. Rather, ASAE has chosen only to address those recommendations which it feels have the greatest impact on its members.

Two final notes before addressing the specific recommendations:

A. ASAE believes that any recommendation for increased disclosure should look to balance the public's right to know with the burdens placed on the exempt organization community. However, ASAE takes issue with the JCT Staff assertion that the tax benefits received by exempt organizations essentially create disclosure obligations akin to those placed on the public sector by virtue of the tax benefits they receive (JCT Staff Report, page 80). Associations and other exempt organizations are private entities, facing the same economic realities as their for-profit counterparts. Though the JCT Staff report states that it takes into consideration the privacy interests of exempt organizations, the sheer breadth and number of new disclosures called for in the report suggests that the JCT Staff values those interests as very minor when compared to the obligations exempt organizations have to the public as a result of their tax status.

B. As ASAE noted in its comments to the JCT Staff prior to the formulation of this report, it is important to remember that the enhanced disclosure provisions of the Taxpayer Bill of Rights 2 law have only recently (June 8, 1999) taken effect. Those provisions require tax-exempt organizations to mail to legitimate requesters, or else make widely available, copies of their three most recent Form 990's and/or Form 1023 or 1024. Previously, tax-exempt organizations could require requesters to come in person to the organization's headquarters in order to conduct such a public inspection. Given that these provisions only became effective very recently, it might be beneficial to allow some time in order to accurately determine the effect that these requirements have on the availability of exempt organization information.

## II. Recommendations Which ASAE Supports

A. ASAE supports the JCT Staff recommendation that taxpayer identification numbers of tax-exempt organizations should not be subject to disclosure (JCT Report, page 88), particularly because of the real potential for unauthorized use of such numbers.

B. ASAE strongly supports the JCT Staff recommendation to accelerate the timetable for optional electronic filing of the Form 990 (JCT Staff Report, page 91). It should be noted, however, that some of the disclosures called for within this report would have the effect of delaying the implementation of electronic filing, especially where the information called for is in narrative form, such as the information regarding heightened disclosure of 501(c)(3) activities that the JCT Staff believes to be related to lobbying.

C. ASAE supports the JCT Staff's call for general revisions to the Form 990 to ensure that it provides more relevant and comprehensible information to the public (JCT Staff Report, page 91).

Specifically, ASAE agrees with a particular suggestion by the JCT Staff which states that it would be "...appropriate to consider whether the need for information relating to an organization should also vary depending on the paragraph of section 501(c) under which the organization qualifies for tax-exempt status" (JCT Staff Report, page 81).

ASAE believes that if the Form 990 is to be revised at some time to make it more relevant and comprehensible to the public, the first step toward that objective should be a clearer expression on the face of the form as to the nature of the tax-exempt organization filing it. Currently, the only such expression appearing on the face of the form is the code section category "501(c)(3)," "501(c)(4)," "501(c)(6)," etc., which appears on a relatively inconspicuous line just below the organization's name and address. ASAE suggests that only a small minority of the general public is familiar with the differences between those categories. Furthermore, even if the reader does understand those distinctions, the code section category does not describe in full the nature of the organization, the makeup of its membership (corporate vs. individual vs. nonprofit), or whether it solicits contributions (deductible or non-deductible) from the general public.

A clearer expression of the nature of the organization on the face of the form would go a long way to informing the public as to the differences between tax-exempt organizations, and would help the public to focus on matters in which it is truly interested. The category in which the organization falls should then dictate which of the remaining pages of the Form 990 would be subject to public disclosure, thus helping the public to focus its gaze more precisely on issues of interest to it. At present, ASAE suggests, the majority of the general public draws no distinction between tax-exempt organizations which receive charitable contributions and those which do not. The unrefined exposure of all Form 990 filings, which tend to look alike to the untrained eye, will only exacerbate that confusion.

Under a separate heading below, ASAE offers some more specific suggestions as to possible revisions to the Form 990, and to the separate categories of disclosure that might be required of each distinctive type of tax-exempt.

## III. Recommendations Which ASAE Opposes

ASAE joins a great many others in the tax-exempt community in expressing its general concern that certain of the JCT Staff recommendations go too far in giving precedence to the public's right to know, and do not give sufficient recognition to the value of certain areas of privacy in promoting compliance and fair administration of the laws.

A. ASAE opposes the public disclosure of all Form 990–T's filed by tax-exempt organizations, as well as any Forms 1120, 1065, and others filed by affiliates of tax-exempts (JCT Staff Report, page 93). The purpose for requiring that those business activities not related to an organization's exempt purpose should be taxed like any other similar activities in the non-exempt sector is to provide a level playing field for competition between the two sectors. If tax-exempt organizations are required to disclose their business income tax returns, and non-exempts are not so required, that purpose of even and fair competition would be undermined.

The JCT Staff states that the disclosure of these returns will "facilitate comprehensive oversight by the public of the full range of activities by tax-exempt organizations" (JCT Staff Report, page 93). This goal is already served, however, given that unrelated business income and affiliated taxable organizations are required disclosure items on the current Form 990. Also currently reported on the Form 990 is the volume of revenues reported on the tax returns associated with each. That disclosure should be more than sufficient to inform the public about such side activities.

B. ASAE also joins with many others in opposing the unredacted disclosure of audit results and closing agreements (JCT Staff Report, page 84). Such a step might well impede, rather than aid, the objective of maximum voluntary compliance with the laws. Also, this disclosure would not have the intended effect of assisting "in the public oversight" of exempt organizations, as the JCT Staff predicts. On the issue of closing agreements, the JCT Staff notes in its own report that they are negotiated and "may not contain all relevant information" (JCT Staff Report, p. 85, FN 186). Exempt organizations might decide to negotiate rather than take on a costly battle with the IRS, even though the organizations firmly believe they have done nothing wrong. Of course, the public is apt to be misled when viewing such negotiated settlements, and many will likely believe from the mere existence of a closing agreement that the exempt organization ran afoul of tax law. Without the promise of confidentiality, exempt organizations will be far less willing to negotiate (and, in the eyes of the public, admit wrongdoing), thus forcing more disagreements into an already overburdened court system.

Under this scenario, the exempt organization pays more, the government pays more, and the public gains nothing. The JCT Staff contradicts itself in its reasoning for requiring this disclosure. It states that it will not recommend such disclosure for non-exempt organizations, citing the potential for this information to be misleading, and thus, presumably, not beneficial to the public. But the JCT Staff then goes on to state that this information would be beneficial to the public if it involves exempt organizations (JCT Report, p. 86).

C. ASAE opposes also the recommendation that public charities be required to disclose expenditures which meet certain exceptions to the definitions of reportable lobbying, such as self-defense and nonpartisan study, analysis and research that includes a limited call to action (JCT Staff Report, page 118). By definition under current tax law, these items do not constitute reportable lobbying, and should not be characterized as such for disclosure purposes.

It might be true that IRS enforcement would be aided by an explicit enumeration, but if that reporting were made subject to public disclosure, its most common use would be by opponents of the organization's views, to point to its use of presumed "loopholes." It should be up to the IRS, not to self-appointed public advocates, to determine if an organization is legitimately asserting these duly considered legal exceptions. This increased disclosures would also significantly increase the recordkeeping requirements currently faced by 501(c)(3) organizations regarding tracking lobbying activities. The recommended disclosures would require the organizations' staff to track separately (1) lobbying activities as defined in 501(c)(3), (2) "self-defense" lobbying activities, (3) certain nonpartisan research and analysis, and (4) lobbying as defined under the Lobbying Disclosure Act of 1995 (Public Law 104–65).

D. ASAE maintains a similar position with respect to the recommended additional disclosure of transfers among various organizations "so that the public and the IRS can better assess whether contributions are being used to fund political activities" (JCT Staff Report, page 97). Any such transfer by a 501(c)(3) organization is a violation of the requirements of its exemption, risking loss of exempt status and possible fines under section 4955. The present Form 990 requires disclosure of any transfers to non-501(c)(3) exempts and requires disclosure of the amount of any such transfers that are made available for lobbying or political expenditures. It should be up to the IRS, not to public advocates, to determine if the organization has complied with the law in this respect.

## IV. ASAE's Suggestions on General Revision of the Form 990

As noted above, ASAE believes that any major changes to the disclosure obligations of exempt organizations should only be done after sufficient time has passed for an accurate evaluation of the impact regarding the new, enhanced public availability rules for exempt organizations' Form 990's and other documents. At such time, Congress should ask how the public has benefited from this increased access, and how the publicly available information can be more beneficial in the future.

In an effort to at least start that analysis, ASAE raises certain specific suggestions below that it believes will begin to make the Form 990's more relevant and comprehensible.

The Form 990 and the Schedule A attachment required of 501(c)(3) organizations have grown in length considerably over the past 20 years. This enlargement is traceable in part to the number of statutory provisions added over that time period, but is also traceable to the addition of more in-depth and detailed questions designed to enhance the IRS's and the state regulatory agencies' ability to discern pertinent information without conducting a first-hand inquiry. The Form also serves as a road map for such inquiries and for full-blown examinations. The Form was not designed, nor should it have been, to be user-friendly to the general public.

ASAE does not dissent from the general proposition that informed, focused public opinion, as it does in almost all areas of a free society, would not only be an essential aid to the regulators, but would enhance the overall level of compliance with the laws relating to tax-exempt organizations. Focused, self-interested public opinion, it is generally agreed, promotes rational outcomes to political and legislative contests, and is beneficial in helping to regulate the behavior of publicly-traded companies in compliance with the securities laws. Absent the self-interest, however, public opinion tends to lack the focus required to produce rational and desirable outcomes.

Presented with a Form 990 filed by an organization that solicits tax-deductible charitable contributions from the general public, any member of the general public has a legitimate self-interest in attempting to make a determination whether those contributions are in fact used for the purposes intended, and not diverted to private purposes, because every member of the public should be presumed to be a potential contributor. With that self-interest in mind, those members of the public possessed of the patience to examine all those areas of the current Form 990 that are subject to public inspection will reach an informed decision, in the main.

Presented with a Form 990 filed by an organization that does not solicit any funds from the general public, charitable or otherwise, but only solicits funds from the professional or commercial members it represents, ASAE believes that most members of the general public would be at a loss as to what to look for, primarily because their interest is not so clear. The most common reaction would probably be to approach it as if one were inspecting another filing from an organization that solicits public contributions.

ASAE suggests that the public inspector will be able to focus on his or her interest and make an informed decision if the Form makes clear on its face certain essential facts about the organization, such as whether or not it is eligible to receive charitable donations, whether it solicits funds from the general public, whether its membership/constituency is composed primarily of individuals, corporations, or other tax-exempt groups, and if its individual members belong in a business or personal capacity. None of those items is clearly evident from the face of the form today.

If, for example, the tax-exempt organization is composed primarily of corporate members from a particular industry, then the public would likely direct its self-interested focus to the nature and size of the organization's efforts to influence the legislative and regulatory process, and to influence consumer attitudes, as well as to other areas like the organization's research, statistical information, standard-setting and self-regulatory endeavors. That focus would only be impeded by such extraneous information as the approximate risk composition of the investment portfolio; the distribution of revenue sources between dues, voluntary contributions, program service revenues, and investment income; the organization's ownership of buildings and other fixed assets and the degree to which that ownership is debt-financed; and even by what the Board members have agreed to pay the exempt organization's top executives in order to compete with comparable positions within their own industry. Yet, those latter items are much more clearly quantifiable and evident in the public inspection copy of the present Form 990 than is anything about the organization's participation in those areas that are likely of greater interest to the public.

(Regarding the issue of exempt organization staff salaries, it should be noted that disclosure of such information is not mandated by statute for most categories of exempt organizations. As ASAE noted in its October 1, 1999, comments to the JCT Staff: "The most popular portion of any organization's Form 990 will likely be the Part V listing of compensation received by certain organization leaders. This information is required by law to be disclosed by § 501(c)(3) organizations under § 6033(b)(7) of the Internal Revenue Code. However, such information is not required by statute to be provided by other tax-exempt organizations (like § 501(c)(4) or § 501(c)(6) organizations), it is only required by regulatory fiat. ASAE believes that compelling individuals to disclose publicly information that is as private as their own annual salaries should only occur when they are required by statute to do so.")

For all tax-exempt organizations, ASAE suggests that the first page of the 990 be used to identify the organization and delineate the general category into which it falls. To quantify the sources of support without identifying the dollar contribution of each member, some use of the North American Industry Classification System ("NAICS") codes to sort revenues by general source might be used. The category in which the organization falls should then dictate the additional public disclosure.

For a trade association composed almost entirely of corporate members from a given industry, ASAE suggests that the additional financial disclosure be confined to the volume of annual revenues and expenditures, and then to the magnitude of expenditures on legislative lobbying, regulatory lobbying, public relations to improve the industry's image, research of potential benefit to the economy, standards-setting to improve public safety, and all other areas of activity.

For a 501(c)(3) professional organization that does not solicit funds from the general public, and which receives little charitable contribution money, if any, the public inspection version of the Form 990 might be organized as follows: After the general description of the nature and sources of support, the public inspector should then be directed to the categories of expenditure to enhance the profession (continuing education programs, research, standards setting, lobbying, etc.) and the volume of expenditures for fundraising and administration. The overall volume of revenues and expenditures and the salaries of officers should be subject to disclosure pursuant to existing law, but the precise composition of the balance sheet and the distribution of revenues between contributions, program fees and investment income should be given much lesser attention.

A list of specific disclosure items should be designated for every other major category of exempt organization.

## V. CONCLUSION

ASAE believes that the intent of increased public disclosure of Form 990 filings is to enhance public understanding of exempt organizations and their activities. ASAE is concerned, however, that much of this increased disclosure will have the effect of further confusing the public, while placing tremendous additional burdens on exempt organizations. If the public disclosure portions of the Form 990 are made more comprehensible to the general public, and the bulk of the information available to it is focused on answering its most common self-interested questions, then the public will be in a much better position to reach informed judgments than it would be if it were forced, by the sheer volume of information, to rely on the opinions of a few self-appointed guardians.

Thank you for the opportunity to provide our remarks on this issue. Please feel free to contact me at 202/626–2703 if you have any questions.

Sincerely,

JIM CLARKE
*Vice President, Public Policy*

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YUCAIPA, CA 92399–1783

The Honorable Bill Archer
Chairman, Committee on Ways and Means
c/o A.L. Singleton, Chief of Staff
Committee on Ways and Means
United States House of Representatives
*1102 Longworth House Office Building*
*Washington, D.C. 20515*

Re: Public Comments Regarding JCS–1–00 Per Chairman Bill Archer's Request of Feb. 3, 2000

Dear Congressman Archer:

Thank you so much for this opportunity to submit public comments on the recently published Study of Present-Law Taxpayer Confidentiality and Disclosure Provisions as Required by Section 3802 of the Internal Revenue Service Restructuring and Reform Act of 1998 by the Joint Committee on Taxation (JCS–1–00), published in three volumes on January 28, 2000.

It was with great surprise and a sense of appreciation that I learned the Joint Committee on Taxation published in Volume III of their Study, page 272, my previous public comments submitted to the Chief of Staff, Ms. Lindy L. Paull, on October 25, 1999 regarding the public disclosure requirements pertaining to tax-exempt organizations in the United States. I wish to add to my previously published comments and to clarify one in particular. However, before I do that, I want to commend the Joint Committee for the incredible work that they accomplished in producing JCS–1–00. I am just amazed at what they did! What a tremendous accomplishment! This is absolutely incredible! We as U.S. citizens are forever in their debt. I wish to heartily endorse their many recommendations, especially the recommendation regarding the making of completed Federal Forms 990–T (Exempt Organization Business Income Tax Return) available to the general public for their inspection so that anyone can then conduct further personal due-diligence on those exempt organizations that they have an interest in. If (or when) this recommendation is enacted into law it would help to further motivate all exempt organizations to be circumspect and above reproach in the way that they report their unrelated (or non-exempt) business activities on this Federal Form. The way the law now stands, plus the fact that the Internal Revenue Service is able to audit less than 1% of all exempt organization tax returns, many of these organizations are not being above reproach in the way that they report their activities on Form 990–T.

I wish to clarify one of my previous public comments found on page 272 of Volume III of JCS–1–00. I mentioned in this comment that exempt organizations should be required to disclose all governmental grants on Federal Form 990 and then I listed the types of information that should be presented. In addition to governmental "grants," I would add governmental "contracts" as well. Also, in meeting this recommendation of mine, I would accept the information disclosures be shown on some web site that is widely available to the general public and easily accessible instead of having to make it an integral part of Form 990 itself, as long as the web site address was clearly given somewhere on the completed Form. I fully realize that the amount of this information could be rather voluminous for some exempt organizations and could be quite a burden if page after page after page were added as supplementary statements to the Form 990. So, to alleviate this burden I would accept posting of the recommended information disclosures be made on a web site where anyone with an interest in doing so could easily download the information for their own personal use.

In response to the Committee's Study (JCS–1–00), I wish to submit six further recommendations regarding the public disclosure requirements pertaining to tax-exempt organizations:

### RECOMMENDATION NUMBER ONE: CONFLICT-OF-INTEREST POLICY

I recommend that a new question be added to Part VI (the Part entitled "Other Information") of Form 990, page five. The question to read as follows: "Does the organization have in effect a Conflict-of-Interest Policy which is duly enforced? If so, then please attach a copy of the current Policy. Also, please indicate whether or not all Corporate Officers, Directors, Trustees, and Key Employees are in compliance with this Policy. If there is any non-compliance, then please attach a summary explanation of the non-compliance AND HOW IT WILL BE RESOLVED."

### RECOMMENDATION NUMBER TWO: AUDITED FINANCIAL STATEMENTS

I recommend that an additional new question be added to Part VI of Form 990, page five. This question to read as follows: "Is a copy of the organization's audited financial statements available for public inspection? If so, then please indicate how a copy can be obtained by listing the appropriate mailing address or e-mail address or web site address (if it is already widely available and easily accessible directly over the world wide web somewhere)."

### RECOMMENDATION NUMBER THREE: IRS COMPUTER PROGRAMS FOR COMPLIANCE CHECKING

Once electronic filing of all Forms 990 and 990–T are required, the Internal Revenue Service should put in place computer programs that will automatically reject or return an organization's information or tax return when it is obviously inaccurate or incomplete, with the necessary summary explanations. Unfortunately, as it now stands, many exempt organizations submit returns that are OBVIOUSLY inaccurate or incomplete. This practice is absolutely disgraceful and needs to be remedied as soon as possible in the most effective and efficient manner. Only when the IRS starts to reject returns automatically will these organizations finally sit up and take notice as to the terrible condition of their returns. I'm sorry to say this, but it is true. Over the last three or four years I have acquired a number of Forms 990 at my own expense from the Ogden Service Center in order to learn the practices of other exempt organizations. And, to see how their returns compared with the ones I prepared for a prominent tax-exempt organization in southern California that was my employer until I recently returned to graduate school at Golden Gate University in San Francisco, in order to fulfill the program requirements for an M.S. degree in Taxation.

RECOMMENDATION NUMBER FOUR: COMPOSITION OF BOARD COMMITTEES

I wish to recommend that the composition of all Board Committees be disclosed on completed Forms 990, especially the composition of the Internal Audit and Corporate Compliance Committees so that legitimate concerns regarding an organization's Forms 990 and 990–T can be taken to the appropriate Committee Chairperson when the organization's present administration is unresponsive to these concerns. I have learned that in some cases that an organization's Board Members have no idea that their organization is filing, and has been filing for quite some time, inaccurate, incomplete and non-compliance information/tax returns with the Federal Government. I'm sure many Board Members would be aghast at what was taking place in their organization, if they only knew. And, if they just knew about the situation, then they might be in a position to help bring about needed change.

RECOMMENDATION NUMBER FIVE: THRESHOLD FOR MEETING FILING REQUIREMENTS OF FORM 990

I wish to recommend that the threshold for meeting the filing requirements for Form 990 be raised from the present threshold of $25,000 in gross receipts to $100,000 in gross receipts and then indexed for inflation in $1,000 increments thereafter, unless the organization possesses any wholly owned or partially owned taxable subsidiary organizations or, unless the organization has any lobbying or self-defense lobbying expenditures. Many of the new legislative proposals for expanding and improving the public disclosure requirements for exempt organizations would prove to be especially burdensome for the smaller organizations who are just barely scraping by. In respect to their plight, I would recommend that the threshold for filing be substantially raised. Many smaller exempt organizations are teetering on the edge of solvency. If they wanted to voluntarily file Forms 990, then they should be allowed to do so—so that their financial statistics can be included in the IRS's Business Master Files and Statistics of Income databases. I would encourage them to make these filings, but only if they have the time and the resources and the determination to do so.

RECOMMENDATION NUMBER SIX: CHURCHES' EXEMPTION FOR FILING FORM 990 SHOULD BE REMOVED

My last recommendation is a very controversial one, to say the least, but one that I feel very strongly about in light of the inability of many church members to acquire meaningful financial information regarding their church, or convention of churches, or association of churches, or even integrated auxiliaries of churches. This is another absolutely disgraceful situation. Any member should be able to conduct meaningful financial due-diligence on their own church! By having the present exemption for filing Forms 990 for churches removed would go a long ways in helping church members to conduct their own due-diligence. I just do not understand why any organization in the United States exempt from income tax should be exempted from filing Forms 990. This should be a basic requirement.

Thank you for taking the time to consider my public comments regarding JCS–1–00. If you should have any questions regarding my comments, then please feel free to contact me at the telephone number or e-mail address listed below. I would be more than happy to answer any of your questions.

Please give my regards to your staff and the staff of the House Ways and Means Committee. How they are able to accomplish all that they do is beyond my comprehension. The organizational challenges must be staggering. Best wishes to each one.

Sincerely,

JOHN ANDERSON

**Statement of Victoria B. Bjorklund, Simpson, Thatcher & Bartlett, New York, NY; Robert H.M. Ferguson, Patterson, Bellknap, Webb & Tyler, New York, NY; and Committee on Exempt Organizations, Section of Taxation, American Bar Association**

## I. Introduction

These comments are submitted in response to a request made by Congressman Bill Archer, Chairman of the Committee on Ways and Means, for public comments on the study, released on January 28, 2000 by the Joint Committee on Taxation (the "JCT Study"), concerning disclosure of federal tax returns and return information. The comments that follow are directed specifically to the portion of the study that relates to tax-exempt organizations.

As a matter of form, our comments follow the order in which recommendations were made in the JCT Study. Each comment begins by restating the recommendation of the Joint Committee Staff and then stating whether we agree or disagree with the recommendation. In those cases where we disagree, our reasons are indicated.

## II. Disclosure of IRS Materials

1. Recommendation: All written determinations, including background file documents, should be disclosed in unredacted form.

Comment: Agree as to disclosure, especially with respect to rulings that have heretofore been undisclosed because they "affect tax-exempt status," but disagree that such materials should be disclosed without redaction.

Reasons: The principal benefit to be derived by the public from the disclosure of written determinations issued to tax-exempt organizations is a more complete and current understanding of how the Service is administering the tax laws and what activities exempt organizations are, or are not, being permitted to engage in by the Service. This benefit can be fully realized without disclosing the specific identity of the organization or the specific monetary and valuation details of the transaction. The additional information that would be available from an unredacted private letter ruling will be available from the recipient organization's Form 990 for the year(s) covered by the transaction. Similarly, the details of any transaction that is the subject of a technical advice memorandum or a field service advice will be available from the returns to which that determination relates. In our view, the highlighting of this additional detail by including it in the published versions of these determinations will add little of material value or benefit to the public; however, it is likely to generate significant correspondence to the Service from individuals and organizations that may have philosophical differences with the organization which have no legal significance. Involving the Service in such philosophical disputes will absorb staff time which would be better spent on administration of tax laws. Objections to legal reasoning or activities can still be identified from redacted determinations so the public's interest is not impaired by redaction. To enable members of the public to direct criticism at a "rifle shot" target where a shotgun approach is actually required, is both unfair to the target and would result in an uneven and clearly undesirable method of administering the tax laws. The JCT staff's explanation "recognizes that certain exceptions to this general rule [that disclosure should be made without redaction] may be appropriate ... [and that the items currently specified] in section 6110(c) ... provide a guide as to the type of information that it may be appropriate to redact," but the proposal would appear to contemplate redaction only with respect to determinations issued during the audit and examination process, and that "[o]nce the examination process is completed, ... such ruling should be disclosed publicly in unredacted form." We respectfully disagree. The public's interest and oversight function will be more than adequately fulfilled by the timely publication of these materials in redacted form.

2. Recommendation: Disclose the results of audits and all closing agreements in unredacted form.

Comment: Tentatively agree as to audit results but disagree as to closing agreements, unless unredacted disclosure is a condition to the agreement.

Reasons: Disclosure of audit results in unredacted form runs the risk of publicizing unagreed or inaccurate, and therefore unfair, information about the audited organization. Embedded in the JCT staff's recommendation regarding the publication of audit results is the assumption that examining agents apply the tax laws in generally accurate and consistent manners. Experience indicates that this is frequently not the case. Within any group of tax-exempt organizations engaged in substantially similar activities, many will never be audited, and those that are will frequently end up with markedly different audit results because of differences in the experience and training of, and positions taken by, the agents conducting the audits and the quality of their representatives. Further, the public may incorrectly draw a negative inference merely from the fact that an organization was selected for audit where such an inference is not warranted (e.g., the Service's recent sampling of private foundations with assets less than $1 million). For this reason, we believe that if audit results are to be disclosed in unredacted form, such disclosure should be made only as a part of the disclosure of the entire return or returns affected by such adjustments, and that public disclosure should occur only after the audit results have been subject to internal Service review by appeals, if not the closing of the audit. To highlight audit adjustments in any more limited context, particularly if the audit issues are unagreed, would create an unwarranted presumption of wrongdoing by the organization in question.

The disclosure of closing agreements presents a different issue. Because the use of closing agreements is optional to the exempt organization and the Service, the possibility of unfairness is lessened considerably. However, because of the wealth of detail that is frequently contained in such agreements, a requirement that they be disclosed in unredacted form could frequently result in an organization's unwillingness to enter into a closing agreement because of the adverse publicity involved. To counter this possibility, the JCT staff suggests that any organization that declines to enter into a closing agreement will perforce be placed in the position of having to litigate the issue or lose its exemption, with either such course of action resulting in public disclosure. We believe that this reasoning is basically flawed in that it assumes that closing agreements are never seriously considered as a way of resolving an issue unless there also exists a real threat of loss of exemption. Once again, experience shows that there are many situations in which closing agreements are clearly the best way of resolving an issue but where loss of exemption is not an issue. For example, an organization might believe that it has a very strong position as to an item for which the amount in dispute is too insignificant to warrant litigation of the issue. Closing agreements are frequently helpful in the CEP context. In these cases, the publicity attendant to the disclosure of a closing agreement presents the very real possibility that the tax-exempt organization will choose not to enter into such an agreement but instead will opt for some other method of dispute resolution that is in neither its nor the Service's best interests. In those situations where loss of exemption is a real possibility, the Service's bargaining position is usually strong enough so that it can require disclosure as an overall condition to the agreement. However, where loss of exemption is not a real issue, we believe that any benefit resulting from requiring public disclosure in unredacted form is far outweighed by the deterrent effect on prompt dispute resolution that would result from such a requirement. We would recommend leaving with the Service the flexibility as to whether a particular closing agreement should or should not be disclosed in unredacted form.

3. Recommendation: Disclose exemption applications (with supporting documents) at the time of filing, together with action taken on the applications by the IRS.

Comment: Agree as to disclosure, but disagree as to timing.

Reasons: Disclosure of applications and accompanying file materials is appropriate and desirable in any case where the exemption is granted. In those cases where an application is filed either by a new organization or by an organization that has previously operated without exemption and where exemption is denied, the disclosure of these materials would result in the involuntary public release of return information of a taxable entity, although the disclosure of the denial itself would normally be unobjectionable. Obviously, such disclosure would have to occur if the entity in question elects to contest the denial, such as by filing a petition for declaratory relief under Section 7428, but we believe that in this situation, the decision to precipitate such disclosure should remain the prerogative of the organization. Even in those cases where exemption is ultimately granted, disclosure of material in the application file prior to the time that the exemption is granted would be of limited benefit to the general public and could result in a highly undesirable politicization of the determination process. The Joint Committee staff argues that early disclosure is warranted because the processing of exemptions occasionally takes a considerable length of time, and disclosure is required to alert the public that contributions to organizations seeking exemption under section 501(c)(3) are not yet deductible. This position fails to take into account that adequate procedures already exist to put members of the public on notice of this fact (i.e., Publication 78, which is easily accessible in public libraries and online at the Service's website, and the Internal Revenue Bulletin), and we think it is unlikely that the early disclosure of application files would provide any significant measure of additional protection or warning to members of the donor public. Early disclosure could also put the Service in the middle of correspondence campaigns initiated by individuals or groups with philosophical, but not legal, objections to applicants. Such campaigns could require attention from Service staff whose time could be better spent in administration of the tax laws.

4. Recommendation: Apply section 6110 disclosure rules to third party communications relating to determinations and applications that are subject to section 6104.

Comment: Agree.

5. Recommendation: Do not disclose employer identification numbers of exempt organizations.

Comment: Agree.

### III. Form 990 and Related Forms

1. Recommendation: Accept Forms 990 and related forms for electronic filing after 2002, and revise such forms to "provide relevant and comprehensible information to the public as well as the IRS."

Comment: Agree, but it must be recognized that the process by which these forms are approved for use by state agencies (attorneys general and the like) may result in their revision being considerably more difficult, from a procedural viewpoint, than is envisioned by the JCT Study.

2. Recommendation: Expand the scope of section 6104 to require the disclosure of all Forms 990–T and any returns filed by "affiliated organizations."

Comment: Disagree.

Reasons: The Joint Committee staff's recommendation fails to take into account the essential differences between the information contained on Form 990, which is an information return, and Forms 990–T, 1120 and 1065, which are income tax returns. The public's "right to know" extends to the manner in which a tax-exempt organization is operating—how it is utilizing its assets and personnel. Consistent with this right, we agree that it would be appropriate to revise the information return (Form 990) to increase the amount of disclosure concerning the nature of any unrelated trade or business activities (potentially including disclosure of a trade or business conducted in connection with or through a taxable affiliate). However, once that information is released, then we believe that the "balancing of interests" referred to in the JCT Study shifts and the organization's right to, indeed its need for, privacy outweighs the public's need for additional detail. In our view, it would be basically unfair to require disclosure of the income tax return of an organization or its affiliates where no disclosure is required of returns of unaffiliated entities that are engaged in similar activities.

3. Recommendation: Expand the scope of section 6104 to require disclosure of returns filed by section 527 organizations; require such organizations to file returns even if they have no taxable income; and revise the form of such returns to disclose more of the activities of such organizations.

Comment: Agree, as this return is essentially an information return, not an income tax return.

4. Recommendation: Require disclosure of both legal and business names.

Comment: Agree.

5. Recommendation: Require the IRS to instruct the public that Forms 990 are publicly available.

Comment: Agree.

6. Recommendation: Require the disclosure, and publication by the IRS, of World Wide Web site addresses.

Comment: Agree.

7. Recommendation: Require the disclosure on Form 990 of "more information concerning the transfer of funds among various tax-exempt organizations ... [to] better assess whether contributions ... are being used to fund political activities."

Comment: Tentatively disagree.

Reasons: We believe that this proposal is too vague. It is not clear what information an organization filing Form 990 could contain as to organizations not under the control of the filing organization. A better alternative would appear to require more detail on the activities of or grants made by filing organizations.

8. Recommendation: Require annual notification to the IRS by organizations (other than churches) that are below the filing threshold.

Comment: Agree. In addition, we suggest that a similar kind of notification be made available on a voluntary basis to any church that wishes to use it. We also recommend that organizations that terminate their existence or have their exemptions revoked be deleted from the hard-copy version of the Cumulative List (IRS Publication 78) in a timely manner. Further, the filing instructions for terminating organizations should be made clearer as many are not aware that they should check the box on line B marked "FINAL RETURN" on the Form 990.

9. Recommendation: Permit private foundations to disclose only a summary of capital gains and losses, with details available on request.

Comment: Agree. We believe that this proposal would encourage copying of Form 990–PF by interested parties. We note that the Forms 990–PF filed by endowed foundations can be several inches thick when securities schedules are included. Where a private foundation holds a position of 10% or more in a single company, however, that fact could be required disclosure in the summary.

10. Recommendation: Extend the tax-return preparer penalties for omission, misrepresentation and willful disregard of rules to preparers of Form 990.

Comment: Agree.

## IV. Disclosure of Returns and Return Information of Tax Exempt Organizations to Nontax State Officials or Agencies

Recommendation: Disclose audit and examination information to attorneys general and other nontax officials with appropriate jurisdictional needs prior to the completion of the audit and when the IRS determines that the disclosure may facilitate resolution of the case.

Comment: Agree.

## V. Lobbying Expenditures

Recommendations: Require public charities to provide a general description of their lobbying activities on Schedule A to Form 990.

Require public charities to disclose expenditures for self-defense lobbying.

Require public charities to disclose expenditures for non-partisan study, analysis and research if it includes a limited "call to action."

Comment: The members of our Committee who were consulted on the above recommendations had differing views with regard to these lobbying proposals.

Reasons: Some members agree with these proposals so long as they are limited to lobbying-related information. However, a majority of those consulted are seriously concerned that requiring electing charities to report on their lobbying activities may defeat the purpose of the section 501(h) expenditure test as the alternative means for determining substantiality. Requiring charities to disclose expenditures for self-defense lobbying could have a chilling effect on their advocacy. Those members who disagree fail to see either the tax-policy reason or the overriding benefit to tax administration of these proposals, especially in a climate in which the Service is seeking to encourage public charities to make the section 501(h) election.

*These comments are the individual views of members of the Section of Taxation who prepared them and do not represent the position of the American Bar Association.*

*Primary responsibility was exercised by Robert H.M. Ferguson and Victoria B. Bjorklund. Substantive contributions to these comments were made by Brian Menkes. These comments were reviewed by Terrill Hyde for the Committee on Government Submissions and by Council Director Douglas M. Mancino.*

*Although the members of the Section of Taxation who participated in preparing these comments may have clients who would be affected by the federal income tax principles addressed, or have advised clients on the application of these principles, no such member (or firm) has been engaged by a client to make a government submission with respect to, or otherwise to influence the development or outcome of, the specific subject matter of these comments.*

CECIL B. DAY FOUNDATION, INC.
NORCROSS, GA 30092
*March 14, 2000*

Mr. A.L. Singleton
Chief of Staff
Committee of Ways and Means
U.S. House of Representatives
*1102 Longworth*
*Washington D.C. 20515*

Dear Mr. Singleton:

It is my understanding that regulations for implementing the IRS Restructuring and Reform Act of 1998 contain provisions requiring nonprofit organizations (including churches) to notify the IRS every time they encourage their membership to contact a member of Congress on any issue. I am writing this letter to voice strong objection to such a requirement.

As you most certainly know, this issue would not only have effect upon freedom of speech and freedom of religion issues for churches in requiring them to report upon their particular statements, but also would extremely infringe upon these rights.

Furthermore, the churches that the Foundation deals with have an average size of between 75 and 125 members (which also matches the norm for approximately 65 to 70 percent of all U.S. churches). This burdensome reporting requirement upon such a small organization would be rather intrusive and cumbersome.

It is respectively requested that this request be stricken from the IRS's consideration.

Sincerely,

EDWARD L. WHITE, JR.
*President*

ELWjr/ksh

THE CHRISTIAN ALERT NETWORK (TCAN) INC.
KILLEEN, TX 76547–1746
*9 March 2000*

A. L. Singleton, Chief of Staff
Committee on Ways and Means
U.S. House of Representatives
*1102 Longworth*
*Washington, DC 20515*

Re: Comments on IRS reform act proposals for 501 (c) (3) organizations—churches

Sir:

Summary: these proposals would create burdensome new record keeping requirements for non-profit organizations, such as churches.

The Internal Revenue Service restructuring and Reform Act of 1998 was intended to consider methods to restructure the IRS to make it more responsive to the needs of Americans and less intrusive in their lives but they have done just the opposite.

There is a clear potential that every time a church asks its members to call or write their elected officials [local, state, and federal] concerning a piece of legislaion, they would be required to report that activity to the IRS. I believe the purpose of this intrusion seems to be to frighten the churches and keep pastors away from expressing their 1st Amendment Rights.

I call upon The Joint Committee NOT to adopt the changes, requirements, or proposals presently being considered as noted below.

1. Provide information about their lobbying activities on their annual tax form (Form 990), described in the Joint Committee's report as "a detailed description of the legislation addressed in their lobbying efforts and the manner in which organizations engaged in lobbying activities." Currently 501(c)(3)s that have elected to use the 501(h) expenditure test for lobbying need only report their lobbying expendi-

tures, and non-electing 501(c)(3)s must provide a narrative description of their lobbying that is probably less detailed than the report envisioned by the Joint Committee's proposal.

2. Disclose the amount of money the organization spends on activities under the "self-defense" exception to the lobbying rules. Currently advocacy involving legislative proposals that effect a 501(c)(3)'s rights or existence are not considered lobbying and need not be reported. Under the Joint Committee's proposal, self-defense advocacy would still not count against a 501(c)(3)'s lobbying limits, but 501(c)(3)s would now have to report all such expenditures.

3. Disclose expenditures for nonpartisan research and analysis if the research or analysis includes a "limited 'call to action.'" Currently under the exception for nonpartisan research and analysis, a "full and fair" discussion of an issue that provides sufficient information for readers to come to their own conclusions about this issue will not be considered lobbying, even if it includes an "indirect" call to action. An indirect call to action is identifying certain legislators that will vote on the issue. The Joint Committee's proposal would require 501(c)(3)s to report expenditures for this educational activity.

