Comments on IRS Announcement 2000-84
on the Need for Guidance Clarifying the Application
of Internal Revenue Code Provisions to Use
of the Internet by Exempt Organizations

The following comments and recommendations express the individual views of the members of the Section of Taxation who prepared them and do not represent the position of the American Bar Association or the Section of Taxation.

These comments and recommendations were prepared by members of the Committee on Exempt Organizations. Primary responsibility was taken by Internet Task Force members Christina L. Nooney, Amy R. Segal, Carolyn O. Ward, Robert A. Wexler, and LaVerne Woods, Chair; Robert H.M. Ferguson, Chair of the Committee on Exempt Organizations and Victoria B. Bjorklund, Vice Chair of the Committee on Exempt Organizations. These comments were reviewed by James K. Hasson of the Section’s Committee on Government Submissions, and Douglas M. Mancino, Council Director for the Committee on Exempt Organizations. Portions were also reviewed by Gregory L. Colvin, Co-Chair of the Subcommittee on Political and Lobbying Organizations and Activities, by Rosemary E. Fei of that Subcommittee, and by Laura Kalick and Adelbert L. Spitzer, Co-Chairs of the Subcommittee on Unrelated Business and Competition Issues.

Many members of the Section of Taxation who participated in preparing these comments and recommendations have clients who would be affected by the federal tax principles addressed, or have advised clients on the application of such principles. With one exception, no such member (or the firm or organization to which such member belongs) has been engaged by a client to make a governmental submission with respect to, or otherwise influence the development or outcome of, the specific subject matter of these comments. The exception referred to in the immediately preceding sentence involves a member of the task force whose law firm was recently retained to review, and may be asked to draft a portion of, a similar submission in response to Notice 2000-84. That member ceased to participate or have anything whatsoever to do with the attached submission from and after the time at which her law firm was so retained.

Contact Person:

Robert H.M. Ferguson
Patterson, Belknap, Webb & Tyler LLP
1133 Avenue of the Americas
New York, New York 10036
(212) 336-2830
fergub@ix.netcom.com

I. OVERVIEW

We welcome the opportunity to respond to the request for comments in IRS Announcement 2000-84, 2000-42 I.R.B. 385 (the “Announcement”), regarding the need for guidance clarifying the application of the Internal Revenue Code (the “Code”) to use of the Internet by exempt organizations.

To our knowledge, the Announcement is unique in its request for comments regarding the tax law’s overall application to a particular technological medium, rather than the application of one or a few Code sections. Given the wide scope of the request, we have concluded that before addressing the specific areas in which the Internal Revenue Service (“IRS”) has asked for comments, it would be helpful to identify the range of guidance levels that may be appropriate and to articulate certain broad principles that inform our approach in all areas.

With respect to the level of guidance needed, the threshold question is whether the IRS should issue any guidance at this time. In our view, there are some areas in which guidance would be helpful. The challenge of providing guidance is complicated by the fact that the technology, capabilities and range of uses of the Internet are expanding at breathtaking speed. Any guidance must recognize those dynamics. Accordingly, we have classified potential guidance topics into the following categories, identified below in the discussion of each topic:

- **Category One (1):** areas where no guidance is necessary because guidance exists under current law that can be generally applied in the Internet context;
- **Category Two (2):** areas where guidance can and should be provided at this time regarding the manner in which current law applies in the Internet context;
- **Category Three (3):** areas where some guidance would be helpful, such as through the development of safe harbors, but where definitive guidance is not currently possible or advisable given the rapidly changing technology and uses of the Internet; and
- **Category Four (4):** areas in which the use of the Internet is incidental to larger substantive issues, the substantive issues are themselves in need of administrative interpretation, and the specific circumstances of the use of the Internet should be addressed only as part of more comprehensive guidance on the underlying substantive issues.

In particular, we recommend that the IRS consider issuing formal guidance on which organizations may rely in the areas of (1) lobbying and political activities and (2) unrelated business income tax (“UBIT”) issues involving the Internet. In addition, we recommend that the IRS provide guidance regarding disclosure of nondeductible contributions and substantiation of charitable contributions through the Internet, either by means of a publication on which organizations may rely or through coordination with Treasury to amend the applicable regulations. For our specific recommendations regarding each of the IRS’s questions, please refer to the “Recommendations” sections under each topic.

The IRS has articulated informally that an exempt organization’s use of the Internet to accomplish a particular task does not change the way in which the tax laws apply to that task. That concept is helpful in contexts where an exempt organization’s activities that involve the
Internet are largely indistinguishable from its activities through other media. In some contexts, however, the Internet’s singular attributes present mechanisms for accomplishing tasks that are not contemplated under existing law. In those contexts, it may be necessary to develop rules that apply uniquely to Internet use.

II. BROAD PRINCIPLES

A. Attribution.

The question of whether one organization’s communications and activities should be attributed to another solely because of a link from one website to another is central to the tax law analysis. This question has broad ramifications in a variety of substantive contexts, including UBIT, political and lobbying activities.

The fact that an organization’s website contains a link to another’s website should not automatically result in attribution. The tax law does not as a general matter attribute the activities of one legal entity to another, even when the organizations are related. For example, in the corporate context, it is fundamental that the separate identity of a corporation will be respected, so long as the corporation is formed for a valid purpose, observes corporate formalities and is not a sham. Moline Properties, Inc. v. Commissioner, 319 U.S. 436 (1943); National Carbide Corp. v. Commissioner, 336 U.S. 422 (1949). This separate identity principle extends to nonprofit, tax-exempt organizations. Center on Corporate Responsibility Inc. v. Schultz, 368 F. Supp. 863 (Dist. D.C. 1973).

The presumption against attribution should be especially strong in the context of a link from one organization’s website to another’s. An exempt organization that provides a link from its website generally has no control over the content at the linked site, which can change daily.

There may very well be circumstances in which attribution is appropriate. The question of attribution must be determined based on all facts and circumstances, however, in the same manner that such questions are resolved outside the Internet context.

In view of the importance of the attribution question, and of the extent to which exempt organizations are using the Internet, there is a need for a bright line safe harbor with respect to links. We propose that the IRS adopt a “one link” safe harbor. Specifically, if it is necessary for a viewer to make more than one link to reach a webpage, then there is no attribution with respect to the content on that page. By “one link,” we mean that the viewer sees at least one page on his or her screen after viewing the organization’s page containing the link and prior to viewing the page containing the content in question. The safe harbor would encompass, but not be limited to, a “jump” or “splash” page that an organization inserts to alert the viewer that he or she is leaving the organization’s site. This would allow an organization to construct a separation between its webpage and that of another organization that would be apparent to any user, in order to avoid the nearly impossible task of the first organization maintaining a constant review of the ever-changing content at the linked webpage.

1 The terms “link” and “hyperlink” are used interchangeably in these comments.
The proposed safe harbor is premised on an assumption that the creation of a link requires an affirmative action on the part of the exempt organization hosting the website. In the event that technology is developed that will allow a viewer to link to any word, name or phrase on an organization’s website without the assistance of any coding associated with the organization’s website, the proposed safe harbor would be rendered obsolete.

Any such safe harbor should not create a negative inference. If a viewer required only one link to reach a webpage from the exempt organization’s page, attribution would not be automatic, and the fact that only one link was required would not be weighed against the organization in assessing whether attribution was appropriate.

B. No Chilling Effect.

The Internet enables all users, including exempt organizations, to communicate widely and effectively at very low cost. Absent a compelling reason to the contrary, the IRS should not interpret the tax law in a manner that discourages exempt organizations from utilizing scarce charitable dollars in the most cost-effective manner possible.

For example, it is often far less expensive for an organization to provide written statements regarding charitable contributions as required under Sections 170(f)(8)\(^2\) and 6115 through email communications to donors rather than through paper communications. The IRS should provide clear guidance that this procedure satisfies legal requirements.

Similarly, the IRS should not interpret the tax law in a manner that inhibits exempt organizations’ use of this powerful medium in comparison to other users. Providing a link to another organization’s website differs from providing the other organization’s address or telephone number, or even website address, only in the level of convenience that it affords the viewer. Exempt organizations should not be penalized for using the most convenient and advanced technology available.

C. Internet Text as Written Communication.

A variety of tax rules apply to communications that are in “written” or “printed” form. In general, such rules should apply to Internet text (as opposed to audio or video) communications, including webpages, email, and wireless text messages received via a personal digital assistant or wireless phone. The characterization of a text communication as “written” or “printed” should not turn on whether it appears on a piece of paper or a screen.

\(^2\) All section references are to the Internal Revenue Code of 1986, as amended, or Treasury Regulations thereunder, unless otherwise noted.
III. GENERAL ISSUES

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

The Need for Guidance.

