Sunshine and Shadows on Charity Governance: Public Disclosure as a Regulatory Tool

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The federal tax treatment of tax-exempt organizations, as I once wrote, is a photo-negative of Congress's treatment of those who pay taxes.[2] As a substantive matter, this favors charities: The higher the tax rate on for-profit corporations, the higher the relative value of the charity's income-tax exemption; the higher the individual income-tax rates, the lower the price of charitable giving (and the greater the interest-rate savings to charities from issuing tax-exempt bonds); and charities are big defenders of the estate tax, under which donations are fully deductible. By contrast, exempt organizations might lament the reversal of the presumption of privacy: In stark contrast to the strict protections enjoyed by taxpayers under Internal Revenue Code section 6103, exempt-organization filings are publicly available under Code section 6104.

Indeed, in the last twenty years, the annual information return filed by federally tax-exempt organizations—the Form 990—has become not only the public face of individual charities, but also the most readily available data source for potential donors, state regulators, the media, and researchers, as well as the charity's governing board, staff, and volunteers. So important is this filing that in 2008 the Internal Revenue Service took into account the interests of these various stakeholders in radically redesigning the Form 990, which now makes available, among other information, a detailed picture of the organization's governing structure, policies, and related-party transactions. Moreover, simply by asking questions about the existence of perceived "best practices," the Service sends a strong signal of their desirability. Meanwhile, the emergence of the third-party online database of Forms 990 maintained by GuideStar—itself a private, nonprofit organization—completes the goal of transparency: Aside from any oversight actions of regulators, any member of the public (including competitors, nonprofit and for-profit) can scrutinize filings without the charity's knowledge of who is looking, when, or why.

Sunlight, of course, creates both clarity and shadows. Knowing that detailed information about charity structure and practices will be available to the public can—as no doubt intended—influence charity behavior. However, requiring charities to disclose information to the IRS is a separate question from requiring charities to disclose their IRS filings to the public. Since 1987 exempt organizations have operated under a statutory obligation to provide their Forms 990 upon demand.[3] That significant development has long made me wonder about the effect on the nonprofit sector from mandated public disclosure of tax filings.[4] In a March 2010 letter, then-ranking member (and former chair) of the Senate Finance Committee, Charles Grassley, praised the 2008 redesign of the Form 990 in declaring: "The best way I know to increase voluntary compliance is to inject transparency."

Meanwhile, pursuant of its obligation to administer and enforce the requirements for federal tax exemption, the IRS has long kept its hand in issues of sound charity governance. In the 1990's, the public was treated to peeks at the IRS's view of appropriate governance through the release of a few otherwise confidential "closing agreements" that the IRS entered into on the condition that the organization agree to publish them.[5] More systematically, in 1996, Congress involved the IRS in charity governance by adopting the "intermediate sanctions" statute designed to deter charity insiders from engaging in "excess benefit transactions" with charities.[6] The legislative history to Internal Revenue Code section 4958 suggested that administrative guidance could protect financial transactions entered into between charities and their insiders if the approval process assured independent decision-making, obtained comparable data, and maintained documentation. Treasury Regulations issued under section 4958 detail the process for qualifying for such a "rebuttable presumption of reasonableness."[7]

More recently, charity governance writ broadly has emerged as a fundamental focus in the regulation of federally tax-exempt organizations. In 2004, the staff of the Senate Finance Committee produced a white paper proposing a broader role for the IRS in charity governance; the nonprofit sector responded with studies and proposals to improve nonprofit governance, including recommendations for self-regulation. Both when chair and subsequently as ranking member of the Senate Finance Committee, Grassley demanded and posted online massive amounts of information (including emails and correspondence, some labeled "privileged and confidential") from specific organizations whose governance practices he questioned.[8]

Relying on public disclosure, however, puts pressure on the IRS to ensure that the form asks the "right" questions, and allows the filer to present complete and accurate answers. The IRS itself benefited from a transparent process in its Form 990 redesign, having posted online drafts of the form (and schedules) and the thousands of comments it received, all still available on the IRS website.[9] That exposure process allowed the IRS not just to rework misleading questions but also recast the questions both to produce a better picture of the organization and to steer the sector to good governance structures and practices. Notably, the IRS acceded to a storm of pleas to remove the most "prejudicial" (and uninformative) lines from the all-important new summary page (Part I). (Compare the 2007 draft, on the first page of the Appendix, with the final version, on the third page.) Line 6 of draft Part I had asked: "Enter the number of individuals receiving compensation in excess of $100,000 (Part II, line 2)"; while this line, like all the others in the summary page, draws from a question elsewhere on the form, what valid information does it convey by including it on the front of the form? Similarly, the IRS removed the three "efficiency ratio" questions, which, while used by some charity watchdog groups and rating agencies, have long been criticized as oversimplified and unhelpful metrics.

To give another example, consider the 2007 draft Form 990's question in Part III (Statements Regarding Governance, Management, and Financial Reporting) on conflict of interest transactions (see the second page of the Appendix):

3a Does the organization have a written conflict of interest policy?

b If "Yes," how many transactions did the organization review under this policy and related procedures during the year?

What is the preferred answer to question 3b? If the organization answers "zero," is this good (because there were no conflict of interest transactions to review) or bad (because the organization was blind to the interested transactions that occurred)? Commentators pointed out the problems with this and other governance questions of the draft. Substantially revised (and renumbered) Part VI not only addresses the suggestions (see the last page of the Appendix), but also states at the outset: "Governance, Management and Disclosure (Sections A, B, and C request information about policies not required by the Internal Revenue Code.)" (On the 2010 version of the Form 990, this disclaimer has been moved to the beginning of Part B (Policies).). Moreover, the 2007 draft did not provide an opportunity for the organization to provide attachments to the form. In response to complaints—including the argument that it is unconstitutional to deny a filer subject to mandatory disclosure the opportunity to explain yes/no and other short answers—the final form includes a Schedule O for extensions of responses and supplemental narration. The final conflict of interest questions read:

12a Does the organization have a written conflict of interest policy? *If "No," go to line 13.*

b Are officers, directors or trustees, and key employees required to disclose annually interests that could give rise to conflicts?

c Does the organization regularly and consistently monitor and enforce compliance with the policy? *If "Yes," describe in Schedule O how this is done.*

(Incidentally, contrary to the suggestion in line 12a, an organization could have a conflicts-of-interest policy, and engage in effective monitoring, without reducing the policy to writing.)

Separately, since 2003, the Internal Revenue Service has become subject to public disclosure obligations of its own. As a result of Freedom of Information Act suits brought against the IRS, the agency's views on a range of issues can, at least informally, be gleaned through the release of rulings denying or revoking exemption. (By law, the IRS redacts these rulings to hide the names of and other identifying information about the charities and other taxpayers.) Most helpful for the nonprofit sector would be for the Service to take the now-substantial database of denial and revocation letters and develop from it formal guidance on which indicators of governance structure and policies the IRS would like to impose as conditions for exemption.