In short, these proposals would create burdensome new record keeping requirements for non-profit organizations, such as churches.

Sincerely,

REV. "CURT" TOMLIN
*Major USA Ret.*
*President TCAN Inc.*

**Statement of Coalition for Fair Competition in Rural Markets**

OVERVIEW

This statement is submitted by the Coalition for Fair Competition in Rural Markets (the "Coalition"). The Coalition currently has more than 150 members including more than 140 companies, nine state propane trade associations and the National Propane Gas Association.

This statement is submitted in response to the Committee's February 3, 2000 request for comments on the January 28, 2000 study and recommendations prepared by the staff of the Joint Committee on Taxation ("JCT") with respect to disclosure of tax returns and tax return information, particularly with respect to tax exempt organizations (JCS–1–00).

The Coalition strongly supports the JCT staff's recommendation that unredacted copies of private letter rulings and other written determinations (along with background documents) related to exempt organizations be publicly disclosed (Volume II, pages 83–84).

Our support for this recommendation arises from our recent experience in which public disclosure of the IRS's ruling that an exempt rural electric cooperative can maintain its exempt status when entering the propane retailing business is prohibited by Treasury regulations, notwithstanding the statutory provision providing for disclosure of Internal Revenue Service (the "IRS") determinations when an entity is granted exempt status initially. Given the special nature of exempt status, we believe everyone—other exempt entities, tax practitioners, taxable companies, the general public—should have access to written determinations affecting exempt organizations.

BACKGROUND

The Coalition's interest in this particular recommendation arises from our efforts to encourage the IRS to develop clear, direct and public guidelines which describe the scope of the exemptions available under Internal Revenue Code section 501(c)(12) in general and particularly the limitations on the term "like organization" in (c)(12)(A) under which rural electric cooperatives ("RECs") have been granted exemptions. The following presents the history of these efforts and the factors which led to this statement.

Taxable propane companies encountered the first REC competitor in 1996. Our concerns about the significant competitive benefits available to RECs (the tax exemption, the substantial business assets built up in the exempt environment and the subsidized loans from the Rural Utilities Service) prompted us in 1998 to seek a thorough review of what federal law allows the RECs to do with their special benefits.

With respect to the income tax exemption, our counsel undertook an extensive research project regarding the sec. 501(c)(12) provisions and its predecessors all the way back to the original 1916 income tax legislation. This project made clear to our counsel and to our members that there is no overall policy statement regarding the (c)(12) exemption in either Treasury regulations or a published revenue ruling. Indeed, much of the available history detailing the IRS's views on what "like organization" means and what RECs can do within their exempt status is found in private letter rulings.

By early September 1999, our counsel had completed a memorandum for delivery to the IRS. That memorandum discussed the law, court decisions, revenue rulings and private letter rulings related to the issues under consideration. It concluded that an exempt REC's entry into the propane retailing business was not allowed under sec. 501(c)(12) because such activity was not permitted for a "like organization" under the statute; RECs' tax exemptions derive from this term because electricity is not explicitly enumerated in sec. 501(c)(12)(A). This was a growing controversy because more than 30 RECs had been identified as having entered the propane business, with the first apparently doing so as recently as 1996. The memorandum and cover letter strongly urged that the IRS promptly develop an overall policy statement in this area and, in the process, make clear the limitations on exempt RECs that enter the propane business.

As they prepared the memorandum for delivery, our counsel saw a memorandum prepared by REC representatives (posted on an REC-related web site) reporting that the IRS had agreed to rule that propane sales are a "like activity" after having refused to do so on previous occasions. Anticipating that we would soon see at least a redacted copy of such a letter ruling, the memorandum was revised to state explicitly that additional commentary would be delivered to the IRS as soon as public release of a letter ruling confirmed the web site's report and enabled our counsel to review the analysis.

## THE PROBLEM

The problem which prompts our support for the JCT staff's recommendation became clear soon after the memorandum was delivered to the IRS on September 28, 1999. We had assumed that, within a few weeks, a redacted copy of the text of a letter ruling would be released in the normal course of IRS activities.

Our assumption was incorrect, as our counsel found through further research and telephone conversations with IRS officials in the Exempt Organizations/Employee Plans division. In fact, IRS officials were prohibited from even discussing the existence or nonexistence of such a letter ruling.

Then, in early November 1999, we read an October 22, 1999 REC newsletter article which reported that the IRS had issued four private letter rulings holding that sales of propane by an REC are considered to be a "like activity" for purposes of sec. 501(c)(12). A brief quotation in the article from one letter ruling provided us with the only insight into the IRS's analysis and conclusion that propane sales qualify as a "like activity" for purposes of sec. 501(c)(12). Knowing that the IRS would neither confirm nor deny the accuracy of such reports, Coalition members and counsel were left to ponder only the published report that such letters had been issued.

We disagree strongly with the reported ruling and particularly with the reason quoted in the article. Although that quotation generally confirms what our counsel had concluded earlier was the IRS's incorrect analysis, we continue to be hampered in our ability to challenge the ruling in communications with the IRS because we do not have any documents from the IRS which provide that analysis in detail. The source of this problem is the anomalous interaction of the general disclosure rules of sec. 6110 (which ordinarily provide for the redacted disclosure of private letter rulings following issuance to the requesting taxpayer) with that section's carve out of those matters that fall under sec. 6104 (which governs disclosure of applications for exempt status and annual information returns). Treasury regulations issued under sec. 6104 effectively extend nondisclosure to virtually all IRS determinations related to an organization's continuing exempt status.

This result appears to be unintended, given the emphasis on disclosure of information by exempt entities. Allowing interested parties to see approved exemption request forms and other information emphasizes the special nature of the public support and subsidy that is inherent in income tax exemptions. However, in our situation where the IRS was asked to rule explicitly on whether a new activity would or would not qualify as a "like activity" for purposes of an REC's continuing exempt status under sec. 501(c)(12), the law prohibits release of even redacted texts.

This is a very troubling problem. From the Coalition's perspective, the IRS apparently has ruled that an REC can engage in direct competition with the taxable companies which comprise our industry and can do so with the continuing benefit of an exemption under sec. 501(c)(12). We believe the IRS's ruling incorrectly interprets and applies current law, but we are hindered greatly in challenging that conclusion when we cannot read the rulings themselves. The non-precedential nature of such rulings does not change the importance of making public a ruling in which the IRS says, in essence, that an exempt entity can begin to engage in direct competition with taxable companies in a sector in which there is neither historical precedent nor, we believe, a sound argument for such action.

Tax practitioners and other exempt organizations, as well as taxable companies and the general public, should be afforded every opportunity to examine guidance issued by the IRS, particularly with respect to rulings which expand, limit or otherwise define the scope of an exemption from the income tax. This would be a natural and parallel rule for the principle of statutory construction which holds that exemptions are to be applied narrowly. For other exempt organizations (and tax practitioners advising those organizations), disclosure allows information to spread more efficiently. But the Coalition's primary interest is that disclosure of such rulings also will allow taxable competitors to have some notice that an exempt entity is, in effect, being granted a new tax exemption for a new business activity.

Coalition members believe that the public, including taxpayers competing with exempt organizations, have a right to know the types of transactions and activities that the IRS endorses and the rationale for such decisions. Taxpayers should not be forced to wait (possibly for years) for formal Treasury regulations, published revenue rulings or technical advice memoranda addressing permitted types of activities, or worse yet, to speculate both as to the types of permitted activities and the IRS's underlying analysis endorsing such activities.

### CONCLUSION

The JCT staff's recommendation to provide for the unredacted disclosure of most types of guidance issued by the IRS to exempt organizations is consistent with current law requiring public disclosure of exempt applications and annual information returns. Exempt organizations should not continue to be subject to less disclosure than fully taxable taxpayers. There exists a strong policy argument in favor of disclosure by exempt organizations that supports the notion that such organizations are publicly accountable. The Coalition strongly supports the JCT staff's recommendation with respect to exempt organizations and urges the Committee to act favorably on it.

## Statement of Coalition for Nonprofit Health Care, Boone Powell, Jr., Chair

The Coalition for Nonprofit Health Care appreciates this opportunity to comment for the record on the recommendations concerning tax-exempt organizations contained in the Joint Committee on Taxation Staff Disclosure Study ("JCT Study") released on January 28, 2000. As discussed below, the Coalition generally supports increased disclosure that advances tax administration or the public interest in a meaningful way while respecting the legitimate privacy rights of tax-exempt organizations and their employees and avoiding undue burdens on them. However, the Coalition has serious concerns about certain of the recommendations in the JCT Study, and would oppose their enactment into law.

### THE COALITION FOR NONPROFIT HEALTH CARE

The Coalition for Nonprofit Health Care ("CNHC" or the "Coalition") champions the role of nonprofit, mission-driven health care and works to preserve our nation's primarily nonprofit health care delivery system through an active agenda of research, education, and advocacy. CNHC is a national membership organization of health care providers and associations of providers, including hundreds of hospitals, academic medical centers, HMOs, physician clinics, integrated delivery systems, nursing homes, and home health agencies, as well as other organizations interested in nonprofit health care. CNHC believes it is in the public interest to preserve a strong charitable, nonprofit health care delivery system because nonprofit providers are mission-driven, provide individuals and communities access to treatment that otherwise would not exist, are responsible for the vast majority of clinical and educational innovation, and provide considerable charity care and other community benefits.

Coalition members are located throughout the United States and include some of the most respected and most innovative health care organizations. A list of Coalition members is attached. They include hundreds of institutional and thousands of individual health care providers, including:

- the nation's largest HMO and nonprofit health care system;
- several of the most respected physician clinics and academic health centers;
- the nation's largest consumer-governed health care organization;
- three of the ten largest health care systems in the nation; and
- four of the nation's largest operators of skilled nursing facilities.

## RECOMMENDATIONS THE COALITION SUPPORTS

*Disclosure of all written determinations*

The JCT Study recommends that all written determinations (and background file documents) involving tax-exempt organizations, such as private letter rulings and technical advice memoranda, be disclosed. The Coalition supports this recommendation. This expanded disclosure would fix a technical gap between Internal Revenue Code Sections 6104 and 6110 and place all IRS written determinations issued to taxpayers on a level playing field. In addition, consistent disclosure of written determinations furthers the goal of enabling the public to obtain guidance as to the views of the IRS on particular issues.

*Disclosure of certain third-party communications to the IRS*

The Coalition supports the JCT Study recommendation to disclose third-party communications (e.g., Congressional, Executive Branch) to the IRS with respect to final IRS written determinations and approved applications discloseable under Section 6104, applying rules similar to current rules under Section 6110(d) applicable to taxable organizations.

*Expanding IRS authority to share information with state non-tax officials or agencies*

The Coalition generally supports the recommendation in the JCT Study to expand IRS authority to share information with state non-tax officials or agencies before reaching a final determination with respect to revocation or denial of exemption. Any such information sharing should remain subject to the confidentiality and nondisclosure provisions of Section 6103 applicable to state officials and agencies. The Coalition believes that such information sharing is in the public interest because it aids in the administration by appropriate governmental officials of both the tax laws and a state's laws governing charitable organizations. In the rare but egregious case in which a charitable organization's assets are being diverted, earlier disclosure to appropriate governmental officials may help preserve charitable assets.

*Requiring IRS to revise Form 990 and accept Form 990 via electronic filing*

The Coalition supports the JCT Study recommendation that would require the IRS to accept Form 990 via electronic filing and to revise the form to make it more relevant and comprehensible to the public as well as the IRS.

The Coalition respectfully submits that wide dissemination of a more relevant and comprehensible Form 990 would achieve most of the goals set forth in the JCT Study without the need for many of the additional disclosures we have identified in this submission as potentially causing more harm than good. The disclosure of a Form 990 containing more relevant and comprehensible information would achieve the primary goal of publicizing the information that is of greatest public interest. Though sometimes difficult to decipher, the Form 990 elicits the types of information identified by the JCT staff as relevant to the public's oversight of tax-exempt organizations. Such information includes financial information similar to that available for publicly traded companies, a description of the organization's activities and use of funds, and a description of how those activities further its exempt purposes. We would be happy to work with the IRS and other interested parties to help redesign the form to improve its relevance and clarity.

*Requiring small tax-exempt organizations to file annual status note cards*

The Coalition supports the JCT Study recommendation to require exempt organizations having receipts of less than $25,000 to file a small note card annually updating the IRS with respect to the organization's continued existence, termination, address, etc.

*Requiring notification that Forms 990 are publicly available*

The Coalition supports the JCT Study recommendation that the IRS be required to notify the public that tax-exempt organizations' Form 990 are publicly available.

*Requiring disclosure of both a tax-exempt organization's legal name and names under which it does business*

The JCT Study recommends that a tax-exempt organization be required to report on Form 990 both its legal name and any names under which it does business, and that the IRS be required to publish both names in Publication 78.

The Coalition generally supports this recommendation. To avoid unnecessary burdens on large health care corporations with multiple small service sites and to avoid public confusion, we suggest that a tax-exempt organization be required to disclose only names under which the organization (1) solicits contributions or (2) conducts substantial activities.

*Requiring disclosure of World Wide Web site addresses*

The Coalition supports the JCT Study recommendation to require disclosure of the address of a tax-exempt organization's Web site (1) by the organization on its Form 990 and (2) by the IRS in Publication 78.

*Expanding preparer penalties for known omissions and misrepresentations on Form 990*

The Coalition supports the JCT Study recommendation to expand preparer penalties for (1) known omissions or misrepresentations on Form 990 and (2) willful or reckless misrepresentation or disregard of the rules and regulations with respect to Form 990, in each case regardless of whether there is an understatement of tax.

RECOMMENDATIONS THE COALITION OPPOSES

*Disclosure of all written determinations in unredacted form*

As discussed above, the Coalition supports the JCT Study recommendation to disclose all written determinations, placing all IRS written determinations issued to taxpayers on a level playing field. The JCT Study further recommends, however, that all written determinations (and background file documents) with respect to tax-exempt organizations be disclosed without redaction. The Study does not make this recommendation with respect to taxable organizations.

The Coalition opposes disclosure of names and identifying details in written determinations because such additional disclosure would undermine the level playing field described above, would do little to advance the public interest, and is unnecessary to achieve the goal of providing guidance on IRS positions. Written determinations, unlike the information contained in Forms 990 and 1023, typically involve specific isolated transactions and address technical issues for which existing precedents provide no clear guidance. Although the Coalition recognizes the public interest in oversight of tax-exempt organizations, the narrow scope of written determinations would not provide a meaningful opportunity for increased public oversight.

Further, the highly regulated competitive environment in which many health care organizations operate makes confidentiality of proposed business arrangements important. The knowledge that any IRS written determination will name names may discourage private individuals or taxable organizations from doing business with tax-exempt organizations or have a chilling effect on an organization's (or the other party's) willingness to seek advance guidance in gray areas. The advance ruling process is an important means by which the IRS keeps up with emerging developments involving exempt organizations. The Coalition believes that this process should be encouraged.

*Disclosure of the results of IRS audits of tax-exempt organizations (without redaction) and all closing agreements involving exempt organizations (without redaction)*

The JCT Study recommends that all IRS examination results involving tax-exempt organizations be disclosed without redaction after the administrative appeal rights have expired. The JCT staff further recommends that all closing agreements involving exempt organizations be disclosed without redaction. This information is not subject to disclosure with respect to taxable organizations.

The Coalition opposes disclosure of IRS audit results and closing agreements and believes existing law regarding confidentiality of these materials should be preserved. The JCT Study asserts that information regarding the outcome of an audit would assist the public in determining whether the organization is in compliance with the law and how the organization is using funds. The Coalition respectfully disagrees that disclosure of audit results and closing agreements will add in a meaningful way to the information otherwise available to the public regarding a tax-exempt organization's compliance with the law and its use of funds. In the absence of such a benefit, the Coalition believes that the negative effects of such disclosure far outweigh any meaningful increase in the public's ability to oversee tax-exempt organizations.

First, only a limited number of tax-exempt organizations are examined in any year. A disproportionate number of those organizations are large organizations, such as universities and health systems, that are subject to coordinated examination procedure ("CEP") audits. The unredacted disclosure of examination results would create two classes of exempt organizations—those that have been examined and those that have not. Whether an organization has been examined typically is no indication of its compliance with the law. Thus, a meaningless and potentially misleading classification would be established that adds little or nothing to the public's oversight ability.

We are very concerned that release of this information with respect to a small number of tax-exempt organizations each year invites misinterpretation and misuse of the information. Audit findings that may be minor or insignificant from the IRS's perspective, but could be damaging to an exempt organization's reputation or business nevertheless, will make their way to the front pages of newspapers, and could escalate into significant public relations problems. Worse, this information is ripe for misuse by litigants, philosophical opponents, and competitors. Nonprofit health care organizations increasingly face competition from for-profits in their local or regional markets (15% of hospital beds and 75% of HMOs are operated by for-profit companies). Releasing IRS audit information and closing agreements involving tax-exempt organizations, while holding confidential the same information involving taxable organizations, places exempt organizations at a disadvantage and could weaken charitable health care providers, invite further conversions to for-profit status, and erode public confidence in the remaining nonprofits.

Further, many of the issues addressed in an IRS examination, particularly a CEP examination, are not unique to tax-exempt organizations and do not even relate to tax-exempt status. For example, there appears to be no compelling public interest in publicizing whether a particular tax-exempt organization has properly characterized certain individuals as employees or independent contractors, a common issue for colleges, universities, and hospitals. Certainly such information would not be subject to disclosure for any other taxpayers, including taxable schools or hospitals.

Most importantly, disclosure of audit results and closing agreements likely would have a harmful effect on tax administration and voluntary compliance. Such disclosure likely would result in a lengthening of the audit process and added litigation because tax-exempt organizations would have a disincentive to compromise with the IRS on disputed matters. An organization may reasonably be concerned that such a compromise could be misconstrued as an admission of failure to comply with the law. Similarly, a tax-exempt organization would be less likely to come forward, independent of the audit process, to resolve with the IRS potential tax issues it may discover on its own.

Under current law, a tax-exempt organization may choose to compromise a contested position during an examination or as part of a closing agreement without any implication that its original position was not in compliance with the law. Many, if not most, disputed issues compromised during the course of an examination relate to areas in which the law is not clear. In the case of a closing agreement initiated by the taxpayer, the organization has identified an area of possible noncompliance and seeks the assistance of the IRS in resolving the matter, including through implementation of agreed-upon corrections. Where the tax-exempt organization has made a good-faith attempt at compliance or correction, the public interest is best served by a compromise acceptable to both the taxpayer and the IRS. In fact, the legislative history of the intermediate sanctions excise tax states that revocation of an organization's tax-exempt status should be reserved for situations in which the organization no longer operates as a charitable organization. The decision to resolve any disputed issues without revoking exempt status indicates that the IRS has determined that the organization continues to operate as a charitable organization or that the dispute did not involve issues relating to the organization's tax-exempt status. Thus, it is difficult to see how disclosure of examination results or closing agreements adds in any meaningful way to the public's interest in compliance by tax-exempt organizations.

*Disclosure of pending applications for tax-exempt status*

Though applications for tax-exempt status and supporting documents are disclosed upon receipt of a favorable IRS determination under present law, the JCT

Study recommends that applications and supporting documents be disclosed when the application is made. In addition, the Study recommends that any IRS action taken on the application be disclosed.

The Coalition opposes disclosure of exemption applications prior to a final determination by the IRS. The review of an organization's application involves a legal determination as to whether the organization has met the applicable requirements for tax-exempt status. This legal determination is made in the first instance by the IRS and is reviewable by the courts. There is little, if any, public benefit to be derived from disclosure of an application while it is pending. In fact, such disclosure could be misleading, particularly in situations in which the IRS requests clarifications or changes during the application process (for example, when a legally unsophisticated applicant has inartfully described activities that do in fact qualify for exemption). In addition, disclosure of applications during the review process would interfere with fair and efficient tax administration by increasing the potential for inappropriate interference by competitors or philosophical opponents and for politicization of a legal process.

Though the IRS appears to have done a good job in recent years in resisting inappropriate political interference, releasing pending exemption applications invites such interference and increases the possibility of inconsistent legal determinations. An application that is accompanied by well-orchestrated opposition or political pressure may receive a different determination than one unaccompanied by such a response. Present law requirements for disclosure of applications and the underlying file aftera final determination by the IRS help ensure consistency of determinations and public understanding of the standards applied.

The release of a Form 1023 or 1024 submitted by an organization that the IRS ultimately does not recognize as exempt, either because the organization withdraws its application or does not qualify for exemption, needlessly discloses information about an organization that is not tax-exempt. If an organization withdraws its application or the IRS denies exemption, the applicant is taxable, and should be treated like any other taxable organization.

The Coalition is aware of one circumstance in which the public may have a limited interest in an organization's pending application. A potential donor has an interest in knowing whether a donation is deductible as a charitable donation under Section 170 of the Code. For most Section 501(c)(3) organizations, tax-exempt status is effective as of the date of incorporation, while the actual IRS determination is not made until a later date. Thus, an organization that believes it meets the qualifications for tax-exempt status under Section 501(c)(3) may solicit or receive contributions from donors while its application is pending. Even in this circumstance, however, disclosure of the application itself would not meaningfully advance the public interest. A donor could not predict, with any greater certainty than the organization itself, whether the IRS will approve the application. In such cases, requiring a public statement that the application is pending and that a final determination letter has not yet been received may be appropriate to alert donors to the possibility that the application may be withdrawn or rejected. Donors may then make an informed decision as to whether deductibility of the donation is important and if so, whether to make the donation currently, defer the donation, or require a redirection of the donation if a favorable determination is not received.

*Disclosure of related returns and returns of affiliated organizations*

The JCT Study recommends requiring disclosure of (1) a tax-exempt organization's Form 990–T, Unrelated Business Income Tax Return; (2) Form 1120 for any taxable affiliate of a tax-exempt organization; and (3) Form 1065 for any partnership in which a tax-exempt organization participates.

The Coalition opposes these recommendations. Tax-exempt organizations are expressly permitted to engage in non-exempt activities, through conduct of an unrelated trade or business or through a separate organization such as a partnership or taxable corporation. Such activities are treated in the same manner as the activities of other taxable entities and are subject to the same tax liabilities. Taxation of these activities in the same manner as the activities of any other taxable entity preserves a level playing field and prevents unfair competition. To subject the tax returns for these taxable businesses to disclosure, when other taxable businesses are not subject to disclosure, creates a non-level playing field and would place nonprofits' subsidiaries and other affiliates at a competitive disadvantage. Disclosure of the detailed information in these returns may also make it more difficult for affected organizations to attract skilled managers and may inhibit relationships with potential investors or business partners, who may be reluctant to enter into transactions if the details will be made public. There is no meaningful public benefit from such disparate treatment and any bases for the public's interest in an organization's exempt activities do not apply to taxable activities.

The nonprofit health care sector, in particular, would be unduly burdened and harmed by required disclosure of taxable affiliates' returns. Health care organizations have developed complex multi-corporate structures as a legitimate means to address liability concerns and the unique regulatory environment in which they operate. Moreover, investor-owned organizations are aggressively moving into some of the more profitable venues in health care, and could use increased disclosure by taxable affiliates of nonprofits as a road map to cherry-pick financially attractive activities, leaving a diminished nonprofit sector to conduct the money-losing activities. It is difficult to identify a public interest that justifies this kind of potential harm.

*Requiring additional information to be reported on Forma 990 regarding the transfer of funds among organizations exempt under Section 501(c)(3), Section 501(c)(4), and Section 527*

The JCT Study recommends that Form 990 should be revised to require tax-exempt organizations to clearly identify conduit arrangements in which funds are being transferred among Section 501(c)(3), Section 501(c)(4), and Section 527 organizations. The JCT staff expressed concern that existing reporting requirements, which apply only to transfers to affiliated organizations, do not require disclosure of more complex arrangements that may be used to circumvent restrictions on political campaign activities and calls for reporting more information on transfers.

The Coalition believes that expanding the required disclosure to include any transfer among Section 501(c)(3), Section 501(c)(4), and Section 527 organizations would be unduly burdensome and is not necessary to address the concern identified in the JCT Study. Many nonprofit health care providers are parts of multi-corporate systems in which funds are routinely transferred back and forth. Any expanded reporting or disclosure should be narrowly crafted to address only the specific perceived abuse related to political campaign activities and to exclude transfers that occur in the ordinary course of legitimate activities and operations.

*Requiring Section 501(c)(3) public charities to provide a detailed description of their legislative activities on Schedule A to Form 990*

The JCT Study recommends that Section 501(c)(3) public charities, a classification that includes most nonprofit health care providers, be required to provide on Schedule A, Form 990, a detailed description of legislation addressed and activities involved in their lobbying efforts. This would include information regarding expenditures for self-defense lobbying and expenditures for nonpartisan study, analysis, or research if it includes a limited "call to action," even though these activities are excluded under certain circumstances from the tax law definition of lobbying.

The Coalition opposes these proposals as unnecessarily broad, burdensome, and in many cases duplicative of information already required to be reported under the Lobbying Disclosure Act of 1995 ("LDA"). Information about activities that fall outside the tax law definition of lobbying likely is not collected at present. Thus, we are concerned that the additional record keeping requirements would be burdensome and unnecessarily expensive for charitable organizations of all sizes. A narrow proposal to disclose only the information required to be disclosed under the LDA in a format that conforms to existing tax and LDA reporting requirements and the method elected by the reporting entity would be far less burdensome, expensive, or chilling of lobbying activities by smaller charities. Moreover, the IRS would likely have little use for lobbying expenditure information beyond that already reported on Schedule A.

We are particularly concerned that the JCT staff's latter two proposals, concerning self-defense lobbying and nonpartisan study, analysis, or research appear to be a backdoor approach to broadening the existing tax law definitions of lobbying, at least for reporting and public disclosure purposes. The recommendation to report and disclose expenditures for nonpartisan study, analysis, and research even though it falls outside the existing tax law definition of lobbying would be a particular problem for membership organizations and associations. Our concern is that, ultimately, collection and disclosure of this information could result in calls for congressional expansion of the definition of lobbying. This could have a chilling effect on organizations like the Coalition and its member associations that seek to review, summarize, and inform their members about legislative proposals affecting issues their membership cares about. This proposal, instead, would discourage open, informed discussion about legislative issues.

If information concerning expenditures for self-defense activities is required to be disclosed, it is likely that the primary persons interested in obtaining or using it would be those who are challenging the organization's exempt status. If those persons or organizations (likely to include for-profit competitors or philosophical opponents) are for-profit, they would not be required to disclose amounts spent challenging exemption.

**Coalition for Nonprofit Health Care**

**List of Members**

PROVIDER MEMBERS

Banner Health System
Fargo, North Dakota

Baptist Health Systems of South Florida
Miami, Florida

Baylor Health Care System
Dallas, Texas

Catholic Health Initiatives
Denver, Colorado

Catholic Healthcare Partners
Cincinnati, Ohio

Catholic Healthcare West/ St. Joseph Health System
San Francisco, California/ Orange, California

The Children's Hospital
Denver, Colorado

Dartmouth-Hitchcock Medical Center
Lebanon, New Hampshire

Deaconess Billings Clinic
Billings, Montana

Fairview/Lutheran Hospitals
Cleveland, Ohio

Group Health Cooperative of Puget Sound
Seattle, Washington

Kaiser Foundation Health Plan, Inc.
Oakland, California

Marshfield Clinic
Marshfield, Wisconsin

The Mayo Foundation
Rochester, Minnesota

Memorial Hermann Health Care System
Houston, Texas

Mercy Health Services
Farmington Hills, Michigan

Moses Cone Health System
Greensboro, North Carolina

PeaceHealth
Bellevue, Washington

Scott & White Memorial Hospital
Temple, Texas

ORGANIZATIONAL MEMBERS

Alliance of Catholic Health Care (ACHC)
Sacramento, California

Alliance of Community Health Plans (ACHP)
New Brunswick, New Jersey

American Association of Homes and Services for the Aging (AAHSA)
Washington, D.C.

American Protestant Health Alliance (APHA)
Washington, D.C.

Premier, Inc.
San Diego, CA

Catholic Health Association of the United States (CHA)
St. Louis, Missouri

VHA, Inc.
Irving, Texas

Visiting Nurse Associations of America (VNAA)
Boston, Massachusetts

CONCERNED WOMEN FOR AMERICA
WASHINGTON, DC 20005
*March 14, 2000*

Mr. A.L. Singleton, Chief of Staff
Committee on Ways and Means
U.S. House of Representatives
*1102 Longworth House Office Building*
*Washington, D.C. 20515*

Re: Comments on Joint Committee on Taxation Staff Proposal, JSC–1–00 (January 28, 2000) regarding Taxpayer Confidentiality and Disclosure Provisions

Dear Mr. Singleton,

Concerned Women for America (CWA) is the nation's largest public policy women's organization and enjoys the support of well over 500,000 members nationwide. In 1999, CWA celebrated 20 years of service to the nation, representing the voice of hundreds of thousands of women and like-minded men who refuse to remain silent when radical feminists attempt to speak on their behalf.

CWA has been able to perform this service to its members and the nation as a 501(c)(3) non-profit H-electing organization. The committee staff recommendations relating to non-profit disclosure drew our attention, and we offer the following observations and urge the Committee members not to accept the recommendations.

Organizations such as CWA actively engage in self-disclosure of our lobbying activities to our members as well as often to the general public. Thus, additional disclosures are largely unnecessary. Unlike government agencies, CWA is directly accountable to its members whose financial support will cease the moment their organization ceases to achieve its promised mission. Unlike taxpayer-supported non-profits, CWA has never requested nor received taxpayer dollars to engage in its member-directed work. Additional disclosure would surely better serve the taxpaying public's interest if it is directed towards those organizations which receive taxpayer support and engage in lobbying. (e.g., Planned Parenthood affiliates or Legal Services Corporation-grantees).

Additional disclosures, as recommended by the Committee staff, are both duplicative and an unnecessary added financial and organizational burden which will tend to distract CWA from achieving its mission. CWA would have to begin to track for reporting purposes potentially multiple issues which it has never had to track and report before.

Congress is engaged in a process of simplifying tax-related requirements. The staff recommendations are the precise opposite: they call for more complex reporting which will require a more complex Schedule A. This additional complexity does not come with efforts to clarify definitions, let alone provide any which may be missing. On the contrary, the additional demands with which the recommendations would burden non-profits come with more terms which are left undefined. For example, a "limited call to action" is apparently different from a "call to action." The statute at least mentions a "call to action." Nowhere does it mention a "limited call to action." This new term could affect the meaning of "lobbying" as defined for H-electing non-profits such as CWA.

CWA and other non-profits are already chilled in expressing their opinions for fear of crossing IRS regulations which are largely undefined, thus allowing federal agencies such as the IRS wide leeway to punish non-profits after the fact. This is an unconscionable situation which will only worsen if the staff's recommendations to further complicate reporting with largely undefined demands upon non-profits.

Respectfully submitted,

BEVERLY LAHAYE
*Chairman and Founder*

**Statement of Dorothy S. Ridings, President & CEO, Council on Foundations**

The Council on Foundations is a national membership organization representing the collective interests of more than 1,900 community, family, independent and company foundations as well as corporate giving programs. The Council has always had a strong commitment to promoting the accountability of grantmakers to donors, grantees and the public. Consistent with its support for accountability, the Council has routinely supported initiatives to improve public access to information about the financial and programmatic operations of its members. In particular, the Council has supported efforts to make both Form 990 and Form 990–PF more easily available. It also has supported, and continues to support, increased funding for IRS oversight of tax-exempt entities, including reviews to ensure that the returns filed by both private foundations and public charities meet the legal requirements for full and accurate disclosure. Finally, the Council supports electronic filing of exempt organization tax returns in order to speed the public disclosure process, as well as reduce the burden of filing paper returns.

We have reviewed the volume of the disclosure report addressing issues related to tax exempt organizations and we support a majority of its nineteen recommendations, although we respectfully disagree with some. We will not, in this submission, discuss the Council's position on each recommendation since our positions are fully reflected in the detailed statement submitted by Independent Sector. We submit this supplementary comment in order to provide more detail on two of the disclosure recommendations that are of particular interest to grantmakers.

However, before discussing those two issues, the Council wishes to underscore two important points in the Independent Sector analysis. First, while the Council has long advocated public disclosure of information about grantmakers, we have done so because we believe that disclosure fosters public trust, and that maintaining public trust is essential to the effective operation of charitable organizations. We disagree with the report's premise that tax exemption and the deductibility of charitable contributions transform private institutions into quasi-public ones that should be completely transparent to the public. We also strongly disagree with the presumption that the burden should be on tax-exempt entities to justify the withholding of any information about their activities and operations. While we support greater public disclosure than that required from taxpaying institutions, we firmly believe that the burden should be on the advocates of disclosure to demonstrate significant public benefit from additional revelations—particularly in areas such as audits, the conduct of activities on which tax is paid, and participation in the public policy process, where privacy would normally be assumed.

Second, we affirm the opposition in Independent Sector's comments to disclosure requirements that could have a chilling effect on charities' participation in the public policy process. Many of the Council's members are public charities, as is the Council itself. Adopting the report's recommendations would have a significant negative effect on these members' educational and policy activities, and on the Council's ability to advocate for its members. Moreover, extension of the self-defense lobbying recommendation to private foundations would further restrict the limited capacity of these institutions to participate in the formation of public policy that directly affects their ability to operate.

## SIMPLIFYING AND STREAMLINING FORM 990–PF

As part of its effort to improve public disclosure of relevant financial information, the Council drew the attention of both the Joint Tax Committee staff and the Department of Treasury's Tax Policy Office to two specific changes to the requirements of Form 990–PF that we believed would substantially lessen the filing burden, while improving public access to information about private foundations. Part II of Form 990–PF (Lines 10 through 15) requires all private foundations to submit to the IRS each year a detailed listing of all of their assets. Particularly for larger foundations with substantial assets, these lists, which catalog the foundation's holdings on a single day during the tax year, add considerable bulk to the foundation's return. The same is true for the requirement in Part IV of the form that private foundations provide a complete list of all of their capital gains transactions during the year. Together, these two schedules can add hundreds of pages of tiny-type schedules to Form 990–PF, burying the reader in such a morass of detail that it becomes difficult to focus on the important parts of the return. Eliminating these schedules would improve public access to information about foundations by making the form easier to read and comprehend and by making it substantially easier to post on a web site. A further compelling reason for eliminating the schedules is that despite the cost and burden of supplying the data, there is every indication that the Internal Revenue Service makes little, if any, use of it.

The Joint Committee Report acknowledges the need for change in this area, recognizing that disclosing voluminous data can obscure more important information. Accordingly, the report proposes that private foundations routinely disclose only a summary of their capital gains transactions to the public (the complete list would have to be supplied to an interested member of the public, upon request). However, this recommendation does not go far enough to solve the problems that the Council identified, because all of the underlying data about capital gains still must be supplied to the IRS. Moreover, the Joint Committee Report did not address the issue of the schedules of assets held. These lists are at least as voluminous and uninformative as the lists of capital gains transactions.

We strongly recommend that Form 990–PF be amended to substitute a requirement that private foundations provide summaries of their assets and their capital gains transactions rather than complete lists. Recognizing that this information could be valuable in the event of an audit, we also recommend that private foundations continue to be required to retain this information in their files until the statute of limitations runs out on the return. The Council would be happy to work with the IRS to devise appropriate ways of summarizing the data that meet the enforcement needs of the Service and the public's interest in information about private foundations.

### DISCLOSURES WITH RESPECT TO RETURNS FILED BY AFFILIATED ORGANIZATIONS

The report recommends that section 6104 be expanded to require the disclosure of Form 990–T (unrelated business income tax) if a tax-exempt organization files that form. The report also recommends disclosing Form 1120 (the corporate tax return) and other returns filed by taxable entities affiliated with tax-exempt entities. For all of the reasons stated in Independent Sector's comments, the Council opposes required disclosure of business tax returns.

There is, however, an additional problem with the recommendation. The report does not elaborate on the basis on which a taxable organization would be deemed to be affiliated with a tax-exempt entity. While we do not believe the Joint Tax Committee staff intended the result, the Council notes for the record that corporations are affiliated with their corporate foundations. Thus, a literal interpretation of the report could lead to the required disclosure of the Form 1120 filed by a significant number of major U.S. corporations simply because they are affiliated with a tax-exempt entity, a result that would quickly lead to the termination of most existing corporate foundations and would certainly chill the formation of new ones. The absurdity of this outcome underscores the complexity of the recommendation to require disclosure of information about the business activities of tax-exempt entities.

FIRST BAPTIST CHURCH
GROTON, VT 05046

To: The Joint Committee on Taxation:
The Chairman of the House Ways and Means Committee, Representative Bill Archer (R–TX)

Re: IRS reform act proposals for 501 (c) (3) organizations—churches

Summary: these proposals would create burdensome new record keeping requirements for non-profit organizations, such as churches.

The Internal Revenue Service restructuring and Reform Act of 1998 was intended to consider methods to restructure the IRS to make it more responsive to the needs of Americans and less intrusive in their lives but they have done just the opposite.

There is a clear potential that every time a church asks its members to call or write their elected officials [local, state, and federal] on a bill, they would be required to report that activity to the IRS. This danger is coming from the Congressional Joint Committee on Taxation which is recommending possible laws that could seriously impact churches. I believe the purpose of this intrusion seems to be to frighten the churches and keep pastors away from expressing their 1st Amendment Rights.

I call upon The Joint Committee not to adopt changes, requirements, or proposals as you have considered below.