We believe this question falls into Category Three (3). Some guidance would be helpful, but definitive guidance is not currently possible or advisable given the rapidly changing technology and uses of the Internet.

Scope of the Question.

This question involves both “communications” and “publications.” The term “communication” appears in the tax law in the context of lobbying and political activities. E.g., Treasury Regulation Section 56.4911-2(a)(2) defines “direct lobbying communication” and “grass roots lobbying communication.”

The question regarding “publications” may be relevant in the UBIT context. Whether a website constitutes a single or multiple publications may bear on the allocation of expenses and calculation of net unrelated business income, and on the analysis under the Section 513(i) corporate sponsorship rules. The issue may also affect expense allocation between entities (e.g., in the case of related organizations sharing a website).

Current Authority.

We know of no existing legal precedent that one might apply to the question of whether a website constitutes one or more communications publications.

Recommendations.

With respect to communications, we believe that a website may encompass multiple communications, and have addressed this issue below in the context of political and lobbying activities. See in particular the analysis regarding a “call to action” in the context of grass roots lobbying, at IV.E.

With respect to publications, a website may comprise multiple publications, depending on the facts and circumstances. We recommend that the IRS publish a list of factors that bear on this determination. No single factor should be dispositive, and the list should be subject to change as circumstances and technology change. Factors might include: the overall feel and flow of the website; whether a website or a portion of the site is intended to represent the electronic version of one or more existing publications printed on paper; whether a portion of a site has a separate editorial staff; whether a portion of a site has the look and feel of a separate publication; whether a portion is updated separately from the rest of the website; whether portions of the site are produced by different sets of individuals with little or no cooperation (e.g., a university’s biology department page and its athletics department page on the same site); whether a portion of the site has limited access, e.g., to members or subscribers only; the
The substantive nature of different portions of a website (related or unrelated); and the overall size of the website.

An organization should be able to determine in good faith whether its website constitutes one or multiple publications. Some organizations may have considered this question for reasons other than tax purposes, for example, when making staffing decisions or when determining standards for style and content on different parts of a website. Therefore, we suggest that the IRS adopt and state a position that it will generally respect an organization’s good-faith determination on this question.

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

The Need for Guidance.

We believe that this question falls into Category Four (4). The use of the Internet is incidental to larger substantive issues, the substantive issues are themselves in need of administrative interpretation, and the specific circumstances of the use of the Internet should be addressed only as part of more comprehensive guidance on the underlying substantive issues. As discussed below, we believe that the only guidance appropriate at this time is an acknowledgment that expenses should be allocated on a reasonable basis.

Scope of IRS Question.

Exempt organizations have various reasons for needing to allocate expenses relating to the creation and maintenance of a website, just as they do other expenses. In addition to calculating UBIT, these reasons might include situations where related organizations share staff who create and maintain their sites, as well as organizations that have made the Section 501(h) election and are dividing website content into lobbying and non-lobbying materials. They might also include non-tax reasons, e.g., the need to allocate expenses to different internal project accounts.

Existing Authority.

There is little existing law on this topic. The Treasury Regulations on UBIT offer limited guidance. Treasury Regulation Section 1.512(a)-1(c) provides that in the case of the dual use of facilities or personnel, expenses shall be allocated between the two uses “on a reasonable basis.” One example in the regulations makes clear that a reasonable basis would include allocations based on an approximation of time spent on a given activity. Treas. Reg. § 1.512(a)-1(c). See also Rensselaer Polytechnic Institute v. Commissioner, 732 F.2d 1058 (2d Cir. 1984) (allocation based on time is acceptable). Note, however, that another example given in the Treasury Regulations glosses over what method might be used to allocate salaries of personnel who carry on both exempt and non-exempt activities: “Such deductions (against unrelated taxable income) include the costs of . . . the salaries of personnel used full-time in the unrelated business activity and an allocable portion of the salaries of personnel used both to carry on exempt activities and to conduct the unrelated business activity.” Treas. Reg. § 1.512(a)-1(e) (emphasis supplied).
Recommendations.

We suggest that the IRS explicitly acknowledge that the “reasonable basis” rule of Treasury Regulation Section 1.512(a)-1(c) applies to the allocation of expenses between exempt and non-exempt Internet activities. Accordingly, costs could be allocated based on staff time, on webpages, or on any other method that is reasonable in a particular situation. It should be up to the organization to determine in good faith whether a method is reasonable in a particular instance. For example, as the IRS notes in posing this question, webpages may not always be the same length. There may also be great variations in the amounts of time, effort and expense devoted by the exempt organization to particular webpages. If the difference in the lengths or content of webpages for a specific website renders unreasonable the use of webpages as the basis for cost allocation, then another method should be used.

For allocation of expenses for purposes other than dividing exempt from non-exempt activities, we suggest that the IRS take no action at this time, as there is not sufficient guidance for such allocation of non-Internet-related activities.

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

The Need for Guidance.

This question falls into Category One (1). Existing guidance under current law can be applied in the Internet context.

Existing Authority.

Section 6001 requires taxpayers to keep such records as Treasury may prescribe. The Treasury Regulations at Section 1.6001-1(c) require organizations that are exempt from tax under Section 501(a) to keep books and records sufficient to show the organization’s items of gross income, receipts and disbursements, and to substantiate the information required for the organization’s Form 990 or 990PF. An organization must also keep books and records sufficient to establish the amount of gross income, deductions, credits, and other items necessary to calculate UBIT on Form 990T. No specific form is required for the records.

Recommendation.

We recommend that the IRS not impose any requirement that exempt organizations maintain either electronic or paper versions of their websites. Particularly in the Internet context, any specific rules regarding records retention would be unrealistic and unduly burdensome on exempt organizations, which generally do not retain copies of all versions of all website pages.

We believe, in fact, that the nature of a website provides a built-in incentive for an organization to comply with applicable rules and regulations, whether related to lobbying, political activity, commercial activities or the carrying out of exempt function activities. An organization has no way to monitor closely who is accessing its site on a regular basis and no
A way to know who is downloading and storing website content, or email or other Internet communications for future reference, and therefore has an interest in maintaining such records itself.

Many organizations do retain outdated versions of portions of their websites for archival purposes, and doing so may constitute good business practice. Organizations should not be specifically required to do so, however, beyond what is currently required under the existing regulations.

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

Background.

The Internet makes it possible for exempt organizations to host electronic discussions among multiple Internet users around the globe in many different forms. A listserv or newsgroup works by sending a mass email to all members of the list every time a message or update is posted. See generally Catherine E. Livingston and Amy R. Segal, “Tax-Exempt Organizations and the Internet,” Part 1, The Practical Tax Lawyer, Winter 2000, at 47. Members can respond by sending an email to the entire list or by responding to another individual list participant. A chat room is an electronic exchange in real time in which users post comments intended for all others in the chat room at that time to read. Other users can respond in the same manner as if engaged in a conversation. A bulletin board allows users to post messages that can be read by other users at that time or by others reviewing the bulletin board at a later time.

While listserves, newsgroups, chat rooms, and bulletin boards have many similarities to traditional public debates or forums, there are some significant differences. While a public forum lasts for a discrete period of time, an electronic discussion can take place over an extended period. In addition, unlike in the case of typical traditional public forums sponsored by an exempt organization, there may not be any moderator or editor overseeing the comments made in an on-line forum. Nevertheless, these distinctions should not result in a harsher rule regarding attribution of statements of participants being applied to Internet forums than to traditional forums. As a general rule, statements made by persons who are not authorized to speak on a tax-exempt organization’s behalf should not be attributed to the organization.

The Need for Guidance.

We believe that this type of attribution issue falls into Category Two (2); that is, it is an area where guidance can and should be provided at this time regarding the manner in which current law applies in the Internet context. While existing guidance regarding attribution of statements arises in the context of lobbying and political activities, and those are the areas most likely to create problems for organizations in an on-line context, we believe that many of the same principles can be applied logically in determining whether any statement made as part of an on-line forum should be attributed to an exempt organization.
Existing Authority.

The presentation of public lectures, forums, or debates is an established method of educating the public. Rev. Rul. 66-256, 1966-2 C.B. 210. The IRS has ruled in several contexts that a Section 501(c)(3) organization can host a forum or debate or permit its facilities to be used for forums or debates without having statements made by speakers using the facilities be attributed to the charity. For example, Revenue Ruling 86-95, 1986-2 C.B. 73, provides that an organization conducting public forums involving candidates for public office held for the purpose of educating and informing the voters did not engage in impermissible political intervention where the treatment of the candidates is fair and impartial, the moderator does not comment on the questions posed to the candidates or imply approval or disapproval of any of the candidates, and the moderator provides a disclaimer at the beginning and end of each forum stating that the views expressed are those of the candidates and that sponsorship of the forum is not intended as an endorsement of any candidate. Similarly, in Revenue Ruling 74-574, 1974-2 C.B. 160, the IRS ruled that statements made by political candidates would not be attributed to a broadcasting station where the station made free air time equally available to all legally qualified political candidates, provided disclaimers as part of each broadcast, and offered no endorsement of any candidate.