The simultaneous developments of substance and process—of increased federal interest in charity governance and in the tool of disclosure—threaten to conflate an examination of the relative merits of each. It might be appropriate, for example, to require reporting of certain information to state regulators or to the Internal Revenue Service without also requiring that information to be made publicly available. It is important to recognize, however, that a large percentage of exempt organizations file forms other than the Form 990, or do not even file a substantive return. Because of statutory exemptions, it can be difficult, if not impossible, to obtain much information on churches and on smaller charities. Moreover, hundreds of thousands of charities will fall below the governance radar when the cutoff between charities required to file the Form 990 and the simplified Form 990-EZ is fully phased in beginning in 2010: The definition of "small" doubled from $25,000 or less in gross receipts to $50,000 or less. Finally, arguably the most important disclosures take place internally within the organization.

To explore these thoughts, Part I begins with the desirability of information flow to key decision makers in the organization, including the board, and considers the possible dilatory as well as salutary effects of public disclosure on governance practices. Part II covers reporting to the states and to the IRS as regulator of the federal tax-exemption regime. Part III, the longest of this essay, compares disclosure of filings with the regulators (the charities' transparency) and disclosure of enforcement activities (the regulators' transparency). Part IV looks at voluntary public disclosure by the organization, as well as disclosure by third parties, notably the media and third-party "watchdogs." Throughout, I not only describe criticisms of required disclosure, but also suggest areas in which the current levels or types of disclosure are not enough.

And now the dark side of sunshine. The largest practical impediment to relying on public disclosure is the unfortunately widespread assumption that providing charity is a free good—and so general overhead, much less fund raising expenses, should be zero or close to it.[10] One of the great lost opportunities of the September 11th experience was the failure of charities to defend the costs of wisely allocating charitable resources. More broadly, charities resist increased standardized disclosures because they worry that the public will misunderstand or misinterpret the information. A public that does not understand cost constraints cannot perform effective oversight. A public whose oversight focuses on the wrong considerations induces charities to adopt inefficient and ineffective behaviors.

In this climate, the solution to the problem of a misinformed public is more disclosure—nothing prevents an organization from providing a more positive narrative of its goals and accomplishments. While the competing demands of the various stakeholders cannot always be reconciled, all involved will better appreciate the challenges faced by a charity that reveals rather than hides its costs of fund raising and administration; explains why its executives merit their pay and why its reserves are necessary; and describes its limits as well as its potential in delivering services and addressing social needs. Finally, the sector as a whole should also weigh in, denouncing unacceptable practices.

Compare a recent U.K. report addressing whether public confidence in charities would be affected by increased mandatory disclosure of expense reimbursements. The report opposed expanding mandated disclosure beyond current requirements, arguing, in part: "Greater disclosure might risk being at best, of little interest or, at worst, of misinterpretation and even suspicion, possibly leading to damage to public trust and confidence. This might risk elevating expenses to become an inappropriate measure of charity effectiveness and distract attention away from more appropriate measures, namely those relating to a charity's overall outcomes and impact. It might even lead to pressure to inappropriately drive down certain costs." Moreover, the report continued, focusing only on expenses ignores issues of greater accountability for "good governance and sound systems of internal control.[11] Rather, the lengthy report—which was based partially on a survey to which 575 registered charities responded—urged trustees to consider additional, appropriate voluntary public disclosure, in addition to ensuring the adoption, internal communication of, and compliance with an expense reimbursement policy.[12]

Indeed, the voluntary disclosure of information also serves charities that do not solicit donations. All nonprofits remain politically vulnerable—not just to the removal of subsidies, but also to the danger of unwise legislation and regulation.[13]

Regrettably, the most important information that both regulators and the public might want will continue to be unavailable—simply because performance measurement is an unsolved metric. As a society, we would want to be able to assess whether and which charities are producing favorable outcomes, but often we cannot even measure outputs because quality can be subjective. At the same time, while focusing on outputs (such as patient stays or unemployed trained) can lead to de facto quotas, focusing on outcomes (such as good health or jobs) holds nonprofits responsible for factors beyond their control. Thus, beyond the scope of this paper is the ultimate disclosure question: How do we challenge an organization that says it "does good"?

I. Sound Governance and Internal Disclosure

As described in the American Law Institute's project on Principles of the Law of Nonprofit Organizations, for which I am the reporter, a charity's governing board is responsible for "establishing appropriate procedures for internal controls, including financial controls, legal compliance, and information flow to the board."[14] Thus, as a matter of good governance, the board needs accurate and timely information from management, including financial reports, and accurate and timely information from board members themselves, such as when a transaction might present a conflict of interest for a particular fiduciary.

I am often asked if there are any limits on the information to which a board member is entitled, and the answer is almost always no.[15] More fundamentally, it seems that we cannot be too basic in explaining to nonprofit board members what information they should be seeking. A comment in the ALI project sets forth the documents which should be provided to every board member.[16] The availability of Forms 990 from GuideStar's website, of course, means that board members—and prospective board members—can learn a great deal about the organization even if management is not forthcoming

After all, organization formation and operations generally are private affairs. If the organization is itself a quasi-public entity, it might be subject to sunshine laws. Tax-exemption alone, however, does not convert a nonprofit organization into a public entity.[17] (Separately, the government as grant-maker might impose transparency as a condition of funding; state laws vary.) Nevertheless, a great deal of internal information becomes public information because it must be set forth on regulatory reports, as explained in Part III.

Nonprofit governance practices have long remained a mystery. In 2007, the first comprehensive survey was published, by the Urban Institute's Francie Ostrower.[18] Notably, she found that charities commonly enter into transactions for goods and service (beyond board services) with members of the governing body, and that these transactions grew with charity size; but she further found that it was not even always known to a particular organization whether a fiduciary was on the other side of a transaction.[19] She further found a serious lack of internal disclosure: "among those nonprofits that say they did not engage in transactions with board members or affiliated companies, however, fully 75 percent also say they do not require board members to disclose their financial interests in entities doing business with the organization, and thus, respondents may have been unaware of transactions that do exist."[20]

How has—and will be—nonprofit governance affected by the knowledge that internal information is public due to its presence on the Form 990 and other filings? (This topic is explored at length in Part III; specifically, see Part II for more discussion of the governance questions in the redesigned Form 990.) Will organizations change their decisions or pay more attention to documenting their decisions, providing additional explanation? Will organizations try harder to skew the information to what it perceives the public wants to see? There is a difference between perceived wrongdoing and actual wrongdoing. If the public misinterprets or demands the wrong "answers," charities can suffer a loss of trust.

To give a personal example, early in the Internet age, as I was about to write our family's charitable contribution checks, I realized I could and should consult the organizations' Forms 990 from my home computer. Back then—and sadly, still too often today—you couldn't expect to find this information on most charities' own websites, but rather you would have to sneak, feeling somewhat guilty, to GuideStar. There I discovered that two organizations to which we had generously contributed reported high executive compensation (i.e., more than four times what I make) and high retained surpluses (i.e., an amount that overwhelms my intended contribution). Then I tried to get a grip on myself: "Hold on," I muttered. "You're a professional! Surely you appreciate why these important, well-run organizations need to pay the executive salaries and maintain the reserves they do." But if that was the reaction of "a professional," it's easy to see why charities are loath to report to the public at large.