1. Provide information about their lobbying activities on their annual tax form (Form 990), described in the Joint Committee's report as "a detailed description of the legislation addressed in their lobbying efforts and the manner in which organizations engaged in lobbying activities." Currently 501(c)(3)s that have elected to use the 501(h) expenditure test for lobbying need only report their lobbying expenditures, and non-electing 501(c)(3)s must provide a narrative description of their lobbying that is probably less detailed than the report envisioned by the Joint Committee's proposal.

2. Disclose the amount of money the organization spends on activities under the "self-defense" exception to the lobbying rules. Currently advocacy involving legislative proposals that effect a 501(c)(3)'s rights or existence are not considered lobbying and need not be reported. Under the Joint Committee's proposal, self-defense advocacy would still not count against a 501(c)(3)'s lobbying limits, but 501(c)(3)s would now have to report all such expenditures.

3. Disclose expenditures for nonpartisan research and analysis if the research or analysis includes a "limited 'call to action.'" Currently under the exception for nonpartisan research and analysis, a "full and fair" discussion of an issue that provides sufficient information for readers to come to their own conclusions about this issue will not be considered lobbying, even if it includes an "indirect" call to action. An indirect call to action is identifying certain legislators that will vote on the issue. The Joint Committee's proposal would require 501(c)(3)s to report expenditures for this educational activity.

In short, these proposals would create burdensome new record keeping requirements for non-profit organizations, such as churches.

Sincerely,

PASTOR CHRIS PAINE

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FIRST GERMAN CONGREGATIONAL CHURCH
LINCOLN, NE 68522
*March 7, 2000*

A.L. Singleton, Chief of Staff, Committee on Ways and Means
U.S. House of Representatives
*1102 Longworth*
*Washington, DC 20515*

Dear Sir:

I have just been informed of proposals from the IRS regarding reporting requirements for 501(c)(3) organizations. It seems to me that charitable organizations do their members a favor to inform them and invite their participation in the political process when legislation that affects their functions are proposed. And the IRS has been trying to persuade us that they are seeking to make the job of reporting to them easier, that they are trying to serve the public! The latest proposals to require reporting of all efforts by charitable organizations to involve the public in public policy with legislators is one of the most onerous requirements ever put forward by this elitist organization.

This is a gross violation of free speech rights. Does the Constitution of this great country mean nothing to the IRS? This is by far not the only attempted violation of Constitutional provisions from the IRS. The fact is, our government has created a monster that it hardly controls. And the citizens are made to feel that we no longer have government "of the people, by the people, for the people."

If the IRS has its way, we will no longer be able to tell our people what legislative actions need their response to their congressman and/or senator without the messy business of reporting it. With stupid laws like this, are you really interested in raising up new levels of lawbreaking, even if it is inadvertent? And is adhering to a law that grants freedom on the one hand to be overturned by another law by a subsidiary of the government? We know that such laws get passed because they are slipped into a larger package in the hope that they won't get noticed. Why lay such stupidity on the courts to resolve when it can be properly handled in committee before it ever slips into law?

It is my sincere hope that your committee will keep the IRS from tyrannizing 501(c)(3) organizations. Our political process is good, but we need to keep using it as intended. Thank you for your attention.

Sincerely yours,

REV. JAMES PEDERSEN
*Pastor*

LOS ANGELES, CA
*March 12, 2000*

A.L. Singleton
Chief of Staff
Committee on Ways and Means
House of Representatives
*1102 Longworth House Office Building*
*Washington, DC 20515*

Dear Mr. Singleton:

I am writing in response to the Committee's advisory of February 2 requesting comments on the Joint Committee on Taxation's Disclosure Study hereafter referred to as JCT Study. I am writing as a private citizen with both a public interest and very personal interest in disclosure provisions relating to tax-exempt organizations.

In summary, my positions are:

1. In strong support of the Joint Committee staff's recommendations for full public disclosure without redactions by the IRS of all audits, closing agreements, determinations, and background file documents.
2. In strong support of full public disclosure of all Form 990s for section 501(c)(3) organizations including salaries of their officers.
3. In support, in general principle and with some modification, of the suggestion made by John D. Anderson in his comments in Vol. III of the JCT Study that Form 990s should be expanded to include detailed information on all federal grants made to the organization. I would favor a summary of how many grants an organization has from various departments/entities within the federal government and full posting of these at an appropriate government website. As government is re-invented/downsized, etc., it is even more important that disclosure be made in a similar fashion for all federal contracts held by tax-exempt organizations.
4. In support of the comments made by Dr. Lee Lillard of the Michigan Retirement Research Center to make available to researchers, with strict confidentiality protection in plans approved by Institutional Review Boards, IRS data for use in linked data research. The working paper presented by Dr. Lillard deals with aging research; however, researchers studying younger populations also have similar needs.

I hope my comments will be especially helpful because they involve a current and real case study related to the JCT Study's recommendations. No one regrets more than I that they must be made in the only capacity in which I can speak as a "disgruntled former employee alleging." However, I believe that this and subsequent related information will assist the Ways and Means Committee, the Appropriations Committee, the Committee on Government Reform, and the Committee on Education and the Workforce in the 107th Congress.

In November 1996, I went to the Pension and Welfare Benefits Administration (PWBA) of the U.S. Department of Labor (DOL) and filed a complaint against my former employer, the RAND Corporation, a tax-exempt 501(c)(3) organization. I alleged that

1. I was misclassified as an independent contractor and thus illegally denied benefits in violation of ERISA
2. That I represented a class of unknown size of RAND employees who were similarly misclassified and denied benefits in violation of ERISA
3. That Section 510 of ERISA was violated against me, i.e., I was threatened, harassed, and ultimately terminated from employment while attempting to clarify my eligibility for ERISA benefits.

For the past 33 months the PWBA has been conducting an audit/investigation as a result of those allegations that are very similar to the ones in the Vizcaino v. Microsoft and Herman v. Time Warner. I provided the PWBA with a large amount of documentary evidence at that time and subsequently. As Members of Congress are well aware, while an audit by DOL, IRS, or any government agency is in progress, nothing can be known or revealed until the investigation is completed. I am providing the only thing I can know to the Committee, i.e., the audit/investigation case number is 72–12099. It is not my purpose herein to in any way interfere with or influence the audit or to rehash material that already is in the hands of the appropriate enforcement agency.

Everything that I present herein either as fact, theory, or opinion already has been communicated to the PWBA. No one has assisted me in writing this document except one close family member. Since I learned of this request for comments only on March 3, I have not had time to ask anyone's permission to use his/her name; therefore, no one's name will appear unless publicly identified and then only law firms that are publicly named as legal counsel in federal courts. I am attempting to write with the objectivity of a professional with a background in government, research and public policy. At the same time, I am writing with the subjectivity of a citizen with a very personal and vested stake in these issues. I hope it will be clear when I switch from one of these perspectives to the other. Finally, while I will cooperate fully with government agencies and Congressional staff, I will make no further public comment while the PWBA audit is in progress.

All the research I have done for my case in the past three and a half years has been done from available public information from the media, the Internet, or public libraries. I have never had access to a law library or Lexis-Nexis. Obviously I have learned a great deal about RAND and a great many topics. I am not including references or doing footnotes; however, I can provide sources of all data to the Committee's staff.

Indeed it is amazing how much can be learned about a high-profile tax-exempt organization from public sources; however, I am advocating for even more public information and access. Tax-exempt status is granted only for specific purposes to benefit the public good. It is given in the name of the federal government and all citizens. I learned from the JCT Study that the charitable donation tax deduction for individual income tax was enacted in 1917. There always has been a strong ethos of charity and volunteerism in our country as well as a suspicion of government as a "necessary evil" about which Garry Wills recently has written in depth. Therefore, we as a society should and do expect more of tax-exempt organizations and those who manage them.

### 1. Public Disclosure of IRS Audits and Closing Agreements

Please note that this section is lengthy and could benefit from some subheadings. I have spent the most time and effort on it because I know that the JCT Report's recommendation is a large change that probably will be opposed by tax-exempt organizations and their associations on general principle.

A key issue in my case is whether or not members of my class and I were employees as defined by IRS criteria. (Please excuse me if I forget to include "alleged" all the time and understand that it always should be assumed.) Since I had previous management experience and was responsible for regulatory compliance (including Medicare) for a large home health agency, I had a working knowledge of the IRS criteria long before I came to RAND. I also thought that everyone knew IRS had been cracking down in this area since at least the late 1980s. I had worked as an independent contractor, done my own tax returns, etc.

Therefore on coming to RAND in September 1995, I questioned why I was required to complete a W–4 if I was considered an independent contractor. As a "consultant" (RAND's term for independent contractors), my income should be reported to IRS on a Form 1099. Someone in RAND's personnel department by telephone answered my question: RAND was caught by either the Franchise Tax Board or the IRS two years earlier, i.e., in 1993, and that I was legally an employee. Over a year later when speaking with lawyers and the PWBA, I could not recall whether she said that it was the Franchise Tax Board or the IRS. I still don't know which it was. It would have been helpful for me to have access to IRS audits and closing agreements regarding this matter.

However, I knew that I was an employee. A year later I had a W–2, W–4, pay stubs showing that RAND paid its share of FICA, and even evidence that the California was paying me an unemployment compensation claim that RAND never challenged. I also met every single other one of the 15–20 IRS criteria for being an employee. Although RAND's ERISA plans had two different types of employees, I should have been given the benefits package of at least one of them. Instead I was told a lot of strange things such as in a pre-employment interview that I would get benefits unless I already had them through a university appointment or a spouse. I said that I had neither and needed benefits because I had COBRA. But they still didn't give me benefits. I wondered if they ask men in pre-employment interviews about benefits from a spouse. I still don't know. I do know that there was nothing about that in RAND's ERISA plans, nor was there anything that said that RAND would not give benefits to a new employee who came with COBRA benefits from prior employment.

My supervisor promised me that I'd get benefits in two months. When that time came, my supervisor and an administrative person told me very different things. The supervisor, who was the principal investigator on the National Cancer Institute grant on which I was the study director, told me that she wanted to give me benefits but RAND wouldn't let her. The administrative person told me that RAND wanted to wait to give me benefits because my boss had high turnover of persons on her projects and she was not satisfied with my job performance. Suffice it to say, that none of the above are provisions in RAND's ERISA plans.

By then I also knew that the person before me in the same position of study director on the same NCI grant had benefits. And after I was gone, the person who succeeded me in that position had benefits. Good human resources and administrative practices, whether for ERISA, federal grants or any other purposes, deal with positions and persons in positions. Once they start being about a specific person, they can become arbitrary, chaotic, unfair, and possibly discriminatory and illegal.

I wanted to know a lot of things that I still don't know, and having IRS or FTB audit reports would have helped. I don't think the woman in personnel would have told me the tax authorities caught RAND if it weren't true. Later I asked someone at IRS what happens when they find a case of misclassification. I'm not sure I recall the time IRS goes back (three years perhaps) to assess the employer's part of FICA that should have been paid for each misclassified person plus a pretty hefty fine or penalty. I wondered about issuing revised W–2s so that the misclassified people could file amended returns and get back the half of FICA they overpaid. The IRS person told me that they require the employer to do that but don't really have the staff to know if it is ever done. I don't think the government should keep that extra FICA and that the employee should not only get a revised W–2 but also advice on how to file amended returns to get that money refunded. So I also am suggesting that when there are misclassifications, the IRS notify each employee.

Obviously, IRS presently needs more staff to even assure that cases is has under investigation can be completed before statutes of limitation expire. Later in this document I will make a very strong case for additional funding and staffing for PWBA. Since I don't often have the opportunity to address many members of Congress, I might as well add my opinion that enforcement of federal civil laws is not something that can be privatized or contracted out. Not only the IRS and PWBA, but also many other federal agencies, for example, the Office of the Inspector General of HHS, do excellent work. They are cost-effective, and the dollars they spend generate more revenue, prevent waste/abuse/fraud, and protect citizens' rights.

I still don't know what happened at RAND in 1993. Maybe the FTB caught them, and RAND just told their employees that there was some change in government regulations or something and the employees never knew that they had been misclassified. Or if it was the IRS that caught RAND, I don't know whether or not revised W–2s were issued. Most of these people still were being called "consultants/independent contractors." I would like to know this information. I also asked if IRS notifies PWBA when it finds misclassifications as there might be ERISA violations, or if it even shares internally with EP/EO. That isn't happening, and I doubt IRS and PWBA have enough staff to follow-up anyhow. While I don't see much logic for having EP/EO together (except in this rare example where an EO is violating terms of its EP), I do hope that the elimination of EP/EO will not lead to lower appropriations for each of these functions.

PWBA would not be auditing RAND for 33 months if my basic premise (that I was an employee and as such should have had benefits under RAND's plans) was in error. It doesn't take 33 months to determine that. Even then RAND continued to fight me about the employee/independent contractor issue with great effort and expense. As far as I can discern, their efforts made no common sense except in the context of the employers' usual response to claims or litigation against them by employees, i.e., deny/deny/deny, stall/stall/stall, pay lawyers/lawyers/more lawyers. Employers use this strategy in tax-exempt organizations as well as for-profit businesses.

Between November 1996 and September 1997, RAND also had to deal with a small claim of approximately $3300 as penalty for paying my last paycheck late, a simple matter handled by the California State Labor Commissioner, hereafter referred to as LC. I know that my cost to represent myself in this matter (mostly involving 8 trips to various LC offices since I had to file papers, get information, etc. for mileage and parking fees plus some copying of documents) was $189. I estimated based on legal fees of $350 an hour for RAND's legal counsel plus travel, etc. that they spent approximately $15,000. Unfortunately if that figure is correct, the US taxpayers picked up 85% of RAND's costs as part of their federal grant and contract overhead. Legal fees and related costs to defend against lawsuits or claims by current or former employees are allowable in overhead calculations. Since 85% of RAND's income is from federal grants and contracts, then the federal fisc paid for 85% of these totally unnecessary and wasted costs. I don't think we would have had to bother with this silly side issue if I had access to IRS audits and closing agreements or to those of the FTB.

Initially, I was represented by a former boss and friend of many years who is a health lawyer, does mostly administrative health law, knows little ERISA, and is not a litigator. During the summer of 1996, while I was still working at RAND and being harassed, threatened with termination of my employment, etc., he warned RAND several times in writing of Section 510 including warnings to my immediate supervisor, RAND's Director of Personnel, and RAND's legal counsel, Cooley Godward, a very large and prestigious firm headquartered in San Francisco but without an office in the Los Angeles area. The documentation is in the PWBA files. But these warnings did not prevent my termination from employment in September 1996.

The first three-judge decision of the 9th Circuit Court of Appeals on Vizcaino v. Microsoft came down in early October 1996, and my attorney sent it to Cooley Godward. However, by November 1996, we were getting nowhere; so I went to PWBA. My attorney also suggested that I file a claim for late payment of last pay with the California LC to get RAND's attention. The first step in these claims is a conference, mostly to get rid of frivolous claims. If the employee doesn't appear for the conference, the claim is dropped. Appearance by the employer or his representative is optional. Most employers don't appear as it is a waste of time and money. At the conference on December 12, 1996, I appeared but did not bring legal counsel and was opposed by RAND's legal counsel, an associate from Cooley Godward flown down from San Francisco to litigate against me. They sent a Boalt Hall educated litigator for this 15–30 minute conference at which RAND did not even need to be represented. The only issue argued was whether or not I was an employee, and I had W–2, W–4, pay stubs showing RAND paid its share of FICA, and documentation of approval of my claim for California unemployment compensation that RAND never challenged. I prevailed, and the case would be scheduled for a hearing.

The hearing was scheduled for August 7, 1997. But a lot happened in those intervening months. In mid-March 1997, PWBA told me that they were investigating my claim further. I told them to go ahead and that I would be contacting the Inspector General of DOL because I feared that RAND would try to use its influence to stop the audit. I knew that a former Secretary of DOL was on RAND's Board of Trustees as well as many other politically influential and powerful people on not just their Board of Trustees but also the Board of Overseers of RAND's Institute for Civil Justice and other subunits' advisory groups as well. I also was aware that RAND had a ten-year $10 million contract from the PWBA (from September 1988 to March 1997) to establish a Center for the Study of Employee Health Benefits. The center's work was done by RAND analysts in collaboration with analysts from The Urban Institute and Harvard University.

A month later in April 1997, my PWBA case was turned over to an auditor/investigator in preparation for an audit of RAND's ERISA compliance. I agreed to cooperate fully even though after months of no negotiations or contact between my attorney and RAND's lawyers, they suddenly were making an offer to settle with me for about $7335, a good reference, and withdrawal of my LC late pay claim—and of course, my silence. In fact, if I had any qualms about going forward and cooperating with PWBA, that settlement offer quickly erased them. I don't need to buy references. Even adding in the $3300 for the late wage claim would hardly amount to a settlement for a totally frivolous claim. Obviously RAND was still claiming that I was not an employee and didn't want the LC to declare that I was one. Furthermore, I considered that offer to be in exchange for my First Amendment rights that definitely are not and never will be for sale. That also is why Section 510 is important.

The PWBA audit began sometime in June 1997. From that point on to this very day, it was under seal. No one including me can know anything until the investigation is completed. Since RAND has only 1000 workers total, it is clear to me that RAND probably is using its legal counsel to make PWBA subpoena every document and is stalling so that all statutes of limitation will be gone. In July 1997, the 9th Circuit Court of Appeals issued its en banc decision for the plaintiffs in Vizcaino v. Microsoft. (Since then, Microsoft appealed to the U.S. Supreme Court that refused to hear the case and let the 9th Circuit's decision stand.) I also knew that RAND had added Paul, Hastings, Janofsky & Walker to its legal team. An attorney from the Los Angeles office of that firm had written the amici curiae in the Vizcaino case on behalf of the American Electronics Association, California Chamber of Commerce, California Employment Law Council, and The Employers Group. I also was aware that the U.S. Supreme Court in May 1997 in a unanimous decision written by Sandra Day O'Connor in Inter Modal Rail Employees Association v. Acheson, Topeka

& Santa Fe Railway Co. had ruled that Section 510 of ERISA applied to welfare (i.e., health benefits) as well as vested pension benefits.

So I mistakenly thought that this time RAND just wouldn't show up for the August 7, 1997 LC hearing. I didn't think I could waste any attorney's time for $3300 to represent me. I planned to argue the case, if I had to, from paper, i.e., all the documentation of my being an employee, the date on the copy of my last paycheck, and the postmark on the envelope in which it was mailed to me. I really wasn't thinking about it much as my father passed away on July 12, 1997, and I was in Ohio for three weeks arriving back in California just a few days before the hearing. This time RAND not only had the same attorney from Cooley Godward flown down from San Francisco, but he had come down the day before to prepare his witnesses, the administrative person who had dealt with me during my last days at RAND and the CFO of RAND, the only officer of RAND whom I have ever met. Actually I was interested in meeting him because he was the study director of the RAND Health Insurance Experiment, the study that put RAND on the map in health research in the late 1970s and early 1980s.

I'm not a lawyer, and anything more about my background is not important. We had a hearing officer recording the proceedings on a boom box. Obviously it is never a good idea to represent one's self, though it is frequently done in these informal LC hearings, and surely not against a top litigator who objected quite a lot. The hearing took about 90 minutes. The RAND witnesses were well prepared with appropriate "I do not recalls." Of course, RAND argued that I was not an employee, but the CFO did state under oath that RAND complies with all laws. Well, I was determined to get something on the record, but I didn't know what to do when RAND's legal counsel objected to my questions (e.g., if RAND had ever been audited by the IRS or FTB regarding misclassification of employees and how much RAND was paying its legal counsel.) It took what I now recall as 4–5 times to get my most important question in the appropriate form, "Do you have any idea why so-and-so in personnel told me that RAND was caught by the tax people for misclassifying employees and that I was an employee?" Of course, he replied, "I have no idea."

The LC's decision was in two parts: The hearing officer mooted the question of whether or not I was an employee but ruled that I had not shown intent to pay me late. An appeal would mean going to Municipal Court and paying all RAND's legal fees if I lost. That wasn't worth the risk for $3300. I did want to get a copy of the tape of the hearing and requested it immediately, but it took a long time to get and then about 15–20 minutes was missing. I don't know for sure how long and can't resist saying that it may have been 18 minutes. It took a long time, many months, help from my State Assemblyman to get someone at LC to listen to the original master tape, to confirm that a portion of the hearing tape was missing, and to apologize to me. The missing portion happened to include the entire testimony of the RAND CFO!

All this is a pretty silly example of how far employers will go to cover up what might be in an IRS audit or closing agreement. The taxpayers of the United States paid 85% of RAND's costs. The taxpayers of California paid the costs of the hearing and all my calls and complaints about the lost tape. On the one hand, this is silly, and on the other is a sad way for a large and prestigious tax-exempt organization to conduct its business.

The classification of workers as employees creates tax costs for the employer as well as costly obligations regarding federal and state legal protections and rights for workers. I've looked at Thomas for the last several years, and there have been many bills about this issue. It's not very hard to tell if the bills favor employers or employees by which Member of Congress introduces and who co-sponsors them. Some are puzzling and amusing such as H.R.19, the Caddie Relief Act of 1999 introduced by Mr. Burton.

I do want to see two kinds of legislation passed eventually as a result of my experiences, and the first ones are three related bills, H.R. 769, 770, and 771 which Mr. Lantos introduced in the 105th Congress with Mr. Campbell and Mr. Shays as the only co-sponsors. All three bills relate to federal procurement and misclassification of employees by federal contractors. The sponsors appeared to be motivated by some constituent employers who wanted to give all their workers benefits and were at a competitive disadvantage to win federal contracts if they did so. These ideas should be revisited as we should not contract away good federal jobs with benefits to those private contractors who won't give some or all of their workers health insurance, vacation, paid holidays, or sick leave or call them employees so that they can take advantage of the Family and Medical Leave Act. At a time when so many workers are uninsured or underinsured for health care, this makes sense as good public policy.

RAND may well have violated the nondiscrimination part of ERISA for pension law by misclassifying mostly workers at the lower ends of its pay scale. I was making about $55,000 and was one of the higher paid members of my class. According to the *Pittsburgh Post Gazette* on September 28, 1999, regarding the opening of an office of RAND in Pittsburgh, "half of its (RAND's) workers are researchers who make an average of $85,000." Nondiscrimination in pensions has nothing to do with civil rights laws but with assuring that the highest paid people don't get more than their fair share of pension funds, ability to put away so much tax-sheltered v. lower paid employees. Ways and Means undoubtedly is familiar with this as it's the main part of ERISA that is very complex and much like tax code law.

Of course, health benefits in ERISA have no nondiscrimination requirements. An employer can write his health plan to include or exclude whomever he wishes so long as he doesn't discriminate by civil rights protected categories and then consistently and fairly administers whatever standards he set. I wonder if, perhaps there shouldn't be a non-discrimination clause for benefits for federal contractors, for example, if they aren't going to provide health benefits for 10% of the workers on a federal contract or grant, perhaps it should always be the highest paid people who can best afford to buy their own coverage. I'm not so sure that this isn't a good idea for all ERISA health benefits. For example, RAND (at the time I was there) paid 100% of the premium for the worker, better than the federal employees plan you all have. But that meant they paid about $300 for the highest paid workers who could afford the higher deductibles for the fee-for-service plan and only $150 for each worker who took an HMO. It wasn't a set amount or percent for each worker. The management of RAND definitely designed its health benefits to give more to the higher paid workers including themselves. And then there were some of us who worked right beside them doing the same kinds of jobs who didn't get any health benefits and whom I allege were illegally denied them.

Maybe if we made the employers who already do give health benefits to their workers and aren't going to stop doing so, meet some nondiscrimination standard, then we wouldn't have to have CHIP or continue Medicaid for workfare people at the bottom of the pay scale—and we could save some tax dollars. That seems fairer to me. And maybe any tax-exempt organization that gets federal grants and/or contracts should be required to give all its workers basic benefits. For example, university presidents are overhead, have good salaries, and always get benefits. So why shouldn't their janitor and laundry workers who also are overhead also have benefits? These have been issues at numerous universities including USC, and just in the past week at Johns Hopkins.

### 2. Full Disclosure of 990s

I hold the officers of RAND responsible and accountable for their actions. Since my alleged Section 510 violation happened just after the Taxpayers Bill of Rights legislation was passed in 1996, I waited for the regs to come out so that I could go over to RAND to get their 990 to learn how big their salaries are. By the start of 1999, I realized that I didn't care to know. I learned from the JCT Study that the regs came out in June 1999. I still don't care. But I think the public has a right to know. I don't think it will stop anyone from serving as an executive in a tax-exempt organization. The public knows your salaries and those of other high government officials. The salaries of major executives of for-profit corporations are published all the time. I volunteer in the development office of a tax-exempt organization that subscribes to a weekly publication, *Chronicle of Philanthropy* Once a year it publishes the 100 or so highest salaries in tax-exempt organizations. It's not surprising that presidents of large universities, conductors of major symphony orchestras, and the CEO of the American Red Cross make high salaries.

We are shocked or concerned only when they are paid so much and don't do their jobs appropriately or act in some illegal way. When they do, they harm the organization and all its employees and its mission. For example, about ten years ago there was such a scandal in Los Angeles involving the head of United Way. For a number of years thereafter donations to United Way were diminished. That hurt a lot of needy people who are served by United Way agencies.

Only a month after I came to RAND, I was surprised by an article in *Los Angeles* magazine that described how RAND had lobbied for zoning changes in Santa Monica. These changes had to be approved by the voters and would prevent zoning changes RAND wanted in order to develop its land commercially. Obviously some employee at RAND was upset about this as that person leaked an internal memo in which the CEO of RAND talked about the need "to ensure that our property rights are upheld." Indeed, as a tax-exempt organization, RAND did not pay property taxes on that land. RAND spent $200,000 to win that vote (The zoning changes had been put on the local Santa Monica ballot as an initiative.), and the opposition spent only $8000. Last fall I read an article in the *American Journal of Public Health* that detailed the very complex rules regarding lobbying by tax-exempt organizations. I know a little now about self-defense lobbying. RAND also got its employees to call voters on their own time after work. The lobbying expenses had to be reported on RAND's 990, and I'm sure that the opposition in Santa Monica was watching. So I know RAND and their attorneys were very careful to obey very complex lobbying laws. I only wish that they were as careful in complying with their ERISA plans.

As a footnote to that, RAND didn't commercially develop the land they got from Santa Monica for $250,000 in about 1950. It was a bargain even then as they were able to borrow $1 million on it. But four years after *Los Angeles* magazine reported these 15 acres of prime land to be worth $41 million, RAND sold 11.3 acres back to the City of Santa Monica for $53 million in October 1999 and retained 3.7 acres to build a new headquarters.

I believe that RAND now is complying with ERISA. RAND probably has rewritten its ERISA plans and either is or is not giving more people benefits. Whatever it is doing, it is complying with the law. However, when I alleged that RAND was violating ERISA, the officers of RAND were the fiduciaries of its ERISA plans. The situation is similar to that in DOL's suit against Time Warner in which DOL asked that the fiduciaries be held responsible and be removed from those positions in the ERISA plans.

In June 1997, RAND hired a highly qualified new head of Human Resources. It probably was time to clean up their personnel department that had been neglected for several years if not longer. The PWBA audit was beginning and still is ongoing. Only seven months earlier in November 1996 a sex discrimination case had been filed against them in U.S. District Court in DC. I am a declarant in that case which is under seal. I haven't spoken with my attorneys at Sprenger and Lang who represent the plaintiffs, but I am pretty sure I can say that and no more about it. I can say what is public knowledge, i.e., the case is still active with several motions being considered by the judge.

### 3. Public Disclosure of Grants and Contracts

While I agree with Mr. Anderson in principle, I think how much extra data would be required on the 990s for a place like RAND. Adequate alternatives should be explored. It is important also to know about federal contracts awarded to tax-exempt organizations.

The RAND situation also relates to this item. I prepared the following material over a year ago for Sprenger and Lang to share with attorneys who were considering representing me in ERISA litigation. It shows the motive for RAND's not giving some employees benefits.

### Benefits and Overhead Rates on Government Contracts and Grants

Benefits are an allowable expense on all federal government grants and contracts. The benefits rate is figured as a percent of salary or pay. RAND had a very generous benefits package for employees with a rate of 49% in 1995. Most universities also have generous packages but have rates around 25–33%. Overhead rates for government grants and contracts are negotiated annually between each organization and the government. They include rent, utilities, basic telephone, management, upkeep, and all supportive services (personnel, library, accounting, janitorial services, etc.). There are many pages of federal regulations governing how these rates are negotiated. Most university overhead rates are around 50%. In 1995 RAND's was 79%. I think these figures are correct, and RAND lowered them some in 1996 to 47% for benefits and 72% for overhead. These are approximate but very close figures. I can't really explain the high overhead given RAND owns its land and has a building which surely has been paid off for many years. RAND also has an $84 million endowment.

### Calculation of Grant and Contract Budgets

In most research, the biggest single budget category always is salaries. (The major exception is nuclear or other high tech research that requires lots of expensive equipment.) Other categories beside salaries might be some computers or office equipment, travel money to go to professional meetings or research sites, maybe some extra postage or phone lines for surveys or incentives to pay respondents to surveys, etc. For salaries, first you apply the benefits rate and then you take the overhead rate to get the cost billed to the government. So let's look at the calculations in 1995 two ways:

Take $100 worth of salary. A "consultant" got 14% more in lieu of benefits or $114. Then with overhead, take 179% of that or $204 (rounded to nearest dollar). An employee got $100 plus 49% benefits or $149. Then take 179% of $149 that is $267. The "consultant" is illegally denied benefits, and RAND charges the government $64 less for $100 worth of work. That adds up. Let's do the same now for my salary for one year with all figures rounded to even thousands. As a consultant, I got $55,000 and with 79% overhead, that is $98,000. As an employee, I'd get $49,000 base pay that with benefits would be increased by 49% to $73,000 on which you then figure the 79% overhead for a total of $131,000. That's a difference of $33,000 a year for my salary only! And I am just one person in the class!

Most grants have ceilings of how much will be paid; so one needs to stay under them. On contracts where there is competitive bidding, misclassifying employees as consultants gives one a competitive advantage. Of course, RAND's rates are so high that really all it did, was decrease its competitive disadvantage. Both grantees and contractors are supposed to obey all federal labor laws including ERISA. Of course, RAND now probably is just using all the ERISA loopholes to do the same thing but be in compliance with ERISA.

There are a lot of people in my ERISA class who were misclassified for only 3–6 months so that they didn't notice or didn't care and actually were grateful and happy to become employees. Deny someone benefits for a year, and he/she notices. Deny four people benefits for three months each, and they don't care—but it's still one year of ERISA violations. If the grocer wants to cheat and he's smart, he puts his thumb on the scale of a lot of people rather than resting his elbow on the scale for one person.

Some of the best ERISA attorneys in California reviewed my ERISA case to consider representing me in litigation. If their names were known, everyone is ERISA circles would say, "If so-and-so says she has a case, she does." But there are no punitive damages or pain and suffering in ERISA—so legal counsel for employees must consider the financial risk of representing clients on contingency versus the potential damages involved. We don't know the size of the class, and we doubt there are many people with large vested pension interests. I am pretty sure that the class is at least 100 in size. Proportionately to the Time Warner class size estimated in DOL's suit, the RAND class is bigger as RAND has only about 1000 workers. So no one wanted to take that risk. Some didn't want to deal with a Section 510, but Sprenger and Lang's attorneys were ready to litigate that part. They don't do ERISA and don't practice in California where the case would have to be filed. But they do wrongful terminations all the time and believed my Section 510 case was strong.

As a result of all the victories by the attorneys for the Microsoft plaintiffs in the 9th Circuit, there has been a plethora of ERISA class actions here. But all the cases are filed against large employers such as ARCO and PacBell. RAND with 1000 workers is not a particularly small employer at all, but with only the worth of illegally denied benefits to be recovered, it is not large enough to obtain legal counsel on contingency. It is unlikely that anyone who works for a smaller employer with an ERISA case that is mostly health benefits denials is going to get legal counsel. There aren't that many ERISA attorneys for plaintiffs anyhow unless one is a member of a union.

I also looked into possible qui tam litigation as RAND was under billing the government and gaining a competitive advantage by not giving its employees benefits. The multiplier factor is astounding. I came to the NCI 36-month grant on which I worked in its 16th month. The study director before me for the first 15 months had benefits. Shortly after I started, I learned the study already was over six months behind schedule. I was not able to recover that time in the year I was there and was without benefits. I was sure that the project was not going to meet its goals, mostly because of enormous problems with a sample gathered months before I began work on the project. I also was sure that the principal investigator would take a one-year no-cost extension, and that happened. The $33,000 saved by not giving me benefits went toward paying the salaries of the principal investigator and other staff in the added no-cost year. I consulted the Government Accountability Project and a qui tam attorney. Qui tam usually deals with over billing the government, and no one knew how one might apply it to the RAND situation. Of course, it is just as egregious and against public benefit. And in some ways, it is worse as RAND cheated its own employees.

The statutes of limitation for my class and me are gone or rapidly going, and I believe RAND and its attorneys want to stall the audit until they all are gone. However, I haven't worried about that for the past six months since I looked into cost accounting principles and federal procurement laws and regulations for government grants and contracts for salaries and wages. All grantees and contractors must obey all federal laws, particularly labor and civil rights ones. They also must treat people working on federal funds consistently with those who are not. RAND receives approximately 85% of its annual budget (about $125 million) from the federal fisc or about $106 million a year. Whatever the size of my class, one then can project that 85% of their time was charged to federal funds. So 85% of the ERISA violations also are violations of federal procurement law. The Secretary of Labor is responsible for labor standards on all federal grants and contracts and has the power to withhold federal funds for such violations. Therefore, I think this ERISA case also is a case about federal procurement law. I checked this out with quick and unofficial opinions from the people at the Office of Federal Procurement Policy at OMB, and they saw no problem with this reasoning. Obviously it needs to be examined further which I am sure DOL is doing. The audit will go on for some time more yet.

I have feared that all statutes of limitation would be gone; RAND would be in compliance with ERISA; and some closing agreement would be made with PWBA behind closed doors. So perhaps nondisclosure for tax-exempt organizations should involve PWBA audits and any other federal investigations of the organization. I don't fear RAND's getting away with settling this matter behind closed doors any more. The audit may not be settled until we have a new President, but it doesn't matter who is President or Secretary of Labor. They will be honorable people and will take seriously their oaths to uphold the laws of the United States. I hope that they will require, as part of any settlement, to make restitution to every member of my class and to me.

The saddest thing to me is how RAND deceived its own employees. The Microsoft plaintiffs worked next to others for years watched them get benefits and become wealthy on stock options that they did not receive. I know how they felt. For a year I watched other people after a few months of work become employees and get health benefits. I was reminded every month when I wrote my check for COBRA premiums. Then when COBRA ran out and I had to take lesser conversion coverage with no prescription drug benefit, I still had that monthly premium check as a reminder. But the thing that bothered me the most is that the people who became employees were pleased as it was an acknowledgment of their good work and performance. They were good enough to be employees at RAND. They were not likely to complain to the government or anyone else. They didn't know that during those first months they worked at RAND they already were employees and entitled to benefits. They are a part of my class. They deserve to know and to be compensated for that loss even if it is only for a few hundred dollars each.

While researching federal procurement law, I learned something else of interest that I mentioned earlier: As part of overhead, RAND could include legal and related costs for defending any litigation brought by an employee or former employee. Since 85% of its income comes from the federal government, that would be an 85% matching by the tax payers of any legal defense funds RAND spends from its other income that also derives from its tax-exempt status. I am very glad that I didn't get legal counsel on contingency for ERISA litigation. I would not want to see them have to litigate for me on contingency with their funds against federally subsidized legal counsel. However, in audits/investigations by the government, RAND can be reimbursed for legal and related costs only if the government allows it as part of a settlement. RAND has plenty of other funds to fight the government and can go on doing that for a long time if it wants to do so.

Last but surely not least, in November 1999, I learned the most astounding thing of all when I looked at PWBA's appropriation for FY99 that was $90 million. RAND gets about $106 million annually from the federal government. PWBA's FY00 appropriation is $101.8 million. However, I must say to both parties in Congress that the PWBA appropriation levels are disgraceful. They are almost ludicrous compared to the extra few billions you give NIH each year. When this problem with RAND began four years ago, PWBA was responsible for ERISA and COBRA for everyone in the country in 15 offices around the country. Since then, Congress has added HIPAA, NMHPA, MHPA, and WHCRA to PWBA's responsibilities that include administration, education of employers and employees, and enforcement. Most people who have health insurance in this country get it under ERISA—125 million or more. That isn't even $1 per person. I don't even know what figure to suggest it should be, but the Appropriations Committee surely should look at this.

### 4. Linked Data

While this item would seem to have nothing to do with RAND, it does because Dr. Lillard's name looked familiar. Indeed while I did not know him, Dr. Lillard was at RAND at the same time I was. That coincidence provides me with an opportunity to express to him and the many other fine researchers at RAND my deep regret that they will be harmed in any way by this whole affair. I always believed that this matter should have been handled and solved internally. The PWBA has documented evidence of my efforts and those of my legal counsel to get RAND to talk with us as well as written evidence of warnings about Section 510. If the officers of RAND violated Section 510 of ERISA against me as I allege, then they did so with impunity.

### CLOSING THOUGHTS

I do wish to bring to the attention of Congress one additional ERISA issue. I don't think anyone really has many good ideas about what to do about ERISA. We'll know by June what the U.S. Supreme Court thinks in the Herdrich case it heard a few weeks ago. My best guess is that they won't want much to do with this messy law and gladly will throw it back to you in Congress. Maybe ERISA should only be about pensions. I surely am not that wise, but I will be asking my Congressman to introduce one very limited piece of ERISA legislation next year to revise Section 510 and to make some technical changes in the law. A couple months ago a leading ERISA advocate told me about a man, I believe in the 7th Circuit area, who just lost his Section 510 case on appeal. I hope that his Representative in Congress will join in co-sponsoring this bill, and I hope that his representative is of the opposite party from mine, as I would like to have a bipartisan bill. While it is probably hoping too much, I would love to see it stand alone rather than be tacked on to some big bill because I would like every member of Congress to consider it and vote for it.