The IRS also has ruled that a university’s provision of facilities and support to a campus newspaper that takes positions on candidates for public office or its offering of a political science course that requires students to work on political campaigns of their choice will not result in the acts of those participating in political activities being attributed to the university. See Rev. Rul. 72-512, 1972-2 C.B. 246; Rev. Rul. 72-513, 1972-2 C.B. 246. None of these rulings require the organization to engage in any form of censorship in order to avoid attribution of statements to the organization; the organizations involved are simply required to be fair and neutral in their treatment of those participating in the forum or using the organization’s facilities.

With respect to attribution of statements or actions of persons other than officials of an organization, the IRS has stated informally that, “there must be real or apparent authorization by the Section 501(c)(3) organization of the actions of individuals . . . before the actions of those individuals will be attributed to the organization” for purposes of the political campaign prohibition. Judith E. Kindell & John F. Reilly, “Election Year Issues,” 1992 Exempt Organizations Continuing Professional Education Technical Instruction Program Textbook (“1992 CPE Text”), at 436. The 1992 CPE Text further provides that “[a]cts of individuals that are not authorized by the IRC 501(c)(3) organization may be attributed to the organization if it explicitly or implicitly ratifies the actions.” Id. With respect to the actions of an individual official, the 1992 CPE Text states that the determination of whether the act of an individual will be attributed to a Section 501(c)(3) organization is based on relevant facts and circumstances. Id, at 435.

Recommendations.

A forum’s occurrence over the Internet rather than in an auditorium or through broadcast media should not affect its qualification as an educational activity if it otherwise qualifies as such; nor should it affect the IRS’s analysis of whether statements made by those participating in the forum should be attributed to the organization maintaining the forum. As stated above under
“Broad Principles,” we believe it is critical that the IRS not interpret the tax law in a manner that inhibits exempt organizations’ use of the Internet. Consequently, we recommend that the IRS issue guidance that establishes the following two principles. First, organizations should not be obligated to monitor or edit statements posted as part of an on-line forum. Second, the determination of whether the statement of a participant in an on-line forum should be attributed to the organization should be based on relevant facts and circumstances.

Consistent with these principles, we suggest that, as a general safe harbor, the IRS provide that if (1) an organization provides a disclaimer that clearly states its editorial and/or monitoring policy with respect to an Internet forum and that statements made by those participating in the forum are the views of the participants and not of the organization, and (2) the organization implements consistently its stated editorial/monitoring policy, then statements made by participants generally will not be attributed to the organization. We have provided some scenarios that may be helpful in formulating guidance on this issue.

Scenario 1. An organization chooses not to monitor or edit an on-line forum it established and posts a disclaimer at the beginning of the forum stating that it does not monitor or edit the forum and that all statements made by those participating in the forum are the views of the participants. Assuming this policy is followed consistently, statements made by participants will not be attributed to the organization. The IRS may want to provide examples of disclaimers that it considers appropriate in this context.

Scenario 2. An organization chooses to monitor an on-line forum solely for programmatic or civility purposes (e.g., to ensure that the discussion remains focussed or to remove obscenities, racist statements or other inappropriate content) and not for purposes of editing statements with lobbying or political content. For example, a health-care organization establishes a bulletin board devoted to exchanging information about Tuberculosis, which is monitored by a health-care professional who is familiar with issues related to Tuberculosis, but who is not qualified to determine whether a statement would constitute lobbying or political activity under Section 501(c)(3). The organization posts a disclaimer explaining its editorial policy and that statements made by participants that might constitute lobbying or political activity are strictly the views of the participant should not be attributed to the organization. Assuming that the organization follows its editorial policy in a consistent and unbiased manner, the organization should not be held responsible for lobbying or political activities statements made by participants.

Scenario 3. If an organization chooses to edit or monitor its on-line forum in order to remove statements that might constitute lobbying or political activities, the organization should follow the principles established by existing guidance. Specifically, moderators or editors should be non-partisan and independent and treatment of those participating in the forum must be even-handed and neutral. If the organization fails to follow these guidelines in a reasonable and diligent manner, statements of participants could be attributed to the organization based on a facts and circumstances analysis. Organizations should be permitted to use any reasonable method to screen comments made as part of forum, although the IRS may want to provide some specific examples of screening techniques it considers to be reasonable.
The Need for Guidance on a Related Issue.

We would like to bring to the attention of the IRS the need for guidance on an issue that is related to the attribution issue addressed above. Some Section 501(c)(3) organizations have expressed concern about the extent to which statements (particularly statements that could constitute participation or intervention in a political campaign) made by employees or others associated with the organizations (e.g., students) using Internet email accounts provided by the organization or websites that are linked to the organization’s website could be attributed to the organization. In this context, unlike in the question posed in IRS Announcement 2000-84, the statements in question do not arise as part of a forum established or maintained by the organization. Rather, the employees or others with access to the organization’s email accounts or linked websites are using the organization’s facilities in a manner that is not directly sponsored by the organization itself. While such use may be permitted generally by the organization, the organization would not authorize the specific statements that are posted or disseminated.

For example, students, faculty or staff may, in a non-classroom context, use their university-provided email accounts to send messages containing statements that would constitute political activities to hundreds of people who may or may not be associated with the university. Organizations are concerned both that such statements might be attributed to the organization, and, at the same time, that their adoption of policies that would prohibit this type of use of the organizations’ Internet facilities would run afoul of the First Amendment. We recommend that the IRS issue guidance providing that there is no attribution of statements made by employees or others in this context unless there is evidence that the organization encouraged or directed the activity.

IV. POLITICAL AND LOBBYING ACTIVITIES

Background.

More and more, Section 501(c)(3) charities, as well as Section 501(c)(4) organizations, are using the Internet to lobby, to educate the public about legislation, and to provide information about candidates for political office. The broad principles that we have articulated above all apply as well in the context of lobbying and political activities. In general, we urge the IRS to issue guidance on the political and lobbying issues, preferably in the form of a detailed revenue ruling containing examples and safe harbors. We indicate below which issues we believe are ripe for guidance, and which issues should be deferred until the IRS is prepared to provide updated guidance generally on those issues.

The preface in the Announcement to this set of questions on political activities and lobbying refers to “charitable organizations described in Section 501(c)(3).” The specific questions are directed towards Section 501(c)(3) organizations. Any guidance issued with respect to Section 501(c)(3) organizations will, necessarily, affect the analysis for Section 501(c)(4) organizations and Section 527 organizations as well. In providing guidance to Section 501(c)(3) organizations, the IRS might also discuss whether, and if so how, such guidance might be relevant for non-501(c)(3) organizations.
We now address each of the questions, in turn.

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

The Need for Guidance.

This is a Category Three (3) item – some guidance would be helpful, such as through the development of a safe harbors, but definitive guidance is not currently possible or advisable given the rapidly changing technology and uses of the Internet.

Scope of IRS Question.

There are many ways in which a website operated by a Section 501(c)(3) organization could potentially involve political activities. Some ways might be obvious such as overt statements on a website that support or oppose a candidate for office.

This question focuses specifically on voter guides and candidate debates, two of the more complex areas. The leading precedential authorities in this area are fourteen to twenty-two years old. Revenue Ruling 78-248, 1978-1 C.B. 154 deals with voter guides and voting records, and Revenue Ruling 86-95, 1986-2 C.B. 73 deals with candidate debates. There are also private letter rulings (such as PLR 9652026 (Dec. 27, 1996)), CPE articles, and informal guidance in IRS remarks at conferences that have helped clarify the rules. Even though half of Revenue Ruling 78-248 discusses the distribution of incumbent voting records, this question does not mention this issue or refer to Revenue Ruling 80-282, 1980-2 C.B. 178, which distinguished Revenue Ruling 78-248 and dealt with the distribution of incumbent voting records. Accordingly, we do not offer proposals for dealing with incumbent voting records. We have limited our recommendations to the issues of voter guides and candidate debates.

Existing Authority.

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

Treasury Regulation Section 1.501(c)(3)-1(c)(3)(i) states that an organization is not operated exclusively for one or more exempt purposes if it is an “action” organization. Treasury Regulation Section 1.501(c)(3)-1(c)(3)(iii) defines one type of “action” organization as an organization that participates or intervenes, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office. The regulations further provide that
activities that constitute participation or intervention in a political campaign on behalf of or in opposition to a candidate include, but are not limited to, the publication or distribution of written statements or the making of oral statements on behalf of or in opposition to such a candidate.