Even before the 2008 redesign of the Form 990, advisors focused on the importance of having the board know what will appear in the organization's federal tax filing.[21] Attention to executive compensation, interested transactions, and relationships among fiduciaries will be even more important as exempt organizations file the redesigned Form 990. As described in Part II, the new version of the form contains numerous questions about organizational structure and governance practices. (See also the last page of the Appendix, which reproduces the governance part of the form.) Despite the disclaimer, described above, that this portion of the form "requests information about policies not required by the Internal Revenue Code,"[22] the expectation is that most organizations will want to answer "yes" to the questions. It will be interesting to see, as the next few years pass, the rise in adoption of the policies and practices asked about on the return.

More basically, if board members have not routinely been provided with the organization's Forms 990, they likely will now: One question reads: "Was a copy of the Form 990 provided to the organization's governing body before it was filed? All organizations must describe in Schedule O the process, if any, the organization uses to review the Form 990."[23] Not only will the typical board's role in preparing or reviewing the 990 change, but also the relationship between the board and management could change as the board focuses on reported structures and events as it might not have in the past.

At the extreme, a nonprofit might even be willing to forgo tax-exempt status in part to preserve the confidentiality of its activities,[24] given that corporate income tax returns are not subject to public disclosure.[25] More likely, a nonprofit might use a for-profit affiliate to carry out charitable activities for which tax exemption would be available,[26] especially when taxable profits are expected to be nonexistent or low. While an organization might sacrifice some support (from employees, donors, or others) in forgoing exemption, other advantages of the for-profit form include the ability of raising equity capital; avoiding an IRS inquiry into whether the nonprofit has sufficient charitable purposes; and gaining some flexibility in providing levels and types of compensation.[27]

II. Regulatory Registration and Reporting

This Part looks at filings received by nonprofit regulators. Part III's discussion of public disclosure includes the transparency of enforcement actions by the regulators.

A. State Registries; Constitutional Limits on State Regulation of Fundraising

A nonprofit corporation typically obtains its certificate of incorporation from the state secretary of state, and makes annual filings with that office. Outside the well-regulated area of charitable solicitation, described below, Marion Fremont-Smith's comprehensive survey chronicles the development—but lamentably limited extent—of attorney general registration and annual filing (7 states).[28] (Fremont-Smith separately found that in four states the attorney general must be notified when the nonprofit seeks tax-exemption.[29]) In 2011, the Uniform Law Commission adopted a "Model Protection of Charitable Assets Act"; the project addresses the authority of state attorneys general to protect charitable assets, to require annual filing and notice of specified "life-events," and to cooperate in interstate and multi-state cases and with the IRS.[30]

Most state oversight of charity deals with the solicitation of contributions. In the 1960s and 1970s, the desire to protect charities from "wasting" resources on fundraising led a total of 28 States and countless municipalities to impose ceilings on the percentage of annual revenues that could be spent on fundraising expenses. In the 1980s, however, a trio of Supreme Court decisions blocked these restrictions, on First Amendment free-speech grounds.[31] To the Court, Procrustean percentage limits on fundraising disproportionately impact new charities (with low name recognition and no established donor base) and unpopular causes (which require a greater expenditure to raise a dollar). States may punish fraudulent fundraising speech after-the-fact, but, as the Court more recently confirmed, regulatory approaches seeking to equate fraud with fundraising efficiency are invalid.[32]

Conceding their inability to mandate fundraising limits, the states have concentrated their efforts on requiring charities to increase public disclosure using standardized forms. Almost all the states require registration; a charity soliciting in many states will welcome the Uniform Registration Statement accepted in most states requiring registration.[33] In addition, 35 states require annual filings, usually with the attorney general, for charitable trusts and nonprofit corporations that solicit charitable contributions; those states either require or accept the Form 990 in partial or complete satisfaction of that filing. Statutes, though, commonly exempt small entities, educational institutions, hospitals, and churches—and membership organizations—but variations abound. Some localities also regulate fundraising.

B. Federal Tax Filings: Governance Focus of Redesigned Form 990

Because of legislation enacted in 2006, the IRS will be able to clean up its Business Master File to weed out those nonfiling small charities that have simply ceased to exist: Effective for tax years beginning in 2007 small organizations that fail to file an annual notice of their continued existence (and minimal other information) for three consecutive years will have their exemption revoked.[34] As of 2009, the IRS records showed a total of 1,912,695 exempt organizations (1,238,201 million of which were exempt under section 501(c)(3)). As of mid-2011, the IRS had announced that the net total of automatic revocations exceeded 330,000.[35] To ascertain whether these organizations were "in fact defunct or just uninformed and/or confused about IRS regulations,"[36] researchers who had previously reached out to vulnerable Indiana organizations concluded that 27 percent of organizations "that we have reason to believe are still active" lost their exemption for failure to file.[37]

With the overhaul of the Form 990 effective for tax years beginning in 2008, we will finally have up-to-date information about organizational form for most large public charities.[38] Line K near the beginning of form asks the filer to identify the type of organization, with boxes provided for corporation, trust, association, and other (with space to describe). In a comment letter on the 2007 draft of the redesigned form, I suggested adding such a question.[39]

Not surprisingly, the Form 990 focuses largely on financial reporting and transactions—the Internal Revenue Service's core competency is, after all, tax collection, which is measured in dollars. The Form 990 is not limited to financial results, though, because it also has to reflect specific requirements and prohibitions in the tax laws. Thus we find many questions about relationships among fiduciaries and conflict-of-interest transactions, as well as questions about two additional concerns of federal tax exemption for charities: unrelated business activity and lobbying and political activity.

The most striking feature of the 2008 redesigned Form 990 is the new first page that highlights key information set forth elsewhere on the form. This summary page will make the form more accessible to donors, the press, and state regulators—not to mention to board members themselves. The form also adds a full page of questions about organizational structure and governance practices.[40] (See the Appendix for the 2007 exposure draft and the 2008 final versions of those two pages.) I strongly supported this focus on governance in my comment letter on the draft redesign. Indeed, I proposed replacing the draft half-page of questions with a full page of my own. As I explained: "It seems to me that most useful for the Service, potential donors, the press, and anyone else who reviews the Form 990 would be a series of questions that describe the governance structure of the organization and that determine whether the organization has in place procedures to support good governance." I added: "At the same time, it is important to recognize that these organizations are private entities, whose obligation to make public disclosures must be based on the requirements of the Code. I agree with those who have urged you make clear—on the Form itself and not just in the instructions—which of these items are legally required, so that readers do not draw inappropriate adverse inferences."[41]

Tracking many of my suggestions, Part VI as finalized requires the disclosure of whether the organization has a voting membership; the identity of voting board members (and which ones are independent); whether and how certain documents, including the organization's Form 1023, Forms 990, and 990-T, financial statements, governing documents, and conflict of interest policies, are made available to the general public; and whether the organization became aware during the year of an embezzlement or other material diversion of the organization's assets.