A statement about Section 510 must be included in every pamphlet describing ERISA benefits for every worker who is covered by an ERISA plan. As presently constituted, it surely is not worth all that paper on which it is written. This is one part of ERISA that requires some penalties/fines/punitive damages/whatever. Perhaps the statutes of limitations also should be increased for Section 510. ERISA cases are heard in federal court by judges, but Section 510 is one part that should have jury trials. Federal judges are and should be appointed for life. No one should be harassed or fear loss of work, references, or employment merely for speaking out about violations of the ERISA law or asking for clarification of his/her ERISA rights. However, I think wrongful terminations might be handled more appropriately by juries of peers whose jobs aren't guaranteed for life than by judges with lifetime appointments.

The technical modification would amend many sections of ERISA by changing "welfare" to "health" wherever it appears. Those ERISA welfare benefits are health benefits. And they are how most working people in this country get their health insurance. "Welfare benefits" is a confusing term. I don't know the legislative history, but I am very curious about how Congress came up with this term originally.

I have tried to weave a great many disparate strands together and surely have left many loose ends and threads. I regret that I could not create a more seamless tapestry or write more clearly. I hope my comments have been of assistance. Thank you for your time, attention, and consideration.

Sincerely yours,

LINDA FISHMAN

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REED & BROWN, LLP
PASADENA, CA
*March 13, 2000*

A.L. Singleton, Chief of Staff, Committee on Ways and Means

Re: Comments on Joint Committee on Taxation Staff Report—Dated January 28, 2000

This Memorandum is intended to comment on the proposals contained in the Study of Disclosure Provisions Relating to Tax-Exempt Organizations ("the Report") prepared by the staff of the Joint Committee on Taxation, dated January 28, 2000 and, in particular, the section addressing lobbying expenditures by tax-exempt organizations, commencing on page 106 of the Report.

This Memorandum concerns the Report's three recommendations stated at pages 118 and 119. Each of the recommendations is designed to increase charities' reporting obligations and to expand the information that charities must provide in their annual IRS filings. Specifically, staff suggests modifying Schedule A to IRS Form 990 ("Schedule A") to require "both electing and non-electing [under Code § 501(h)] public charities to provide a detailed description of the legislation addressed in their lobbying efforts and the manner in which organizations engaged in lobbying activities." Secondly, staff suggests that Schedule A be changed to require charities to disclose amounts attributable to self-defense lobbying (direct lobbying concerning an issue affecting the organization's existence or powers). Third, staff suggests Schedule A be further modified to require charities to disclose all non-partisan study, analysis and research that contains "a limited call to action." The Report defines the term "limited call to action" to mean those actions listed in Regulation § 56.4911–2(b)(2)(iii)(D). The Report would require disclosure of all non-partisan studies that identify "one or more legislators who will vote on the legislation as "opposing the communication's view...; being undecided ...; being the recipient's representative in the legislature; or being a member of the legislative committee or subcommittee that will consider the legislation." Id. Under existing law, communications of self-defense and non-partisan study do not constitute lobbying.

We respectfully object to the proposed changes to the Internal Revenue Code (the "Code") suggested in the Report for the following reasons:

1. The recommendations effectively expand the definition of lobbying. Detailed Regulations already define grass roots and direct lobbying and require amounts spent on such lobbying to be reported. Staff recommendations add new categories of disclosure (self-defense and non-partisan study) that are now expressly not reportable lobbying.

2. The recommendation to regulate "limited calls to action" is onerous and unjustified. The well-accepted understanding of the Code and Regulations among exempt organizations has been that a communication from an exempt organization to its constituents or others which expresses a view on legislation, but does not include a call to action, is not a lobbying communication and is not reportable by the exempt organization. The Report moves substantially beyond that position, in that it proposes to impose reporting requirements even for those communications which it describes as including a "limited call to action" which it defines as being a communication which identifies one or more legislators who will vote on the legislation as (i) opposing the organization's views with respect to the legislation, (ii) being undecided with respect to the legislation, (iii) being the recipient's representative in the legislature, or (iv) being a member of the legislative committee or subcommittee that will consider the legislation. The staff argues that such activities constitute a form of advocacy of which the public should be aware. The Staff admits that such activities do not constitute lobbying [page 119 of Vol. II of the Report], but conclude that the mere fact that the activities do not constitute lobbying does not eliminate the public interest in access to information concerning such expenditures. The Report fails, however, to explain what the basis for that interest may be, other than mere curiosity or the unstated interest of the government in further regulating the lives of its citizens. If Congress believes that communications which do not contain a call to action should be regulated, Congress should explain the reason for such regulation. It appears to us that, at its root, this proposal really grows from the conviction on the part of some that tax-exempt status is really a gift from the government and represents a tax subsidy. We believe that reasoning has been rejected by Congress and should not be reintroduced through the means of the Report.

3. The recommendations needlessly increase complexity of already intricate regulations. Lobbying regulations are already cumbersome and difficult to understand. The Staff recommendation would create yet another division within the maze of regulations—lobbying that is not reportable lobbying, but still must be disclosed on the organization's Form 990.

4. The recommendations will add new record keeping requirements and increase expense to exempt organizations. The Report proposes changes to the existing law which will further complicate an already complicated portion of the law, forcing tax-exempt organizations to spend ever more of their resources analyzing their communications, calculating the percentages of those communications which constitute, or may hereafter constitute, lobbying communications, or "limited calls to action" and compiling reports to the IRS.

5. The recommendations are contrary to the clear direction of the Congress, especially Senate Finance Chairman Roth, toward tax simplification. These recommendations will add reports and expense whereas the Senate Finance Committee has championed the reduction of reports and the simplification of record keeping. Changes to existing regulations should not be considered unless they simplify and decrease burden and expense.

6. The recommendations risk misleading the public about the lobbying activities of exempt organizations. By requiring disclosure and reporting of activities that are expressly not lobbying, the recommendations may mislead the public by portraying lobbying activities in too large a scale. The recommendations are apt to confuse more than inform.

7. The recommendations will further chill the voice of non-profits in the public square. The Internal Revenue Code, Treasury Regulations and IRS activity in the area of lobbying and political activity already exert an "in terrorem" effect that causes non-profits to withhold communicating their views for fear that the IRS will impose sanctions. Non-profit speech is thereby artificially curtailed by IRS activity. The issue that should be addressed is how to bring clarity to IRS actions and regulations in this area. Increasing the burden and threats to non-profits that express views on legislation only exacerbates the existing problem.

In 1999, both houses of Congress voted, as part of the 1999 Tax Bill, to eliminate the statutory difference between grass roots and direct lobbying. Both houses recognize that the distinction is artificial, does not advance any legitimate governmental goal, and that removing the distinction will help simplify the Code. The Report's recommendations are diametrically opposed to simplification and, if enacted, will further complicate the Code. We respectfully urge that the recommendations of the Report contained on pages 118 and 119 be rejected.

Respectfully submitted,

STEPHEN W. REED,
*General Counsel,*
*Focus on the Family and Family Research Council*

**Statement of Free Speech Coalition, Inc., McLean, Virginia**

INTRODUCTION

The Free Speech Coalition, Inc. is pleased to submit these comments along with other organizations and companies with respect to the Joint Committee on Taxation's Study of Disclosure Provisions Relating to Tax-Exempt Organizations. This study comprises the second volume of a three-volume Study of Present-Law Taxpayer Confidentiality and Disclosure Provisions which was published on January 28, 2000, pursuant to Section 3802 of the IRS Restructuring and Reform Act of 1998.

The Free Speech Coalition, Inc. ("FSC"), founded in 1993, is a nonpartisan group of ideologically diverse nonprofit organizations and the for-profit organizations which help them raise funds and implement programs. Our purpose is to protect First Amendment rights through the reduction or elimination of excessive regulatory burdens which have been placed on the exercise of those rights.

FSC is joined in these comments by several concerned tax-exempt organizations and for-profit companies, including: Accuracy in Media; American Center for Law and Justice; American Conservative Union; American Preventive Medical Association; American Target Advertising, Inc.; APMA Legal & Educational Foundation; Bruce W. Eberle & Associates; Citizens Against Government Waste; Citizens United; Coalition to Stop Gun Violence; English First; Freedom Alliance; Gun Owners of America; High Frontier; The Leadership Institute; National Center for Cardiac Information; National Rifle Association; National Right to Life Committee; Policy Analysis Center; Public Advocate; 60 Plus Association; Squire & Heartfield Direct, Inc.; Tri-State Envelope Corporation; United Seniors Association, Inc.; United States Border Control; and U. S. Taxpayers Alliance.

SUMMARY

FSC and its co-commenters fully support efforts to ensure accountability within the nonprofit community, and reasonable oversight of that community by the Internal Revenue Service. While the road to the Joint Committee's study may have been paved with good intentions, several of the study's recommendations are badly flawed. Indeed, it is difficult to conclude that certain of the important matters dealt with in the study were truly "studied."

Specifically, we are concerned that, in trying to ensure the provision of more complete information regarding tax-exempt organizations to the general public, enactment of the study's findings would instead inhibit the orderly resolution of audits, guarantee the diversion of charitable assets from tax-exempt purposes to legal defense purposes, and facilitate greater opportunity for IRS abuse of its oversight authority through the publication—and transmission to state authorities—of interim (read unbalanced and incomplete) findings and analyses in the determination and audit process.

To its credit, the study acknowledges the existence of a tension between tax-exempt organizations' right to privacy, arising in part out of their concern about misuse of private information, and the study's purported principal objective—the public's right to know.

Curiously, there is no indication that the general public has even the slightest interest in the additional information proposed to be compelled to be released at substantial expense under the study's recommendations. Even the provision in the statute (Section 3802) which called for the staff study was in neither the House nor Senate bill, arising spontaneously in the conference committee's version—probably at the urging of regulators seeking greater power over the independent sector of the economy. Yet the study finds that "information regarding tax-exempt organizations ... should be disclosed unless there are compelling reasons for nondisclosure that clearly outweigh the public interest in disclosure." (Vol. II, pp. 6, 80–81.)

FSC and its co-commenters urge the Committee to consider alternatives to proposing new legislation. If, however, it deems new federal legislation appropriate, such legislation should focus more on scrutinizing the enforcement activities of the IRS, thereby reducing the Service's vulnerability to charges of abuse in its exercise of authority over the nonprofit community.

## COMMENTS

*1. Requiring the disclosure of more documents relating to audits and closing agreements will reduce the chance of anything being resolved short of litigation.*

Audits of tax-exempt organizations are perceived within the nonprofit community as designed to ensure compliance with applicable law, and to obtain effective corrective action where necessary. Closing agreements have been the principal vehicle that the IRS has used over the past decade to resolve cases and obtain compliance by tax-exempt organizations.

Currently, tax-exempt organizations have strong incentives to resolve an audit as quickly and painlessly as possible. While such incentives do not preclude occasional gamesmanship, or strategic withholding of information, they certainly promote prompt and complete responses to appropriate requests. Further, if a closing agreement would not be made public, counsel for the tax-exempt organization may be far more likely to accept an admission of liability on an issue that is questionable (or capable of being litigated effectively).

By contrast, the prospect that documents will be publicly released, as the study recommends, would lead to posturing by both sides, substantially diminishing the likelihood of settlement. Negotiations would be conducted as if everything will be reported in the newspaper. The exempt organization's counsel will seek to assess how each document could be "spun" for greatest journalistic (or, as regards information provided by the IRS to state attorneys general, greatest political) impact.

The study observed, speciously we would submit, that:

> There are a variety of reasons why both the IRS and a tax-exempt organization may wish to settle a matter that are independent of whether the activity will be disclosed. These include the costs of litigation, as well as the likelihood of ultimate success on the merits. Further, if a tax-exempt organization chooses not to settle a matter, the only option will be litigation, which also will result in public disclosure. With respect to the effect of disclosure on voluntary compliance, the Joint Committee staff notes that it would be inconsistent with an organization's exempt purposes and fiduciary responsibilities to continue to engage in activity that violates the law. Thus, tax-exempt organizations should continue to have an interest in voluntary compliance and correction of inappropriate activity regardless of whether such activity is disclosed publicly. [Vol. II, p. 86.]

However, the Joint Committee staff's analysis lacks mature consideration of several points. To begin with, speaking bluntly, the IRS' assertion of a finding does not make it true. Further, the IRS has been known to experiment with aggressive, untested legal theories upon unsuspecting tax-exempt organizations, based on iterations of their famous "facts and circumstances" test, which at least one federal appeals court has called "no standard at all." United Cancer Council, Inc. v. Commissioner of Internal Revenue, 165 F.3d 1173 (7th Cir., 1999).

As noted above, under current law, with a private agreement, the balancing of costs between paying the penalties of the settlement and those incurred by litigating the issues, with consideration of the likelihood of ultimate success, may lead an organization to prefer settlement over defense of its rights in court—even where such a defense would likely prove successful. On the other hand, if the nonprofit's donors are likely to hear of the organization's essentially false admission, the cost becomes far higher. The study simply does not deal with that truth.

Further, while public disclosure may occur pursuant to litigation, such disclosure—e.g., the IRS alleges that the nonprofit has engaged in X practice, but the nonprofit denies the allegation and is fighting the IRS in court—lacks the impact of a public admission of impropriety. Thus, it would normally be in the tax-exempt organization's best interests to defend its innocence, when the only recourse would be public disclosure of admitted tax violations.

Likewise, the Joint Committee staff's assertion that a nonprofit should cease any activity that the IRS does not favor, on the IRS' word alone, presumes a deference that the IRS has not earned.

Clearly, one likely consequence of the enactment of the study's findings would be that most disputes will wind up in court—thereby increasing the cost of handling audits for both exempt organizations and the IRS. Given the current environment of limited resources dedicated to exempt organization oversight, the study's proposals (issued with the intent of facilitating greater oversight of tax-exempt organizations) may logically result in fewer audits and less oversight.

While the Joint Committee staff proffered its proposals with the justification that "public oversight of tax-exempt organizations generally is viewed as increasing compliance with Federal and State laws" (id., p. 65), it is far from self-evident that these proposals would result in improved public oversight of tax-exempt organizations. As the study itself acknowledged:

> Some argue that increased disclosure will not result in an increase in the quality and quantity of information received. It has been suggested that tax-exempt organizations may attempt to manipulate publicly available information so that the public perceives the information in a more favorable way, and that persons who misuse tax-exempt organization funds will actively conceal information. Some argue that organizations may be reluctant to bring violations of the law to the attention of the IRS or work with the IRS to correct a problem if they know that the violation will be made public. [Id. at 66.]

Having acknowledged the risk that tax-exempt organizations would become less forthcoming if the Joint Committee's recommendations are enacted, the staff express confidence that yet other burdens on the tax-exempt community—further reducing "flexibility regarding characterization of expenses," and modifying penalties for violations of the law—would somehow ensure the success of their scheme. Again, the cycle of greater legal fees, fewer charitable services, and reduced oversight of the tax-exempt community can be expected to result.

*2. Increasing the complexity of IRS Form 990 reporting will increase the administrative cost, as well as accounting cost, of preparing and filing these annual forms, with no real benefit to anyone.*

As the Joint Committee staff acknowledges, "[m]ore information is not necessarily better; rather, information needs to be tailored to those who will use it.... Any proposals relating to disclosure should be examined to determine whether they will in fact serve the purposes for which disclosure is made." Id., p. 67.

The Joint Committee staff recognizes this as a significant concern with the Form 990. They cite comments which stated that "the current Form 990, while containing valuable information, may also be confusing, particularly to members of the general public." Id. Nevertheless, the staff recommend that the Form 990 be modified to include "information regarding how well an organization accomplishes its exempt purposes that may not be relevant to whether the organization is complying with the Federal tax laws." Id., p. 90.

Evidently, the staff's view that "information regarding tax-exempt organizations ... should be disclosed unless there are compelling reasons for nondisclosure that clearly outweigh the public interest in disclosure" is not even limited to materials with at least an arguable relationship to legal compliance. Tax-exempt organizations would be obliged to present a compelling reason to limit disclosure of any information that could conceivably be asked, so long as such information is allegedly "relevant to the public in order to oversee the tax-exempt sector" id., p. 90—at least, such is the goal of the Joint Committee staff.

Not that such demands are cost free. The Joint Committee staff observes that there are direct costs of disclosure which should be taken into account—costs which may be quite burdensome to smaller organizations. Id., p. 67. They further suggest analysis of whether the cost of the disclosure is appropriate relative to the public benefit of the disclosure. Id.

Thereafter, the study ignores such observations and suggestion. In the staff's detailed recommendations regarding changes to Form 990, the significant cost of increased disclosure was not even discussed, and relief from such burdens is dismissed out of hand. Id., pp. 92–93. Only the interests of state regulators and of those entities which serve as self-appointed guardians of the nonprofit community were deemed worthy of consideration.

*3. The public disclosure of pending applications for exempt status (and supporting documents) can be expected to lead to the further politicization of the IRS*

The Joint Committee staff expressed concern that "an organization may be in operation and the public may believe the organization is tax exempt and, in the case of purported section 501(c)(3) organizations, incorrectly assume that donations to the organization are tax deductible." Id., p. 87. Thus, the Staff concluded public disclosure of pending applications should be necessary.

That is an extremely weak argument for increased disclosure. It might be more persuasive if the IRS did not already provide a publication (and Internet access) allowing prospective donors to determine the tax-exempt status of a prospective donation recipient, but there is clearly no need for "reform" in this area. At least the study does not point to any need.

Further, the Joint Committee staff appear oblivious to the resultant danger that this practice would lead to the further politicization of the IRS. Imagine a press report regarding a pending application for tax-exempt status by an organization addressing abortion, or global warming, or international trade. At once, competing interest groups begin to lobby Members of Congress and Administration officials to intervene, either in support of, or opposition to, the application. Or consider the well-connected tax-exempt organization that wishes to avoid competition in representing a given viewpoint. Perhaps an influential public figure demonstrates his unhappiness with an existing organization by seeking to quash the application of a new group affiliated with the existing organization.

What benefits would result from this publicity which would in any way justify such risks and costs?

*4. The provision of preliminary findings to state officials during the IRS audit process facilitates further harassment of tax-exempt organizations.*

The Joint Committee staff has recommended that the IRS be permitted, prior to a final determination to deny or revoke tax-exempt status, to disclose to State Attorneys General and other nontax State officials or agencies audit and examination information concerning tax-exempt organizations. In addition, the Joint Committee staff has recommended that the IRS be permitted, either upon request or on its own initiative, to share audit and examination information concerning tax-exempt organizations with nontax State officials and agencies with jurisdiction over the activities of such organizations when the IRS determines that such disclosure may facilitate the resolution of cases. Id., at 104.

Purportedly, these recommendations would: (1) enhance the combined efforts of the Federal and State governments to protect the public by promoting the continued flow of information from State officials to the IRS; (2) improve the ability of State officials to monitor compliance with nontax State laws affecting tax-exempt organizations and to enforce and pursue correction of violations of such laws; and (3) facilitate the participation of both the IRS and State officials in the resolution of cases involving significant charitable and fiduciary violations by making more complete information available in earlier phases of such cases to both State officials and the IRS. Id., at 104–05.

Admittedly, this practice would make the punishment of tax-exempt organizations far more efficient. It would certainly "facilitate the resolution of cases" by encouraging state bureaucrats to "pile on" tax-exempt organizations while they are already investing scarce resources in responding to the IRS audit.

But what of the accused? Does the tax-exempt organization become guilty until proven innocent—before two jurisdictions concurrently? What if the organization lacks resources to defend both at once?

## CONCLUSION

FSC strongly opposes the Joint Committee Staff's recommendations because the additional burdens which would be imposed upon tax-exempt organizations (and upon the IRS) would be infinitely greater than any possible public benefit arising from their implementation.

The Joint Committee Staff, while recognizing a tax-exempt organization's right to privacy, appears oblivious to the effect of compelled disclosure on these organizations' First Amendment rights. The U.S. Supreme Court has long recognized "that significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest. Since NAACP v. Alabama we have required that the subordinating interests of the State must survive exacting scrutiny. We also have insisted that there be a 'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed." Buckley v. Valeo, 424 U.S. 1, 64 (1976), addressing the constitutionality of the Federal Election Campaign Act of 1971. Thus, the Joint Committee Staff's recommendation that exempt organizations be forced to disclose information on the Form 990—information that expressly has no relation to enforcement of the laws—would appear to explicitly violate the First Amendment protections accorded exempt organizations.

We welcome the opportunity to work with the Committee on this matter so that it may better understand the adverse effects of new burdens being placed upon the nonprofit sector.

**Free Speech Coalition, Inc.**

Accuracy in Media
American Center for Law and Justice
American Conservative Union
American Preventive Medical Association
American Target Advertising, Inc.
APMA Legal & Educational Foundation
Bruce W. Eberle & Associates, Inc.
Citizens Against Government Waste
Citizens United
Coalition to Stop Gun Violence
English First
Freedom Alliance
Gun Owners of America
High Frontier
The Leadership Institute
National Center for Cardiac Information
National Rifle Association
National Right to Life Committee
Policy Analysis Center
Public Advocate
60 Plus Association
Squire & Heartfield Direct, Inc.
Tri-State Envelope Corporation
United Seniors Association, Inc.
United States Border Control
U. S. Taxpayers Alliance

JOHN HOWARD

March 10, 2000

Al Singleton
Committee on Ways & Means
U. S. House of Representatives
1102 Longworth
Washington D.C. 20515

Mr. Singleton:

**Subject: Lobbying Tax**

I strongly oppose any plan to assess a 'lobbying tax' upon ministers, pastors, priests or other religious representatives. Such a tax amounts to hindering ministerial freedom of speech, in terms of communicating issues political or otherwise, to their respective congregations, to which they are held accountable and to whom look to leadership as it impacts their individual spiritual walk. I would find it contemptible should anyone in government attempt to enforce any kind of 'lobbying tax' designed to limit religious voices at any level. This is tantamount to tampering with church activity and so consequently, it is, by design, a way in which a government law may be the beginning of a federally established religion by coercion or manipulation. I refer you to the first amendment which says:

> **"Congress shall make no law respecting an establishment of religion, or prohibiting the FREE exercise thereof, or ABRIDGING the freedom of speech, of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances."**

Hopefully, this 'lobbying tax' is simply a rumor and nothing else, since it would be a disingenuous action to dignify any such notion considering the level of government in which YOU function. However, should this be more than simply a rumor, my question would then be: "Are all agencies with 501© status coming under this tax equally or just those agencies considered to be politically incorrect (the ones that proclaim and uphold the Constitution and those rights afforded to the citizens of this country)?".

Respectfully,

John Howard

John Howard

P.O. Box 2152
Branson West, MO 65737

**Statement of Independent Sector**

I. INTRODUCTION

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

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

Independent Sector and the many charities it represents have a keen interest in ensuring that charities provide public disclosure of key information to help ensure that they operate strictly in the public interest and not for private benefit. Charities depend on public trust to raise money and carry out their missions, and transparency is essential to maintaining that trust. For this reason, IS supports twelve of the nineteen recommendations for additional disclosure made in the Joint Committee on Taxation Study on Disclosure by Tax-Exempt Organizations (hereafter, "the JCT Report").

In particular, IS strongly urges Congress to adopt the JCT recommendation that electronic filing for exempt organizations be greatly accelerated and that the Form 990 be redesigned to be far more understandable for members of the public. A substantial amount of information about charities is already available, but it is not as easy to find and to use as it should be. Of all the proposals made, IS believes this proposal has by far the greatest potential to improve public oversight of charities and to ensure that they are serving public and not private purposes.

IS does, however, take issue with the JCT Report concerning the appropriate analytic framework for evaluating proposals for additional disclosure. IS believes that charities' disclosure obligation derives from their role in serving public interests, not from their tax treatment. Many taxable taxpayers receive exemptions for part of their income or tax benefits of comparable value. The JCT Report correctly recognizes that these tax benefits do not justify mandatory disclosure of return information by taxable entities and individuals; the result should be no different for charities and other exempt entities.

Charities must operate with a high degree of transparency to ensure the public trust essential to the performance of their social role. However, charities are fundamentally private entities and as such are entitled to a substantial zone of privacy with respect to their internal decision-making process. Moreover, in certain key contexts confidentiality is also essential to fair and efficient tax administration. Finally, the burden of additional disclosure with respect to public policy related activities will create an undue chilling effect on charities' participation in the development of public policy, an effect that is not in the public interest. Accordingly, weighing the costs and benefits of additional disclosure, IS strongly opposes seven of the JCT recommendations, including the three recommendations for increased reporting on charities' participation in the public policy process.

II. FRAMEWORK FOR ANALYSIS

*Independent Sector has long advocated public disclosure by charities of substantial information related to programs and finances as a key mechanism for ensuring that charities meet their obligation to operate strictly in the public interest. Consistent with this long-standing commitment, IS supports many of the recommendations offered in the JCT Report.*

Public trust is charities' most important asset. Maintaining public trust requires a high degree of transparency in charities' operations. As a collective voice for charities across the country, Independent Sector has consistently supported initiatives to guarantee the public broad access to information about the financial and programmatic operations of charities. For example, IS strongly supported the recent legislation requiring charities to mail copies of their Forms 990 and 990–PF on request. Likewise, IS has consistently supported increased funding for IRS review of Forms 990 and 990–PF to ensure that all charities are fully and accurately meeting current disclosure requirements. Finally, IS also strongly supports electronic filing and related initiatives to give the public immediate on-line access to all Forms 990 and 990–PF.

Consistent with this long-standing commitment, IS welcomes the opportunity to present its views to the Ways and Means Committee on additional federal tax disclosure by charities. IS supports the majority of the specific recommendations contained in the Joint Committee on Taxation's recent report.

*2. IS believes that charities' public disclosure obligations derive from charities' fundamental nature as voluntary associations formed by private citizens to advance the public good—not from charities' receipt of favorable tax treatment.*

The JCT Report suggests that charities' public disclosure obligations derive principally from charities' favorable tax treatment—*i.e.*, tax exemption and the right to receive deductible contributions—which the Report regards as the equivalent of a government subsidy. Independent Sector disagrees with this premise in two important respects.

First, IS believes that charities' public disclosure obligations derive from charities' fundamental nature as voluntary associations formed by private citizens to advance the public good—not from charities' receipt of favorable tax treatment. By definition, going back to their origins in the English common law, charities are organized and operated for the benefit of the community. To qualify as a charity, an organization must dedicate all of its income and assets, in perpetuity, to serving the disadvantaged or otherwise providing goods and services for the benefit of the public at large. Charities were recognized as separate entities with legal rights and responsibilities long before there was a federal income tax code. The need for disclosure stems from charities' unique social role. A charity must be transparent enough to make donors, volunteers, and partners confident that the charity will, in fact, advance public rather than private interests. This need for disclosure as a means of ensuring public trust is conceptually independent of the receipt of favorable tax treatment.

Second, IS takes issue with the JCT Report's characterization of tax exemption and the charitable deduction as government subsidies and the Report's view that the receipt of those subsidies creates a strong presumption in favor of increased disclosure. The Report treats tax exemption and the charitable deduction as tax benefits because they enable charities and their donors to avoid paying tax they would otherwise have to pay. There have been years of serious academic debate over whether the charitable exemption and deduction are appropriately viewed as special benefits or as structural necessities of a properly calculated income tax.[1] A sound tax policy case can be made that neither the charitable tax exemption nor the charitable contribution deduction are properly characterized as government subsidies.

[1] In the principal article with respect to the charitable exemption, Boris Bittker and George R. Rahdert, argues that the exemption for nonprofit organizations is consistent with the fundamental principles of an income tax and is not a special exception or subsidy. See Boris I. Bittker and George Rahdert, "The Exemption of Nonprofit Organizations from Federal Income Taxation," 85 Yale Law Journal 299 (1976). The arguments for treating the charitable contribution deduction as a subsidy are somewhat stronger. It is treated as a tax expenditure. However, there has also been scholarly debate over whether this treatment is appropriate or whether the deduction is an essential element in measuring the normal income tax base. As Professor William D. Andrews argued more than twenty-five years ago in the Harvard Law Review, amounts contributed to charity are no longer available for either present or future personal consumption and, therefore, should not be included in defining taxable income. William Andrews, "Personal Deductions in an Ideal Income Tax," 86 Harvard Law Review 309 (1972). See also, Adam Yarmolinsky, "The Charitable Deduction: Subsidy or Limitation?" 29 Nonprofit and Voluntary Sector Quarterly 173 (2000) (arguing that the charitable deduction is best viewed as a Congressional limitation on federal taxing power instead of as a subsidy). The only benefit that can come back to the taxpayer is a psychic sense of satisfaction. Any more tangible quid pro quo of value will reduce the taxpayer's charitable contribution deduction. See, United States v. American Bar Endowment, 477 U.S. 105 (1986). Furthermore, two-thirds of American taxpayers are nonitemizers who still give substantial amounts to charity. Their contributions do not carry any tax-based subsidies with them because they cannot claim an itemized deduction.

Furthermore, the logical extension of the JCT Report's treatment of the charitable exemption and deduction as tax benefits[2] would be to treat every deduction, credit or exemption as a tax benefit. If the public is viewed as having an interest in all tax benefits accorded under Federal law, as the Report suggests,[3] then disclosure should be required of all taxpayers who receive tax benefits in any form. Following this view, every taxable corporation with a business expense deduction or net operating loss carryover, or every individual receiving a child care credit, should likewise be required to disclose their tax returns. Plainly, the Joint Committee Staff is not prepared to adopt this general approach. Indeed, the first volume of the JCT Report explicitly recognizes that confidentiality of tax return information is essential to fostering voluntary compliance with the system.[4] Clearly then, the receipt of tax benefits—whether in the form of the charitable exemption and deduction or the many benefits received by taxable entities and individuals—does not create a general presumption in favor of disclosure.

Finally, it is significant to note that even government entities funded entirely with public subsidies enjoy a significant zone of privacy.[5] Clearly, Congress has recognized that even in the case of publicly funded governmental entities, where the case for public accountability is strongest, unlimited disclosure can be counter-productive.

*3. While IS supports a high degree of transparency for charities, IS believes that it is extremely important to avoid reporting requirements that could have an undue chilling effect on charities' participation in the public policy process.*

Because of their unique role in mobilizing citizens and communities to address issues of common concern, charities make an important and valuable contribution to the development of public policy. Charities are on the front lines of the struggle against the most significant social problems, including hunger, poverty, discrimination, and disease, and are also the vanguard of many significant social innovations. The hands-on experience charities derive from their day-to-day work for the public good can help legislators make more informed and enlightened decisions on the full range of issues that come before them. Key members of Congress explicitly and repeatedly recognized the important contribution charities make to the legislative process in the course of developing the landmark 1976 legislation clarifying and liberalizing the lobbying rules for public charities.[6] The clear premise of this legislation—a premise IS believes should continue to guide Congress—is that the public interest is served by encouraging more rather than less participation by charities in the public policy process.

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[2] Staff of Joint Committee on Taxation, 106 th Cong., 2d. Sess., Study on Present Law Taxpayer Confidentiality and Disclosure Provisions As Regional By Section 3807 of the Internal Revenue Service Restructuring and Reform Act of 1998 Vol. II, 47 (Comm. Print 2000) (hereinafter "JCT Staff Report").

[3] JCT Staff Report, Vol. II, 80.

[4] "This confidentiality is based on persons' right to privacy, as well as the view that voluntary compliance will be increased if taxpayers know that the information they provide to the government will not become public." JCT Staff Report, Vol. I, 5.

[5] The Freedom of Information Act was established to insure accountability of federal government actions through disclosure of records. Nonetheless, it provides eight categories of exemptions that allow the government to avoid disclosure of records. For example, the Freedom of Information Act includes specific exceptions that allow government employees to have extensive, candid, and confidential discussions while they are formulating policies. See 5 U.S.C. § 552(b)(5) (1988). Moreover, the Federal Advisory Committee Act and other sunshine laws provide for exemptions from public scrutiny under certain circumstances. If government agencies are entitled to some privacy, charities, as private entities, a fortiori are entitled to a zone of privacy and a far greater one than government agencies enjoy.

[6] Illustrative of the tenor of the Congressional debate that led to the enactment of section 501(h) and section 4911—the Internal Revenue Code provisions that define the lobbying rules for public charities—are the following statements by key supporters of the legislation:

• Senator Dole (R–KS): "Charities can be and should be important sources of information on legislative issues." 121 Cong. Rec. 42032 (1975).

• Representative Conable (R–NY): "The role of charities in a pluralistic society—something we are all dedicated to—is constructive and the charities should not be muzzled." 119 Cong. Rec. 42632 (1973)

• Senator Nelson (D–WI): "[Charities] represent the public in many important areas such as health, education, and the environment. These groups have much information to contribute and a wide range of helpful experience that could greatly assist the consideration and enactment of this country's laws." 119 Cong. Rec. 5749 (1973).

• Senator Muskie (D–ME): "It makes no sense to decide that these organizations operate in the public interest and grant them tax-exempt status and then silence them when they attempt to speak to those who must decide public policy." 117 Cong. Rec. 8517 (1971).

As a practical matter, one of the chief barriers to such participation by charities in the public policy process is the complex set of federal and state rules governing lobbying by charities. Charities are subject not only to the federal tax law rules on lobbying but also to the federal Lobbying Disclosure Act, the separate lobbying restrictions related to the receipt of federal grant funds, and to various state lobby disclosure statutes. The regulations interpreting the federal tax limitations on lobbying alone total more than 40 pages in the Code of Federal Regulations. The complexity of these rules has a substantial, and highly undesirable, chilling effect on participation in the democratic policymaking process, both for smaller organizations with limited staff and access to legal counsel and for larger organizations that must establish and maintain complex record-keeping systems. IS opposes additional reporting requirements that could further deter charities from participating in the public policy process. Such a chilling effect would be particularly troubling because charities are often the only parties able to speak on behalf of the least fortunate in our country.

Congress must assess any new disclosure requirements against a complex legal landscape. Not only are the rights to free speech and association implicated; freedom of religion must also be given proper deference. The charitable community includes many churches and other religious organizations, and the JCT Report implicitly recognizes the importance of freedom of religion. Even though the JCT Report's arguments about tax subsidies and the public interest would apply equally to these religious entities, the JCT Report recommends no changes in the current rules exempting churches and their integrated auxiliaries from the basic reporting requirements. IS believes that similar and explicit consideration must be given to the effect of additional disclosure on other constitutional considerations, including, most importantly, the chilling effect on free speech.

Thus, absent a finding of an absolutely compelling public interest in additional disclosure, IS believes Congress should avoid imposing additional reporting burdens in this important and constitutionally sensitive area. IS did not find any discussion in the JCT Report of any abuses that the staff believed needed to be addressed with respect to charities' participation in the policy formation process. Given the growing disaffection of many Americans from our public policy process, Congress should be doing everything possible to encourage, rather than discourage, active participation from all quarters of American society, including most especially the charities, in the public policy arena.

*4. The scope of charities' overall reporting obligations should be determined through a careful cost-benefit analysis that weighs the public interests advanced by disclosure of particular information against those public interests undermined by additional disclosure.*

IS agrees with the JCT Report that proposals for additional mandatory disclosure should be evaluated under a careful cost-benefit analysis that weighs the public interests advanced by disclosure against the public interests that may be undermined by the proposed additional disclosure. In the constitutionally sensitive area of charities' participation in the public policy process, IS believes that the chilling effect on free and open speech, association and participation can be outweighed only if additional disclosure is the only way to safeguard an important public interest. In other areas, the costs and benefits may be more evenly matched, but each must still be given its due weight.

IS believes that the principal interests advanced by disclosure are as follows:

- Increasing the public's ability to oversee tax-exempt organizations for the purpose of verifying that the organizations are serving the public and not private interests, and are remaining faithful to the goals of their contributors and other supporters;
- Increasing compliance with Federal tax (and other applicable) laws;
- Promoting the fair application and administration of the Federal tax laws; and
- Encouraging charitable giving, volunteerism, and collective activity.

This list of purposes to be served by exempt organization disclosure is substantially similar to the list of policies the JCT Report articulated,[7] although there are some very notable clarifications. IS disagrees with JCT's view that disclosure necessarily "improves the efficiency" of the exempt sector. In fact it questions why the government is concerned with efficiency rather than accountability in the nonprofit sector. IS also does not believe that additional public disclosure necessarily increases public accountability. There is a nearly infinite amount of information that charities could be required to provide to the public. Substantially increased disclo-

[7] See JCT Staff Report, Vol. II, 80.

sure necessarily entails substantially increased costs. These are costs measured in the time and resources needed to learn about new legal requirements, change record-keeping systems, gather and store additional information, and deal with harassment from adversaries who use the required disclosure as an opportunity to distract the charity from its real work.[8] Time and resources spent on government paperwork are time and resources not spent on providing food, clothing, shelter, medical care, child care and other vital services to the charity's beneficiaries. Congress should impose such administrative costs only when it is clear that they will produce a commensurate increase in meaningful public accountability.

IS believes that the principal interests that may be adversely affected by increased mandatory disclosure are as follows:

- Avoiding imposition of excessive reporting costs that drain resources from activities that further a charity's mission;
- Avoiding a chilling effect on constitutionally protected rights to freedom of speech and freedom of association;
- Protecting the privacy interests of donors, members and other taxpayers whose personal information is in a charity's possession;
- Ensuring competitive equality for unrelated business activities;
- Promoting increased voluntary compliance and efficient tax administration; and
- Protecting appropriate privacy interests of exempt organizations in seeking determinations and rulings on proposed organizations and transactions.