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

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

Situation 1 described what the IRS considered to be an appropriate publication of incumbent voting records, while Situation 4, the IRS opined, focused only on a narrow topic, “land conservation issues” of importance to the organization. Similarly, Situation 2 describes a voter guide that the IRS considers to be appropriate for a Section 501(c)(3) organization, while Situation 3 describes a voter guide based on questions that evidenced a bias on the part of the organization.

Situation 2 represents what many have considered to be a safe harbor for voter guides. The requirements for this safe harbor appear to be the following:

1. The voter guide must be based only upon answers in response to a questionnaire sent to candidates. The ruling does not appear to permit use of information from other sources, such as legislative voting records, the candidate’s public statements, news stories, or campaign literature.

2. The questionnaire must be sent to all candidates for a particular public office. It appears that this includes minor party candidates and generally anyone who “offers himself, or is proposed by others, as a contestant for an elective public office.” Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii).

3. The questionnaire must solicit a brief statement of each candidate’s position on a wide variety of issues. The term “wide variety” is not defined, but it appears to be broader than the scope of issues covered in Situation 4 of Revenue Ruling 78-248 – that is, “land conservation issues of importance to the organization.” The issues must be selected solely on the basis of their importance and interest to the electorate as a whole.

4. All responses must be published in the voter guide. The ruling is silent as to whether this means that publishing the responses of only one candidate, where the opposing candidate failed to respond, meets the safe harbor. In contrast, Regulations of the Federal Election Commission (“FEC”) require only that all candidates “be provided an equal opportunity to respond.” 11 C.F.R. 114.4(c)(5)(ii)(B).

5. The voter guide must be made generally available to the public.
6. Neither the candidate questionnaire nor the voter guide, in content or structure, may evidence a bias or preference with respect to the views of any candidate or group of candidates.

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

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

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

The facts in Revenue Ruling 80-282 deal with incumbent voting records and do not directly involve voter guides. We review it here, however, because it did specifically modify Revenue Ruling 78-248, and because some practitioners believe that a voter guide that does not fit squarely within all of the facts of Revenue Ruling 78-248 is more likely to be acceptable to the IRS if it is distributed only to members, not targeted to districts with close races, and not timed to coincide with an election.

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

- All legally qualified candidates were invited to participate.
♦ The debate covered a broad range of issues.

♦ Questions were prepared by a non-partisan panel of knowledgeable persons composed of representatives of media, educational organizations, community leaders, and other interested persons.

♦ Each candidate was given equal opportunity to present his or her views.

♦ There was a moderator, whose sole purpose was to make sure that ground rules were followed.

**The ABA Proposals.** In 1999, the ABA Exempt Organizations Committee’s Subcommittee on Political and Lobbying Organizations and Activities presented a position paper (the “ABA Proposals”) which urged the IRS to modify, update, and expand the older Revenue Rulings on voter guides. The ABA Proposals do not discuss the Internet, but simply try to bring the 1978 revenue ruling on voter guides up to date. As the ABA Proposals indicate, we continue to need updated guidance with respect to this area generally, and, in providing such guidance, the IRS should also discuss the use of the Internet.

Like our discussion, the ABA Proposals focused only on voter guides, not on voting records and not on debates. First, the ABA Proposals recommend the following change to Situation 2 of Revenue Ruling 78-248:

For consistency, and to prevent obstruction by nonresponding candidates, we propose that the following clarification be made in Revenue Ruling 78-248, Situation 2:

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

Among other things, the ABA Proposals asked the IRS to expand the revenue ruling. It focused on four-real life examples of voter guides and explained why these guides should be permitted. In particular, the examples presented varied from Revenue Ruling 78-248 in the following ways:

♦ By permitting the organization to express its view on questions asked without taking a position on the candidates.

♦ By permitting the organization to send its questionnaire only to major party candidates, using some objective standard to determine appropriate candidates, such as those receiving a certain percentage of votes in a primary.
♦ By permitting the organization to focus a questionnaire on a narrower range of issues important to the organization.

♦ By permitting the organization to publish, in a full and accurate manner, other public statements made by a candidate that were not prepared in direct response to the questionnaire.

♦ By permitting the organization to publish a chart, created by the entity, that fully and fairly summarizes and compares the views of candidates on a range of issues.

**FEC Guidance.** In September 1999, an organization called Democracy Network (“DNet”) received an advisory opinion from the FEC. FEC Advisory Opinion 1999-25. DNet is a website which, among other things, operates a voter guide. It is sponsored by the League of Women Voters (the “LWV”) and the Center for Governmental Studies. The website offers, among other things, an on-line database of textual, audio, and visual statements, which candidates can directly update, and which voters can access according to their interests. Candidates can respond to questions from the public that have been screened by the LWV. To see a candidate’s position on an issue, the viewer clicks a checkmark in a grid of issues. The viewer can also create his or her own grid, by topic, by sorting and searching. This type of website makes a voter guide much more useful and practical for the user.

The FEC Opinion is also significant because it allows a charitable organization to present the views of candidates other than by asking the candidates questions; for example, by publishing representative samples of newspaper editorials or news articles about the candidate. The FEC found that this website did not cause DNet or LWV to be engaged in intervention in a political campaign.

The statutes that the IRS and the FEC enforce are not comparable, and we are not suggesting that the IRS is in any way bound by the FEC opinion. On the other hand, we believe that the FEC’s analysis could be helpful to the IRS, and, as we recommend below, we believe that the particular voter guide examined in this FEC opinion is exactly the type of website that the IRS could use as a model of an acceptable voter guide for tax purposes.

**The Internet Difference.**

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

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

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

Three of the ways in which the Internet differs from printed communications are targeting and timing, and interactivity.

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

**Timing.** A publication is written at a point in time, and it is mailed or otherwise delivered at another. A website is published, it can be changed frequently or infrequently, and it remains on until it is “turned off.” As long as the exempt organization gives candidates a reasonable amount of time before an election to state their positions, timing should not affect a validly configured voter guide.

**Interactivity.** Voter guides, voting records, transcripts of candidate debates, and debates themselves become more useful and informative on a website that permits interactivity. A good example is DNet.org. This website published by LWV allows the user to take basic information, which otherwise clearly complies with the voting guide standards of Revenue Ruling 78-248, and sort and search in ways to make the information more meaningful to the user. The FEC Opinion stated that this website did not violate FEC prohibitions against corporations engaging in candidate activity, and we believe that the IRS could use this website as an example of a website that would be consistent with existing revenue rulings. Unfortunately, at this time, it is not possible to anticipate all of the ways in which an interactive website might be constructed.

In our view, as long as the voter guide is presented and available in a manner that complies with Situation 2 of Revenue Ruling 78-248, as modified by the ABA Proposals, and as long as the site is structured in such a way that the user can select the material that is important to the user, and the user sorts or searches based on the user’s priorities, the charity should not be penalized for making a more flexible, functional voter guide available to users. The feature of interactivity alone should not affect the legal status of the voter guide. The IRS needs to encourage exempt organizations to make the most of technology.

**Recommendations.**

Overall, therefore, we recommend the following:

1. The IRS should consider the examples suggested in the ABA Proposals, and we continue to recommend that it adopt a revenue ruling based on the ABA Proposals to update the law on voter guides generally.
2. The IRS could provide a revenue ruling with a safe harbor based on the DNet.org website’s voter guide as discussed in the FEC opinion. This example might at least be helpful in showing how an interactive voter guide might work.

3. With respect to candidate debates, it would be helpful if the IRS could indicate that the format approved in Revenue Ruling 86-95 would also be acceptable on the Internet, even if the candidates were given a more extended length of time to respond to questions in writing. The medium of the Internet would allow candidates to consider their thoughts rather than responding immediately. It might cause them not to avoid answering questions that they are unable or unwilling to answer quickly in a live debate. In addition, it would be helpful if the IRS could clarify that questions from the audience are permitted as well, whether or not they are screened by the charity, as long as, if screened, they are screened in a non-biased, non-partisan manner.

4. The IRS should make it clear that interactivity, in and of itself, does not transform the status of a valid voter guide. The status of the voting guide should not be affected just because the user is provided with the ability to make the guide more useful for the user by being able to sort and search a voting guide, or to tailor a guide that covers issues of concern to the user. Again, the DNet.org site is a good safe harbor example.

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

The Need for Guidance.

This is a Category Three (3) item. Some guidance would be helpful, such as through the development of a safe harbors, but definitive guidance is not currently possible or advisable given the rapidly changing technology and uses of the Internet. There is no current law on this issue.

Recommendations.