But the governance-focused part of the Form 990, which Steve Miller, then-Commissioner for the Tax Exempt and Government Entities Division (TE/GE), characterized as "the crown jewel" of the IRS's recent activity in the nonprofit governance area, has proven somewhat controversial. The Advisory Committee on Tax Exempt and Government Entities (the "ACT"), a high-level advisory body to TE/GE, issued a lengthy report in June 2008 focused on the IRS role in charity governance. The 2008 ACT report comments:

> We believe in large part the governance questions on the redesigned Form 990 for 2008 are appropriate and formulated in a relatively neutral manner, recognizing that true neutrality is an unattainable goal. The inclusion of the questions, however, inherently (and intentionally) suggests that the IRS supports adoption of specific governance policies and practices. The danger then is that organizations will take the path of least resistance and adopt the policies and practices whether or not they are appropriate for them, or effective in their context.[42]

The ACT concludes that the public availability of the Form 990 will induce organizations to adopt practices that they might not need, as discussed in Part I, above: "Thus, while disclosure and transparency play a valid role in promoting compliance with the tax laws and in encouraging appropriate nonprofit governance, they also can impact behavior in a manner that can be harmful to the sector, and inappropriately suggest to the public and watchdog groups that the absence of specific governance policies or practices is in effect misgovernance. Accordingly, the IRS should carefully consider the public disclosures it requires."[43]

C. *What's Not Publically Available from Federal Tax Filings*

As thorough as the redesigned Form 990 appears, we still have reporting holes.

1. Filing Exceptions

Separate from the filing exemption for churches, as mentioned above, the IRS phased in the requirement to use the new Form 990 or the simpler Form 990-EZ by the size of the organization.[44] The Service doubled the annual revenue threshold for filing Form 990 or Form 990-EZ from $25,000 to $50,000 beginning in 2010.[45] Thus many "small" organizations will shift to filing either the short Form 990-EZ or the bare-bones e-postcard, Form 990-N (which requires only such basic information as employee identification number, the name of a principal officer, a mailing address, and affirmation that gross receipts total less than the threshold). Although I am sympathetic to saving costs for small organizations as well as the IRS, both regulators and the public stand to lose valuable information on hundreds of thousands of small organizations. This latter issue is of particular concern to state regulators that accept the series Form 990 as its annual filing document.

2. Data on Form 990 That Are Unclear or Not Collected

Some of the ambiguities on the prior Form 990 will be cleared up by the redesigned Form 990. Consider the fundamental example of determining who is in charge of the organization—particularly who actually has power in those arts and cultural or educational institutions with multiple advisory positions (the proliferation of titles, like "life trustee," are uniformative). While the draft redesigned Form 990 asked simply for a listing of trustees or directors, the final form makes clear that it is looking for those with voting rights only.

As another example, my comment letter to the IRS noted the tendency of too many expenses winding up on the "other" line, which allows for the itemization of specific categories not listed above. In the redesigned Form 990, Line 24 of Part IX (Statement of Functional Expenses) of the Core Form cautions: "Expenses grouped together and labeled miscellaneous may not exceed 5% of total expenses . . . ."

Problems of inaccurate or incomplete filings will continue. The push to electronic filing will help with the latter problem if the system will not accept a return unless the fields are properly filled in. As to the former problem, Floyd Perkins, former Illinois charities bureau chief, commented, "People don't realize how poor the quality is."[46] (See Part I, above, for a discussion of the pressures to fudge numbers. Perkins added, though, that there are "not a lot of examples where people relied on phony reports.")

Is there a duty to amend a return discovered to contain a material misrepresentation? The tax system imposes no statutory duty to amend a tax returns, although filing an amended return stops the accumulation of penalties and interest (but for an exempt organization, interest on what?). By contrast, the federal securities laws require amendment of a filing if failure to amend would be materially misleading. The possibility of state-level enforcement of an inaccurate return, where the Form 990 satisfies the state filing requirement, can provide an incentive to file an amended Form 990 at both the federal and state levels.[47]

3. Group Returns

The tax rules provide not only for umbrella recognition of multiple related exempt organizations, but also permit the filing of group returns. By contrast, the IRS does not permit members of an affiliated group to file a consolidated return, as that term is understood in corporate tax. Group returns thus can be uniquely uninformative and nontransparent: The return includes all members of the group except the "parent," in contrast to a corporate consolidated return (and any member of the group can elect to file its own return); the transactions within the group are not netted, as they would be in a corporate consolidated return; and it is impossible to determine the finances and operations of any particular member of the group. The topic was the subject of the 2011 IRS ACT report, which urged the IRS to strengthen the group exemption requirements but disallow the filing of group returns.[48]

III. Public Disclosure of Regulatory Filings and Determinations

The discussion in this Part III examines the privacy interests of charities and relevant third parties; reviews what types of state and federal filings are made public; analyzes the possible rationales for public disclosure; and addresses the transparency (or not) of charity regulators.

In the federal tax system as a whole, Congress' overarching lodestar with regard to tax return information is confidentiality. While individuals and businesses are compelled to report their activities to the IRS, the IRS may not release taxpayer identifying information to the public—or even, except as specifically permitted by statute, to other governmental agencies.[49] Indeed, a taxpayer may recover damages from the government for unauthorized disclosure, and severe penalties apply to IRS employees who improperly disclose return information. This presumption of confidentiality, however, is reversed for tax-exempt organizations.[50] Why does Congress only in the nonprofit view context view sunlight as an important disinfectant?

A. Privacy Interests of Charities and Their Supporters

By longstanding law and practice a charity's governance activities and operations are generally private affairs. Requiring regulatory filings and other information to be disclosed to the public intrudes even more than does reporting to regulators on the associational and operational autonomy of charities, and might even make board service or employment less attractive. (Thus the title for the talk from which this Article derives: "Governing in a Fishbowl.") Indeed, the most controversial portion of the IRS Form 990—and the primary reason for initial resistance by exempt organizations to requests for public disclosure—is the section reporting board member and executive compensation. (Often, the organization's own employees and volunteers are the most curious!) As discussed below, policy makers and observers have identified a variety of justifications for state and federally required public disclosures by charities, the levels and types of which seem only to increase. Importantly, the summary cover page of the redesigned Form 990 highlights certain information of particular importance to donors, the press, and state regulators—not to mention to the organization's board members.

Privacy interests are broader than the charity's, of course, and in certain situations public disclosure can lead to harm for the charity or to its donors, members, or those it serves. One category of sensitive information includes the types of trade secrets and personnel information protected from disclosure, as described below, by Freedom of Information laws. Narrower examples of sensitive information protected from disclosure include the address of a battered women's shelter (so that abusers cannot find clients) and the countries of operation of human rights organizations (note that Schedule F of the new Form 990 was revised to address this concern). Public disclosure of membership lists also can be sensitive, particularly for groups advocating on socially contentious issues; usually, membership lists are not even required to be filed with regulators. Churches receive special protection by their exclusion from the requirement to file an application for recognition of federal tax exemption and Forms 990. (But see the lengthy discussion in a 2011 staff memorandum to Senator (and then-Ranking Member) of the Senate Finance Committee) Charles Grassley about the history and possible modification of this special treatment of churches.[51])

The identity of donors is an area of particular focus. The names of contributors to private foundation are not redacted from the Form 990-PF, which is required to be made publicly available in full. Donors to state-related nonprofit institutions, such as alumni-created foundations affiliated with state universities, are often unprotected as well.[52] By contrast, Congress exempts from public disclosure the names of donors reported on the list of major donors (Schedule B) to the Form 990 filed with the IRS by exempt organizations other than private foundations. As one result, only the IRS can fully review a charity's claim to be publicly supported, and thus not a private foundation.[53]

B. What Filings Are Subject to Public Disclosure?

The states typically make available—often online—corporate annual reports filed with the secretary of state, and annual reports filed with the attorney general in those states requiring reports, generally from those who solicit charitable contributions (see Part II, above). Confidential information can be protected from public disclosure. Uniquely, as far as I know, New Jersey requires that the audit submitted to the attorney general be accompanied by the auditor's management letter, if one was prepared, although the management letter will not be released to the general public.[54] Material supplied in the course of or subsequent to a state investigation remains confidential except as might be required under a state freedom of information law.