Again, the JCT Report has identified many of these same factors as bearing on the cost-benefit analysis for proposed new mandatory disclosures. However, IS believes that in weighing the costs and benefits of a number of the disclosure proposals—especially those that relate to a charities' communications with the IRS, unrelated business activities, and lobbying activities—the JCT Report significantly underestimates the negative effects of increased disclosure.

*5. IS believes that in working to ensure appropriate transparency of charitable organizations, policy-makers should recognize the very substantial amount of information that charities already disclose and should give high priority to making this information more readily available, in user-friendly form, to the public.*

The existing disclosure requirements that apply to charities under the Federal tax law generate a substantial volume of publicly available information. With the finalization of the regulations under section 6104 last year, incentives are in place for more and more of that information to be readily available and easily searchable over the Internet. Unfortunately, much of the most valuable information for the public is hidden among the more than 400 separate pieces of data (not including attachments and schedules) that are found on the six page Form 990. To illustrate, from the Form 990, any member of the public can already see the following information:

- Detailed Description of Activities Furthering the Charitable Mission Including Discussion of any Significant Changes in Activities Since the Application for Exemption or last Form 990 was filed
- Total Revenues
- Total Expenses
- Names and addresses of all officers, directors, trustees and key employees
- Compensation of officers and directors, trustees and key employees
- Compensation of the five most highly paid employees other than officers, directors or trustees
- Average hours per week these individuals devote to their positions
- Other payroll, including fringe benefits
- Professional Fundraising Fees
- Legal Fees
- Accounting Fees
- Travel
- Conferences, Conventions and Meetings Expenses
- Assets
- Liabilities
- Fees and Contracts Received from Government Agencies
- Investment Income
- Membership Fees received
- Whether the organization had unrelated business income tax liability
- Names of taxable subsidiaries and percentage ownership

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[8] Congress recognized the possibility of harassment arising in connection with mandatory disclosure when it revised section 6104 in 1996. Section 6104(e)(3) specifically relieves exempt organizations of the burden of producing copies of their core tax documents when they receive a request that is part of a "harassment campaign."

- Whether the organization engaged in lobbying
- If so, lobbying expenditures made by the organization
- Transfers to and Transactions with Exempt Organizations that are not charities, including section 527 political organizations

Without an understandable user's guide—and no such guide exists—the public derives little benefit from much of the information already reported by charities. Thus, there is a deep need for tools to help the public understand the information that is already disclosed. We believe that oversight of the charitable sector by both the government and the public could be dramatically improved by revising the Form 990 so that it highlights critical information and facilitates the reader's understanding of the significance of the information being presented. A top priority for the IRS in this regard should be providing, either directly or through non-governmental intermediaries, on-line access to all Forms 990.

## III. Comments on Specific Recommendations

*A. Overview*

The JCT Report makes nineteen separate recommendations with respect to disclosure by exempt organizations. Independent Sector's position on these proposals is summarized below.

*Recommendations IS Supports*

IS supports the following eight JCT recommendations:

- Accelerated electronic filing and redesign of Form 990
- Disclosure of third party communications re written determinations
- Confidentiality of taxpayer identification numbers
- Disclosure of annual returns by section 527 organizations
- Disclosure of names under which exempt entities conduct their operations
- IRS notification of public availability of Form 990
- Mandatory disclosure and IRS reporting of exempt entities' web page
- Increased preparer penalties for preparers of exempt entities' returns

*Recommendations IS Supports But That Require Further Study or Refinement*

IS supports the goals of the following four JCT recommendations, but IS believes these recommendations need further study or refinement:

- Greater flexibility for IRS information sharing with state charity regulators
- Increased reporting re transfers among section 501(c)(3), section 501(c)(4), and section 527 organizations
- Permitting private foundations to report only summaries of their investment transactions and assets
- Annual notice requirement for small exempt entities

*B. Recommendations That IS Opposes*

IS strongly opposes the following seven JCT recommendations:

- Non-redacted disclosure of written determinations and related file documents
- Non-redacted disclosure of closing agreements and audit results
- Non-redacted disclosure of exemption applications at the time of filing
- Non-redacted disclosure of Forms 990–T and 1120
- Narrative description of lobbying by charities reporting under section 501(h)
- Reporting of self-defense lobbying expenses
- Reporting of expenses for nonpartisan analysis containing limited calls to action

*B. Recommendations that IS Supports*

1. The Joint Committee Staff recommends that the Form 990 and related forms: (1) should be accepted by the IRS for electronic filing for returns filed after 2002; and (2) should be revised to ensure that the forms provide relevant and comprehensible information to the public as well as the IRS.

IS emphatically endorses these recommendations. The capacity to distribute this information economically and swiftly depends increasingly on having it available in digitized form. Furthermore, as IS stated in comments submitted to Treasury last fall, the Form 990 is already rich with information. However, most readers find it difficult to locate the most important information or to assess the significance of the information provided. IS stands ready to work with the IRS in developing a more useful form that will increase meaningful access to information.[9]

[9] The IRS regularly encourages outside parties familiar with the Form 990 to suggest improvements. Two organizations are beginning a substantial project to do exactly that. They are Philanthropic Research Inc. (the nonprofit that operates the Guidestar web site) and the National Center for Charitable Statistics located at the Urban Institute.

2. The Joint Committee Staff recommends that rules similar to the disclosure rules that apply to third-party communications under section 6110 should be applied to third-party communications relating to written determinations and exemption applications subject to disclosure under section 6104.

Section 6110 generally requires that communications to the IRS by third parties relating to a specific taxpayer or taxpayers must be disclosed to the public. The purpose of this requirement is to put the public on notice when third parties attempt to influence the IRS to take action to benefit, or to harm, a particular taxpayer. IS agrees that the same rules should also apply—for the same reasons—to third party communications related to tax-exempt organizations.

3. The Joint Committee Staff recommends that the taxpayer identification number of tax-exempt organizations should not be subject to disclosure.

IS appreciates the JCT Report's concern about the possible misappropriation of taxpayer identification numbers. To the extent that the record developed by the JCT Staff indicates that such misappropriation constitutes a significant threat to tax-exempt organizations or the tax system, IS would support this recommendation. IS notes, however, that exempt organizations have been routinely disclosing this information for many years on the first page of the Form 990. IS is not aware of any problems that have arisen from this disclosure.

4. The Joint Committee Staff recommends that the scope of section 6104 should be expanded to require the disclosure of the annual return filed (Form 1120–POL) by political organizations described in section 527. The Joint Committee staff also recommends that section 527 organizations should be required to file an annual return even if such organizations do not have taxable income and that the annual return be revised to include more information concerning the activities of such organization.

IS believes that the involvement of section 527 organizations in partisan, election-related activities creates a legitimate public interest in disclosure of the financial information contained on the Form 1120–POL. Accordingly, IS supports this recommendation. IS notes that the Form 1120–POL requires disclosure of investment income and expenses and certain other financial income, but does not require disclosure of donors or political contributions received.

5. The Joint Committee Staff recommends that tax-exempt organizations should be required to provide both their legal name and the name under which they do business on the Form 990.

IS supports this change and believes that it will help reduce public confusion about the identity of some charitable organizations. IS believes the public would find it useful to be able to find the names under which charities do business not only on a charity's return but also in the IRS list of exempt organizations.

6. The Joint Committee Staff recommends that the IRS notify taxpayers in instructions and publications that Form 990 is publicly available.

IS agrees that more public education will lead the public to take greater advantage of the access they already have to information about exempt organizations.

7. The Joint Committee Staff recommends that the World Wide Web site, if any, of a tax-exempt organization should be included on Form 990 and that the IRS should be required to publish such addresses.

IS agrees that having this information readily available will increase the general public familiarity with specific tax-exempt organizations.

8. The Joint Committee Staff recommends that the present-law tax penalty imposed on tax return preparers should be expanded to apply to willful or reckless misrepresentation or disregard of rules and regulations with respect to Form 990.

IS believes it is appropriate for return preparers to be held to a comparable standard of accountability when preparing returns for tax-exempt organizations as currently applies to the preparation of returns for taxable organizations. However, to ensure that charities will still be able to obtain the services of return preparers at a fair price, and the volunteer services of return preparers who help many smaller charities, IS asks that it be clear that preparers of exempt organization returns will be subject to penalties only where the IRS can demonstrate that they acted willfully, recklessly and without reasonable cause in preparing the return. The differences between the Form 990, which is an information return that does not state an amount of taxable income or amount of tax due, and the basic tax returns other taxpayers file could make it problematic to apply the same preparer penalties with respect to exempt organization returns as apply to returns filed by taxable taxpayers.

*C. Recommendations that IS Supports in Principle But that Need Further Study or Refinement*

1. The Joint Committee Staff recommends that the IRS should be permitted to disclose to Attorneys General and other non-tax State officials or agencies audit and

examination information concerning tax-exempt organizations with respect to whom the State officials have jurisdiction and have made a specific referral of such organization to the IRS prior to a final determination with respect to the denial or revocation of tax exemption. In addition, the Joint Committee staff recommends that the IRS should be permitted to share audit and examination information concerning tax-exempt organizations with non-tax State officials and agencies with jurisdiction over the activities of such organizations if (1) the State officials regularly share information with the IRS, and (2) the IRS determines that such disclosure may facilitate the resolution of the case.

Independent Sector believes that increased collaboration between the IRS and state charity regulators merits full and careful exploration. Fostering such collaboration could result in valuable improvements in overall accountability for charities. However, relaxing the current confidentiality rules also raises complex policy issues related to taxpayer privacy and equity between tax-exempt and taxable entities.

In order to develop a statutory framework that strikes the appropriate balance between enhanced enforcement capabilities and protection of charities against harassment or unjustified burdens, IS believes Congress needs input from a task force comprised of current and former federal and state charity regulators and representatives of charities who have been through federal and state enforcement actions. A dialogue among these parties is essential to producing statutory language that is effective and fair. IS would gladly convene such a task force to provide Congress with this essential input as rapidly as Congress's timetable demands.

2. The Joint Committee Staff recommends that the Form 990 report more information concerning the transfer of funds among various organizations so that the public and the IRS can better assess whether contributions to tax-exempt organizations are being used to fund political activities.

Part VII of Form 990, Schedule A already requires charities to provide detailed reporting with respect to such transactions with non-charitable exempt entities. The JCT Report does not make clear what additional reporting the Joint Committee Staff is recommending or why the current reporting requirements are inadequate. However, to the extent the Joint Committee Staff can share any record they have developed that supports the conclusion that current reporting requirements are inadequate to prevent potential abuses, IS would support appropriate additional reporting requirements.

3. The Joint Committee Staff recommends that private foundations reporting capital gains and losses on Form 990–PF should be permitted to disclose a summary of those capital transactions. A full listing of the transactions would be required to be filed with the IRS and to be provided to the public upon request.

IS agrees that disclosure of such voluminous information does not necessarily benefit the public, and may in fact reduce the level of meaningful disclosure by obscuring other important information. However, the real burden comes in having to file the detailed information with the IRS in the first place, especially because the IRS has indicated that it does not use the information except in the rarest of cases. The same problem arises with respect to Part II of Form 990–PF on which foundations are required to submit a detailed listing of all foundation assets.

For large foundations with extensive and highly diversified investment portfolios, the required schedules of investment transactions giving rise to capital gains and losses can be thousands of pages long. The Form 990–PF similarly requires foundations to attach a detailed schedule of all foundation assets, which, likewise, can be extremely lengthy.

When the media or members of the public at large ask to examine these parts of the Form 990–PF—and few ever do—they are stymied by the sheer volume of information. IS believes they are interested in the information that a summary would provide. Thus, neither the IRS nor the public derives any significant benefit from these highly burdensome reporting requirements. Moreover, requiring the submission of these voluminous records is a major impediment to electronic filing of the Form 990–PF.

As the detailed information contained on these assets or capital transactions schedules could conceivably be relevant in the case of an audit, IS recommends that private foundations be required to keep the information on file as long as the relevant statute of limitations remains open. However, IS further recommends that foundations be permitted to submit summary statements of their assets and capital transactions instead of the detailed schedules currently required. This change would not jeopardize any enforcement interests, would actually improve the public's ability to understand the information that is disclosed, and would substantially reduce the reporting burdens on private foundations.

4. The Joint Committee Staff recommends that tax-exempt entities (other than churches) that are below the filing threshold of the Form 990–EZ should be required to file annually a brief notification of their status with the IRS.

While IS agrees that there might be some public benefit in enabling the IRS to maintain complete and current information about smaller organizations, IS believes the costs of enforcing such a rule, particularly for the IRS, far outweighs the benefits. Small organizations tend to be staffed by volunteers who may well not be familiar with the rules for annual filing. Frequent changes in volunteer leadership results in frequent changes of address and a pervasive lack of awareness of IRS reporting requirements. Imposing penalties on these tiny charities for failure to file would be impractical where changes of address made it impossible for the IRS to contact the organizations. More broadly, absent any pattern of abuse, it is difficult to see what compliance gains would justify the substantial costs to the IRS of trying to find these small entities in order to enforce an annual reporting requirement. Considering all of these factors, IS urges Congress to maintain the current rules while encouraging the IRS to develop simple flexible methods—perhaps using a national toll-free telephone number or a web site—small organizations could use voluntarily to inform the IRS of their whereabouts.

*C. Recommendations that Independent Sector Opposes*

1. The Joint Committee Staff recommends that all written determinations and background file documents involving tax-exempt organizations should be publicly disclosed. In general, the Joint Committee Staff recommends that such disclosure be without redactions

IS strongly opposes this recommendation.

If taxable taxpayers so request, the IRS must redact their names, addresses and other identifying details from private letter rulings and technical advice memoranda and related background file documents before they are released publicly.[10] The JCT Report provides no convincing rationale why a different rule should apply to charities and other tax-exempt entities. Accordingly, IS believes that exempt entities should have the benefit of the same redaction rules that apply to taxable entities.

Charities are private entities formed by private individuals. As such, they have the same competitive interests in privacy that taxable organizations do. For example, a charity considering a joint venture with a taxable entity may feel the need to obtain an IRS ruling that the joint venture will not adversely affect its exempt status. Requesting such a ruling allows the charity to identify in advance potential areas of disagreement with the Service, and frequently enables the charity to modify the proposed transaction to address any Service concerns. Thus, the private letter ruling process is an important means of encouraging voluntary compliance.

However, in considering such ruling requests, the IRS frequently requires exempt entities to make extensive disclosures related to both current and future operations at a level of detail far beyond that required by the Form 990. If faced with the prospect of non-redacted disclosure of this detailed, and sometimes quite sensitive, operational information, many charities would simply decline to seek advance rulings. Charities face competitive pressures in their sphere comparable to what for-profit entities face in the business world. Charities compete for funding and strategic advantages among their peers. The cost of being forced to disclose not only the proposed transaction that is the subject of the ruling request but any other operational information the IRS may seek may far outweigh the benefit of gaining IRS assurance that the IRS sees the transaction as being in compliance with the law.

Even more than the specific charity, it is the IRS and the public that loses if charities are deterred from seeking rulings. IRS enforcement can be more efficient and more effective when government officials can see transactions before they happen and shape them, where appropriate, to comply with the law. With the advantages of foresight, the IRS can even help ensure that particular records are kept to make subsequent audits swifter and easier. It would be far more costly for the IRS to have to review most of these transactions after they have happened. Moreover, because the rulings process is prospective and the audit process is retrospective, the rulings process can alert the IRS to problem areas when they are getting started and enable them to put out public guidance to avert abuses. The public benefits from this proactive work and will lose this benefit if charities are deterred from seeking advance rulings.

Equally serious problems would arise if Congress mandates non-redacted disclosure of technical advice memoranda and related background file documents. In the case of a disputed audit issue, the exempt organization and the agent will have to

[10] See IRC § 6110(c)(1).

wrestle with a set of costs and benefits wholly unrelated to getting technical resolution of the issues. The negotiating balance between both sides will be skewed because raising the possibility of technical advice necessarily would entail raising full disclosure. Charities who believe an agent has simply made errors of law in his or her analysis will be put in the untenable position of choosing between getting the benefits of a correct legal interpretation to which they are legally entitled and protecting the confidentiality of their internal decision making processes and strategic plans. For these reasons, requiring disclosure will not support efficient tax administration and will discourage exempt organizations and agents from seeking the best technical input available from the experts in the National Office.

Finally, there is no public interest being served. The fact that technical advice is being requested provides no basis for suspecting the organization of wrongdoing or requiring disclosure. The whole point of the process is to encourage agents to recognize honestly where the law is not clear and request assistance from experts in the National Office who are not directly responsible for the audit.

Disclosure of identifying information in these written determinations is not necessary to promote fair application and administration of the Federal tax law. The public can clearly see how the IRS is applying the law from a redacted document as has been demonstrated by years of experience with written determinations issued to taxable taxpayer under the rules of section 6110(c) which provides for redaction of identifying information. What is far more urgently needed to improve fair application and administration is a substantial increase in the amount of guidance published by the IRS on specific legal questions affecting exempt organizations. Written determinations issued to a single exempt organization operating under a specific set of facts can never offer as much help in understanding how the law applies to exempt organizations as published guidance can.

In sum, the costs of this proposal would be significant and would include impairment of charities' capacity to operate effectively; reduced opportunities to encourage voluntary compliance through the private letter ruling process; and damage to the public credibility of charities subject to audits that include technical advice, even if the charity ultimately prevails. The costs can be eliminated and the benefits of this proposal can be achieved by simply requiring release of written determinations subject to the same redaction rights enjoyed by taxable taxpayers, including the rights to appeal decisions about the drafting of the technical advice memorandum and the redactions to be made.

2. The Joint Committee Staff recommends that the IRS disclose the results of audits of tax-exempt organizations. In addition, the Joint Committee staff recommends that all closing agreements with tax-exempt organizations should be disclosed. In general, the Joint Committee staff recommends that such disclosures should be made without redaction. Closing agreements should be disclosed "regardless of whether the agreement arose as a result of an audit."

IS strongly opposes this recommendation.

IS disputes JCT's view that release of closing agreements serves the public interest. The IRS has had the discretion to require disclosure of closing agreements as a condition of settlement, but has actually cooperated with public release as a term of settlement in only two of the thousands of agreements it has signed with exempt organizations. Closing agreements are simply negotiated resolutions compromising disputed issues, and contain no detailed statement of facts or of the Service's legal position. Therefore, they have virtually no educational value in clarifying the Service's interpretation of the law.[11] The two closing agreements that were cited by the JCT staff as having been publicly released—in the Hermann Hospital and Bishop's Estate cases—had highly unusual fact patterns that the IRS believed would be instructive to the public. Obviously the IRS has not had a similar view with respect to most of the other closing agreements it has entered. It follows that mandating disclosure of all closing agreements would provide the public with little information of use or interest in ensuring that charities serve public interests while imposing substantial costs on the affected charities.

The Report's recommendation of mandatory disclosure of closing agreements would force certain cases to litigation even though the IRS would prefer to settle rather than commit scarce litigation resources to those cases. Charities may refuse to settle and accept disclosure because of the potential for the public to perceive the

[11] The JCT Staff concurs in this view. The Report states, "In general, the Joint Committee staff does not believe that closing agreements are an effective means to provide guidance to taxpayers regarding the law. Such agreements are negotiated, and they may not represent the IRS view of the law. Further, because such agreements may be fact specific and may not contain all relevant information, they may be misleading if relied upon by others." JCT Staff Report, Vol. II, 85, n.186.

settlement as an admission by the charity of failure to comply with the law. Press coverage is unlikely to capture the fact that the settlement does not formally contain any such admission but will instead likely focus on the fact that the IRS has pursued an enforcement action. Litigation, though far more costly to the charity, the IRS and the overall system of tax compliance, preserves for the charity the ability to make arguments in its own defense.

The JCT Report does not provide any reason why its proposed rule should be limited to exempt entities. To the extent the public has an interest in knowing the terms on which the Service has settled a disputed tax issue, it would seem that that interest would be at least as great in the case of a publicly traded company in which members of the public have made substantial financial investments. However, the JCT Report does not make a similar recommendation with respect to taxable entities because of the obvious adverse effect on voluntary compliance. There is no reason why exempt entities should be subject to a different rule.

The JCT Report's recommendation would also have a highly adverse effect on voluntary compliance programs involving exempt entities. Under current law, an exempt organization that discovers that it is in violation of a tax law requirement can generally enter into a confidential settlement agreement with the Service typically involving a financial penalty, correction, and prophylactic steps to ensure future compliance. Mandatory public disclosure of such agreements would create a strong disincentive to come forward and take advantage of this highly desirable mechanism for promoting voluntary compliance.[12] The cost of disclosure would be too high, particularly when evaluated against the likelihood of examination.

IS would be interested in exploring the periodic release of audit results strictly on an aggregate basis. IS believes there could be considerable value in making this information available to the exempt sector provided that it can be done in a way that protects confidentiality. A similar approach was required in connection with last year's APA legislation.[13] In this way, practitioners who participate in an exempt organization audit infrequently can get some useful information on the types of issues that the IRS may be willing to settle in a closing agreement and how common or rare it is to raise the issues his or her client is facing.

3. The Joint Committee Staff recommends that applications for tax-exempt status (and supporting documents) should be disclosed when the application is made. In addition, the Joint Committee staff recommends that any action taken on the application be disclosed.

IS strongly opposes this recommendation.

Disclosure is supposed to facilitate the public's ability to ensure that charities serve exclusively public purposes. Though various members of the public may have their individual reasons for being interested in particular applications, the public as a whole lacks a legitimate stake in the operations of an organization that has not yet been recognized as exempt. These same concerns apply with respect to applications that are rejected. There is no limit to public curiosity, but there must be a limit on satisfying it if we are to maintain consistency in disclosure standards, fair and efficient tax administration and protection for the legitimate privacy interests of non-exempt parties.

Furthermore, individuals contemplating the establishment of a charity have a legitimate interest in maintaining the confidentiality of their plans until they have a chance to obtain a determination of tax-exempt status from the Service. If their application were disclosed when filed, other individuals and institutions—like existing charities that would not have to disclose their plans prospectively—would have an unfair advantage in competing for funding, staff and other resources. Thus, mandatory public disclosure of pending applications might well prevent the successful launch of a new organization and thereby deny the public the benefits the new organization would have produced and the individuals founding the charity the opportunity to work collectively with the peers they have selected to accomplish their charitable mission.

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[12] In this regard, IS urges Congress to see these closing agreements the same way it saw Advance Pricing Agreements last year when it passed legislation clarifying that APAs are confidential and may not be released as written determinations. In that case, Congress recognized that disclosure of APAs would threaten the continuation of the program because the program's success depended upon taxpayers' willingness to disclose substantial amounts of sensitive proprietary information. H. Rept. 106–344, 106 th Cong. 1 st Sess, 21.

[13] Congress directed Treasury to publish an annual report regarding APAs, which is to provide extensive information on the program, including a model APA, the number of pending APAs executed and the number requested, and the transactions covered and the functions performed and risks assumed by the related organizations, trades or businesses involved Pub. L. 106–170 § 201(b)(2) (December 17, 1999).

Of equal importance, public disclosure of the applications could result in abuse of the application process. Third parties who dislike the applicant or the applicant's views will have the opportunity to try to influence the review process by sending information to the IRS. The IRS will have no capacity to evaluate the veracity of information that third parties will likely submit in connection with applications they support or oppose. Furthermore, IRS employees will be subject to pressure from public opinion when evaluating applications from very unpopular organizations. The process of being considered for exemption should be a strict application of the law to the facts as represented by the organization, and every organization deserves equal treatment. A confidential process, as exists currently, is the best way to ensure even-handed treatment of all applicants for exempt status.

4. The Joint Committee Staff recommends that the scope of section 6104 should be expanded to require the disclosure of all Forms 990–T and any forms (including forms 1120 and 1065) filed by affiliated organizations of tax-exempt organizations.

IS strongly opposes this recommendation.

Disclosure of a charity's Form 990–T (its unrelated business income tax return) runs counter to the policy behind UBIT, which is to create a level playing field between taxable and tax-exempt organizations, not one tilted toward the taxable entities. When a tax-exempt organization is paying tax on its unrelated trade or business activities, it should be entitled to the same confidentiality that a taxable business enjoys. As the JCT Staff acknowledged in the first volume of their study, confidentiality in this context promotes voluntary compliance. It would be thoroughly unfair to a tax-exempt organization to force it to show its competitors its business tax return when it does not have the corresponding right to see its competitors' returns.

The JCT Report states that disclosure of this information will "facilitate comprehensive oversight" by the public of exempt organizations. Disclosure is not provided for disclosure's sake, and oversight is not for oversight's sake. Disclosure has costs associated with it, and before those costs are imposed, they must be justified. Disclosure must serve a purpose, and where charities are concerned, that purpose is to ensure the charities operate strictly for public purposes and not private purposes. Where a charity is paying tax in connection with its business activities, it has acknowledged that the activities generating the taxable income do not serve charitable purposes. The public's concern with respect to these activities, therefore, is in seeing that the revenues generated are ploughed back in to charitable activities. Knowing the technical details of how a business reports its income does not move the public any closer to knowing whether the charity is serving public rather than private ends.

Finally, the proposal is clearly overreaching. No definition is provided of what constitutes an affiliated organization. It would be unfair and unjustified to require a taxable entity to disclose its tax return simply because it had been generous enough to form a corporate foundation or had some overlapping board members with a charity.

5. The Joint Committee staff recommends that public charities (both electing and non-electing charities) should be required to provide a general description of their lobbying activities on Schedule A to Form 990.

IS strongly opposes this recommendation.

Public charities play an invaluable role in the legislative process. They are the principal vehicle through which individual citizens can come together to work for public policy changes that they believe will advance the greater good. Whether the issue is how to reduce drunk driving, promote literacy, strengthen families, or revitalize blighted communities, public charities are on the front lines of the effort in communities across America. Their unique experience has led several legislators to urge that private charities, and faith-based organizations in particular, serve as models for various public policy initiatives. The expertise charities derive from this front-line experience can be of tremendous value to legislators at the federal, state, and local levels—but only if charities are free to participate in the legislative process.

In 1976, Congress enacted section 501(h) of the Internal Revenue Code precisely to encourage such participation. Prior law had prohibited charities from "substantial" lobbying, but had provided no clear definition of either "substantial" or "lobbying." The resulting uncertainty had a profound chilling effect on charities' participation in the legislative process that remains to this day. In an effort to dispel this chilling effect, section 501(h) provided an alternative to the vague substantial test with specific lobbying expenditure limits and also established a much clearer, albeit fairly complicated, definition of lobbying.

While section 501(h) was an important step toward reassuring charities that it is legal and proper for them to lobby, the overall set of federal and state laws and regulations governing lobbying by charities remains a substantial deterrent to charities' participation in the legislative process. The section 501(h) rules, while reasonably clear, are also quite complex. The relevant regulations fill more than 40 pages of the Code of Federal Regulations. Charities electing to be subject to section 501(h) must establish complicated record-keeping systems to track their direct and grassroots lobbying expenses, and must continually invest significant staff time and resources in maintaining these systems. Charities that receive federal grant funds must comply with a different, and comparably complex, set of lobbying restrictions contained in OMB Circular A–122. Further, charities are also subject to the Federal Lobbying Disclosure Act and to various state lobbying reporting statutes.

Unfortunately, many charities read into these complex and stringent requirements a signal that participation in the legislative process is a suspect activity that they undertake at their peril. That impression runs directly counter to Congress's own deliberate efforts, through the enactment of section 501(h), to send the opposite message, that lobbying is an appropriate rather than a suspect activity. Similarly, the IRS even states in the Internal Revenue Manual that making the section 501(h) election tends to be a sign of compliance with laws; the IRS has observed that the election gives charities a clear set of standards to apply to their lobbying and feel comfortable that they can lobby and be in compliance with the law.[14] Nevertheless, many charities are deterred from participating in the policymaking process by the sheer cost and complexity of complying with these complicated, overlapping regulatory regimes. The cost of this chilling effect is profound, and it is borne ultimately by the public who loses the benefit of charities' participation in the public policy process.

The JCT Report's recommendations for imposing yet more reporting requirements on charities' participation in the legislative process must be evaluated against this backdrop. The substantial complexity of the existing rules already has a profound chilling effect. The JCT recommendations would only exacerbate this serious problem.

The JCT Report's first recommendation is that public charities that have elected to be subject to the section 501(h) lobbying rules should be required to provide a detailed description of their lobbying activities and the manner in which they conducted those activities, all in addition to reporting the amount of their lobbying expenditures as required by current law. Three key facts bear note in relation to this proposal:

- This is a solution in search of a problem. The JCT Report does not provide any hard evidence or arguments that this additional reporting would serve any important public purpose. Instead, the Report merely asserts that "staff believes that the public has a significant interest in understanding and monitoring the lobbying activities of a public charity ..." The Report makes no effort to explain why the public has a different or greater interest in monitoring lobbying by charities as opposed to monitoring the much more substantial lobbying of the business community.
- Congress has already addressed the need for greater access to information on lobbying expenditures by enacting the Lobby Disclosure Act. Under this Act, charities that exceed the registration and reporting thresholds must file semi-annual reports to Congress identifying the legislation on which they have lobbied. Most states have similar lobbying registration and reporting statutes that require charities to report on state-level lobbying. Given that both Congress and most state legislatures have already established comprehensive lobby reporting regimes for both taxable and exempt entities, it is difficult to see the rationale for embedding additional lobby reporting requirements in federal tax law. In fact the IRS has made other changes to the form to address enforcement concerns, but has never seen the need for such a narrative.
- Finally, the proposed additional reporting is absolutely unnecessary to enable the IRS to assess electing charities' compliance with the section 501(h) lobbying expenditure limits. Charities are already required to report their lobbying expenditures, and must also maintain in their files, subject to IRS audit, detailed records substantiating their reported lobbying expenditures. The IRS has always had the authority to require a narrative description of lobbying activities by organizations subject to section 501(h) but has never seen the need to do so. In fact, the IRS has made other changes to the form to address enforcement concerns, but has never seen the need for such a narrative.

As these facts make clear, there is simply no compelling rationale to support the proposed requirement for a narrative description of lobbying activities, and certainly

[14] See I.R.M. Sub-Section 7925; Letter from Marcus Owens, Director, Exempt Organizations Division, IRS to Bob Smucker, Charity Lobbying in the Public Interest dated February 11, 1999.

no rationale that can justify the additional chilling effect on participation in the development of public policy that such a requirement would certainly entail.

6. The Joint Committee staff recommends that public charities should be required to disclose expenditures for self-defense lobbying.

IS strongly opposes this recommendation.

Congress has long recognized that charities, like all other individuals and entities, have a fundamental right to respond when their existence, powers, duties, or tax treatment are the subject of a legislative debate. Charities are entitled to correct the record when inaccurate statements are made about them and to provide their own views in contrast to the views of their legislative adversaries. Accordingly, the federal tax law definitions of lobbying applicable to both public charities and private foundations contain express provisions excluding self-defense activities from the definition of restricted activities.

Presumably, a charity's members, donors, and beneficiaries fully expect the charity to defend itself when its tax exemption or ability to raise deductible contributions is under attack. The JCT Report cites no evidence that these stakeholder groups have any desire to require the charities they support to report the amount of their self-defense expenditures. Nor is there evidence that the public at large perceives itself as having a vital interest in having information on charities' self-defense activities.

A charity's opponents might, of course, be interested in having such information, but their private interest in gaining a strategic advantage in the debate by burdening the charities hardly constitutes a legitimate public interest justifying the imposition of an additional reporting burden. After all, the opponents have not provided—and have no intention of providing—any of the resources the charity is using to fund its self-defense efforts. The charity clearly owes them no duty of disclosure with respect to these expenditures.

Nor does the IRS need information on the amount of a charity's self-defense expenditures, since spending on self-defense is not relevant for purposes of enforcing the requirements of section 501(c)(3).

And finally, it is difficult to see why legislators need information on the amount of a charity's self-defense expenditures. The self-defense exception only applies to direct lobbying—that is, to direct communications with legislators by an organization and/or its members. If a charity engages in a substantial self-defense campaign, legislators, of all people, will not need to see the organization's Form 990 to gauge the scope and intensity of the effort.

In short, requiring charities to track and report the cost of their self-defense activities would not advance any significant public purpose. It would, however, impose quite substantial administrative costs and burdens on charities. Charities would be required to train their staffs on what does and does not fall within the scope of the self-defense rule. Charities would also have to establish time reporting and cost allocation systems to track self-defense costs. Given this substantial administrative burden on the one hand, and the lack of any significant public benefit from the reporting of these self-defense costs on the other, this proposal clearly fails the cost-benefit test. Accordingly, IS strongly opposes this recommendation.

7. The Joint Committee staff recommends that public charities should be required to disclose expenditures for nonpartisan study, analysis, and research if such study, analysis, or research includes a limited "call to action."

IS strongly opposes this recommendation.

The JCT Report's recommendation would require charities to track and report the expenses of preparing and distributing so-called "nonpartisan study, analysis, and research." if that nonpartisan analysis contains an "limited 'call to action'." Under the relevant tax rules, a communication that refers to and reflects a point of view of a legislative proposal qualifies as nonpartisan analysis if it contains a full and fair exposition of the issues it addresses and provides sufficient information to allow the recipient to form an independent view on the issues discussed.[15] Under the JCT recommendation, such nonpartisan analysis contains a "limited 'call to action'" if it specifically identifies one or more legislators as (1) opposing the organization's view with respect to the legislation; (2) being undecided with respect to the legislation; (3) being the recipient's representative in Congress; or (4) being a member of the legislative committee or subcommittee that will consider the legislation.[16]

This recommendation would impose a substantial and unproductive record-keeping burden on the many charities that produce valuable policies analyses of legisla-

[15] Treas. Reg. Sec. 53.4945–2(d)(1).

[16] See concept of a "limited" or "indirect" call to action is defined in the existing regulations implementing the public charity lobbying rules under section 4911. See, Treas. Reg. Sec. 53–4911–2(b)(2)(iii) and (iv).

tive issues. The fact that an otherwise purely educational report lists the names of legislators on a committee with jurisdiction over one or more legislative proposals or provides readers with help in identifying their representatives is an entirely arbitrary way of sorting what merits reporting. For example, when a health organization produces literature to educate the public about the importance of finding a cure for cancer or insuring that children get vaccinations, it should not have to accept a special record-keeping and reporting burden simply because it gives the public a list of all the legislation that has been introduced to help accomplish its health goals and mentions the members of Congress who have jurisdiction over the legislation. This kind of nonpartisan research and analysis confers a clear public benefit by making both the public and legislators better informed about issues of general public concern. Imposing disclosure burdens will only hurt the public and Congress by making it harder for charities to provide them with fair and detailed discussions of issues raised in specific legislation.

Educational institutions and other charities provide instruction and training on every conceivable topic, including topics relating to public policy. Indeed, for educational institutions in particular, this is the reason they exist. To force colleges, universities, schools, and other charities to scrub every article, study or other piece of scholarship that relates to a public policy matter and contains a "limited call to action" would be overwhelmingly burdensome and a huge waste of resources. To determine the amount of the institution's expenditures on that particular article—when funding for faculty work is often provided from multiple sources—would be complex to the point of impossibility. For example, under this proposal, a college would have to report on a professor who writes an article on the history of agriculture, drops a footnote citing a newly introduced bill that would change federal law on genetically engineered crops, mentions the name of the legislator who introduced it and the fact that he chairs the committee that will have jurisdiction over the bill, and simply states that he supports the bill because he supports any effort to address the subject. More to the point, the college would have to report on every professor who publishes any article or study that mentions any bill, a view on the bill and otherwise benign information about legislators who are working on the bill. Even worse, the college would then need to determine the expenditures it had made to contribute to the production of these articles. The faculty members who write these pieces, along with their scholarly colleagues at many other charities devoted to public education, were not attempting to influence the legislative process, yet the JCT's overly broad recommendation would cover all of this activity. The effort that would be required to comply would overwhelm educational institutions and drain vast resources that could otherwise be used productively.

It is difficult to see what possible public interest would be served by this disclosure requirement. The fact that one policy paper discussing a legislative proposal identifies the members of the relevant legislative committees while another does not hardly seems like a rational basis for requiring reporting of expenses related to the first report but not the second. The reference to the legislative committees is completely irrelevant to IRS enforcement efforts since both reports clearly qualify, and would continue to qualify, as non-lobbying communications. Moreover, it seems equally clear that the public is neither asking for, nor would derive any benefit from, this expenditure data. And once again, the JCT staff has not presented any information to suggest that this disclosure requirement would address any known existing abuses. Accordingly, IS firmly believes that this recommendation clearly fails the requisite cost-benefit analysis.

## Statement of International Health, Racquet & Sportsclub Association, Boston, Massachusetts

Mr. Chairman and Members of the Committee:

The International Health, Racquet & Sportsclub Association (IHRSA) submits this statement in response to the Committee's notice seeking comment on the Joint Committee on Taxation staff recommendations (the recommendations) to increase disclosure of information relating to tax-exempt organizations.

IHRSA represents over 3000 proprietary health clubs and fitness facilities. The provision of health and fitness services is one of those areas of our economy in which there is significant growth and intense competition, both among proprietary firms, and increasingly with large and amply funded entities which enjoy tax exempt status. Whether those tax free competitors are appropriately carrying out their charitable responsibilities, or using their charitable status as an umbrella to shield them from taxes while pursuing an essentially commercial market, is a major concern of our members.

IHRSA firmly endorses the proposed recommendations to increase the level of disclosure of tax exempt organization reporting. Increased public discussion and awareness of the nature of exempt organization activities is a necessary condition of the increasing scope of services that are sheltered from taxation. The credibility and fundamental fairness of our tax system is at risk, unless we take steps to recognize and promote the public discussion of such issues, not just in the context of general theories, but in relation to the specific activities of organizations in local communities. Allowing more sunshine to illuminate tax exempt activities is a very small burden, given the significant advantages which exempt firms have over proprietary firms.