We recommend that the IRS issue guidance that establishes the following principles:

A Section 501(c)(3) organization should be permitted to link to candidates’ websites as part of the 501(c)(3) organization’s non-partisan voter education activities so long as the links are established on a non-partisan basis. For example, where a Section 501(c)(3) organization publishes a non-partisan voter guide that otherwise qualifies as non-partisan educational activity, the website should also be able to provide links to the websites of all qualified candidates, as long as all candidates in a race are treated equally. Presumably, if some candidates in the race do not have a website, then the organization should make available phone numbers or addresses where the user can receive comparable information.

A Section 501(c)(3) organization should be able to link to a broad range of politically diverse PACs or other political organizations that provide candidate profiles, voting history and
records, and similar information. The relevant fact and circumstance is whether the Section 501(c)(3) organization is providing access to a broad range of websites that represents the full spectrum of views. The IRS might provide some examples, including safe harbors. One favorable example that the IRS might consider is the links section on LWV.org, the League of Women Voters Website.

Often a Section 501(c)(3) organization and a Section 501(c)(4) organization will be affiliated, by sharing a common name, some common board members and employees, and even common offices. A Section 501(c)(3) organization that is affiliated with a Section 501(c)(4) organization should be able to provide a link directly to the Section 501(c)(4) organization’s home page, particularly if the Section 501(c)(4) organization also links back to the Section 501(c)(3). The rule might be different if the Section 501(c)(3) organization provides a link directly to a portion of the Section 501(c)(4) organization’s website that takes positions in support of, or opposition to, candidates. The proposed “one link” safe harbor would permit this type of link.

Sometimes a Section 501(c)(3) organization and a related Section 501(c)(4) organization will share a website. It would be helpful to have clarity on a shared website situation. As a safe harbor, the IRS might provide that Section (c)(3) and (c)(4) organizations that are legally affiliated through common board members and/or a shared name can share a website if: (a) some pages on the site are shared and others are not; (b) the shared pages, such as the home page and pages with educational information, do not contain any statements in support of or opposition to candidates; (c) pages specific to the Section 501(c)(4) organization’s work or that contain any political activities are paid for and maintained exclusively by the (c)(4); and (d) the Section 501(c)(3) organization pays for no more than its fair share of the common areas of the website. In this context, it may be helpful to think of a website like a physical office occupied by one or more organizations. A Section 501(c)(3) and a (c)(4) organization will often share office space and other resources, which is permitted as long as the Section 501(c)(3) organization pays for no more than its fair share and does not contribute to any political activities that the (c)(4) organization engages in.

There may be other situations in which a Section 501(c)(3) organization should be able to link to a more limited number of websites because those sites provide the comprehensive discussion of a particular issue, even if other portions of those sites are political. It would be particularly helpful for charities trying to develop some certainty about their affairs if the IRS were to adopt some clear rules. The proposed “one link” safe harbor would permit a Section 501(c)(3) organization to link to the portions of another organization’s website that contain purely educational content.
C. For charitable organizations that have not made the election under Section 501(h), what facts and circumstances are relevant in determining whether lobbying communications made on the Internet are a substantial part of the organization’s activities? For example, are location of the communication on the website (main page or subsidiary page) or number of hits relevant?

The Need for Guidance.

This is a Category Four (4) item. The use of the Internet is incidental to larger substantive issues, the substantive issues are themselves in need of administrative interpretation, and the specific circumstances of the use of the Internet should be addressed only as part of more comprehensive guidance on the underlying substantive issues.

Existing Authority.

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

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

Some of the leading cases and rulings are:

Seasongood v. Commissioner, 227 F.2d 907 (6th Cir. 1955) – suggested that attempts to influence legislation that constituted 5 percent of an organization’s total activities, were not substantial. The concept of “activities,” however, is not clearly defined.


Haswell v. U.S., 500 F.2d (Ct. Cl. 1974) – held that 16.6 to 20.5 percent of an organization’s activities on lobbying is substantial. Again “activities” is not clearly defined.

IRS General Counsel Memorandum 36148 (Jan. 28, 1975) attempts to summarize the law. Relevant factors include:
The percentage of time devoted to an activity.

- The amount of volunteer time devoted to an activity.

- The percentage of a budget devoted to an activity.

- The amount of publicity the organization assigns to the activity.

- The continuous or intermittent nature of the activity.

In addition, the IRS looks at the overall impact and effect of the activity.

**Recommendations.**

1. The same types of tests that the IRS applies in non-Internet scenarios should apply to a website analysis. If the same amount of time and energy is put into a website as is put into other, non-web activities, there is no reason to consider the website lobbying just because it might have a more broad-reaching audience. Charities should not be penalized for using the Internet if they spend the same amount of activity and energy on a lobbying activity that happens to involve the Internet, even if it may have a broader impact than a non-web activity that involves substantially more time and energy.

2. Clearly, concrete guidance on this issue would be helpful. If the IRS is going to update its formal guidance on the “substantial part” test, then it would be helpful, indeed essential, also to discuss lobbying on the Internet. Otherwise, guidance with respect to the Internet alone would not be warranted.

**D. Does providing a hyperlink to the website of another organization that engages in lobbying activity constitute lobbying by a charitable organization?**

What facts and circumstances are relevant in determining whether the charitable organization has engaged in lobbying activity (for example, does it make a difference if lobbying activity is on the specific webpage to which the charitable organization provides the hyperlink rather than elsewhere on the other organization’s website)?

**The Need for Guidance.**

This is a Category Three (3) item. Some guidance would be helpful, such as through the development of safe harbors, but definitive guidance is not currently possible or advisable given the rapidly changing technology and uses of the Internet. There is currently no law on this question.

**Scope of the Question.**

As with hyperlinks in the context of political activity, exempt organizations could benefit from guidance on the use of hyperlinks in lobbying situations. There is really no relevant law directly on point today. This question is very much related to the next question, which asks whether an organization has made a call to action on a website. For purposes of this Question D,
we will assume that the first organization’s website contains none of the elements of lobbying itself, and the organization would be considered to be lobbying only if the activities of the linked website were attributed to it. We also assume, for purposes of Question D, that the page it is linked to either contains all three elements of grassroots lobbying or contains none of the elements. The analysis of Question E, below, considers, among other things, the possibility that the first website could contain some of the elements of lobbying with the call to action on another website, or that the second website contains different parts of the lobbying elements on different webpages.

Recommendations.

In order to bring clarity to this question, the IRS should adopt the following guidelines:

1. As a general presumption or rule, the activities of one organization should not be attributed to another organization. We have to recognize that a link is very different, in terms of timing and efficiency, from a printed reference to a phone number or address. Nonetheless, conceptually, a link is no different than a reference in written material to the name and phone number of another organization – it is simply a more efficient way of getting from the first location to the second. Charities should not be penalized for taking advantage of more efficient technology.

2. The IRS should adopt the proposed “one link” safe harbor. If a link takes the user to a webpage that does not itself contain lobbying, and an additional link would be required to move to the lobbying page, then the link should not create lobbying. Presumably, with a safe harbor, organizations would structure their affairs to take advantage of it; for example, by creating multiple webpages within a website, rather than one continuous webpage. The more attenuated the elements, the less likely the user will “hear” the lobbying message.

3. The above would be a safe harbor. If the webpage to which the user is taken does contain lobbying, the IRS should examine at least two key facts: (1) the message on the first home page from which the user was sent to the page that contained lobbying and (2) the proximity of the lobbying message to the place on the page where the user was taken by the link. In this case, there would only be lobbying if it were clear that communication on the first page, combined with the proximity on the second page to the lobbying communication, would cause a reasonable user to consider the communication to be lobbying.

4. A Section 501(c)(3) organization should be able to link to a related organization’s home page without having the activities of that related organization attributed to the Section 501(c)(3) organization. In order to take advantage of the proposed safe harbor, the related entity should not place lobbying on its home page.

5. A Section 501(c)(3) and a Section 501(c)(4) or other related organization should be able to share a website, under the same circumstances described above with respect to Question B.

Much of the relevance of this issue goes to how we treat the website and what portion of the costs of constructing the site are included in lobbying, since the Section 501(h) election looks at actual expenses.
E. To determine whether a charitable organization that has made the election under Section 501(h) has engaged in grass roots lobbying on the Internet, what facts and circumstances are relevant regarding whether the organization made a “call to action”?

The Need for Guidance.

This is a Category Three (3) item – some guidance would be helpful, such as through the development of a safe harbors, but definitive guidance is not currently possible or advisable given the rapidly changing technology and uses of the Internet.

Current Law.

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

There are four types of calls to action. Treas. Reg. § 56.4911-2(b)(2)(iii).

1. A statement that the recipient should contact a legislator or an employee of a legislative body, or should contact any other government official or employee who may participate in the formulation of legislation.