Specifically, Code sections 6104 and 6110 provide for disclosing applications for tax exemption, including supporting documents, and determination letters and rulings. All of these items are available from the IRS upon request. Moreover, the organization must make its exemption application, supporting documents, and determination letter or ruling available for public inspection without charge. Separately, the law obligates a charity to produce any of its last three tax returns upon request. Posting the Form 990 on the charity's website satisfies this obligation—but the posted return must be complete. Evidently, of greatest interest to the press, the public, competitors, and even other workers in the organization are the salaries and other compensation paid to the top executives and independent contractors, and a return provided without this information does not satisfy the disclosure obligation.

Even though the filings made with the IRS are available from the regulator (the same is true for some of the states), private groups revolutionized charity transparency. The searchable databases on GuideStar and the National Center for Charitable Statistics at the Urban Institute—themselves privately funded charities that work with each other and with the IRS—make this whole system work.[55] The IRS itself offers for sale (at no cost to the media and other government agencies) scanned copies of the last seven years of filed Forms 990 on DVD or CD-ROM.[56] It would be most helpful if the IRS provided usable data from these forms promptly to researchers.

A training program by the IRS Exempt Organizations Division explains some of the advantages of instantaneous, online disclosure: "Obtaining information from an organization had potential drawbacks if a requestor and the organization were not on friendly terms. Despite the requirements of the law, some organizations simply refused to allow access to their returns."[57] That article provides "a discussion of the more common errors made and an explanation of the reasons for some of the information requested." (Regrettably, in 2005, the EO division discontinued drafting these training materials, which has been a great loss to practitioners as well as to the Exempt Organization staff.[58])

Some information still remains private between the organization and the tax collector. The statute excludes from public disclosure the customary FOIA exceptions for "a trade secret, patent, process, style of work, or apparatus if the Service determines that the disclosure of the information would adversely affect the organization." In addition, as mentioned above, Schedule B to the Form 990, on which public charities report the identities of their large donors, is protected from mandatory disclosure.[59] Exemption applications are not public until exemption is granted; nor must withdrawn applications for exemption be disclosed.

Finally, the Pension Protection Act of 2006 requires an exempt organization to make public its Form 990-T, on which it reports and pays any tax due on unrelated business taxable income.[60] However, Congress did not impose a parallel requirement on the corporate returns of an exempt organization's taxable affiliates (business tax returns, like the returns of individuals, are not public documents), giving charities one more reason to spin off unrelated businesses into a separate for-profit corporation. Unfortunately, because of a glitch in the statute, the IRS cannot provide the Forms 990-T to GuideStar, so anyone curious about unrelated business activity of a particular charity will have to ask the organization for the form, and they will not be available in a searchable database of these forms.

1. Applications for Exemption—Form 1023

The application form used to file for recognition of federal tax exemption under section 501(c)(3) was significantly revised in 2004.[61] The 2008 ACT report on the IRS role in charity governance described the evolution of the IRS's approach to governance during the exemption application process: "While the Form 1023 prior to the current version asked questions regarding organization structure and governance, it principally focused on the charitable activities of the organization. In contrast, the 2004 (the most current) version places an increased emphasis on an organization's governance by focusing on board and management relationships (independence) as well as compensation and other potential opportunities for inurement."[62]

Commentator Jack Siegel praised the IRS for "attempting to identify those organizations that are likely to violate the rules governing Section 501(c)(3) organizations before granting tax-exempt status rather than relying on an audit process that is currently underfunded and spotty." However, Siegel cautioned future applicants who seek to abuse tax-exempt status to take care in filling out the application: "In the past, questions covering compensation, grant making, affiliations, and activities were very open-ended, permitting people who wanted to game the system to conveniently omit information without significant risk. The 2004 revised Form 1023 touches on all the same topics, but with very specific questions which will make it much more difficult to hide abusive arrangements without risking penalties of perjury.[63] Siegel added: "We also suspect that certain answers to questions may not cost an organization its requested exempt status, but may place the organization in a special queue for subsequent audits focused on potential violations under the intermediate sanctions."

Of course, failure to make full disclosure on the prior versions of the application form—which, like the Form 990, is filed under penalties of perjury—still had consequences. In an unusual case, the United States recently won a criminal conviction against a Muslim group that had failed to disclose on its Form 1023 what the Justice Department asserted were such terrorist activities as publishing newsletters and raising funds for jihad.[64]

2. Forms 990: Problems of Accuracy and Timeliness

Like other federal tax returns, the Forms 990 are self-reported. Many as filed contain errors, some materially misleading. Hopefully, compliance will improve as boards and top management become more involved in preparing the form. Even with the redesign, though, this document cannot provide much insight into the nature and quality of charity activities.

Moreover, many Forms 990 are filed under an automatic six-month extension. The blame for this commonly falls on the accountants, who can barely recover from having to prepare tax returns for individuals (due April 15) before gearing up to file Forms 990 (due May 15, for calendar-year organizations). No reputational sanction seems to follow from filing late, so many calendar-year exempt organizations file close to November 15. (You can set your calendar by all the news stories on nonprofit compensation that appear around Thanksgiving.) This means that events that occur in, say, January 2011 will likely not be disclosed to the public until November 2012, almost two years later.[65]

The IRS highlights the value of disclosure in describing its e-filing initiative: "E-filing reduces normal processing time and makes compliance with reporting and disclosure requirements easier."[66] Indeed, e-filing is mandatory for large charities: "For tax years ending on or after December 31, 2006, exempt organizations with $10 million or more in total assets may be required to e-file if the organization files at least 250 returns in a calendar year, including income, excise, employment tax and information returns . . . . Private foundations and non-exempt charitable trusts are required to file Forms 990-PF electronically regardless of their asset size, if they file at least 250 returns annually."[67] Beginning in 2006, the Service started a federal/state filing system, and has begun working with individual states to test their systems.[68] In 2008, the Service processed 901,000 exempt-organization tax returns (mostly Forms 990, 990-EZ, and 990-PF); and in 2009 processed 1,132,000, an increase of 25.6% (presumably due to the filings of the e-Postcard, Form 990-N).[69] Of these returns, many were filed electronically: In 2008, exempt organizations filed 57,975 Forms 990; 44,362 Forms 990-EZ; and 292,002 Forms 990-N (which can only be filed electronically).[70]

C. Rationales for Governmentally Mandated Disclosure to the Public

This subpart considers four possible rationales for mandating public disclosure of charity finances and other activities.