## General Principles Relating to Disclosure

The recommendations state clearly and accurately the important reason to discuss disclosure of exempt organization information. In our system, we have recognized the role of non-government organizations in carrying out activities which may otherwise be governmental in nature, and we encourage that role through tax exemption. These organizations are not "owned" by particular parties; their central purpose is public in nature. The public supports them, directly through deductible contributions and indirectly by giving them a pass from the tax system which burdens all businesses and individuals. This special status must be earned by performance of the appropriate exempt functions.

Whether and how these entities carry out their charitable purposes is a legitimate matter of public information. IHRSA therefore absolutely endorses the recommendation that an essential framework for discussion is that "disclosure of information regarding tax-exempt organizations is appropriate unless there are compelling reasons for nondisclosure that clearly outweigh the public interest in disclosure."

## Disclosure of Written Determinations

The recommendations suggest public disclosure of a number of types of IRS decisions involving exempt organizations, including audit results, applications, and third party communications. IHRSA endorses those recommendations. Whether in the context of general public oversight of exempt organizations, or more specifically, to improve public understanding of the IRS decision process regarding such organizations, it is time to remove the veils which keep the public and other entities shielded from the exact outlines of questions involving exempt organizations.

IHRSA particularly urges adoption of the recommendation for disclosure of the exempt organization application. We urge the Committee to look at this from a practical perspective. Most exempt organizations applications are granted, and once granted, it is very rare for the Service to remove the exemption. In contrast to the very scant information on charitable mission now required in the annual 990 form, it is in the application form that the organization must describe, in some detail, the planned scope of its activities, and how they will fulfill the charitable purpose. The possibility for public review of the application would be an important factor in ensuring that potential exempt organizations clearly fulfill their exempt purposes.

Some have criticized this recommendation as likely to burden the IRS by unleashing a torrent of correspondence to the IRS by critics of applicants, where there might be a difference of philosophy or apparent political perspective. Even if that unlikely result occurs in isolated cases, the underlying tax law principles which the IRS must apply will not be changed by any disclosure. The Service will presumably reach its decision on granting exemption based on the facts and circumstances of the application, and not on the weighing of the mail.

From IHRSA's perspective, our members are not interested in judging the political philosophy of an organization. We are, however, interested in seeing that entities which claim charitable purpose and activity do, in fact, make good on those claims. The current system, in which only the annual summary 990 information is disclosed, does not allow a serious analysis of whether an organization has clearly stated how it intends to carry out its charitable purposes, and if it is in fact doing so after the application is granted.

## Disclosure of 990–T Forms and Annual Returns of Affiliated Organizations

IHRSA strongly agrees with the recommendations that disclosure of annual 990 forms be extended to 990–T and affiliated organization 1120 returns. The current system, requiring disclosure by an exempt organization of only part of its operations, is not adequate to allow the public any comprehensive view of the complete scope of activities of exempt organizations. At its most basic, the 990–T Form may be regarded as a detail, a report on the presumably slight level of unrelated business income of organizations pursuing charitable purposes. But it is clear that this benign view is probably no longer accurate. "Probably" is the only possible word to use, because the public does not have any knowledge of the scope of an exempt organization's unrelated activities under the present system. Major levels of growth in unrelated income have been suggested by some recent IRS analysis. And it is clear, for example, that the public does not know how particular tax exempt organizations pay their executives and allocate their costs between charitable and unrelated activities. There is no reason not to regularly make such information available.

By the same token, we believe that the concerns of some critics of the recommendations about proprietary data are overstated. The 990–T's report a scope of economic activity, not customer information. The 990–T's will still contain largely summary information, whose disclosure is less likely to represent any competitive value and more likely to reveal essentially how such unrelated activities compare to the pursuit of the underlying charitable purpose. Trade secret concerns can be accommodated with 990–T disclosure.

The recommendation's alternate of folding the 990–T into the 990 is a very useful suggestion, as is the recognition that the issue of disclosure should not be affected by the nature of the legal organization relating the affiliate to the sponsoring tax exempt organization.

## SUMMARY

IHRSA strongly supports the recommendations of the Joint Committee regarding disclosure. As many observers have noted, the sharp divisions between proprietary and tax exempt activities have become much less sharp, especially within the past decade. At the same time, the economic scope of activities of the tax exempt sector has mushroomed. The nature of those activities is often difficult or impossible for the public to discern, notwithstanding the fact that they are carried out from a platform which originally was established for specific charitable purposes. IHRSA is neither condemning nor endorsing these developments in the abstract. However, the public has the right to know about them in some meaningful way. Only if that occurs can we be assured that tax exempt organizations are in fact aggressively pursuing their charitable mission and not utilizing the exemption as a shield to deter taxation of essentially commercial non-charitable economic activity.

We urge the Committee and the Congress to enact the appropriate changes in the Internal Revenue Code which will effect the Joint Committee recommendations. We would be happy to supply the Committee with any further relevant information.

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*April 26, 2000*

Hon. Rep. Bill Archer, Chairman
Hon. Sen. William V. Roth, Jr., Vice Chairman
Attn: Lindy L. Paull, Chief of Staff
Joint Committee on Taxation

Dear Joint Committee on Taxation:

The Joint Committee on Taxation is doing long-neglected and long-needed work to require disclosure of lobbying and political activities by non-profit organizations.

There is a broad misconception that all non-profits are charities, doing charity work, or that non-profits somehow are non-political. But charities are only a subgroup of non-profits. America's most active and vocal lobbying and political pressure groups have organized as non-profits, hoping to gain a charitable image by mixing among true charities. Many of these political groups also depend heavily on "grants" of taxpayers' money to finance their group.

For many years, a huge effort has been underway to persuade non-profits to use their special tax status not to perform works of public service, but to launch political agendas and to focus on political advocacy. Both lawmakers and the general public are the targets of these major propaganda efforts. Free speech must be protected, of course, but that does not require giving huge tax advantages to some while denying it to others. (For example, 1993 legislation greatly limited political speech by profit-making groups, by restricting their tax deductions for lobbying, while not placing equal restrictions on lobbying by non-profits.)

When Congress in 1995 examined political advocacy and lobbying by non-profit organizations, we discovered that 57% of lobbying by non-profits comes from just 3%

of 501 (c) 3 grantees. We also discovered that lobbying activities conducted by other non-profit organizations who receive government grants is not being disclosed under current law. Clearly, taxpayers have a right to know how their funds are being used.

The Joint Tax Committee is performing a valuable service by examining the issue, and recommending greater disclosure. The public needs to know about the activities of special interest organizations who receive tax exemptions. More information certainly should be reported on the Form 990, which is the key public record filed by these groups, but which does not now require sufficient disclosure.

The Joint Committee's staff recommendations clearly show they understand the problems with lobbying by tax-exempt organizations, which has become a backdoor subsidy for political activists, giving them a louder voice than tax-paying groups.

Public charities should welcome the opportunity to distinguish themselves from advocacy groups. Disclosure of lobbying efforts is a key way to identify the difference. This should include lobbying and advocacy thinly-disguised as studies, analysis, and research, when they are actually used to attract media attention and support for a group's political agenda. Too often, the media fail to report the political motives which underlie supposedly impartial studies.

In addition to the Committee staff's recommendations, I hope the Form 990 will also be revised to require disclosure of grants from taxpayers' money, separate and distinct from disclosure of privately-funded grants, and distinguishing between federal, state and local grants from public funds.

The acceptance of the Joint Committee staff's recommendations will help the tax-exempt non-profit community to police themselves better. The IRS will receive appropriate information. Contributors will know that their contributions are being used as outlined in an organization's charter, and not to finance political advocacy instead.

Sincerely,

ERNEST J. ISTOOK, JR.
*Member of Congress*

EJI/wad

**Statement of William J. Lehrfeld, Bethesda, MD**

I.

Except for provisions relating to increased disclosure of lobbying information, the recommendations of the Joint Committee staff to disclose substantially all interaction between exempt organizations and the Internal Revenue Service is deserving of Congressional support. As the staff analysis makes clear, the degree of benefits available to the exempt organization sector generally, and the 501(c)(3) sector particularly, justifies these modest intrusions on what otherwise might be considered areas of corporate privacy. A 501(c)(3) exempt organization has no private constituency, *per se,* in that it purports to serve and operate in the public interest in the historic sense of charity.[1] But there are thousands of 501(c)(3) organizations that have users, even as vendees, and these users, as with any consumer orientation, bring to the relationship a desire for continuity of service or function, undeterred by anyone's oversight other than their own. Establishing oversight for the operation of a school, church, hospital or other charity is a subjective task in that most enjoy their privileges and immunities not by reason of the success achieved for their limited population, but by the fact that as a whole, such institutions provide broad public services—and stability—that is appropriate and necessary to our open, co-dependent society. But a gas station and a dry cleaner are appropriate and necessary for society as well, so there must be some justification for the direct and indirect largesse offered by the Congress to these organizations through a variety of deduction incentives, exclusions, exemptions, or credits. In return, at the very least, in this marketplace, an alert public expects these organizations to perform their roles with an overriding sense of responsibility to the public. Some private profit or benefit must be involved since good help is hard to come by, especially in certain TV markets where college athletics prime many a pump.

Congress is fully justified in demanding a full and fair accountability of the totality of subsidies. Accountability for charitable organizations especially is historic and,

[1] *Bob Jones University v. United States,* 461 U.S. 574 (1983).

in fact, it was the lapses and failures of many charities that led to the Statute of Charitable Uses in 1601 creating a "reform" of the charitable sector in England. There has been no equivalent "reform" much less analysis and understanding of the public sector here in the United States and, but for the Internal Revenue Service, there is no single private or public entity that assumes responsibility for assuring that 501(c)(3) organizations turn square corners. And surely no one, nowadays, believes the Internal Revenue Service has manpower, the money or the stomach to vigorously address and remedy the fault lines running through the nonprofit sector. That leaves the public—meaning the media—to press the sector for inside information about its affairs.

II.

In 1965, the United States lost a decision involving taxes imposed on International Business Machines.[2] The case involved the discriminatory effect a private letter ruling had on competitors selling a comparable product. The text of the decision is unimportant and it is noted here solely because of the notions spread in the petition for certiorari filed by the United States; the petition claimed that if the IBM case were allowed to go unreviewed by the Supreme Court, the entire private letter rulings process of IRS would collapse. It also alleged that, unless the Supreme Court reversed the IBM case, the government would be forced to shut down the private letter ruling process because it would be unable to administer a program subject to the wild vagaries of court review. As it turns out, the hyperbole of the United States was so far wrong it now seems almost quaint. The private ruling process not only prospered but became a valuable, sometimes irreplaceable tool for all forms of tax planning, so much so that Congress took the initiative, in 1976, to make sure that all America had access to the facts, law, arguments, rationale and conclusions found in substantially all private letter rulings.[3]

Private letter rulings are a gateway when planning "iffy" transactions, because counsel is edgy, the employer is uncertain, and the law could be read as easily against as for the transaction. Private rulings issued by the National Office (in the form of technical advice) upon review of issues raised during audits, also disclose the application of law and regulations on completed transactions raised during an examination. It would be extremely helpful for the public to know and benefit from not only the offensive or defensive thinking of the exact exempt organization seeking IRS assistance and comfort when eliciting a ruling on a proposed transaction, but also in the context of the *who* and the *why* of it. More can be gleaned from who a petitioner is than what is revealed today by background file documents in closed, confidential files. It is also an important accountability consideration that technical advice memoranda, especially relating a to proposed revocation, be made public so that organizations which have failed to conform their corporate behavior to the norms expected by law and regulations, have the arguments and rationale analyzed by the press and the public for a more important judgment, blessing or sanction. Congress correctly noted that there should be limited exceptions to disclosure, especially where national security or trade considerations are involved.[4] Even these rules today seem anachronistic. There is no justification for refusing to disclose, as completely as possible, the entire work file of any private ruling or any technical advice memorandum. The party seeking assistance or relief wants the continuation of its subsidies. The public needs to know—is it still prudent, or efficient, or relevant that these subsidies remain supportable. If IRS needs a complete picture for a ruling or technical advice task, so it is that the public does as well. More information, accessible on a more timely basis and from IRS sources, allows a better-informed judgment about the entity, its corporate behavior and the extent it is meeting the public's expectation of its mission.

It is also important that IRS disclose their own postures in audit cases since the text of private rulings traditionally are quite modest in their description or explanation of the facts, description or explanation of the law and regulations, and description or explanation of the rationale which justifies the conclusion. The Joint Committee staff did not recommend a statute which requires the IRS to write intelligible private letter rulings; that would be an exercise in mischief. But the idea has merit.

[2] *International Business Machines Corp. v. United States,* 343 F.2d 914 (Ct. Cl. 1965).

[3] See, IRC 6110, enacted to create boundaries against the law being created in *Fruehauf Corp. v. Internal Revenue Service,* 522 F.2d 284 (6th Cir. 1975), vacated by 429 U.S. 1085 (1977) as a result of the Tax Reform Act of 1976.

[4] IRC 6110(c)(2) and (4).

The Committee staff did not demand IRS reveal its work product—conference reports, interoffice memos, opinions of IRS personnel, which eventuated in the ruling or technical advice. This disclosure is also necessary so the public can judge whether IRS is driven by justifications serving no policy or revenue purpose, or may be acting vindictively or is even politically motivated. Whatever the audit or ruling file contains should be disclosed even if ordinarily privileged. Let the system decide and give IRS some insight from outsiders. Look back at the original purpose of the Freedom of Information Act and make that the measure for IRS disclosure.

It comes as no surprise to anyone that the staff of the Joint Committee has, on a number of occasions, been called upon to evaluate whether or not there was invidious selection and/or political discrimination in the audit and ruling process involving conflicts or controversies between taxpayers and the IRS. Despite the Chairman's desire to have a report by September 15, 1997 concerning the potential political influence on the IRS by the Administration or Members of Congress, he has not seen fit to explain publicly to the press, or to anyone, why the report has not been made public, as of the date of these comments. This is important because many times the Congress itself is the party responsible for intruding upon an exempt organization audit or ruling process either strongly opposing or strongly supporting the exempt organization. Under the proposals, these congressional letters would have to be associated with the case file and not filed someplace else.[5] Complete disclosure of private ruling letter ruling requests, the names and identifying details in private letter ruling requests, or audits, might early on decrease the number of rulings requested by exempt organizations with respect to proposed transactions. That is not necessarily a bad thing since many rulings are merely for taxpayer comfort, and not due to any lack of counsel's confidence that the transaction is out of bounds. What is important is that full disclosure will give some shape and meaning to the administration of the law and by knowing who is involved, what the IRS thought, what third parties were interested, and how a favorable or unfavorable ruling will implicate related transactions. Such full disclosure will not only allow the public to gain more insight and value from a ruling, but also discern whether the proposed transaction, after the ruling, is accurately reflected in the events that come to pass. IRS does no follow-up on its rulings, but if the press is looking, a measure of accountability can be achieved that is now ignored or lost.

### III. Closing Agreements

Closing agreements are an important aid in resolving controversies involving all taxpayers but especially exempt organizations. The problem with closing agreements is that the Service is just now beginning to appreciate the value which closing agreements have on regulating prospective behavior by previously errant organizations rather than merely quickly resolving a tax dispute involving certain dollars, for certain years, for certain issues. During my six years of service in the IRS National Office, I remember seeing one, perhaps two, closing agreements that passed through the Branch on the way up to the Commissioner. Prior to the mid-nineteen nineties, I had little personal experience with closing agreements, perhaps less than a dozen in 30 years. In the last five years, however, I have seen closing agreements come up in the ordinary course of negotiating settlements because the government can not only fix a "tax" for the resolution of the years in issue, but can also formulate a plan for corporate behavior over the horizon that requires the entity's conformance to the rules set out in the closing agreement. In the last several years only one of my closing agreements (out of five) would have faltered if IRS insisted on any disclosure of any sort about the agreement. Because the organization strongly disagreed with the IRS position but felt that it could get in and out of its situation without significant expense, signing the closing agreement seemed a quick and practical solution. But that case was unusual, involving an educator and an overheated revenue agent, and the relationship was so venomous that the Inspection Service was always nearby. For other clients, signing a closing agreement has been a useful tool to settle private foundation tax liabilities, unrelated business tax liabilities, and exempt status issues. These settlements work because of the imposition of conditions subsequent in the closing agreement unrelated to the actual behavior of the organization leading to the assertion of tax liability in the first place. These conditions guide the entity and act as a way of reducing revisits by agents, since manage-

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[5] In *Lehrfeld v. Richardson,* 132 F.3d 1463 (D.C. Cir. 1998), there was testimony by Internal Revenue Representatives that congressional records involved in a particular exemption application *would not be* kept in the same file as the exemption application itself. This needs to change by redefining the application file. See, IRC 6104(d)(5).

ment and counsel can cooperate to protect the entity from donors, directors, or others (like politicians) from going off-task.

If there is a particular problem today with respect to the closing agreement program, it is that it is selectively applied when it comes to the disclosure of the agreement itself or the existence of the agreement. It appears, from both personal experience and industry gossip, that the Internal Revenue Service has, as a rule, sought to impose some form of disclosure on closing agreements relating to church organizations and not to impose a comparable requisite on non-church organizations. Press releases were required of Jimmy Swaggart, Jerry Falwell, Church of Scientology, and several others entities and there seems to be no notice or demand that the Internal Revenue Service, in the implementation of a closing agreement process, expects publicity in other cases or circumstances. It is as if churches have been singled out by the Internal Revenue Service for additional repentence in the form of an acknowledgement of their alleged political activity or other untoward behavior.

This forced disclosure problem is exacerbated by the fact that, based upon depositions taken in the *Tax Analysts* case,[6] Internal Revenue Service is not certain where its closing agreements are filed, retains no generalized index, and its senior management is uncertain whether or not there is any consistency in the textual explications of closing agreements, other than the format provided by the revenue procedure. See Rev. Proc. 68–16, 1968–1 C.B. 770. The chaotic approach to closing agreement administration, evidenced by these depositions,[7] indicates there is no "master plan" nor any guidelines that are easily accessible to IRS senior management in dealing with CEP cases, or just plain "large" cases, or sensitive cases, or cases in which a publicity demand is being pressed by IRS for reasons that it will never share with the affected entity or be known to the public.

The notion that disclosure of the text of a closing agreement contents will impede their utility is nonsense. A closing agreement is often the first, best route to be taken by an exempt organization with compliance problems, because it immediately resolves the liability issue for prior years, it creates over the horizon boundaries which are readily referenced by the agreement, and is executed perhaps by the same persons who had complicity with the orginal dysfunction. Such agreements reduce the likelihood of a protracted and very expensive investigation, appeal and litigation; it allows a controversy to be resolved and not to stay within public earshot. Both parties can use the power and effect of time and distance brought by an agreement to their own advantage. While disclosure of an agreement may sometimes be irksome or even painful, the process has so many benefits weighed in its favor that its utility would almost never be undermined by its disclosure.

Disclosure also means that the organization facing that prospect would have, it would appear, a strong bargaining tool to moderate inappropriate langugage which the government might seek to impose in the ordinary nondisclosure case. Disclosure of the closing agrteement also allows the organization to make a clearer choice on whether it wishes to directly confront the government's argument on noncompliance. Certainly if an issue addressed by Internal Revenue Service is not a continuing issue, and has little or no future significance, a closing agreement can be utilized to promptly dispose of the asserted liability and create a series of negotiated promises concerning future behavior. On the other hand, if there is a continuing issue with larger liability over the horizon, publicity of the closing agreement may be the one factor that causes the organization to face up to the desirability (apart from the cost) of confronting the Internal Revenue Service through a notice of deficiency or refund suit on the integrity of the IRS argument.

## IV. Additional Disclosure Suggestions

There are some matters which the staff did not deal with and the purpose of this part of the submission is to suggest that additional disclosure could prove useful.

1. *Disclosure of Certain Contributors.* Under present law private foundations must list on Form 990PF the names of their grantees. This information seems to be useful in allowing commercial publishers and others to create reference books on the missions of various foundations. It is suggested that the names of private foundations which are donors to 501(c)(3) organizations, or others, be disclosed on Form 990. The information is already in the public domain and its disclosure on the return of the donee organization would facilitate public awareness of the types of support received by certain organizations.

2. *Disclosure of Corporate Contributors.* There are expectations of privacy under many circumstances, especially where governmental units might use membership

[6] *Tax Analysts v. Internal Revenue Service,* 53 F. Supp. 2d 451 (D.D.C. 1999).

[7] Depositions are available for disclosure to Joint Committee staff upon request.

lists or donor lists as a way of harassing an organization. There is also some concern on the part of donors that if their names are disclosed, many potential donees will seek them out for contributions and create a form of friction between the charitable sector and donors which could possibly reduce contributions. However, with respect to contributions to non–501(c)(3) organizations, these organizations should be required to disclose donors which are related, affiliated or controlled organizations (i.e., where the 501(c)(4) is a mere piggy back) or where they receive contributions from corporations so that the public becomes aware if the organization is carrying out a business purpose of the donor, rather than an exempt purpose of the donee. To the extent that a corporate donor could reasonably expect to claim a business expense deduction for its contribution to support a 501(c)(4), (c)(5), (c)(6) organization, it is not unreasonable to expect that disclosure of this information may assist in determining whether or not the organization is in compliance with the expectations of its exempt status. In other words, if an organization is seen as being a mere conduit for a group of business corporations which use the conduit as a way in which it can disguise corporate involvement in a particular program, project or cause, then it is in the public interest to know exactly why a particular social welfare organization or trade association is immediately involved and whether or not the integrity of the organization can be impugned because of the financial controls that may be exercised over the organization's policies through the medium of financial support.

3. In the 1992 tax bill, Congress chose to alert charities of their financial stake in a charitable remainder trust. The need for this proposed legislation was indirectly grounded in a decision of the Wyoming Supreme Court which held that a charity could not rescind a sale of property from a charitable remainder trust that apparently was sold to a person related to a fiduciary at below its fair market value. Charities thereupon went to Congress and successfully argued that if a remainderman had early notification of its financial stake in a charitable remainder trust it could assume a role of oversight and accountability with respect to its financial interest, given the fact that there is almost no Internal Revenue Service oversight of charitable remainder trusts. The common law of charitable remainder trusts allows the charity oversight and accountability.[8] To the extent that the charity learns of its interests immediately, it is able to be responsible so that its financial stake in the trust is protected from erosion, arising out of fiduciary nonfeasance or misfeasance. Given the slovenly way in which IRS approaches charitable remainder trusts,[9] it is strongly recommended that the committee enact the proposal that was provided for in 1992 as a way of sending additional signals[10] to the "planning" community that the opportunities for manipulation and mal-administration will no longer be tolerated.

4. Part of better accountability can be achieved for charitable remainder trust by Congress overturning Reg. Section 1.170A–13(c)(7)(v)(B) and (C) and Reg. Section 1.170A–13(f)(13). These two regulations allow the trustee of a charitable remainder trust to substantiate the contribution of a donor to the trust, rather than having the charity, as called for by law, do the substantiation. It seems that if the charity itself is the enterprise which is required to substantiate the contribution made by a donor by knowing what property was gifted and the terms in the text of the trust, it would be able to provide a mechanism to assure that the substantiation rules operate as effectively as Congress first designed them to do, especially in light of the fact that many charitable remainder trustees are the donors themselves, as well as the income beneficiaries. When a donor is both an income beneficiary and a trustee of a charitable remainder trust, there is great temptation to utilize the trust to exploit the trust to points not contemplated by the statute or the regulations because of the significant tax advantages that can accrue to a manipulated trust when trusteed by the person who gains the initial stake in the trust. Altering these two regulations by statute would be an abrupt notice to these donors and fiduciaries that they must turn square corners with respect their philanthropic intentions.

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[8] *Shriners Hospital for Children v. Smith,* 385 S.E.2d 617 (Va. 1989).

[9] IRS has no notion of how much is in the corpus of charitable remainder trusts; IRS has never sought to impose any kind of a civil penalty for failure to file a timely or complete return; and IRS has an indifferent attitude with respect to the examination of these trusts as part of its responsibility of assuring the integrity of the exemption and deduction provisions which create the incentives for establishing such trusts.

[10] Recent regulation amendments make it clear regulations are addressing abuse issues.

NATIONAL ASSOCIATION OF STATE CHARITY OFFICIALS
HARRISBURG, PA
*March 14, 2000*

A. L. Singleton, Chief of Staff
Committee on Ways and Means
U.S. House of Representatives
*1102 Longworth House Office Building*
*Washington, D. C. 20515*

Dear Mr. Singleton:

The National Association of State Charity Officials (NASCO) is the national organization of the various state officials responsible for administering and enforcing over three dozen state charitable solicitation statutes. On behalf of the NASCO board, I submit the following comments concerning the Joint Committee on Taxation staff report dated January 28, 2000.

The NASCO board commends the Joint Committee staff's thorough research and well-documented report. We strongly support, with one exception, the Joint Committee staff's recommendations because they will significantly enhance the ability of NASCO members to fulfill our statutory mandates to protect the public from charitable solicitation fraud and improve both the quantity and quality of the information available to the public concerning tax-exempt organizations.

The Joint Committee staff's most important recommendation is the one recommending that the IRS be permitted to disclose to State Attorneys General and other nontax state authorities audit and examination information from both completed and ongoing IRS audits and investigations of tax-exempt organizations.

In at least 38 states, NASCO members, like the IRS, are charged with overseeing the activities of tax-exempt organizations. Notwithstanding this fact, the IRS has not been permitted to share information with state authorities who, in many cases, were conducting simultaneous investigations or audits of the same tax-exempt organizations the IRS was investigating or auditing.

This current prohibition on the IRS sharing information with state authorities having similar oversight responsibilities is especially frustrating in those cases where state authorities have specifically referred a matter to the IRS and the IRS is prohibited from even confirming that it is conducting, or will conduct, an investigation or audit.

For these reasons and others, implementation of this recommendation alone would significantly improve the ability of NASCO members to perform our oversight responsibilities more effectively. If implemented, unnecessary duplication of effort would be eliminated, unscrupulous organizations would be prosecuted more expeditiously by both the IRS and state authorities, and the public would be protected more effectively and efficiently.

The NASCO board's only concern about this particular recommendation is that it appears to limit the IRS's ability to share information concerning its audits and investigations to those states which have made specific referrals to the IRS or have a history of making such referrals. We believe the IRS should be permitted to share information concerning tax-exempt organizations even with states which have not made specific referrals or have a history of making such referrals. In other words, if the IRS completes a major audit or investigation of a tax-exempt organization located in Pennsylvania, it should be required to notify the appropriate Pennsylvania authorities even if they did not make a specific referral to the IRS concerning the organization in question and have never made any referrals to the IRS. Otherwise, the Pennsylvania authorities' ability to protect their residents will be significantly diminished.

The NASCO board is also strongly in favor of the Joint Committee staff's recommendation to increase the penalties imposed upon tax return preparers who knowingly or recklessly make material misrepresentations, falsifications, or omissions on 990s.

Given the significant number of material falsifications and omissions several states have documented on 990s, it is imperative that tax return preparers who knowingly or recklessly prepare and submit false or misleading 990s be appropriately disciplined and/or prosecuted.

The 990 is the primary public document the IRS and state authorities have used, and will continue to use, to conduct our oversight responsibilities. It is also the primary document the general public relies upon to help them make better, more informed charitable giving decisions. As a result, it needs to be accurate, complete, and free from material misrepresentations, falsifications, and omissions.

This is especially true now that thousands of 990s are widely available on the Internet through the Guidestar web site. This recent technological innovation has the potential to revolutionize accountability in the tax-exempt community. However, if many of the 990s submitted by organizations contain material misrepresentations and falsifications, the value of having them widely available on the Internet will be significantly diminished. Those responsible for preparing these important tax documents must be held accountable for any knowing or reckless falsifications or misrepresentations.

The NASCO board is also very much in favor of the Joint Committee staff's recommendation to have the IRS accept electronic filings of 990s after 2002.

The only Joint Committee staff recommendation the NASCO board does *not* agree with is the one to no longer make the taxpayer identification numbers of tax-exempt organizations disclosable. The reasons for our disagreement with this recommendation are several. First, many state authorities routinely use this information for tracking, retrieval, and investigative purposes. Second, it would be cumbersome and costly to have this currently public information deleted from 990s before they are posted to the new Guidestar web site or routinely disseminated by state authorities to the general public. Third, we are not aware of any instances where this number which has been available to the public for years has been used by third parties to the detriment of any tax-exempt organization. Indeed, the Joint Committee staff report did not cite any specific instances of actual misuse. It simply stated that the staff believed "the potential for misuse may be increased." And, lastly, to now make organizations' taxpayer identification numbers nondisclosable would only benefit new organizations since the taxpayer identification numbers of thousands of existing tax-exempt organizations have been routinely disclosed and available to those who could potentially misuse them for years.

In closing, the NASCO board appreciates the opportunity to submit these written comments to your Committee and again commends the Joint Committee on Taxation staff for its exemplary work on this important topic. Do not hesitate to contact me if you have any questions concerning our comments.

Sincerely,

KARL E. EMERSON
*President*

**Statement of National Club Association (NCA)**

The following comments are submitted for the record by the National Club Association (NCA).

INTRODUCTION

NCA is the trade association representing the legal, legislative and business interests of private social, recreational and athletic clubs. Member organizations include country, golf, city, yacht, tennis, and athletic clubs. The scope of these clubs ranges from small clubs with limited membership and facilities to larger, full-scale operations with dining and extensive recreational facilities. Some clubs operate on a seasonal basis while many are open year-round.

The majority of the clubs NCA represents are tax exempt under section 501(c)(7). These clubs are organized for social activities, recreation and other nonprofit purposes. This exemption reflects the recognition by the government that these clubs are not-for-profit mutual endeavors by their members.

These comments are submitted in response to a study released by the Joint Committee on Taxation on January 28, 2000, entitled a Study of Present Law Taxpayer Confidentiality and Disclosure Provisions as Required by Section 3802 of the Internal Revenue Service Restructuring and Reform Act of 1998. We are specifically responding to the recommendations made in Volume II relating to disclosure provisions for tax-exempt organizations.

OVERVIEW OF COMMENTS

NCA has been interested in the issue of the public disclosure of Form 990 and related documents by tax-exempt groups as well as what we consider to be redundant and often unnecessary requirements for information on the Form 990. As a result, we are concerned with many of the sweeping and far-reaching recommendations for changes to existing public disclosure requirements for tax-exempt organizations as contained in the Joint Committee's January 28 report.

We agree with the Joint Committee that the issue of public disclosures requires a balancing of an organization's right to privacy and concerns about misuses of information and the legitimate public interest in information regarding charitable organizations. However, we believe the Joint Committee's recommendations will cause the pendulum to swing too far in one direction, thereby upsetting this delicate balance.

Many of the recommendations are overreaching and unprecedented in that they would apply to no other tax reporting groups. We believe that other recommendations, such as disclosing an application of an entity that has been denied tax-exempt status, fail to have any relevance to the goal of proper public disclosure. Finally, we believe that the recommendation to disclose unredacted tax audits and closing agreements would have, in some instances, a chilling effect on voluntary taxpayer compliance. NCA's specific comments on these points are outlined below:

*Recommendations are Overreaching*

The JCT study recommendations for further public disclosure of tax-exempt organizations across the board are a substantial overreaction to public concerns regarding charitable organizations.

These recommendations are not warranted when applied to certain types of tax-exempt organizations, particularly those that are not classified as 501(c)(3) charitable organizations. The public interest concerning 501(c)(3) organizations is far different that than for 501(c)(7) social clubs or for trade associations organized under 501(c)(6). As a result, in many instances disclosure by tax-exempt groups other than 501(c)(3) organizations would promote more of a voyeur interest rather than the protection of the public.

For example, we fail to see what public purpose is served by disclosing the application of an entity that is denied tax-exempt status. Furthermore, procedural or administrative hurdles (that may be overcome later by an applicant) may have prompted the denial. The disclosure of an application that is denied by the IRS could be misconstrued by the public and put the entity in an unfair or prejudicial position when applying for exempt status at a later date.

*Written Determinations and Background Documents*

The JCT study recommends that all written determinations and background file documents involving tax-exempt groups be disclosed. We believe this recommendation has serious implications and could create a chilling effect for groups seeking private letter rulings (PLRs) from the IRS to clarify certain issues.

The publication of unredacted PLRs would discourage organizations from seeking advice before proceeding with certain actions. PLRs, although only applicable to the entity seeking the advice, have served as a key compliance tool for the tax-exempt community concerning the IRS's position on certain issues. Public disclosure of the name of an organization that is merely seeking advice on a proposed action would not serve the public good and might impede it.

*Privacy Concerns Regarding Salary Disclosures*

The JCT study recommends that exceptions to any public disclosure requirements be made on a case-by-case basis. This would be both time-consuming and expensive and places an unfair burden on the tax-exempt organization. NCA believes that further consideration should be given to a broader basis for limiting disclosures on certain issues.

For example, NCA believes that the public airing of salaries and benefits of certain key personnel on the Form 990 serves no vital public interest with respect to 501(c)(7) social clubs. Such disclosures raise a number of issues relative to the privacy concerns of individual citizens (serving in a nonpublic capacity). In communities where several tax-exempt social clubs exist, the disclosure of salaries serves little purpose other than to raise awareness of a purely confidential personnel matter. In addition, it may also serve to drive up wage costs for those clubs that may not be competitive. NCA recommends that such disclosures only be required for excessive salaries that far exceed the industry norm.

*Disclosure of Audits and Closing Agreements*

The recommendation that audits and closing agreements be disclosed unredacted is particularly troublesome and could have a negative effect on various components of the audit process.

Closing agreements, for example, are confidential documents and represent, in effect, a negotiated agreement between the taxpayer and the IRS on issues raised in the audit. The ability to negotiate and settle tax issues that are in dispute could be impeded and ultimately affect the negotiating process if public disclosures are to be made. As a result, a greater number of cases may end up in the court system, thereby adding time and cost burdens for both the taxpayer and the government.

Tax audits usually involve extensive supporting documents, questionnaires and often Field Service Advice (FSA) inquiries made by IRS agents requesting IRS clarification on key issues. The public disclosure of these documents, especially unredacted FSA inquiries, may work at cross purposes and chill voluntary disclosure and early resolution of outstanding tax issues. Furthermore, during an audit many inquiries and the accompanying answers or explanations provided by the taxpayer are oral, leaving the written record incomplete and potentially creating confusion for the general public.

Furthermore, tax issues for tax-exempt groups are unique and complex, and often have legislative histories that may be unknown to the general public. As a result, the public disclosure of such tax documents could be misconstrued and used for the wrong purposes.

*Disclosure of Form 990–T*

The JCT study recommends that in addition to Form 990, tax-exempt groups should also publicly disclose their Form 990–T, which is essentially a corporate income tax return. We believe that such a disclosure is another onerous regulatory burden. Such a requirement is unprecedented and it is unfair to require it of tax-exempt groups and not others which pay corporate income taxes.

NEW YORK STATE OFFICE OF THE ATTORNEY GENERAL

*March 14, 2000*

Mr. A.L. Singleton
Chief of Staff
Committee on Ways and Means
House of Representatives
*1102 Longworth House Office Building*
*Washington, D.C. 20515–6345*

RE: Study of Disclosure Provisions as Required by Section 3802 of the Internal Revenue Restructuring and Reform Act of 1999

Dear Mr. Singleton:

We are writing to comment on the January 28, 2000 report of the Joint Committee on Taxation, Study of Present Law Taxpayer Confidentiality and Disclosure Provisions as Required by Section 3802 of the Internal Revenue Restructuring and Reform Act of 1999 ("The Report").

## I. INTRODUCTION

We strongly support the Report's recommendation of increased disclosure to state charity regulators, including Attorneys General, of information relating to tax-exempt organizations gathered under the Internal Revenue Code. The Joint Committee's goal to enhance efforts to protect the public by promoting the flow of information between the IRS and the states will improve the ability of the states to enforce state laws and will facilitate the cooperation of the states and the Internal Revenue Service in cases involving breaches of fiduciary duties by charitable organizations and their managers and disqualified persons.

The Charities Bureau of the New York State Department of Law is charged with the responsibility to oversee charitable entities that conduct activities in New York and/or solicit contributions from New York State residents. We audit and investigate such entities. When we discover violations of the Internal Revenue Code, we forward information to the Internal Revenue Service for its action.

As the Report points out, state charity regulators currently are not advised as to whether the IRS has taken action based on our referrals. This is extremely frustrating and can result in duplications of effort or no effort on our part where the issues are multi-state or primarily federal. As with the IRS, our resources are limited (nineteen lawyers and seven accountants), and we have to prioritize. Nevertheless, we believe our law enforcement efforts are significant and enclose a draft of our 1999 annual report to indicate the scope and results of our efforts.

In an effort to remedy this situation, we met in Washington with the new exempt organization leadership of the IRS last Spring. We have referred to them issues of exclusive or primary concern to the IRS and some that we believe warrant joint efforts. We have been unable to obtain a meaningful response from the IRS.

We do not think the legal restrictions on disclosure are the only obstacle. If we have one general criticism of the Report, it is that it appears to assume that greater states/IRS cooperation will follow from increased disclosure. This may be true, but in our experience the mindset of the IRS is antithetical to cooperation. This we know has also been the experience of some United States Attorneys offices. If their and our experience is typical, the IRS's mindset, particularly at the national level, also has to be changed, dramatically and decisively.