2. A statement of the address, telephone number, or similar information of a legislator or an employee of a legislative body.

3. Inclusion of a petition, tear-off postcard, or similar material for the recipient to communicate with a legislator or an employee of a legislative body (or other government official involved in the legislation).

4. Specifically identifying one or more legislators who will vote on the legislation as: opposing the charity’s view on the legislation, being undecided, being the recipient’s representative in the legislature, or being on the committee or subcommittee that will consider the legislation.

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

In its simplest form, Question E is asking when does something on a website constitute a “call to action.” With respect to this narrow question, the only difference between a website and a printed text is that a website allows for links. Each of the four types of calls to action described above should also be a call to action if set forth directly on a website. Where an organization affirmatively creates a direct link on a website to a legislator’s email address, the result is very much like a tear-off post card, and should be treated as such.

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

**Scenario 1.** In the first (simplest) scenario, a single webpage (meaning you can scroll from beginning to end without the need of further links) contains all three elements of grassroots lobbying. In that case, there will usually be a grassroots lobbying communication.

**Scenario 2.** In a second scenario, an exempt organization operates a website, but the different elements of grassroots lobbying are not set forth on the same page. For example, one page discusses a substantive issue, refers to pending legislation, and then reflects a view on the legislation. This first page links to another page that sets forth the names and addresses of legislators. The link could be in the text itself or appear as an overlay, usually on the left side or top of the website. This would normally constitute a grassroots lobbying communication.

**Scenario 3.** Same as the second scenario: one page on the organization’s website contains a discussion of legislation and reflects a view on it, another page contains the call to action. In this example, however, the two pages are not directly linked. Either the user must link back to the home page to then link again to the page with the names and addresses of legislators, or there is an intermediary page between the first page and the page with the names and addresses, and that intermediary page contains some non-lobbying substance; for example, it discusses various ways in which a user might learn more about the pending legislation. In this case, in our view, the exempt organization should be able to avail itself of the proposed “one link” safe harbor. It should be able to host a website that sets forth, in one location, a discussion of and views on legislation, and in another location, the elements of a call to action, as long as the two are not directly linked.

**Scenario 4.** In this scenario, the first organization has a webpage with the first two elements of grassroots lobbying, but it then links to another entity’s website, which contains the names and addresses of legislators. In this case, we would again suggest a one link safe harbor. If the link goes to a page that does not have the four types of a call to action, there is no lobbying. If the link goes to a webpage that does have a call to action, then we look at what the first organization said in connection with the link and the proximity of the linked location to the actual information that would constitute a call to action.
F. Does publication of a webpage on the Internet by a charitable organization that has made an election under Section 501(h) constitute an appearance in the mass media? Does an email or listserve communication by the organization constitute an appearance in mass media if it is sent to more than 100,000 and fewer than half of those people are members of the organization?

The Need for Guidance.

This is a Category One (1) item. We do not believe that guidance is required on this issue because the current Treasury Regulations are clear, and the answer to both IRS questions is “no.”

Existing Authority.

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

A paid mass media ad is presumed to be grassroots lobbying if it: (1) is made within two weeks before a vote by a legislative body or committee on (2) highly publicized legislation, (3) reflects a view on the general subject of that legislation, and (4) either refers to the legislation or encourages the public to contact legislators on the general subject of the legislation, even though it does not include any call to action. The grassroots presumption may be overcome by showing that the timing of the ad was unrelated to the upcoming vote.

This exception to the call to action rule requires a “paid” mass media ad. The current rule includes an explicit list of media that are included in the definition of “mass media” – a list that includes “television, radio, billboards, and general circulation newspapers and magazines.” The regulations also tell us that “general circulation newspapers and magazines” do not include newspapers and magazines published by an organization which has filed a 501(h) election, except where both the total circulation of the newspaper or magazine is greater than 100,000 and fewer than one-half of the recipients are members of the organization. In the definition of “mass media,” there is no mention of the Internet or a website. See Treas. Reg. § 56.4911-2(b)(5)(iii)(A).

The regulations further provide that “where an electing public charity is itself a mass media publisher or broadcaster, all portions of that organization’s mass media publications or broadcasts are treated as paid advertisements in the mass media, except those specific portions that are advertisements paid for by another person.” Treas. Reg. § 56.4911-2(b)(5)(iii)(B).

Analysis and Recommendations.

The publication of a webpage on the Internet by a charitable organization that has made an election under Section 501(h) does not, per se, constitute an appearance in the mass media. First, we have a regulation that provides a specific and limited definition of “mass media.” This definition interprets a part of the Code that deals with a bright line safe harbor – the Section 501(h) election. Any change in this definition would require an amendment to the regulation.
The regulation is not stated in terms of a descriptive list, but rather provides an exclusive list of media that can be mass media.

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

In addition, an email or listserve communication by the organization does not constitute an appearance in mass media even if it is sent to more than 100,000 and fewer than half of those people are members of the organization. An email or listserve communication is not the publication of a general circulation newspaper or magazine. The current mass media regulation does not encompass a mass mailing of a letter. It refers to a “paid” mass media advertisement, and substantively, an email letter sent, even via a listserve, while it might constitute a mass mailing, is not a paid mass media advertisement, nor does it make the operator of the listserve a mass media publisher or broadcaster.

Absent an amendment to the Treasury Regulations, IRS guidance is not required on this subject.

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

The Need for Guidance.

This is a Category Two (2) item. The IRS could be helpful in discussing how existing law applies to the Internet.

Existing Authority.

The current Treasury Regulations at Section 56.4911-5 set forth rules regarding when communications with members are treated differently from other communications. In certain situations, communications only with members are not lobbying at all (even if they might have been lobbying had they been communicated to non-members). In other situations, communications made only to members become direct lobbying when they might otherwise have been characterized as grassroots lobbying. The Treasury Regulations also discuss situations in which communications directed “primarily” (but not exclusively) to members take on a different character.
Recommendations.

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

**Email.** If an exempt organization maintains a current list of the email addresses of its members, in the same way that it maintains a current list of the mailing addresses of its members, it should be able to send communications only to members or primarily to members. Charities should not be penalized for saving charitable dollars in using email rather than postage. The IRS should treat an email just like a letter. A group of emails, just like letters, are either sent only to members, primarily to members, or not primarily to members.

**Listserve.** A listserv is analogous to, albeit even more efficient than, a database that generates mailing labels. If a charity sends lobbying materials only to members or primarily to members, via listserv or any other media, the existing rules should apply. Just as with a mass mailing, the factual question is to whom was the communication sent, all members, primarily members, or not primarily to members.

**Limited Access.** Charities should be able to provide information to members only, in limited-access areas of their websites. If a charity exercises reasonable diligence in offering its passwords only (or primarily) to members and in updating passwords on a regular basis, then it is providing information only to members, or primarily to members, as the case may be. We recognize that members could pass their codes onto non-members, but members could also provide a written newsletter to non-members, and the charity should not be penalized for either. Again, the IRS needs to encourage charities to take advantage of new technologies, especially those that save charitable dollars.

Accordingly, for communications sent exclusively to, or primarily to, members, the current regulations should apply to provide the needed guidance. Because this issue has been raised, the IRS should provide guidance.

V. ADVERTISING AND OTHER BUSINESS ACTIVITIES

A. General Internet Questions.

For many Section 501(c)(3) charities, the Internet presents not only the opportunity to advance their mission by enhancing communications with existing members and reaching out to new constituents, but also the opportunity to earn income through one of a variety of means. The Announcement refers to certain of these potentially income-producing activities, including the following:

♦ banner exchanges

♦ hyperlinks to corporate sponsors

♦ links for which the exempt organization receives a payment based upon a percentage of purchases made by the person who uses the hyperlink
♦ links for which the exempt organization receives a payment based on the number of persons who use the hyperlink

♦ direct sales on a website

The Announcement states that the IRS is considering whether clarification is needed regarding whether the income received from these activities is subject to UBIT. We address each of these activities, and state our view regarding the advisability of specific guidance, below.

1. Banner exchanges.

The Need for Guidance.

This topic fits within Category Two (2) – an area where guidance can and should be provided at this time regarding the manner in which current law applies in the Internet context.

Existing Authority.

Many organizations with websites include a list of links to other websites in which their constituents might be interested. In a similar practice, an organization might agree to provide information about and a link to another organization’s website on its own website in exchange for a similar link on the other organization’s website. Organizations may also trade banner or button space on their websites to promote each other’s charitable activities. The IRS addressed banner exchanges informally in the following article: Cheryl Chasin, Susan Ruth and Robert Harper, “Tax Exempt Organizations and World Wide Web Fundraising and Advertising on the Internet,” 2000 Exempt Organizations Continuing Professional Education Technical Instruction Program Textbook, (hereinafter, “2000 CPE Text”). The IRS authors stated that it was unclear whether banner exchanges should be treated like mailing list exchanges.