1. Disclosure Without Judgment: "Disclose or Abstain"

While, as mentioned above, Congress provides for the confidentiality of tax returns, in regulating the securities issued by publicly traded companies, Congress has generally adopted a "disclose or abstain" model in lieu of prescriptive regulation. Under that approach, if the issuer makes honest (i.e., not materially misleading) public disclosures, we essentially leave investment decisions to the market. If a similar public disclosure rationale is chosen for charity regulation, what are nondisclosing nonprofits supposed to abstain from? Soliciting the public for contributions (state registration model)? Something else? After all, the typical private foundation or government-funded agency is not seeking or expecting contributions from the public. Interestingly, Congress required private foundations to make their Forms 990-PF available on request in 1969, but did not obligate publicly supported charities to make their Forms 990 available until 1987.

Incidentally, a disclosure model based on this rationale might be the only constitutional regulation permitted of corporate political speech after the Supreme Court's decision in Citizens United, a topic beyond the scope of this article.[71]

2. Condition of Tax Subsidies

Is the rationale for public disclosure instead that the "public" benefits through providing support for tax subsidies, and therefore tax filings should be made public? (Generally, imposing requirements conditions on tax-exempt status does not give rise to the argument of "unconstitutional conditions," because exemption is not a constitutional right.[72]) In 2000, the staff of the Joint Committee on Taxation released a congressionally-mandated study of the disclosure rules in the tax system, devoting a full volume to those that apply to exemption organizations.[73] The Joint Committee called for increased public disclosure of exempt-organization information, including the release of (1) complete private letter rulings and technical advice memoranda, without redaction of information identifying the entity and its transaction; (2) the results of all audits of tax-exempt organizations, also without redaction; (3) applications for exemption, not just exemptions once issued; (4) Forms 990-T (unrelated business income tax) and the returns of taxable affiliates; and (5) a description of lobbying activities, and amounts spent on self-defense lobbying and on nonpartisan research and analysis that includes a limited "call to action." Many of the Joint Committee's recommendations attracted strong criticism.[74] As mentioned above, Congress now requires disclosure of Forms 990-T (but not the returns of taxable affiliates); and as discussed below, the IRS must release determination letters denying or revoking exemption, although in redacted form.

The Joint Committee asserted the following rationale for public disclosure: "Disclosure of information regarding tax-exempt organizations also allows the public to determine whether the organizations should be supported—either through continued tax benefits or contributions of donors—and whether changes in the laws regarding such organizations are needed." That is, informing potential donors is one aspect, but only one, of this rationale. Just as important to the Joint Committee is allowing the public to judge the legitimacy of tax-exemption, and whether it should be altered.

3. Condition of Nonprofit (Epecifically, Charitable) Status

The Independent Sector, a leading trade association of charities, proposed an alternative rationale for transparency. In commenting on the Joint Committee's 2000 report, the Independent Sector declared: "IS believes that charities' public disclosure obligations derive from charities' fundamental nature as voluntary associations formed by private citizens to advance the public good—not from charities' receipt of favorable tax treatment."[75] After all, the Independent Sector observed: "Charities were recognized as separate entities with legal rights and responsibilities long before there was a federal income tax code. The need for disclosure stems from charities' unique social role. A charity must be transparent enough to make donors, volunteers, and partners confident that the charity will, in fact, advance public rather than private interests."[76]

As a general comment, the Independent Sector challenged the utility of counting on the Form 990, as it existed then, as the vehicle for informing the public: "Without an understandable user's guide—and no such guide exists—the public derives little benefit from much of the information already reported by charities. Thus, there is a deep need for tools to help the public understand the information that is already disclosed."[77] Independent Sector urged the IRS to revise the Form 990 "so that it highlights critical information and facilitates the reader's understanding of the significance of the information being presented. A top priority for the IRS in this regard should be providing, either directly or through nongovernmental intermediaries, on-line access to all Forms 990."

4. We Can't Think of a Better Alternative

Finally, we have to admit the possibility that we rely on public disclosure because we don't know what else to do (or who should do it). Betsy Adler nicely summarized the current regulatory approach with the acronym "FED": "funding, enforcement, disclosure."[78] In our laissez-faire system, we don't want government telling charities what to do and how to do it.[79] The absence of shareholders goes to why we disclose to regulators: By contrast, public disclosure seems driven by regulators' lack of resources, expertise, or inclination.

Nor should we discount the ceremonial value of sunshine. Public disclosure—even in the absence of enforcement action—is useful because knowing that information will be disclosed induces the fiduciaries to pay more (and better) attention not just to how they report, but also to what they do. At the same time, this leads to the possibility of fudging the reporting due to the pressures described in Part I. As the 2002 CPE text commented: "Several things must happen in order for this increased disclosure of Form 990 to be of maximum benefit to the public. First, the information entered on Form 990 must become more standardized and reliable. Second, potential users of the data must become more familiar with the requirements for proper completion of the return so that they will understand the data they are viewing."[80]

D. Disclosure of State and Federal Enforcement Activity

1. What Are the States Doing?

It is not easy to figure out how to spur nonprofit board members into performing better. Increasing monetary sanctions might make things worse: Indeed, we might improve nonprofit governance by reducing what's at stake. In large part regulators are so timid (at least publicly) because they don't want to discourage volunteers acting in good faith. As a result they don't send a sufficient signal (at least publicly) of the problems they encounter on nonprofit boards.[81]

But lack of transparency in their regulation of charities makes it impossible to assess the effectiveness of regulators in improving charity governance—or even whether they are acting at all. Few cases involving nonprofit fiduciary issues have reached the courts. Reform rather than punishment is generally the goal of the charity regulator, and charities as well prefer a chance to improve their behavior while avoiding embarrassment and personal liability. Most settlements are kept confidential. Finally, state attorneys general can act—or not act—out of parochial and political motives.[82]

Regulators have limited (financial and political) resources.[83] In that case, we might expect attorneys general to publicize their enforcement actions in order to benefit from the leveraging effect—miscreants in a similar position would recognize themselves in the press release, and voluntarily straighten out.[84] Indeed, attorneys general do trumpet cases in which they catch someone violating the law. In other cases, where there's no real "bad guy"—but rather well-meaning fiduciaries caught in governance failures—states usefully could issue aggregate annual reports on the types of enforcement activities they undertook and outcomes achieved. See, for example, Pennsylvania's database of consent agreements and adjudications relating to charities, solicitors and fundraising counsel.[85] Regrettably, though, even the limited official reporting of enforcement activity tends to have a frustratingly short shelf-life. Press releases often vanish from attorney general websites when a new attorney general comes into office, thus undercutting the educational and deterrent value of publicizing enforcement actions; the Massachusetts attorney general's website no longer carries the very useful "Final Judgment Database" of legal actions, with links to the specific cases.

Private-sector solutions, while promising, have their own limitations. Notably, in 2008, the Charities Law Project at Columbia Law School began developing a website to assist attorneys general in fulfilling their responsibilities over charitable assets.[86] Although a separate intranet just for attorneys general might be created, so far most of the posted material is available to the public. The clearinghouse contains links to state and IRS websites (and specifically to state best practice guides) and summaries of law review articles. No enforcement materials have been posted yet, but a few recent settlements from around the country are available through links to materials for a panel on remedies presented at the March 2008 conference.[87] As of January 2011, the most recent conference shown on the project's website was held in April 2010; the page containing summaries of "AGs in the News" is current through November 2010.