In at least one recent case, we have been able, at the district level, to cooperate with the IRS to a point that we feel we are on the brink of achieving a significant result in the case of a foundation whose actions implicate violations of both state and federal law. A for-profit disqualified person bought shares of its stock held by the Foundation. The Foundation needed to sell such shares to avoid the assessment by the IRS of substantial excise taxes for excess business holdings. The IRS seemingly had ignored the self-dealing issues.

The Charities Bureau became aware that the Foundation had received offers from parties other than the company to purchase the Foundation's company stock for significantly more than what was paid by the company. The Bureau is working with the IRS to assess penalties on the Foundation managers and the company for self-dealing rather than to impose an excess business holdings excise tax on the Foundation itself. Under state law, Bureau is seeking restitution from the company to the charity.

If this experience could be replicated nationwide, we believe both the states and the United States will have taken a significant law enforcement step forward.

## II. Specific Recommendations

The Report recommends that the IRS be authorized to provide state regulators with information concerning its actions with regard to referrals. To be effective, such disclosure must be prompt. Otherwise the states will not know how to proceed and may encounter state statute of limitations issues.

The language of the Report (*page 104*) should be strengthened. The IRS should not be "permitted" to disclose, but should be authorized and directed to disclose. Nor should the IRS have the exclusive power to determine whether or not "disclosure may facilitate resolution of cases." If this escape clause is retained, experience tells us that disclosure by the IRS to the states will be rare.

Disclosure by the IRS to the states of documents relating to the imposition of intermediate sanctions, private foundation excise taxes, revocation of exempt status and other proceedings would assist greatly in enforcement of state laws that regulate the disposition of charitable assets and solicitation of contributions from the public. Although, from time to time, we receive notification of the revocation of exempt status, there does not appear to be any systematic procedure by which we are advised of such determinations even though such disclosure is now required by Section 6104(c) of the Code. As we observed in our letter of September 30, 1999, printed at pp 296–297 of volume III of the Report, the now permitted IRS disclosure to state officials discussed at pages 36–37 of the Report should be required to be prompt and consistent.

Information concerning the failure to grant or the denial of exempt status is very helpful to the states. For example, entities may, in the course of soliciting charitable contributions from New Yorkers, claim that they are tax exempt when they have not been granted tax-exempt status or such status has been revoked.

Likewise, information concerning pending IRS proceedings to impose taxes and/or penalties on charitable entities might be relevant to our oversight of trustees' management of charitable assets. Early intervention on state law issues might prevent future misuse of charitable funds.

In this connection, we wish to make two points of substance. Both the intermediate sanctions and private foundation excise tax Code provisions generally provide for taxation of both the exempt organization and its managers. From the point of state regulators anxious to maximize charitable assets and mindful of the fact the exempt organizations act by their managers, the federal taxation of the exempt organizations is not consistent with state policy. The excise tax burden should generally fall on the managers, not on the charity. Correction is triggered in either case.

Particularly counterproductive are the provisions of the regulations that provide a blanket exception to self-dealing for indemnification of foundation managers for excise taxes paid under chapter 42. This makes no public policy sense whatsoever.

It violates Congress's intent to make foundation managers financially responsible. In the situations where an excise tax is also imposed on the charity, the indemnification exemption could lead to the absurd result of the charity paying twice and its managers not at all.

The Report recommends that charitable entities be required to disclose forms 1120 and 990T which report their for-profit income. More and more tax-exempt entities are developing relationships with for-profit entities, including the establishment of for-profit subsidiaries. Some tax-exempt organizations try to conceal some of their activity behind for-profit companies. In order to have a full understanding of the financial activities of tax-exempt organizations, knowledge of related for-profit activities is essential. We support the proposal to make such information available to the public.

Currently, charitable organizations that do not normally have income of less than $25,000 are exempt from filing any report with the IRS and most states. The Report recommends that such organizations be required to file with the IRS an annual notification of their status. In New York, we find that small organizations that were, at one time, exempt from filing often fail to file when their income rises above $25,000. Other organizations that were exempt from filing cease activity but, since no annual filing was required, fail to notify us of that fact. Requiring an annual notification of status would go a long way to solving these problems if such notice will also promptly shared with the states by the IRS.

This Bureau receives numerous 990's of all types that contain material omissions, errors in preparation and misrepresentations. We support the Report's proposal to increase penalties imposed on preparers. We anticipate that increased penalties will reduce the number of incomplete and incorrect filings and, consequently improve accountability and decrease the amount of time state offices spend in seeking amended reports.

More important, exempt organization reports and returns that are materially incomplete should be rejected by the IRS, and penalties against foundation managers for late filing should be levied unless the exempt organization promptly refiles. The states should get notice of such rejections.

The Report's support of electronic filing is welcomed. We are trying to develop our technology to implement electronic filing. We are pleased that the report encourages making technology issues a high priority for the IRS.

We do not support the Report's recommendation to exempt the taxpayer identification number from disclosure to the states. That number is used by many of the states to identify their registrants and to cross-reference numerous other databases maintained throughout the country. We are not aware of any instances in which the taxpayer identification number has been misused by the states, and the Report does not give any reason why the TIN should not be disclosed. We are certain that its exemption from disclosure to the states will deprive the states of a valuable tool.

Nor is it clear to us why the Report recommends limiting disclosure of the TIN at all. Most state and private databases use the TIN as the identification/registration number of tax-exempt organizations and the TIN is routinely disclosed to the public. Many databases of information concerning tax-exempt organizations are available on the Internet. We are unaware of any instances of abuse resulting from disclosure. Exempting the TIN from disclosure would deprive the states and the public of an important method of following the activities of tax-exempt organizations.

The Report recommends permitting disclosure to a state by the IRS when there has been a specific referral by the state and/or the state regulator regularly makes referrals to the IRS. While a relaxation of the restrictions on disclosure will likely encourage the states to refer matters to the IRS, making such disclosure a quid pro quo may result in inefficient use of resources when the states and the IRS separately investigate and litigate the same or similar issues and may result in lost opportunities to conduct cooperative enforcement efforts. Therefore, we recommend that the IRS be also directed to refer to the states matters that raise primarily state law issues and/or affect a state's charitable assets.

Foreign exempt organizations that apply for federal income tax exemption under the Code probably do not qualify to do business or register in states where they should. The Report does not appear to us to address the issue of how a foreign exempt organization should notify the IRS, when it applies for exemption, what state or states should be notified of its application. This may not be a significant issue for many states, but it is for New York and presumably also for California and Florida.

There is a similar issue, also apparently not addressed in the Report, with respect to domestic exempt organizations engaging in activities in states other than the state of incorporation or situs that under applicable state law should require them to qualify to do business or register in states other than the state of incorporation or situs. The 1023s and 990s should require such organizations to indicate the other states in which they have activities, and the IRS should notify all such states, not just the state of incorporation or situs.

Nondisclosure of information that might harm the national defense is discussed briefly at pp 35–36 of the Report but otherwise apparently not considered. We are aware of at least one situation that might involve such disclosure where nevertheless we believe it could be to the advantage of the IRS to be cooperating with New York and another state. The tax committees should consider arrangements, similar to the cross-swearing arrangements frequently made between United States and state prosecutors, under which carefully screened state charity officials could be security cleared to participate in these matters.

New York strongly favors disclosure of all of the items mentioned on pages 64–65 of the Report, especially fund raising practices and how much of the donation will be used to support charitable purposes and how much will be retained by professional fund raisers. This Bureau regularly publishes "Pennies for Charity, Where the Money Goes." A copy of the December 1999 issue is enclosed. It shows that on the average only 29 percent of money raised by telemarketers goes to the charity, which, of course, will in turn spend some of that amount on its own administrative expenses.

New York strongly favors IRS disclosure of audit results and closing agreements to the concerned states. Report, pages 84–86.

We also favor specific IRS disclosure of enforcement actions to the concerned states, but this is not specifically mentioned in the Report.

The Report apparently does not discuss vested charitable remainder trusts. They normally do not apply for exemption or register with the states until the noncharitable beneficiaries' interest has terminated. In our experience, the charitable remainder has too often been dissipated by then, even though the settlor took a charitable deduction on the creation of the trust. To alert state charity enforcement officials to the existence of vested charitable remainder trusts, the IRS should notify them of form 1023 or 5527 or of final forms 1041 or 1041A that reflect no charitable disposition. Forms 1023 or 5527, 1041 and 1041A should require the trusts to disclose the states where they have activities.

If we can provide any further information or be of any further assistance in the implementation of the Report and on further recommendations, please contact us.

Sincerely,

WILLIAM JOSEPHSON
*Assistant Attorney General-in-Charge*
*Charities Bureau*

KARIN K. GOLDMAN
*Assistant Attorney General*
*Registration Section Chief*
*Charities Bureau*

Encl.

CC: The Honorable Eliot Spitzer, Attorney General of the State of New York
Michele Hirshman, First Deputy Attorney General
Dietrich Snell, Deputy Attorney General

[An attachment is being retained in the Committee files.]

NORTHWEST FEDERATION OF COMMUNITY ORGANIZATIONS
SEATTLE, WA 98144
*March 15, 2000*

A.L Singleton
Chief of Staff
Committee on Ways and Means
U.S. House of Representatives
*1102 Longworth*
*Washington D.C. 20515*

The Northwest Federation of Community Organizations (NWFCO) respectfully submits the enclosed comments in opposition to the recent proposals related to "Lobbying Expenditures" contained in the *Study of Disclosure Provisions Relating to Tax-Exempt Organizations* prepared by the staff of the Joint Committee on Taxation.

The Northwest Federation of Community Organizations was founded in 1993 to facilitate the needs of grassroots organizations and their community leaders across Montana, Idaho, Washington, and Oregon. Together the five organizations that are affiliated with NWFCO—Idaho Community Action Network; Montana People's Action; Washington Citizen Action; Oregon Action; and the Coalition of Montanans Concerned with Disabilities—represent approximately 100,000 members. These members include retirees, farmers, farm workers, professionals, blue-collar workers, and welfare recipients. They are African-Americans, Native Americans, Latinos, and whites.

The Northwest Federation of Community Organizations and our affiliates share a commitment to advocacy by nonprofits. We appreciate the Joint Committee staff's effort in exploring the many issues related to disclosure and formulating recommendations regarding lobbying and other areas. Although our organization supports various other recommendations in the staff's report, the three lobbying proposals seem to us to be an overly broad solution to a problem that does not exist.

We oppose the lobbying proposals because we believe they would:

- chill the vital contribution that nonprofits make to the public policyprocess;
- impose unnecessary bureaucratic reporting obligations on nonprofits,reducing the resources available to address core charitable needs; and
- provide little information not already publicly available that would beuseful to charitable regulators or the public.

The attached comments are excerpted from comments prepared by Independent Sector addressing the complete list of proposals contained in the staff's report. The Northwest Federation of Community Organizations has focused on the advocacy-related proposals in these comments because they directly implicate our mission. These more focused comments demonstrate the consensus of the nonprofit sector in opposition to these proposals in particular.

The Northwest Federation of Community Organizations stands ready to assist the Committee in any way we can as you consider these flawed proposals. If the Committee decides to proceed with legislation implementing these proposals, we request that hearings be held to allow the nonprofit sector and the public we serve to respond to the legislation. In the meantime, we would be delighted to provide you with further information regarding our concerns and, in particular, the impact these proposals would have on our organizations.

Sincerely,

LEEANN HALL
*Executive Director*

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The nonprofit sector has an essential role to play in the policy process. By their very nature, charities have direct experience in meeting society's needs and proven knowledge of effective ways to meet those needs. In addition to this unique expertise, nonprofits also have the credibility that is inherent in their independent status to encourage responsible civic engagement and advance the causes of the disadvantaged and under-represented members of our society.

Although the value of nonprofits' participation in the policy process is clear, the threat that these proposals seek to address is not. There is no evidence of systemic problems with current disclosure practices or malicious failure to comply with lobby laws. Nonetheless, the Joint Committee staff has made proposals that would consume charitable resources that could otherwise be used to serve the public. These proposals are a burdensome solution in search of a problem.

We urge the Committee in the strongest possible terms to reject the staff's recommendations. All three of these proposals would chill the valuable participation of nonprofits in the policy process because the increased scrutiny would suggest Congressional skepticism about the value of that participation. All three of these proposals would drastically increase the burdens on nonprofits that engage in these educational and advocacy activities, consuming resources for needless bureaucracy when might be better spent in meeting the needs these charitable organizations werecreated to address. There is no compelling need for these new requirements that justifies the negative impact on core, first amendment speech.

Furthermore, each of the individual proposals has additional flaws. The proposal to require 501(c)(3)s that make the 501(h) election to provide a detailed description of its legislative concerns and activities provides little additional information beyond what is already publicly available in state and federal lobbying disclosure statements. The proposal to require reporting of self-defense lobbying challenges the right of 501(c)(3)s to respond to legislative threats to their rights or existence. The proposal to require reporting of certain nonpartisan studies, analyses, and research would regulate speech that improves, rather than taints, the quality of policy deliberations.

OKLAHOMA FAMILY POLICY COUNCIL
BETHANY, OK 73008–3458
*March 10, 2000*

Mr. A.L. Singleton
Chief-of-Staff
Joint Committee on Ways and Means
U.S. House of Representatives
*1102 Longworth HOB*
*Washington, DC 20515*

Dear Mr. Singleton:

As volunteer board members and officers of a charitable organization, we are writing to vigorously register our strong disapproval of certain concepts presently contained in Volume II of the Committee's report entitled "Study of Present-Law Taxpayer Confidentiality and Disclosure Provisions as Required by Section 3802 of the Internal Revenue Service Restructuring and Reform Act of 1998."

From our reading of your report, we understand the Joint Committee to be recommending substantive and material changes in the ways in which the Internal Revenue Service would relate with—and provide oversight of—exempt organizations under the Internal Revenue Code of the United States.

Specifically, it is our understanding that the Committee is considering the following:

1) a material change to Schedule A to IRS Form 990 to require "both electing and non-electing (under Code § 501(h)) public charities to provide a detailed description of the legislation addressed in their lobbying efforts and the manner in which organizations engaged in lobbying activities."

2) a modification of Schedule A to IRS Form 990 to require disclosure of amounts attributable to direct lobbying by an organization concerning an issue affecting the organization's existence or powers; and to also require disclosure of amounts spent on membership communications that encourage members to engage in direct lobbying that would meet the definition of self-defense lobbying if conducted by the organization.

3) a change to Schedule A to IRS Form 990 to require disclosure of non-partisan study, analysis and research that contains "a limited call to action." By the term "limited call to action," Committee staff is referring to the actions listed in Regulation § 56.4911–2(b)(2)(iii)(D). Essentially, this staff recommendation would require disclosure of all non-partisan study that identifies "one or more legislators who will vote on the legislation as "opposing the communication's view ...; being undecided ...; being the recipient's representative in the legislature; or being a member of the legislative committee or subcommittee that will consider the legislation." Id. The quoted material is the so-called "limited call to action." Under the Regulations, such non-partisan study with a limited call to action does not constitute grass roots lobbying.

Mr. Singleton, if our understanding of what the Committee is proposing is correct, then we must register our strongest disapproval for the following reasons:

1. The proposals implicitly change the definition of lobbying, something that is not really needed since very detailed regulations already define grass roots and direct lobbying in U.S. law and reasonably require amounts spent on such lobbying to be reported.

2. The recommendations needlessly increase complexity of already intricate regulations. Lobbying regulations are already cumbersome and difficult to understand. The Staff proposal would create yet another division within the maze of regulations—lobbying that is not reportable lobbying, but still must be disclosed on the organization's Form 990. Does this make sense? We think not.

3. The recommendations will add burdensome new record keeping requirements and substantially increase expenses to exempt organizations. As you know, exempt organizations do not now need to keep track of self-defense and non-partisan analysis activities. If the recommendations are adopted, then organizations such as the Oklahoma Family Policy Council will need to track these activities in sufficient detail to comply with whatever reporting requirements may be imposed, incurring significant financial hardship. As volunteer board members, who have each given sacrificially to fund important work such as that conducted by an exempt organization such as ours, we really must object to new onerous and unnecessarily burdensome regulations coming at us from our own government.

4. The recommendations are contrary to the clear direction of the Congress, to move the IRS and the Code toward tax simplification. We well remember the televised hearings into IRS abuses, and questioning by our own Sen. Don Nickles, the assistant majority leader. The Senator favors IRS simplification, as does the Committee's chair, Mr. Roth. These proposed recommendations will add many new reports and expense whereas the Senate Finance Committee has championed the reduction of reports and the simplification of record keeping for the American people.

5. The recommendations risk misleading the public about the lobbying activities of exempt organizations. This is a very serious infringement on our First Amendment rights, and the First Amendment rights of all charitable organizations. By requiring disclosure and reporting of activities that are expressly not lobbying, as defined and interpreted by the IRS and the courts, the proposed recommendations may grievously mislead the public by portraying lobbying activities in too large a scale. The recommendations are apt to confuse more than inform, which would be shameful. If the general public—as a result of this proposal—comes to wrongly see nonprofit organizations as simply lobbying organizations, and withdraws support, than much good charitable and educational work will no longer be accomplished.

6. Regulations imposed on non-profits are already too complex and the recommendations just add to the complexity and burden of operating a nonprofit. Changes to existing regulations should not be considered unless they simplify and decrease burden and expense.

7. The recommendations will further chill the voice of non-profits in the public square, and our society will be much worse for it. As you know from the hearings that have previously been held, the Internal Revenue Code, Treasury Regulations and IRS activity in the area of lobbying and political activity already have an "in terrorem" effect that causes non-profits to withhold communicating their views for fear that the IRS will impose sanctions. Increasing the burden and threats to non-profits who legally express their views on legislation is only enhancing the existing problem.

Too often in these days in which we live, government—our U.S. government—comes at the people, rather than springing forth from them. This appears to be the situation here. There has been no public groundswell to further complicate our tax laws. Rather the opposite is true, as you well know.

Absent any real need to impose additional burdensome regulations on public charities, which are operating legally under U.S. laws, we beg you to choose another path.

The Joint Committee staff, for whatever reason, appears to have "run amuck" in their thinking related to the concepts and recommendations contained in Volume II of the study. Possibly it is because they do not have to live under the rules they propose to the Committee members. We do. As volunteer board members and officers, who often struggle mightily to pursue this work, we know that the proposal, herein described, will have serious negative consequences for the nonprofit sector. Therefore, the proposed recommendations should be rejected as a policy option for the Joint Committee at the earliest opportunity.

Thank you for considering what we hope are thoughtful, worthy, and helpful comments to you, the Joint Committee staff, and the full membership of the Committee on Ways and Means.

Sincerely,

LLOYD G. MCALISTER
Chairman
ALAN MAULDIN
Treasurer
MICHAEL L. JESTES
Executive Director
WILLIAM DONOVAN
Board Member
DAVID C. DUNN
Research and Project Director
STEPHEN PRENTICE
Board Member
JEANNE R. YOUNG, CPA
K.E.E.P. Program Administrator
VELONIA JESTES
OFPC Receptionist

PHILANTHROPIC RESEARCH, INC.
WILLIAMSBURG, VA 23185
*March 14, 2000*

The Honorable Bill Archer, Chairman
Joint Committee on Taxation
*1015 Longworth House Office Building*
*Washington, DC 20515–6675*

Dear Chairman Archer:

Philanthropic Research, Inc. (PRI) is a 501(c)(3) public charity whose mission is to promote philanthropy by helping donors, institutional funders, and charities become more informed, effective, and efficient. PRI publishes the GuideStar® Web site (''http://www.guidestar.org), which includes the most comprehensive database of charity information available to the general public.

In addition to our Internet presence, we work closely with the National Center for Charitable Statistics at Urban Institute (NCCS), the National Association of State Charities Officials, and the IRS to improve the quality of Form 990 reporting. We are currently undertaking a sector-wide project to explore ways to improve the Form 990. An outline of this program is attached.

COMMENTS ON THE JOINT COMMITTEES RECOMMENDATIONS

*Non-disclosure of Taxpayer Identification Number*

PRI generally supports the recommendations made by the Joint Committee regarding disclosure by tax-exempt organizations. However, we believe that the Joint Committee's recommendation regarding non-disclosure of taxpayer identification numbers (TIN) of tax-exempt organizations would actually work against the Joint Committee's finding that the public should know more, rather than less, about the operations of tax-exempt organizations. Increasingly, the public learns about tax-exempt organizations through public sources such as the GuideStar Web site, which receives an average of 1.8 million hits each week. The information that resides in the GuideStar database is compiled from many sources, including the IRS Business Master File, the IRS Returns Transaction File, actual Forms 990 filed by organizations, and information provided by the organizations directly to PRI. The only foolproof way to link the information from these various sources into a coherent whole is through the use of the TIN.

As a simple example of the problem created by the absence of TINs, consider that there are six distinct organizations listed in the IRS Business Master File with the name ''POP WARNER LITTLE SCHOLARS INC'' in Tucson, AZ. In this situation, matching data from different sources in the correct way requires human intervention. The human intervention becomes much more intensive and expensive (perhaps even impossible) when it comes to the 4,328 affiliates of Ducks Unlimited, most of which use the corporate address in Memphis, TN, regardless of their actual location.

Redaction of the TIN from official IRS documents before they are provided to the public will also create a burden at the IRS that can only decrease their responsiveness to legitimate queries from the public. While a relatively small percentage of tax-exempt documents currently available to the public through the IRS must be redacted, the non-disclosure of the TIN would mean that essentially all of these documents would have to be redacted. And, in many cases, such as most software-prepared Forms 990, the TIN is printed on each page, which would require greatly increased redaction efforts.

Given the absence of documented, widespread misuse of the TIN by third parties, we believe the Joint Committee should reconsider this recommendation.

*Acceleration of Electronic Filing of Form 990*

We strongly endorse your recommendation to accept electronic filing of Form 990 after 2002. In addition to the inefficiencies created in the Federal and State systems by the absence of electronic filing, there are many expensive efforts in both the for-profit and nonprofit arenas to provide this information in the absence of a stronger Federal presence. PRI and NCCS will spend more than $2 million in 2000 on data entry and image processing of Forms 990.

*Notification Requirement for Entities not Currently Required to File*

We believe that this will be of great value to both the IRS and the general public. The IRS itself estimates that more than 20% of the tax-exempt organizations on its master file are no longer in existence. Further, even if an organization that is not required to file is still in existence, as time passes and addresses change, it is difficult if not impossible for the IRS to locate these organizations if the need arises.

Thank you for the opportunity to comment on these recommendations. We believe that, on the whole, they are positive steps toward more openness in the tax-exempt sector that will benefit the public and tax-exempt organizations alike.

Sincerely,

ARTHUR W. SCHMIDT, JR.
*President*

AWS:cem
Att.

**Improving the Quality of Reporting on Forms 990**

Scanned images of all IRS Forms 990 filed by public charities, an essential and widely used source of information on the nonprofit sector, are now easily and instantly accessible on the Internet. The Urban Institute's National Center for Charitable Statistics (NCCS) and Philanthropic Research, Inc. (PRI) with its GuideStar® Web site have worked together on this project to create the most accessible data on the sector ever available.

The Form 990, which has been long subject to public scrutiny, is the primary source of information about the nonprofit sector. The June 1999 implementation of new Federal disclosure regulations, as well as the posting of the forms on the Web through the joint NCCS/PRI project, has made these documents more easily available than they have ever been and highlighted the quality problems that nonprofit sector representatives have been addressing for many years.

NCCS and PRI, with the support and advice of nonprofit sector representatives from a broad range of interested organizations, are launching an effort to review the Form 990 itself—its format, instructions, and the information requested—to help ensure that the nonprofits provide the highest quality information possible on the form.

There are a number of approaches to helping improve the quality of reporting. First and foremost, nonprofits must pay more attention to the forms, filling them out completely and accurately. Improvements in the software used to prepare the forms could help eliminate arithmetic and omission errors and prompt the need to attach supplemental statements with all the necessary information. A more standardized approach to accounting practices in the sector to better align reporting with the Form 990 as well as the various government and professional requirements would also help reduce the burden of reporting.

But a review of the form itself and the instructions is also essential to this effort. The joint NCCS/PRI project will include the following steps:

• Drafting a working paper outlining the various issues related to the form (clarification of the form and the corresponding instructions, format changes, and items that should be added or changed, etc.) in March.

• Circulating the paper for comments to: Sector representatives, including Independent Sector and other national organizations, such as National Council of Nonprofit Associations (NCNA), National Association of Attorneys-General, National Association of State Charity Officials, United Way of America, National Health Council, National Association of State Arts Agencies, Alliance of Information and Referral Services, Foundation Center; Government representatives, including the Internal Revenue Service, Office of Management and Budget, General Accounting Office, Department of Health and Human Services, as well as the National Association of Attorneys-General/National Association of State Charity Officials, (NAAG/NASCO); and Preparers of Forms 990, including State CPA societies, led by Greater Washington Society of CPAs and California CPAs.

• Posting the draft for comment on various listservs and Websites, including cyber-accountability, NCCS (nccs.urban.org), PRI ("http://www.guidestar.org) and Quality 990 ("http://www.qual990.org), a web site hosted by NCCS that serves as a communication tool and resource for nonprofit organizations, the accounting profession, and government charity regulators.

• After the comments from nonprofit sector practitioners and researchers have been incorporated, the recommendations for changes in the Form 990 will be presented at the annual NAAG/NASCO-IRS meeting in May 2000, hosted by NCCS at the Urban Institute.

• Continuing to meet with IRS, NAAG/NASCO, and sector representatives to work to implement the recommended changes in Form 990.

As the sector's size and role continue to grow, policy makers, practitioners, researchers, and the public must have better information about nonprofits. While the focus of this effort is the Form 990, including the Form 990–EZ, there are new disclosure regulations that will give the Forms 990–PF filed by private foundations the same wide visibility. As we learn more about these forms, NCCS and PRI believe that a similar process of review must be initiated to help ensure that the newly accessible data are of the highest quality possible. Such efforts are essential to improving reporting on all versions of Form 990 and the quality of information available on the nonprofit sector.

## Statement of Piercy, Bowler, Taylor & Kern (CPAs), Mr. Gil Hyatt, and others, Las Vegas, Nevada

This statement is being made on behalf of Piercy, Bowler, Taylor & Kern (CPAs), Mr. Gil Hyatt, and others in response to House Ways and Means Committee Press Release FC–18 on the study and recommendations released on January 28, 2000 by the Joint Committee on Taxation ("JCT"), JCS–1–00, concerning disclosure of Federal tax returns and return information ("the JCT Disclosure Study"). The JCT Disclosure Study was required by Congress as part of the Internal Revenue Service Restructuring and Reform Act of 1998 (P.L. 105–206).

First, we applaud Congress and the JCT for addressing the serious matter of breaches of taxpayer confidentiality and unauthorized disclosure of tax return information. Next, while we support many of the statements and recommendations contained in the JCT Disclosure Study, we believe the study falls far short in addressing the area of breaches of taxpayer confidentiality and unauthorized disclosure of tax return information by state tax agencies. The JCT relies on a GAO survey of safeguard deficiencies reported by State taxing authorities and states that "[A]lmost all of the surveyed State taxing authorities reported some discrepancy of one type or another." *See,* JCT Disclosure Study, Vol. I (p. 168). Despite this troubling self-admission by the States, the study does not recommend adequate remedies to address this serious problem.

We submitted numerous facts and documents to the JCT as part of their study that overwhelming evidences this problem in the case of the California Franchise Tax Board. These submissions are contained in Volume III of the JCT Disclosure Study. *See,* JCT Disclosure Study, Volume III (p. 221–268). These comments include specific examples of misuse of confidential tax return information by the California Franchise Tax Board ("FTB"), as well as administrative and legislative recommendations.

This problem has been highlighted by Congressman Brad Sherman who recently wrote two letters to the California Franchise Tax Board about their inappropriate use of training materials and of enforcement tactics used to create a culture where violations of taxpayer rights and privacy go unchecked. A copy of Congressman Sherman's letters is attached hereto as "Attachment 1." Also attached hereto is an outline of recommendations ("Attachment 2") and a memorandum further highlighting recommendations and comments made herein ("Attachment 3").

As a guiding principle, we believe that any state or local tax agency, like the FTB, that does not have proper safeguards in place or that recklessly disregards safeguards designed to protect taxpayer information should be prohibited from receiving Federal tax returns and return information from the IRS. To implement this sound tax policy, we believe the House Ways and Means Committee should:

1) Hold hearings on the JCT Disclosure Study;

2) Further investigate abuses by State tax agencies, particularly the California Franchise Tax Board ("FTB"); and

3) Pass legislation to do the following:

> a. Grant authority and provide direction to the IRS to immediately cease sharing Federal tax returns and return information with any state or local tax agency, such as the FTB, that does not have proper safeguards in place or that recklessly disregards safeguards designed to protect taxpayer information, until identified abuses have been rectified and the agencies have taken appropriate measures to prevent future abuses;
>
> b. Require that all state or local tax agencies that receive Federal tax returns and return information, including the FTB, should adopt and fully comply with the same reforms and taxpayer rights protections imposed on the Internal Revenue Service by the Internal Revenue Service Restructuring and Reform Act of 1998 as a prerequisite for obtaining Federal tax returns and return information from the IRS; and
>
> c. Direct the IRS Taxpayer Advocate to establish a function within his/her office to specifically address taxpayer complaints regarding breaches of confidentiality relating to Federal tax returns and return information by state and local tax agencies as well as provide authority to the Taxpayer Advocate to request that the IRS cease sharing Federal tax returns and return information with any state or local tax agency, such as the FTB, that does not have proper safeguards in place or that recklessly disregards safeguards designed to protect taxpayer information.

Thank you for the opportunity to submit this written statement for the record and comments.

---

CONGRESSMAN BRAD SHERMAN
24TH DISTRICT, CALIFORNIA
*February 7, 2000*

Jerry Goldberg
Executive Director
Franchise Tax Board
*P.O. Box 942840*
*Sacramento, CA 94240–0040*

Dear Mr. Goldberg:

Its been a while since we have had a chance to talk and exchange letters here in Washington. From time to time I run across people who do not love the Franchise Tax Board as much as you do. Sometimes the FTB has a "result oriented" image as opposed to simply trying to get the fairest possible resolution of a tax matter. While I know you strive to avoid any basis for this image, the image itself is certainly not helpful to California's continuing efforts to recruit business.

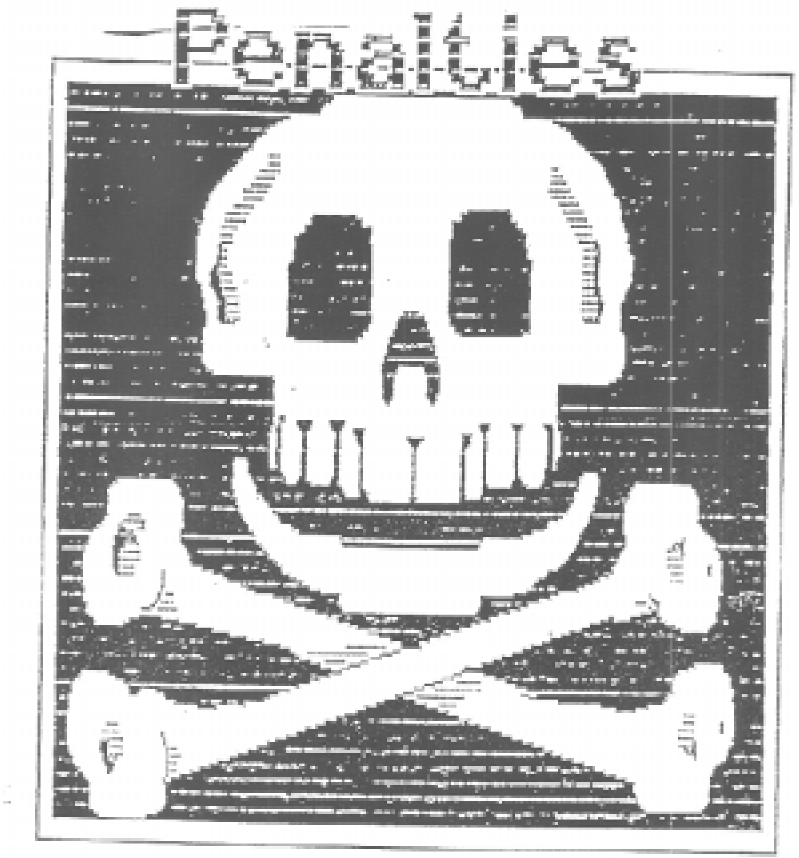
I have enclosed what I am told is the front cover of a FTB training manual. Its dated August 31, 1993. 1 am told that this same cover or approach may still be in use.

I think you will agree that the picture on the cover is simply not an appropriate way to set the tone for FTB staff.

Very truly yours,

BRAD SHERMAN

cc: Kathleen Connell, B. Timothy Gage, Dean Andal, Marcy Joe Mandal, Aleesa Islas, Jim Speed, Johan Klehs, Claude Parrish, John Chiang




Prepared by:
Larry Moy
Los Angeles District Office
August 31, 1993

CONGRESSMAN BRAD SHERMAN
24TH DISTRICT, CALIFORNIA
*February 7, 2000*

Jerry Goldberg
Executive Director
Franchise Tax Board
Sacramento, CA 94240

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State Controller
Sacramento, CA 95814

Kathleen Connell
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State Board of
Equalization
Van Nuys, CA 91406

Office of Governor Davis
c/o Aleesa Islas
Constituent Affairs
Representative
State Capitol
Sacramento, CA 95814

Dear Friends:

As you know, information provided by the Internal Revenue Service is critically important to the Franchise Tax Board and the Board of Equalization.

On January 28, 2000, the staff of the Joint Committee on Taxation released a report entitled Study of Present—Law Taxpayer Confidentiality and Disclosure Provisions as Required by Section 3802 of the Internal Revenue Service Restructuring and Reform Act of 1998.

Complete copies of this 3-volume study are available by simply contacting my office.

I want to refer you to pages 168 through 173 of volume I (a copy of which is enclosed). This discusses efforts by state governments to safeguard the confidentiality provided to them by the IRS.

As you know, I continue my dedication to effective tax administration that requires the exchange of information between the IRS and relevant state tax authorities. The more that can be done to ensure that federal information is kept strictly confidential, the easier it will be to convince Congress to continue to allow and facilitate these exchange of information agreements.

If you want to delve into this issue further, I refer you to the letter dated January 12, 2000, which appears on page 221 of volume III of the study (a copy of which is enclosed). It addresses the issue of states keeping the information they receive from federal tax authorities confidential. It particularly focuses on the Franchise Tax Board.

In setting policy, it is important to remember how dependent state authorities are on federal tax information, and the reluctance most members of Congress have in taking heat to collect revenue that Congress doesn't get to spend. I am sure you are familiar with the failure of Congress to overturn the Quill case, and the successful attempt by the electronic commerce industry to shape the debate on the taxation of the Internet to often include taxation of tangible personal properties sold through the Internet.

Accordingly, it is very important that California do everything possible to maintain proper confidentiality of information obtained through the IRS, and avoid pressure in Washington to reduce the flow of this information, Not only does the continuing battle with direct mail and Internet sales indicate a reason for care in this area, but also you should remember that, here in Washington, Nevada has as many senators as California. Moreover, tax fighters tend to have more friends than tax collectors.

I look forward to doing whatever is possible to have a working efficient exchange of information. I also trust that you will do everything possible to avoid instances that would make that effort difficult.

Very truly yours,

BRAD SHERMAN

## ATTACHMENT 2

## RECOMMENDATIONS

Any state or local tax agency that does not have proper safeguards in place or that recklessly disregards safeguards designed to protect tax payer information should be prohibited from receiving Federal tax returns and return information from the IRS.

To implement this sound tax policy, we believe the House Ways and Means Committee should:

1) Hold hearings on the JCT Disclosure Study;

2) Further investigate abuses by State tax agencies, particularly the California Franchise Tax Board ("FTB"); and

3) Pass legislation to do the following:

a. Grant authority and provide direction to the IRS to immediately cease sharing Federal tax returns and return information with any state or local tax agency, such as the FTB, that does not have proper safeguards in place or that recklessly disregards safeguards designed to protect taxpayer information, until identified abuses have been rectified and the agencies have taken appropriate measures to prevent future abuses;

b. Require that all state or local tax agencies that receive Federal tax returns and return information, including the FTB, should adopt and fully comply with the same reforms and taxpayer rights protections imposed on the Internal Revenue Service by the Internal Revenue Service Restructuring and Reform Act of 1998 as a prerequisite for obtaining Federal tax returns and return information from the IRS; and

c. Direct the IRS Taxpayer Advocate to establish a function within his/her office to specifically address taxpayer complaints regarding breaches of confidentiality relating to Federal tax returns and return information by state and local tax agencies as well as provide authority to the Taxpayer Advocate to request that the IRS cease sharing Federal tax returns and return information with any state or local tax agency, such as the FTB, that does not have proper safeguards in place or that recklessly disregards safeguards designed to protect taxpayer information.

## ATTACHMENT 3

## MEMORANDUM

### I. *INTRODUCTION*

The Joint Committee on Taxation ("JCT") was required to prepare a study on taxpayer confidentiality by the Internal Revenue Service Reform and Restructuring Act of 1998 ("the Act") (P.L. 105–206). As part of their study, the JCT requested public comments on various issues of taxpayer privacy and the use of tax return information, including the impact on taxpayer privacy of sharing tax information for the purposes of enforcing State and local laws. On January 28, 2000, the JCT released the results of their study in a three-volume set of comments and recommendations ("the JCT Disclosure Study").

On February 3, 2000, the House Ways and Means Committee requested public comments on the JCT Disclosure Study in Press Release FC–18. Set forth herein is a memorandum supplementing comments made in response to Press Release FC–18.

### II. *BACKGROUND*

Congress has taken great steps to prevent abuses against taxpayers, in particular, violations of confidentiality with regards to Federal tax returns and return information. Federal tax returns and return information are shared with state tax agencies so long as those agencies abide by certain rules that protect confidential taxpayer information.