Under Section 513(h), the exchange of member lists among exempt organizations (i.e., organizations that are described in Section 501 and contributions to which are deductible under paragraph (2) or (3) of Section 170(c)) is excepted from the definition of “unrelated trade or business.” Conceptually, a banner exchange between exempt organizations is similar to a member list exchange. The reciprocal placement of hyperlinks on each organization’s website allows members of one organization, who are the most likely visitors to that organization’s website, to connect with another organization which the first organization believes to be of interest and relevance to its members.

Recommendation.

We recommend that the IRS issue guidance to clarify that banner exchanges between Section 501(c)(3) organizations should, like membership list exchanges, be excluded from the term “unrelated trade or business.” Where banner exchanges are made between a Section 501(c)(3) charity and an organization that is not a Section 501(c)(3) charity, the determination of whether the activity produces unrelated business taxable income will depend on the specific circumstances of the case. In general, we believe that these types of banner exchanges are subject to the same analysis as that applicable to links, discussed below.
2. Hyperlinks to corporate sponsors.

Recommendation.

This issue was addressed in the Committee’s Comments on Notice of Proposed Rulemaking: Prop. Treas. Reg. Section 1.513-4. In short, we agree that the IRS should issue guidance clarifying that general corporate sponsorship principles will apply to an organization’s Internet activities and that links to a sponsor’s website should not be considered, in and of themselves, a substantial return benefit for purposes of that Proposed Treasury Regulation. In addition, we believe this is an area where application of the proposed “one link” safe harbor would be appropriate. Specifically, if it is necessary for a viewer to make more than one link to reach a webpage containing advertising or other information which would be considered a substantial return benefit, then there should be no attribution with respect to the content on that page. If only one link is required to reach a sponsor’s webpage, then there should be no negative inference creating attribution.

3. Links for which the exempt organization receives a percentage of purchases made by the person linking over, and

4. Links for which the EO receives a payment based on the number of persons who link over.

The Need for Guidance.

These are Category Three (3) items – some guidance would be helpful, such as through the development of one or more safe harbors, but definitive guidance is not currently possible or advisable given the rapidly changing technology and uses of the Internet. Because these two areas are closely related we discuss them together.

Existing Authority.

The treatment of payments received by an exempt organization as a result of links made from its website poses a complicated question because of the variety of circumstances under which a link could give rise to a payment. The characterization of the income produced will therefore depend upon all of the facts and circumstances giving rise to the payment. Under some circumstances, the item and thus the related income will be substantially related to the mission of the exempt organization and will be characterized as income from an exempt activity.

With respect to income from a purchase that cannot be considered substantially related to an exempt organization’s mission, the 2000 CPE Text queries whether these types of payments might be akin to the royalty payments received in the affinity credit card cases. As this Committee discussed in our comments on the proposed corporate sponsorship regulations, we believe this to be the appropriate characterization. In an affinity credit card arrangement, a payment is made to the exempt organization for the use of its name and logo on the credit card. The Tax Court has accepted the characterization of this payment as a royalty, and therefore excluded from unrelated business income, in a series of cases, most recently in Sierra Club, Inc. v. Commissioner, T.C. Memo 1999-86. Both the payment of a percentage of purchases made by a person linking over from the exempt organization’s website and the payment of a set amount
based on the number of persons linking over are akin to the payment of a percentage of purchases made on an affinity credit card. In each case, the person reaches the retailer because of an interest in the exempt organization that brings him or her to the organization’s website, and is further induced to link to the retailer and/or to make a purchase based upon the fact that the link or the purchase will result in income being directed to the exempt organization. The click on the link and, where applicable, the subsequent purchase, are direct results of the retailer’s connection to the exempt organization and therefore constitute a use of the exempt organization’s name and logo. The fact that in some cases the payment is based on a percentage of sales does not affect the treatment. A payment calculated as a percentage of sales should be treated as a royalty in the same way that a flat fee for the use of an intangible would be. GCM 38083 (Sept. 11, 1979).

**Recommendation.**

As a result of the above, we believe that the proper treatment of such payments, if not substantially related to the exempt organization’s mission, is as royalty payments. While we believe that this result can be reached through the application of existing law, we nonetheless classify this topic as a Category Three (3) item and recommend that the IRS issue guidance, in order to avoid the uncertainty such as existed regarding the appropriate treatment of income received in connection with affinity credit cards.

5. **Direct sales on a website.**

**The Need for Guidance.**

This fits within Category One (1), as an area where guidance exists that can be generally applicable in the Internet context and no additional guidance is necessary.

**Recommendation.**

There is no reason that direct sales on an exempt organization’s website should be treated differently from sales made in stores or through catalogues. Sales on a commercial organization’s website that produce a payment of some sort to an exempt organization should also be treated as under existing law.

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

**The Need for Guidance.**

We view this as a Category Two (2) item – an area where guidance can and should be provided regarding the manner in which current law applies in the Internet context.
Existing Authority.

The IRS has issued extensive guidance addressing the requirements for an activity to be “regularly carried on” under Section 512. Overall, these rulings follow the guidance contained in Treasury Regulation Section 1.513-1(c), in comparing the frequency and continuity of the activity with the frequency and continuity with which the comparable commercial activity is carried on “in light of the purpose of the unrelated business income tax to place exempt organization business activities upon the same tax basis as the nonexempt business endeavors with which they compete.”

The facts and circumstances relevant in making that assessment with respect to on-line unrelated trade or business activities might be slightly different than those for off-line income producing activities, however. The IRS should consider the active involvement of the organization with its website or, more specifically, any divisible portion of its website that is income generating – how much time and energy is expended by the organization and its staff members to update and monitor the income-producing portion of its website? This activity should be aggregated with off-line activities to determine if the activity is regularly carried on. For example, are staff members required to take action to respond to website inquiries or fulfill orders placed on the website as a result of the activity? There may be cases where the activity is merely to exercise quality control over the use of the organization’s name, logo and website in, for example, an affinity program. In that context, the activity should not be considered a regularly carried on trade or business, regardless of whether the program remains posted on the website for an extended period of time.

Recommendation.

Because the facts and circumstances relevant to determining whether an Internet activity is “regularly carried on” may differ from the facts and circumstances relevant to off-line activities, we recommend that the IRS consider issuing precedential guidance with examples targeted to whether Internet activities are “regularly carried on.”

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

The Need for Guidance.

This very narrow question falls within Category One (1) – an area where no guidance is necessary because guidance exists under current law that can be generally applied in the Internet context.

Scope of Question and Recommendation.

The specific question asked in the Announcement is very narrow, and can be answered “yes.” If the sale of an item “contributes importantly” to the exempt organization’s mission or could be sold directly by the exempt organization without the proceeds being characterized as unrelated business income, the fact that a payment is based on a percentage of sales should not change the determination of whether the activity is substantially related within the meaning of
Treasury Regulation Section 1.513-1(d). While guidance could be issued to clarify what is meant by “substantially related” this is not specifically an Internet question.

D. Are there any circumstances under which an on-line “virtual trade show” qualifies as an activity of a kind “traditionally conducted” at trade shows under Section 513(d)?

The Need for Guidance.

This is a Category Two (2) item. Guidance can and should be provided at this time regarding the manner in which current law applies in the Internet context.

Existing Authority.

Under Section 513(d)(3) and Treasury Regulation Section 1.513-3(b), a qualifying organization (i.e., an organization described in Section 501(c)(3), (4), (5) or (6)) that conducts qualified convention and trade show activities is not engaged in an unrelated trade or business. The qualifying organization must regularly conduct a qualified convention or trade show activity as one of its substantial exempt purposes. A qualified convention or trade show activity is an activity of a kind “traditionally” conducted by a qualifying organization in connection with an international, national, state, regional or local convention or annual meeting or show if:

a. One of the purposes of the organization in sponsoring the activity is promoting and stimulating interest in, and demand for, the products and services of that industry, or educating the persons in attendance regarding new products and services or new rules and regulations affecting the industry, and

b. The show is designed to achieve its purpose through the character of the exhibits and the extent of the industry products that are displayed.

Some exempt organizations have attempted to replicate a traditional trade show in the Internet context in connection with a convention or annual meeting. Such virtual shows are conducted for a limited period contemporaneous with the associated event. There is no reason why a virtual trade show that meets the specific criteria stated above should not qualify for the exception to carrying on an unrelated trade or business under Section 513(d)(3). The existing law does not specifically address a virtual trade show, however, and the statute’s reference to activities “traditionally” conducted creates ambiguity.