2. IRS Determination Letters Denying or Revoking Exemption

As a threshold matter, despite the Service's fearsome reputation, it is as resource-constrained as the states. In 2010, the IRS Exempt Organizations Division employed only 942 people: 366 in Rulings and Agreements, 549 in Examinations, 14 in Customer Education and Outreach, and 13 in the EO Director's office. While total employment had gratifyingly grown from 837 in 2008 and 910 in 2009, the EO Division must oversee 1.8 million registered tax-exempt entities, including almost 1.2 million registered charities.[88] Thus, the development of published guidance (as well as examinations) suffers, putting pressure on practitioners to grasp at any type of informal guidance they can find.

Throughout the tax-practice world, practitioners and their clients have long benefited from the public availability of (redacted) versions of private letter rulings, audit memoranda, and other taxpayer-specific agency positions.[89] Marion Fremont-Smith explains how this type of informal transparency can improve tax administration in general: "Members of the bar were also able to identify issues needing study or revision, and call these to the attention of the Service as a group and not as partisans of individual clients."[90]

The Service, however, long refused to release redacted determination letters relating to denial or revocation of tax exemption. In a milestone decision issued in 2003, however, the District of Columbia Circuit held "that the portions of Treasury regulations sections 301.6110-1(a) and 301.6104(a)-1(i) that include denials and revocations 'within the ambit of section 6104' and prevent their disclosure violate section 6110's plain language."[91]

In annual revenue procedures, the Service sets forth the process for issuing determination letters and rulings on exempt status, both in response to applications for recognition of exemption and in cases of revocation or modification of determination letters or rulings. Section 8 of the revenue procedure describes the rules for disclosure. Notably, "[u]pon issuance of the final adverse determination letter or ruling to an organization, both the proposed adverse determination letter or ruling and the final adverse determination letter or ruling will be released under section 6110" . . . "after the deletion of names, addresses, and any other information that might identify the taxpayer", as set forth in Code section 6110(c).[92] Importantly, section 6104 applies only to material furnished by the organization or issued by the IRS,[93] and not to settlement agreements (termed "closing agreements") between the IRS and the organization unless the organization consents.[94]

These redacted denial and revocation letters began to appear in 2004. An early redacted denial letter was issued to a recreation center in which the Service found an inbred governance structure not likely to ensure public benefit; specifically, the IRS wrote: "Since all three members of your original board were related and receiving compensation, we asked you to expand your board of directors by three to four non-related members of the community. [You added three new members.]" However, the IRS continued: "[a] full copy of your approved bylaws have not been received by the Service. The limited information provided indicates that the * * * may appoint and remove the directors. The * * * appear to be the three related directors."[95]

Incidentally, when faced with the prospect of a denial, why doesn't the applicant simply withdraw the application (this would not be a disclosable event)? Evidently, the denial letters are for groups that want judicial review, and the determination letter is the ticket to court. Alternatively, the IRS might back down and flag the file for examination after a period of operations.

With the continued issuance of denial and revocation letters, we have seen a flood of up to a dozen a week, adding up to hundreds a year.[96] An adverse ruling generally falls into one (or more) of three categories: private benefit, "commerciality," with, most recently, the return of the ground that the charity failed to conduct a charitable program "commensurate-in-scope" with its resources. The Service has denied exemption to nonprofits engaged in a variety of activities including adoption, insurance, financial services, religious publishing, conference centers, low-income housing, and retreats for caretakers—generally on the basis of their resemblance to similar for-profit businesses. Examples of recent determination letters with governance implications include the following, as summarized in the 2008 ACT report:

> PLR 200736031 (Dec. 7, 2006) (noting that married couple were sole officers and directors, there was no conflict of interest policy and couple did not recuse themselves when causing organization to contract for management services with for-profit company of which husband was sole shareholder); PLR 200535029 (June 9, 2005) ("Finally, despite the expansion of your governing board from three (3) to five (5) members, and the enactment of a conflict of interest policy, we still have some concern that your actual operations will be controlled and directed by B and his daughter C. We acknowledge that there is no evidence of any inurement to the benefit of these individuals, but then there has been no financial activity on your part to date.["]); PLR 200514021 (Jan. 13, 2005) ("There seems to be great likelihood of inurement to these individuals in that they all serve on the Board of Directors, and have a vote on compensation arrangements, leasing arrangements, and other financial matters that would affect the organization's financial interests as well as their own. This situation gives rise to an inherent conflict of interests that would potentially, adversely impact the financial well being of the organization. Thus, you have failed to show that B, C, D and E, through their positions on the Board, would not benefit from inurement . . . . ["]); PLR 200510031 (Nov. 15, 2004) ("There is not even one outside, disinterested board member to speak for the community. We must conclude that you violate the second fundamental rule for exempt organizations, and operate for private, not public benefit.["]) [97]

Unfortunately, the IRS website makes these exempt-organization determination letters available only as part of its general release of all determination letters.[98] Given how many of these determination letters we now have, and how cumbersome the process is of reviewing them, the Service—or another institution, with either public or private funding—could usefully collect and sort these documents.[99] The easiest way to find specific issues in these letters is to search a commercial electronic database, such as LEXIS or Westlaw.

Even when one can find a particular determination letter, the redactions[100] are simple elisions. As with all private rulings and memoranda, the redactors make no effort to give a sense of the substance underlying the facts.[101] Thus, we get such baffling indications as "$j" or "$ * * * " rather than, say, orders of magnitude, percentages, or relationships that would give a sense of the materiality of the problem; one recent revocation letter dealing with a complex structure referred to all names, places, and banks accounts by an undifferentiated "XX."[102]

The steady stream of denial and revocation letters has allowed the Service informally to stake out positions on basic substantive issues such as whether a particular activity is eligible for exemption.[103] For example, it is understood that the Service demands a minimum of three unrelated board members, although, because such a requirement does not appear in the statute or regulations, the Service cannot deny exemption on this basis alone. The 2008 ACT report comments: "We were not able to find guidance as to how the IRS takes governance issues into account in the determination process, except in limited instances in the health care and low-income housing joint venture areas. We certainly appreciate that governance can bear on the operational test, among other issues. Our personal experience and research for this report suggest, however, that the IRS may require specific governance practices on an ad hoc and inconsistent basis." The Report cites two illustrations: "[D]etermination specialists may require organizations seeking exemption to have independent boards or at least some independent board members. Similarly, despite the fact that the Form 1023 specifically states that a conflict of interest policy is recommended but not required, our experience and interviews suggest that determination specialists often require adoption of such a policy, and occasionally require adoption of the sample form of policy included with the Form 1023 instructions."[104] Note, as the 2008 ACT report, adds: "There typically is no public record where taxpayers agree to make the changes required, strongly urged, or recommended by the IRS in the determination process and receive an exemption; or where an application is withdrawn."[105]

The ACT concludes that while "we have only anecdotal evidence regarding governance issues in the determination process . . . [,] the 'when' and 'what' [seem] unclear and not uniformly applied. We are concerned about the IRS having this level of discretion in cajoling or requiring specific governance process, particularly in the determination phase, where there usually is no track record evidencing operational failures."[106] Now, six years on, the IRS should use this substantial database of published denial and revocation letters to develop formal guidance. As with the revenue ruling on housing down-payment assistance organizations,[107] and in light of congressional endorsement of the Service's position on credit-counseling agencies,[108] the sector is entitled to revenue rulings or even regulations setting forth the agency's positions on organizational and operational issues, including nonprofit governance, that jeopardize exempt status. Such guidance would allow the Service to provide examples that show specific or relative dollar amounts and other facts masked by the redaction process.