State and local tax agencies must maintain safeguards that protect taxpayer privacy and confidentiality with respect to tax returns and tax return information. Agencies that do not maintain adequate safeguards or recklessly disregard such safeguards should be prohibited from receiving Federal tax return information.

Congress has a strong interest in the policies and procedures of the state tax agencies that receive Federal tax returns and return information. Internal Revenue Code § 6103 makes it clear that state employees with access to Federal tax return information shall keep such information confidential and may not disclose it to anyone except for those properly authorized to view such information. Because Federal tax information is what is being shared, Congress must insure that tax information shared with State and local agencies is protected to the same degree called for by Federal law and that such agencies must be held to the same standard to which the IRS is held regarding Federal tax information, including full compliance with recent IRS reforms and "taxpayer rights" legislation.

Congress should also insure that recent IRS reforms are not undermined by abusive state tax agencies misusing Federal tax information. Furthermore, Congress should also insure that the IRS is not a partner with abusive state tax agencies using Federal tax information improperly to coerce, threaten or abuse taxpayer's rights, including during state examinations or audits.

## III. *VIOLATIONS OF CONFIDENTIALITY BY STATE AGENCIES*

### A. OVERVIEW

Unfortunately, some state tax agencies do not have proper confidentiality safeguards for taxpayer information and many states that do recklessly disregard such safeguards in their zeal to collect as much tax revenue as possible, many in violation of taxpayer privacy and confidentiality of Federal tax returns and return information.

While Congress addressed the issues of taxpayer privacy and abuse at the federal level in the Act, there may be just as many oppressive actions currently occurring throughout the country at the State level. Included in Volume III of the JCT Disclosure Study is an article from Forbes Magazine entitled "Tax torture, local style" (July 6, 1998). *See,* JCT Disclosure Study, Vol. III, page 231. This article highlights the fact that "[T]here are at least half as many revenue agents working for the states as the federal government" and "[C]ollectively, they are just as oppressive as the feds." Moreover, many of these abuses and violations derive from information states receive from federal agencies under their information sharing arrangements.

The Forbes article lists a number of state tax department problems including: (1) privacy violations by California, Connecticut, and Kentucky; (2) criminal or dubious activities by Connecticut, Indiana, Kentucky, New Mexico, North Carolina, Oklahoma, and Wisconsin; and (3) mass erroneous tax-due bills by Arizona, California, Indiana, Michigan, and Ohio.

In another article included in the JCT Disclosure Study, the Los Angeles Times reported that the state taxing authority, the California Franchise Tax Board, "is second in size and scope only to the Internal Revenue Service—and by all accounts the state agency is the more efficient, more aggressive and more relentless of the two" and that "there is little to stop the agency from becoming more aggressive." *See,* JCT Disclosure Study, Vol. III, page 233 "State Agency Rivals IRS in Toughness," Los Angeles Times (August 2, 1999, page 1).

The state tax agencies are also applying inconsistent rules resulting in inequitable treatment and unfair burdens on nonresident taxpayers. Another article included in the JCT Disclosure Study is entitled "State Taxation of Professional Athletes: Congress Must Step In" (Paul Barger, *Tax Notes, October 11, 1999, p. 243). See,* JCT Disclosure Study, Vol. III, page 235. It details the type of inconsistent and disparate treatment that some nonresident taxpayers face from state taxing agencies.

Overall, serious violations of taxpayer confidentiality and taxpayer rights in the examination and audit process are presently occurring at an alarming rate at the State and local levels. In many cases these abuses involve the misuse of confidential Federal tax returns and return information.

### B. EXAMPLES OF TAXPAYER ABUSE AND MISUSE OF CONFIDENTIAL INFORMATION AT THE STATE LEVEL IN CALIFORNIA

Recent cases evidence a total disregard of taxpayer protections and safeguards of confidential tax return and return information by the California Franchise Tax Board ("FTB"), the state's income tax collection agency, particularly with respect to residency audits.

In a case involving Mr. Gil Hyatt, the FTB practiced indiscriminate breaches of taxpayers' confidentiality and improperly used the threat of disclosing taxpayer confidential information to exact additional taxes. The FTB blatantly disregarded the requirements for proper treatment of confidential information and then used the disclosure of confidential information to coerce settlement of an unreasonable tax assessment from a taxpayer. Among the FTB's more reprehensible actions was the public disclosure to newspapers and other public entities of Mr. Hyatt's name, social security number, and non-public address through quasi-subpoenas during the state examination and audit process.

The accounting firm of Piercy, Bowler, Taylor & Kern has represented a number of other clients in similar circumstances—all involving a total disregard of taxpayer protections and safeguards of confidential tax return and return information by the FTB. Other cases of abusive tactics and misuse of taxpayer information by the FTB are described in memorandums attached hereto. These memos by Mr. Gil Hyatt include descriptions of his case, the case of Mr. George Archer (a professional golfer), and the case of Mr. Joseph and Emily Gilbert. *See,* JCT Disclosure Study pages 245 through 267 entitled "Attachment C;" "Attachment D;" and "Attachment E."

### C. Facts in the Case of Mr. Gil Hyatt

Mr. Gil Hyatt is a Nevada resident who is well known throughout the world for his innovations in computer technology. He is justly protective of the location of his office and research lab in view of the industrial espionage that is rampant in the industry marketplace in which he works and in view of established dangers from stalkers and other predators. He has taken great care to keep the address of his home, office, and research lab secret to protect against industrial espionage and stalking, including purchasing the property through a trust and taking other precautions so that his name was not connected with the property.

Mr. Hyatt moved from California to Nevada in September 1991 and still resides in Nevada to this present day with no intention of changing his Nevada residency. Even though Mr. Hyatt has physically moved away from California and intends to stay in Nevada indefinitely, the FTB refused to acknowledge the move for tax purposes, began an extensive tax examination and assessed him with what is tantamount to an "exit tax" of millions of dollars. Because of his particular need for confidentiality and privacy, the FTB with blatant disregard for both Federal and state laws, proceeded on a calculated program to intimidate and harass him by public disclosure of his confidential information (including shared Federal tax information) and by making threats of further public disclosure if he did not settle with the FTB over the amount of taxes owed.

Because of the tortious conduct by the FTB, Mr. Hyatt filed a complaint in Nevada state court claiming violations of his right to privacy, fraud, and abuse of process. This case is set for trial in Nevada in November 2000. In spite of the claims in this case and the pending state court action, the FTB continues its tortious conduct, including continuing to disclose Mr. Hyatt's confidential information.

In general, the facts in Mr. Hyatt's case involve an assessment by the FTB of millions of dollars in false penalties and intentional errors in income calculations, done in a manner consistent with the FTB's established practice of significantly increasing assessments in preparation for settlement negotiations. When Mr. Hyatt argued against the assessment, the FTB threatened that his confidential personal information would become public if he didn't settle his case. In other similar examples, taxpayers have been known to settle at the protest stage to keep their private information from becoming public.

During the course of this "residency" examination, Mr. Hyatt was cajoled into giving his private address to the FTB only after the FTB provided assurances that it would keep it strictly confidential and that California law made it a crime for the FTB to disclose this information. As the examination proceeded, without notice to Mr. Hyatt and with total disregard for his privacy, safety, and confidentiality, the FTB, within weeks of receiving the information, began indiscriminately broadcasting the private address to the very entities from whom Mr. Hyatt sought to keep the private address confidential. The FTB sent out formal Demands for Information (quasi-subpoenas) to newspapers and to other public entities that keep large databases of information on citizens. A copy of this quasi-subpoena ("Demand to Furnish Information") is included in the JCT Disclosure Study. *See,* JCT Disclosure Study, page 243.

These quasi-subpoenas disclosed Mr. Hyatt's name, social security number, and his non-public residence address to the very entities from which he sought to be protected. This without even noticing, servicing, or informing Mr. Hyatt or his attorney that such quasi-subpoenas were being sent out, thereby depriving him of his legal right to take legal action to quash these fraudulent quasi-subpoenas. When challenged about this disclosure of confidential information, the FTB argued that the private address need not be kept confidential because it was public—in spite of the fact that Mr. Hyatt was never publicly linked to this address.

The FTB did not just disclose this confidential information accidentally or discretely. In fact, the FTB was very direct in using the Demands for Information form to indiscriminately disclose Mr. Hyatt's confidential information and cast him in a bad light, while at the same time getting the recipient's attention due to its formal, criminal-investigation type format. *See,* JCT Disclosure Study, page 243. While the FTB asserts that these quasi-subpoenas are intended only to demand information from uncooperative third parties, the FTB has adopted another use for them—as tools for embarrassing and intimidating taxpayers during the examination and audit process and disclosing the taxpayer's confidential information by indiscriminately sending them out in mass mailings.

Another abuse in the Hyatt case occurred when the FTB located a check made out to a Dr. Shapiro. Instead of asking Mr. Hyatt for information on this Dr. Shapiro, the FTB located six Dr. Shapiros in the telephone book and sent out quasi-subpoenas containing confidential information to all of them, thereby informing a group of professionals that Mr. Hyatt was under investigation, focusing more attention on him, and causing him even greater exposure and embarrassment. The FTB also sent quasi-subpoenas containing confidential information to several newspapers on a "fishing expedition" calculated to cause Mr. Hyatt even more exposure and embarrassment. These examples are strong indications that the FTB uses confidential taxpayer information to intimidate taxpayers in order to exact improper tax assessments and recklessly disregards safeguards with respect to tax information.

### D. Other Generic Violations of Confidentiality By the FTB and the State of California

A state tax agency that receives federal tax information should maintain a secure area for such information. The FTB, however, allows its auditors to carry such information in unsecured briefcases to locations outside of the FTB (e.g., an auditor's residence). Furthermore, all federal tax information should be provided only on a need-to-know basis and should not be commingled with other information or indiscriminately disseminated even within the recipient agency. At the FTB, in contrast, Federal and state tax information is commingled into a single audit file, which is then indiscriminately disseminated throughout the agency without proper protection for the federal tax information within. The FTB does not properly safeguard confidential federal taxpayer information, but instead often keeps such information in the offices, car trunks, and homes of FTB agents and even regularly misplaces or loses such information.

In Mr. Hyatt's case, the FTB, without any indication of satisfying the special requirements of Federal law, intermingled Federal income tax returns with extensive state audit information in audit files, shipped those files to an unsecured agent's home in Arizona, and maintained the audit files (including the Federal tax return information) in this unsecured and illegal environment. The Federal tax returns and return information remains intermingled to this day with no indication that the FTB will ever provide safeguards for the Federal tax returns and return information.

In addition, recent Federal tax reforms seeking to prevent individual's within agencies from inspecting a taxpayer's federal tax information without authorization ("illegal browsing") have not been enforced at the state level in California. For instance, the FTB in some cases appears to practice a "fishing" tactic of browsing taxpayers' confidential tax information in order to determine which taxpayers would make good candidates for a state "residency" tax audit. These techniques fly in the face of recent Congressional legislation restricting such illegal browsing.

Because the FTB does not distinguish between Federal confidential information and state confidential information, the FTB is no more likely to be careful with Federal tax information than it is with state tax information. For example, as evidenced above, the FTB indiscriminately discloses social security numbers and home addresses, regardless of the Federal or state tax return source, with the cavalier position that social security numbers and home addresses constitute public information and hence do not have to be protected. These activities are clear violations of Federal and state laws that specifically protect such information.

In other areas, the State of California receives Federal tax return information for tracking down "dead beat" dads. The state uses this confidential information to obtain child support payments from out-of-state parents, but then misuses the fact that child support payments are made by nonresident parents as "evidence" to tax these nonresidents as residents. This issue is addressed more fully in a memo included in the JCT Disclosure Study. *See,* JCT Disclosure Study, page 265 "Attachment E."

The receipt of Federal tax returns and return information from tax-sharing agreements with the IRS, whether used by the FTB in its "residency" and tax audits or by the state of California in other areas, should be subject to strict privacy safeguards. Unfortunately, there are cases under current law that show, regardless of the protections that the IRS provides for Federal tax returns and return information, these protections can be and are circumvented by the FTB and the state of California in a manner that recklessly disregards taxpayer protection safeguards.

### E. Summary

As evidenced in the Gil Hyatt case and other cases, the FTB is one of many state taxing agencies which relies upon IRS information for its taxing activities, but which recklessly disregards any safeguards protecting confidential tax returns and return information. Moreover, since the tax laws of California have *not* been conformed to the Internal Revenue Service Restructuring and Reform Act of 1998 ("the Act"), the reforms and taxpayer rights protections in the Act do not apply to any such inappropriate actions by the FTB or the state of California.

Thus, while the IRS is required to operate under the taxpayer protections granted by the Act, State and local agencies, like the FTB, can and do end-run around the Congressionally mandated taxpayer protections and can reek havoc on unsuspecting taxpayers. Even worse, any safeguards that do exist are in some cases recklessly disregarded by the FTB, in effect blatantly violating State law with impunity. Again as evidenced in the Gil Hyatt case and other cases, nowhere is this truer than with the FTB's "residency" auditing department—the department responsible for going after former California residents now residing in other states.

Examples of improper and/or illegal activities by the FTB include the same type of activities that were under scrutiny by the Congress at the Federal level in 1998 when it passed the Act. These include not only blatant disregard of the requirements for proper treatment of confidential tax information, but also actually using the disclosure of such confidential information as a threat to exact unreasonable tax assessments from taxpayers. There are also indications that the FTB in its training materials, encourages its agents to inappropriately assess penalties so that they can intimidate taxpayers and then later negotiate away the penalty to exact the unfair tax assessment originally desired. Many of these same issues were under scrutiny by Congress when it passed IRS reforms as past of the Act.

Any State or local agency guilty of such improper acts, bad faith or breaches of taxpayer confidentiality should not be allowed to receive Federal tax returns and return information. Agencies, like the FTB, that are incapable of providing the safeguards necessary to protect shared tax returns and return information or that recklessly disregard such safeguards should be prevented from receiving Federal tax return and return information. Moreover, any evidence that a state tax agency is using Federal tax information in conjunction with any kind of improper and/or illegal state tax examination or audit activities should be grounds for immediate suspension of any sharing by the IRS with that state tax agency.

## IV. *CONCLUSION*

Congress should do whatever it can to protect the rights of U.S. citizens against overzealous State and local tax agencies that misuse confidential Federal tax return and return information.

Any state or local tax agency, like the FTB, that does not have proper safeguards in place or that recklessly disregards safeguards designed to protect taxpayer information should be prohibited from receiving Federal tax returns and return information from the IRS.

To implement this sound tax policy, the House Ways and Means Committee should make the administrative and legislative recommendations set forth in the attached document.

TRADITIONAL VALUES COALITION
WASHINGTON, DC 20003
*March 13, 2000*

Mr. A.L. Singleton
Chief of Staff
Committee on Ways and Means
U.S. House of Representatives
*1102 Longworth House Office Building*
*Washington, DC 20515*

RE: Opposition letter to the proposals made by the Congressional Joint Committee on Taxation concerning additional reporting requirements for 501 (c) (3) organizations.

Dear Mr. Singleton:

On behalf of Traditional Values Coalition's 43,000 member churches, I am submitting these comments.

The Internal Revenue Service Restructuring and Reform Act of 1998 was intended to consider methods to restructure the IRS to make it more responsive to the needs of Americans and less intrusive in their lives.

Conversely, this report seems to be doing the opposite.

There will be much more intrusion, record keeping and expense for non-profits once the recommendations are implemented from the Joint Committee on Taxation staff report entitled "Study of Present Law Taxpayer Confidentiality and Disclosure Provisions as Required by Section 3802 of the Internal Revenue Service Restructuring and Reform Act of 1998, Volume II," which concerns disclosure provisions relating to tax-exempt organizations. Unfortunately, as so often occurs, it appears that while Congress gave with one hand, it decided to take with the other.

The purpose for this increased intrusion seems to be the ludicrous notion that the public is anxious to know what non-partisan, non-lobbying the non-profits are engaged in.

It would appear the result of this report would be to tighten the noose around the neck of churches in an attempt to cut off any involvement in the culture outside of the church wall under the threat of losing their tax-exempt status. Non-profit speech is already artificially curtailed by IRS activity and churches currently are afraid to speak on issues that impact them because they live in terror of the IRS.

In addition, I am concerned that these changes would needlessly effect the definition of lobbying and would make for very complex reporting of local church facility needs such as obtaining a conditional use permit or building permit from a city or county board. Furthermore, every time a church spoke with a public official about any issue it would have to be disclosed, requiring unneeded record keeping and paperwork.

Forcing reporting requirements on non-profits even for those communications including a "limited call to action" is unnecessary.

These recommendations are completely contrary to the previous direction of the Congress toward tax simplification. These proposals would create burdensome new record keeping requirements for non-profits.

Finally, I would like to have a count and also be able to see copies of the letters the committee has received previous to their January 28, 2000 release of the Committee on Taxation proposal that evidence an outcry of the public showing their great interest in further regulation of non-profits. Would you please be so kind as to accommodate this request? I will look forward to an immediate reply.

Sincerely,

REV. LOUIS P. SHELDON
*Chairman*

URBAN INSTITUTE
WASHINGTON, DC 20037
*March 14, 2000*

The Honorable Bill Archer, Chairman
Joint Committee on Taxation
*1015 Longworth House Office Building*
*Washington, DC 20515–6675*

Dear Chairman Archer:

The mission of the National Center for Charitable Statistics (NCCS) at the Urban Institute is to serve as a data repository for statistics and other quantitative information to help describe and define the nonprofit sector. NCCS serves as a bridge between practitioners and scholars, and a vital source of information for public policy decision makers. It has long been at the forefront of efforts to make IRS Forms 990 data readily accessible to the general public, regulators, practitioners, and researchers. IRS data are available for noncommercial research purposes from our web site and on CD–ROMs. We work closely with state charity officials and state attorneys-general to provide them with electronic data from the Forms 990. A description of our project to help improve the quality of reporting on Forms 990 is enclosed for your reference.

NCCS also has a contract with the IRS to obtain scanned images of all Form 990 returns filed by 501(c)(3) organizations. We are currently working with Philanthropic Research, Inc. (with its Guidestar web site) to make these images available to the public on the Internet.

NCCS strongly supports all of the recommendations contained in the Joint Committee's report, with one exception: making the taxpayer identification number (TIN) of the exempt organization confidential.

### THE NEED FOR THE TAXPAYER IDENTIFICATION NUMBER

Unless some other system of unique identifiers is developed, making the TIN confidential would make the tasks of using and disseminating IRS data a nightmare. The TIN is the key for ensuring that data sets have a complete complement of organizations for a year. It is also necessary for matching organization data from the major public data sources such as the IRS's Business Master File, its Return Transaction File, and the Statistics of Income Division's Exempt Organization Sample.

Tasks which are now relatively simple, such as making three years of Forms 990 available for a single organization (as required) would become much more difficult. Without the TIN, we would be left to match records using the names and addresses of the organizations. This is not a viable option because:

- Many organizations have similar names. For example, is the Hartzwell Foundation the same as the Hartzwell Family Foundation? Looking only at the names, one might think that the Form 990 preparer used a longer formal name one year and the shorter the next year. However, the two different TINs make it clear they are, in fact, different organizations.
- Organizations, especially the smaller ones that make up the majority of the exempt organization universe, move offices and addresses on a fairly regular basis. Thus, the address is not a reliable way to match organization returns.

In short, the proposal to make the TINs confidential will make a relatively mechanical process for linking hundreds of thousands of records an expensive and tedious process requiring extensive verification. The process of developing samples and compiling accurate data sets would be greatly impeded.

The use of exempt organization data by policy-makers and donors is increasing dramatically, much as the use of data on publicly-traded companies has grown in the past twenty years. The combination of increased societal wealth, the use of the Internet, the new exempt organization disclosure requirements, and the access to scanned images of Forms 990 on the web sets the stage for the development of many new efforts by consultants, financial service companies, the nonprofit sector and others to help donors make wise and efficient giving decisions. Easily accessible data also eases the burden on the state attorneys-general who are trying to monitor charities and ensure that charities are meeting their legal requirements.

ELECTRONIC FILING

On a final note, NCCS is especially pleased to see that the committee is recommending the acceleration of the IRS's schedule for implementing electronic filing. We believe the public benefit of electronic filing will be immense since electronic filing will greatly reduce the cost of making data available.

We appreciate the opportunity to comment on these recommendations.

Sincerely,

EUGENE STEUERLE,
Senior Fellow
The Urban Institute
Former Deputy Assistant Secretary of the Treasury
ELIZABETH T. BORIS,
Director
Center on Nonprofits and Philanthropy
The Urban Institute
LINDA M. LAMPKIN,
Manager
National Center for Charitable Statistics
The Urban Institute

## Improving the Quality of Reporting on Forms 990

Scanned images of all IRS Forms 990 filed by public charities, an essential and widely used source of information on the nonprofit sector, are now easily and instantly accessible on the Internet. The Urban Institute's National Center for Charitable Statistics (NCCS) and Philanthropic Research, Inc. (PRI) with its GuideStar web site have worked together on this project to create the most accessible data on the sector ever available.

The Form 990 is the primary source of information about the nonprofit sector. Although long subject to public scrutiny, the June 1999 implementation of new federal disclosure regulations, as well as the posting of the forms on the web through the joint NCCS/PRI project, has made these documents more easily available than they have ever been. And, also, highlighted the quality problems that nonprofit sector representatives have been addressing for many years.

NCCS and PRI, with the support and advice of nonprofit sector representatives from a broad range of interested organizations, are launching an effort to review the Form 990 itself—its format, instructions, and the information requested—to help ensure that the nonprofits provide the highest quality information possible on the form.

There are a number of approaches to helping improve the quality of reporting. First and foremost, nonprofits must pay more attention to the forms, filling them out completely and accurately. Improvements in the software used to prepare the forms could help eliminate arithmetic and omission errors and prompt the need to attach supplemental statements with all the necessary information. A more standardized approach to accounting practices in the sector to better align reporting with the Form 990 as well as the various government and professional requirements would also help to reduce the burden of reporting.

But a review of the form itself, and the instructions, is also essential to this effort. The joint NCCS/PRI project will include the following steps:

• Drafting a working paper outlining the various issues related to the form (clarification of the form and the corresponding instructions, format changes, and items that should be added or changed, etc.) in March.

• Circulating the paper for comments to: Sector representatives, including Independent Sector and other national organizations, such as National Council of Nonprofit Associations (NCNA), National Association of Attorneys-General, National Association of State Charity Officials, United Way of America, National Health Council, National Association of State Arts Agencies, Alliance of Information and Referral Services, Foundation Center; Government representatives, including the Internal Revenue Service, Office of Management and Budget, General Accounting Office, Department of Health and Human Services, as well as the National Association of Attorneys-General/National Association of State Charity Officials, (NAAG/NASCO);

and Preparers of Forms 990, including State CPA societies, led by Greater Washington Society of CPAs and California CPAs.

• Posting the draft for comment on various listservs and websites, including cyber-accountability, NCCS (nccs.urban.org), PRI ("http://www.guidestar.org) and Quality 990 ("http://www.qual990.org), a web site hosted by NCCS that serves as a communication tool and resource for nonprofit organizations, the accounting profession, and government charity regulators.

• After the comments from nonprofit sector practitioners and researchers have been incorporated, presenting the recommendations for changes in the Form 990 at the annual NAAG/NASCO-IRS meeting in May 2000, hosted by NCCS at the Urban Institute.

• Continuing to meet with IRS, NAAG/NASCO, and sector representatives to work to implement the recommended changes in Form 990.

As the sector's size and role continue to grow, policy makers, practitioners, researchers, and the public must have better information about nonprofits. While the focus of this effort is the Form 990, including the Form 990–EZ, there are new disclosure regulations that will give the Forms 990–PF filed by private foundations the same wide visibility. As we learn more about these forms, NCCS and PRI believe that a similar process of review must be initiated to help ensure that the newly accessible data are of the highest quality possible. Such efforts are essential to improving reporting on all versions of Form 990 and the quality of information available on the nonprofit sector.

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VENTURA MISSIONARY CHURCH
VENTURA, CA 93003
*March 20, 2000*

A.L. Singleton, Chief of Staff
Committee on Ways and Means
U.S. House of Representatives
*1102 Longworth*
*Washington, D.C. 20515*

Dear Members of the Joint Committee,

It has come to my attention that additional requirements may be imposed on churches that would require them to report to the IRS every time they urge their members to call or write their elected officials (local, state or federal) on any bill under consideration.

If this report is true, it would be one of the most flagrant violations of the First Amendment that I can think of in recent history. I am personally seeing a growing intrusion by government into the life of churches across the nation. To me it is alarming and it needs to be opposed courageously.

Please head this off now before it goes any further.

Sincerely,

LEONARD W. DEWITT
*Senior Pastor*

LWD/lld

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**Statement of Edward N. Goodman, Vice President, Public Policy, VHA Inc.**

VHA Inc. (formerly Voluntary Hospitals of America) appreciates the opportunity extended by Chairman Bill Archer to offer comments on the legislative recommendations contained in the Joint Committee on Taxation ("JCT") Disclosure Study released on January 28, 2000.

VHA is a nationwide network of community-owned health care systems and their physicians. VHA has more than 1,900 members—including some of the nation's leading health care institutions:

- Baylor and Memorial Hermann Health Systems in Texas
- Bakersfield Memorial Hospital and Cedars-Sinai Health System in California
- INTEGRIS Health in Oklahoma
- BJC Health System in Missouri and Illinois
- Baptist Memorial Health Care System in Tennessee
- Allina Health System in Minnesota

As "community-owned" health care organizations, VHA members affirm that their assets belong to the community, and that no individual shareholder or corporation makes any profit.

VHA was founded in 1977 to help preserve the not-for-profit philosophy of providing health care. At that time, large, for-profit health care systems were threatening the success of community-owned hospitals. These large investor-owned systems could demand purchasing discounts unattainable by individual not-for-profit organizations. To help preserve not-for-profit health care, VHA offers its members contracts on regional and national products and services in areas such as clinical effectiveness, information technology, learning networks and education, market-share development, performance improvement and supply-chain management.

Accordingly, VHA's comments on the JCT staff's disclosure study are focused on those provisions recommending significantly increased disclosure of *exempt organization* tax information.

In general, VHA supports increased *public access* to exempt organizations' financial and operational data through broader disclosure of tax filings and IRS determinations. VHA also strongly supports greater *legal clarity* through the release of material applying the law of exempt organizations to particular facts. However, VHA cannot support the creation of an *unlevel playing field* in which tax-exempt nonprofit organizations are subject to significantly greater disclosure and recordkeeping burdens than those imposed on taxable for-profit entities.

VHA believes that the goals of public access and legal clarity are generally well served by the JCT staff recommendations concerning exempt organization trade names, Internet addresses, notifications in IRS publications of Form 990 availability, and the proposed termination reports. Moreover, the staff recommendation to release all exempt organization rulings (including those which deal only with exempt status issues) would result in significant increases in legal clarity and understanding of IRS positions.

Many of the other JCT proposals, however, raise very serious concerns for nonprofit health care organizations. Set forth below is a list of such provisions, along with a brief description of VHA's concerns. We look forward to discussing our concerns in greater detail with the staff and Members of the Ways and Means Committee when your schedule permits.

### Disclosure of Pending Applications for Exemption

Under current law, approved applications for exemption are subject to disclosure and public access. The JCT staff would extend the disclosure rule to pending applications for exemption.

*VHA Concern:*

VHA believes that broader disclosure is necessary to facilitate public access only in those situations where a nonprofit organization represents to the public that it has filed a Form 1023 application in order to solicit charitable contributions or secure some other benefit. However, where a newly formed organization makes no public representation about its exempt status or eligibility for charitable contributions, disclosure of a pending application is potentially misleading to the public and disruptive to the efforts of both the IRS and the organization to complete the application process expeditiously and cost-effectively.

### Disclosure of IRS Rulings Without Redaction

The JCT staff recommends that all *written determinations* (including private letter rulings and background file documents) involving tax-exempt organizations be publicly disclosed. In general, the staff recommends that such disclosure be made without redactions.

*VHA Concern:*

VHA agrees with the JCT's recommendation to correct the anomaly in the disclosure law that prevents private letter rulings issued to exempt organizations from being released to the public unless they address tax issues beyond continued qualification for exempt status. VHA believes that *all* private letter rulings issued to both nonprofit and for-profit organizations should be released. Such a change levels the playing field.

However, VHA disagrees that rulings issued to exempt organizations should be publicly disclosed *without redaction.* Such a change would distort the level playing field achieved by the first aspect of this JCT proposal. Moreover, it will be administratively burdensome to apply the exemptions from disclosure in Section 6110(c) (e.g., disclosure exemptions for trade secrets, commercial, and financial information), and such exemptions will be meaningless to the exempt organization if its name is released in connection with the ruling.

DISCLOSURE OF AUDIT RESULTS AND CLOSING AGREEMENTS

The JCT staff recommends that the IRS disclose the results of audits of tax-exempt organizations. In addition, the staff recommends that all closing agreements with tax-exempt organizations should be disclosed. Again, the staff recommends that such disclosure should be made without redaction.

*VHA Concern:*

Mandatory disclosure of unredacted closing agreements and audit results will have a negative effect on potential settlements. When faced with the choice of litigating or settling an IRS audit issue, the current rule protecting the confidentiality of IRS settlements provides a strong incentive not to litigate. Moreover, the IRS always has the option to negotiate for disclosure as part of a settlement. Closing agreements are also used outside the audit context to deal with self-identified tax compliance problems. The proposed disclosure without redaction will clearly have a chilling effect on organizations' willingness to voluntarily step forward to correct tax problems in this context. Taxable corporations and individuals have comprehensive protection from disclosure in both the audit and non-audit contexts.

Mandatory disclosure may also have a chilling effect on the IRS' willingness to enter into settlements. If all closing agreements are disclosed, the IRS will have to worry about whether a particular settlement will be interpreted as a general policy or enforcement position.

DISCLOSURE OF TAX RETURNS FOR UBIT, TAXABLE SUBSIDIARIES, AND JOINT VENTURES

The JCT staff recommends that the scope of 6104 should be expanded to require the disclosure of all Forms 990–T and any Forms (including Forms 1120 and 1065) filed by affiliated organizations of tax-exempt organizations.

*VHA Concern:*

Mandatory disclosure of Form 990–T (UBIT tax returns filed by exempt organizations), Form 1120 (corporate tax returns filed by taxable affiliates), and Form 1065 (partnership tax returns filed by joint ventures) would create an unjustifiably unlevel playing field for the non-profit owners of such entities. In general, taxable corporations' returns are protected from disclosure. In the case of joint ventures and less than 100%-owned affiliates, there is also a concern that the privacy of the exempt organization's taxable partners could be jeopardized. Such individuals and entities are *not* subject to disclosure of comparable tax return information when they do business with for-profit parties.

DISCLOSURE OF MORE DETAILED INFORMATION REGARDING TRANSFER OF FUNDS AMONG AFFILIATES

The JCT staff recommends that Form 990 require reporting of more information concerning the transfer of funds among various affiliated tax-exempt organizations. In particular, the JCT staff would require tax-exempt organizations to identify clearly conduit arrangements in which funds are being transferred among Section 501(c)(3), 501(c)(4), and 527 organizations (e.g., PACs).

*VHA Concern:*

Tax-exempt hospitals systems frequently transfer funds between exempt affiliates, but rarely use the 501(c)(3)–(c)(4)–PAC conduit arrangement that the JCT staff is concerned about. This disclosure requirement is acceptable only if narrowly tailored to its purpose. If it is not so tailored, it will impose onerous reporting burdens on large multi-entity health systems that go far beyond the abuses it is intended to address.

DISCLOSURE OF MORE DETAILED INFORMATION REGARDING LOBBYING

The JCT staff recommends that public charities (a category that includes most tax-exempt hospitals and health care organizations) be required to supply additional, more detailed information regarding lobbying on Schedule A of the Form 990 filed each year. Such information would include:

- a detailed description of specific lobbying activities and issues (e.g., legislation supported or opposed) at the Federal, State and Local levels
- expenditures for self-defense lobbying (a category that includes any efforts to protect an organization's tax or nonprofit status).
- expenditures for non-partisan study, analysis and research if such study, analysis, or research includes a limited "call to action."

Under IRS regulations and rulings, self-defense lobbying and nonpartisan study, research and analysis (even when the latter includes a limited "call to action") are excluded from the definition of lobbying.

*VHA Concern:*

Increased reporting of lobbying activities and issues will impose substantial additional recordkeeping and reporting burdens on nonprofit health care systems, particularly those multi-hospital systems with facilities in different states and local jurisdictions. To require reporting of activities that IRS regulations actually *exclude* from the definition of lobbying makes the proposal even more objectionable from a policy viewpoint. Reporting should be limited to categories of activities that have a particular legal significance.

DISCLOSURE OF TRADE NAMES

The JCT staff recommends that a tax-exempt organization be required to list on the Form 990 all trade names, as well as the organization's legal name.

*VHA Concern:*

Large health systems with multiple ancillary providers may use a number of trade names to represent their numerous facilities and services. VHA recommends that organizations be required to provide all names under which the organization conducts substantial activities or solicits contributions. Such disclosure should be sufficient to address the concern of the JCT staff without requiring burdensome reporting of extraneous detail.

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VIRGINIA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES
RICHMOND, VA 23218
*March 13, 2000*

Mr. A. L. Singleton
Chief of Staff
Committee on Ways and Means
U.S. House of Representatives
*1102 Longworth House Office Building*
*Washington, D.C. 20515*

Dear Mr. Singleton:

On behalf of the Virginia Department of Agriculture and Consumer Services, I respectfully submit for your consideration the following written comments regarding the Joint Committee on Taxation Disclosure Study regarding provisions related to tax-exempt organizations.

We concur with all but one of the recommendations relative to the Disclosure of Internal Revenue Service (IRS) Materials. Specifically, we disagree with the recommendation that the taxpayer identification number (TIN) of tax-exempt organizations should not be subject to disclosure.

While the TIN of a tax-exempt organization is routinely disclosed under present law, the study suggests that the potential for misuse may increase given the additional disclosures recommended. However, the study does not cite specific examples of misuse. We believe that the TIN is a critical piece of information for investigative and record management purposes that should continue to be subject to disclosure. For example, our staff uses the TIN for processing refunds of overpayment of registration fees, identifying organizations with sound-alike names, requesting information from the IRS, and identifying the parent organization from an affiliate.

Thank you for the opportunity to comment on the recommendations of the Joint Committee.

Sincerely,

J. CARLTON COURTER, III
*Commissioner*

cc: The Honorable Barry E. DuVal
Donald W. Butts, DVM

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THE WHITING LAW FIRM, P.A.
PORTLAND, ME 04101
*March 13, 2000*

A. L. Singleton, Chief of Staff
Committee on Ways and Means
U.S., House of Representatives
*1102 Longworth*
*Washington, DC 20515*

Re: *Proposed Changes to Section 501(c)(3) Rules*

Dear Mr. Singleton:

I represent about two dozen section 501(c)(3) groups here in the State of Maine. Many of them are involved in educating their members and the public as to the likely effects of proposed legislation, and concerning where political candidates stand on various issues.

I understand that the Joint Committee on Taxation is considering proposals to make section 501(c)(3) organizations report on their annual 990 forms expenditures related to such educational activities. From what I have been told, these educational activities still will not be considered "lobbying," and will not jeopardize a group's section 501(c)(3) tax exempt status. Rather, the government is just curious as to how much is being spent on such activities, and believes the public should know how much a group is spending and for which issues.

My clients and I are greatly concerned about those proposals for three reasons.

First, such reporting requirements will chill the "free speech" rights of my clients and other section 501(c)(3) groups. See: *McIntyre v. Ohio Elections Commission,* 514 U.S. 334 (1995); *FEC v. Massachusetts Citizens for Life, Inc.,* 479 U.S. 238 (1986); *First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1978); and *Buckley v. Valeo,* 424 U.S. 1 (1976).

This is especially true if section 501(c)(3) organizations are required to report which bills and/or political issues they spent money on. See: *McIntyre v. Ohio Elections Commission,* supra. As our U.S. District Court Judge here in Maine recently held in *Yes For Life Political Action Committee v. Peter B. Webster,* 74 F. Supp. 2d 37 (D. Me. 1999), at 42:

> "I recognize that many people find anonymous statements on controversial issues to be repugnant... But what the Constitution protects and what good judgment or good policy permits are often two entirely different things. The Supreme Court has ruled that under the First Amendment anonymous political messages deserve protection because in some important instances the face of an unpopular speaker will otherwise interfere with the legitimacy of the political message he/she is sending. Ultimately, it is up to the voters to assess the message and what weight to give it."

Second, we do not understand why section 501(c)(3) groups should have to report such expenditures if they are not considered "lobbying," and will not jeopardize a group's tax exempt status. Idle curiosity hardly seems sufficient justification for requiring organizations to report confidential and politically sensitive financial information... opening the door for those who oppose the group's views on those political issues to misuse that information to the detriment of the organization [which, again, is likely to chill the "free speech" of the organization].

And third, to my knowledge no section 501(c)(3) organization currently keeps a separate account of these expenses... which means that all such groups will have to revamp their recordkeeping and accounting systems to track and report these expenses separately. No doubt this will be an expensive and time consuming process; and keeping track of such expenses and reporting them separately will be a totally unnecessary accounting headache. In this age when the public is crying out to make the IRS and tax reporting more "user friendly" this proposal would be a big step in the wrong direction.

I am enclosing six copies of this letter, along with a computer disk of this letter. I understand that this what is required to comment on proposals before the Joint Committee.

Thank you for your consideration of our concerns.

Very truly yours,

STEPHEN C. WHITING

SCW/sr
Enclosures

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