Recommendation.

Some form of guidance from the IRS on this issue would be of great assistance to organizations seeking to engage in on-line convention or trade show activities.
VI. SOLICITATION OF CONTRIBUTIONS

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

The Need for Guidance.

The initial question whether a webpage or email solicitation for contributions is in “written or printed form” is a Category Two (2) item. The IRS can and should provide guidance at this time regarding the manner in which current law applies in the Internet context.

The further question as to what facts and circumstances are relevant in determining whether a disclosure is in a “conspicuous and easily recognizable format” is a Category Three (3) item. Some guidance would be helpful, such as through the development of safe harbors, but definitive guidance is not currently possible or advisable given the rapidly changing technology and uses of the Internet.

Existing Authority.

Section 6113(a) requires organizations that are ineligible to receive tax-deductible charitable contributions under Section 170 to disclose to potential donors that their contributions are not deductible. The organization must make the disclosure in the course of any “fundraising solicitation,” as defined in Section 6113(c), “in an express statement (in a conspicuous and easily recognizable format).” A “fundraising solicitation” includes any solicitation of contributions or gifts that is made “in written or printed form.”

IRS Notice 88-120, 1988-2 C.B. 454, provides guidance on how to comply with Section 6113. A fundraising solicitation will be considered to include “an express statement (in a conspicuous and easily recognizable format)” that contributions are not deductible if it satisfies certain safe harbor requirements. The Notice sets out the required elements of safe harbors for solicitations made through print medium, telephone, television and radio. The print medium safe harbor is a helpful starting point for the Internet context.

The safe harbor requirements for a solicitation by “mail, leaflet, or advertisement in a newspaper, magazine or other print medium” are as follows:

The solicitation must include one of the following statements: “Contributions to [name of organization] are not deductible as charitable contributions for Federal income tax purposes,” “Contributions or gifts to [name of organization] are not tax deductible,” or “Contributions or gifts to [name of organization] are not tax deductible as charitable contributions.”

The statement must be in at least the same type as the primary message stated in the body of the letter, leaflet or ad.
The statement must be included on the message side of any card or tear-off section that the contributor returns with the contribution; and

The statement must be either the first sentence in a paragraph or itself constitute a paragraph.

Recommendations.

The IRS should provide guidance regarding the application of Section 6113 in the Internet context, adopting the following principles. An Internet text (as opposed to audio or video) communication, whether in the form of a webpage, an email or wireless message, constitutes a communication in “written or printed form” in the same manner as a facsimile or a computer-generated letter sent through the conventional mail. An organization to which Section 6113 applies therefore solicits contributions in written or printed form when it does so through text communications on its website or by email or wireless.

The IRS should in addition develop a safe harbor for complying with Section 6113, based on its print medium safe harbor in IRS Notice 88-120. The first element of the safe harbor, i.e., the content of the disclosure statement, can be directly applied in the Internet context. Similarly, the second element, the type size of the disclosure, can be directly applied. It may be appropriate to add a requirement in the Internet context that the disclosure statement remain in the viewer’s screen for the same duration as the solicitation message.

The third element of the print medium safe harbor, i.e., that the disclosure statement must be included on the message side of any card or tear-off section that the contributor returns with the contribution, is not directly applicable in the Internet context. The safe harbor rules in the telephone, television and radio context provide a better guide. In all three media, the required statement must be made “in close proximity” to the request for contributions. Specifically, in the Internet context, it should be positioned on the website or the email in a manner reasonably calculated to ensure that the viewer will see the statement prior to making a contribution. By way of example, a website solicitation that requires the viewer to link from the solicitation message to view the required statement would not satisfy the safe harbor. Any rule that provides greater detail regarding the required position of the statement likely would quickly become obsolete.

The fourth element of the print medium safe harbor, i.e., that the statement must be either the first sentence in a paragraph or itself constitute a paragraph, is directly applicable in the Internet text context.

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

The Need for Guidance.

This is a Category Two (2) item. The IRS can and should provide guidance at this time regarding the manner in which current law applies in the Internet context.
**Recommendations.**

Section 6115 requires organizations described in Section 170(c) (other than paragraph 1) to provide written disclosures to donors who make quid pro quo contributions in excess of $75. The organization must, in connection with the solicitation or receipt of the contribution, provide a “written statement” that (1) informs the donor that the amount of the contribution that is deductible for federal income tax purposes is limited to the excess of the amount of any money and the value of any property contributed by the donor over the value of the goods and services provided by the organization, and (2) provides the donor with a good faith estimate of the value of such goods or services.

A text communication that is printed from the Internet, whether a printed webpage or a printed email message, constitutes a written statement in the same manner as a facsimile or a computer-generated letter sent through the conventional mail. The IRS should provide guidance clarifying that if the recipient organization provides such a statement that contains the information required under Section 6115, then the organization has met the requirements of Section 6115.

A further issue is whether an Internet communication that the donor does not print out, but retains in digital form may satisfy the requirements of Section 6115, assuming that it contains all required information and is in a form that can be printed by the recipient. Consistent with the analysis above regarding Section 6113, an Internet communication need not be in printed, as opposed to digital form in order to constitute a written statement. It is the textual nature of the communication, combined with the ability to store and produce the communication in text form on demand, that determines whether it is “written,” not whether it appears on a piece of paper or a screen. This analysis is consistent with the recent public disclosure regulations under Section 6104, which define a “written request” for an organization’s exemption application or annual information return to include electronic mail, without reference to whether the message is printed. Treas. Reg. § 301.6104(d)-1(d)(2)(A). Any guidance that the IRS provides in this area should not limit the range of Internet text communications that constitute a “written statement” for Section 6115 purposes solely to those communications that are stored in printed form.

IRS officials have informally expressed concern with the potential for fraudulent preparation of electronic statements. This potential is no different from that which exists outside the Internet context, however. It is as easy to create a false printed statement as it is to create a false electronic one. This concern should not be a bar to organizations that wish to provide statements to their donors in a cost-effective manner through the Internet.

**C. Does a donor satisfy the requirement under Section 170(f)(8) for a written acknowledgment of a contribution of $250 or more with a printed page confirmation or copy of a confirmation email from the donee organization?**

**The Need for Guidance.**

This is a Category Two (2) item. The IRS can and should provide guidance at this time regarding the manner in which current law applies in the Internet context.
Recommendations.

Section 170(f)(8) provides that no deduction is allowed under Section 170(a) for any contribution of $250 or more unless the donor substantiates the contribution by a contemporaneous “written acknowledgment” of the contribution by the donee organization. The written acknowledgment must include (1) the amount of any cash and a description (but not the value) of any property other than cash contributed; (2) whether the donee organization provided any goods or services in consideration for the property contributed; and (3) a description and good faith estimate of the value of any such goods or services provided, or, if such goods or services consist solely of intangible religious benefits, a statement to that effect. There is no requirement that a representative of the donee sign the acknowledgment.

The question is whether a webpage confirmation that may be printed out or an email confirmation constitutes a “written acknowledgment” for purposes of Section 170(f)(8).

Just as in the Section 6115 context discussed above, a communication that is printed from the Internet, whether a printed webpage or a printed email or wireless message, constitutes a written statement in the same manner as a facsimile or a computer-generated letter or postcard sent through the conventional mail. The IRS should provide guidance clarifying that if the donee organization provides such an acknowledgment that includes the information required under Section 170(f)(8), and such acknowledgment is contemporaneous within the meaning of Section 170(f)(8) and the regulations thereunder, then the donor has met the requirements of Section 170(f)(8).

Also as in the Section 6115 context, a further issue is whether an Internet communication that the donor does not print out, but retains in digital form may satisfy the requirements of Section 170(f)(8), assuming that it contains all required information and is in a form that can be printed by the recipient. Consistent with the analysis above regarding Section 6113, an Internet communication need not be in printed, as opposed to digital form in order to constitute a written statement. It is the textual nature of the communication, combined with the ability to store and produce the communication in text form on demand, that determines whether it is “written,” not whether it appears on a piece of paper or a screen. This analysis is consistent with the recent public disclosure regulations under Section 6104, which define a “written request” for an organization’s exemption application or annual information return to include electronic mail, without regard to whether the message is printed. Treas. Reg. § 301.6104(d)-1(d)(2)(A). Any guidance that the IRS provides in this area should not limit the range of Internet communications that constitute a “written acknowledgment” for Section 170(f)(8) purposes solely to those communications that are stored in printed form.

IRS officials have informally expressed concern with the potential for fraudulent preparation of electronic statements. This potential is no different from that which exists outside the Internet context, however. It is as easy to create a false printed statement as it is to create a false electronic one. This concern should not be a bar to organizations that wish to provide statements to their donors in a cost-effective manner through the Internet.