3. Information Sharing: Disclosure from IRS to State Attorneys General

Amendments to Code section 6104 in the Pension Protection Act of 2006 (PPA) broadened the IRS's authority to provide certain information to state charity regulators, especially regarding exemption applications and denials.[109] The PPA extends to those state charity officials the section 6103(a) obligation to protect the confidentiality of the taxpayer information it receives. In March 2011, the Service proposed regulations under amended section 6104(c). The preamble emphasizes: "All disclosures authorized under section 6104(c) may be made only if the state receiving the information is following applicable disclosure, recordkeeping and safeguard procedures."[110] The National Association of State Charity Officials (NASCO) has commented, though, that in part because of the "cumbersome nature of the safeguard requirements and the resources needed to adhere to them," just three states (California, Hawaii, and New York) have reached information-sharing agreements with the IRS.[111] Indeed, NASCO asserted, the situation is now worse: "the PPA actually decreased disclosure of information to the states since the non-participating states no longer receive the pre-PPA notifications of final denials, revocations and notices of tax deficiencies."

E. Congressional Oversight

In a class by itself, and generally beyond the scope of this essay, was the devotion by Senator Charles Grassley—while he served as Chair and Ranking Member of the Senate Finance Committee—to publicizing abuses in the charitable sector. His most systematic effort began with a 2004 hearing and staff white paper on nonprofit governance,[112] followed by Senator Grassley's invitation to the Independent Sector to convene a blue-ribbon Panel on the Nonprofit Sector, which produced three influential reports.[113] Senator Grassley also issued a series of "love letters" to specific nonprofit organizations inquiring about their practices. This latter group included the American Red Cross, American University, the Nature Conservancy, and the Smithsonian Institution.[114] Industry-wide inquiries, often joined by Finance Committee chair Max Baucus, asked extensive questions about nonprofit hospitals' charity-care practices, higher educations' endowment spending, and, most recently, a group of televangelists of the "Prosperity Gospel" bent. These investigations had greater legitimacy when they covered nonprofit subsectors (rather than individual nonprofits) and the oversight of the IRS's performance in administering the laws. Indeed, Senator Grassley deserves much of the credit for the extensive exempt-organization reforms in the Pension Protection Act of 2006.[115] However, the IRS, as part of the executive branch, has the enforcement responsibility and expertise to prosecute individual cases; moreover, as described above, the IRS must function under confidentially constraints that Senator Grassley seemingly felt unencumbered by. Perhaps not surprisingly, the first sign of public resistance to providing the information "requested" came from some of the televangelists.[116]

IV. Voluntary Disclosure by the Organization and Disclosure by Private Parties

A. Voluntary Disclosure by the Organization Itself

Charities often make disclosures to various constituencies without the compulsion of law. Prospective donors and grantmakers might condition funds on the production of satisfactory financial or other information. For example, before making grants to charities, many community foundations insist on being advised of such information as the names and relationships of board members and officers, the compensation of officers and relevant relationships, the identities of beneficiaries, audit data, and basic performance metrics. Government contracting rules, too, might demand reporting and audited financial statements. Beyond statutory requirements, the bylaws of membership organizations might require certain disclosures to the members. As discussed in Part II, charities have no excuse for refusing to provide basic information to members of the governing board, who should not be compelled to bring litigation to obtain that information on a timely basis.

While, as mentioned in Part III, the affairs of a nonprofit, non-governmental entity are private, and generally not subject to public disclosure, many of the reported troubles that have befallen charities in recent years could have been avoided had there been routine, timely and consistent public disclosure of basic information. Some of this information is already available through the regulatory and tax filings described in above, but usually only much after the fact (even when timely filed) and in a form that can be difficult for laymen to parse. The Panel on the Nonprofit Sector's Principles for Good Governance and Ethical Practices recommends: "A charitable organization should make information about its operations, including its governance, finances, programs, and activities, widely available to the public. Charitable organizations also should consider making information available on the methods they use to evaluate the outcomes of their work and sharing the results of those evaluations."[117] Charities should consider making clear in their bylaws or policies that transparency with the public is to be the norm, and deviations from that norm ought to require board consideration. The fact that transparency is the norm itself would deter many of the abuses made public.

For the benefit of the general public, nonprofits commonly post annual reports to their websites, but it is not so common to see Forms 990 and financial statements. For a laudable example of transparency, see the Ford Foundation's site,[118] which provides its articles of incorporation; bylaws; committee charters and membership; standards of independence; trustee code of ethics; staff code of conduct and ethics; procedures for approving affiliated grants; procedures for the receipt, retention and treatment of complaints regarding accounting, internal accounting controls and auditing matters; and annual reports and financial statements.

In a crisis, whether as a matter of damage control or sincerely to get ahead of the story, nonprofits should make timely disclosure. Spinning is a problem, though. For example, prior to the 2008 settlement, the dueling websites of the litigants over the Robertson gift to Princeton University to fund the Woodrow Wilson School represented an attempt to influence the court of public opinion.[119] Other recent scandals include the Smithsonian Institution[120] and the J. Paul Getty Foundation (discussed in Part IV.C).[121]

B. Media

Spurred by the perceived fund raising abuses by charities in response to the attacks on September 11, 2001, mainstream as well as specialty media interest in nonprofit governance has exploded. For those trying to keep up, important resources include the Chronicle of Philanthropy's daily posting of summaries (with links) of news stories published around the country,[122] as well as such legal nonprofit blogs as Don Kramer's Nonprofit Issues,[123] a group of legal academics' Nonprofit Law Prof Blog,[124] and Jack Siegel's CharityGovernance blog.[125]

Reporters often dwell on "fraud and abuse" in the nonprofit sector.[126] We run the risk, however, of overreaction to anecdotal information—since we don't know the denominator, is the fact that we're seeing more stories an indication of increasing problems, or of increasing observation? In general, the increased availability of information on nonprofit operations increases the public expectation for more transparency.

C. Peer Regulators and Charity "Watchdogs"

Peer regulation in the nonprofit sector comes in two flavors—the third-party watchdogs and the trade associations. The watchdogs are donor-focused, and they typically provide assessments (sometimes using a star system or letter grades) regardless of whether the charity knows about the review or supplies information. However, the BBB Wise Giving Alliance—which assesses whether a given charity meets or does not meet its Standards for Charity Accountability—relies on information from the charity and states cases in which the organization failed to respond.[127]

By contrast, membership in the trade associations is voluntary, with the organizational member submitting both to the groups' standards[128] and to any disciplinary process for violation. Most groups are not as open as the Evangelical Council for Financial Accountability, which posts a chart of former members, indicating the reason—voluntary resignation or termination.[129] For example, Brian Gallagher, head of the United Way of America, said at the July 22, 2004 Senate Finance Committee roundtable that the UWA has decertified 30 UW's around the country in the previous two years. This information should have been more widely known—I couldn't even find it on the UWA's website. Peer organizations generally seem loathe to publicly discipline noncompliant members. While still an anomaly, compare the Council on Foundation's brief suspension of the J. Paul Getty Trust's membership, ending when the Trust adopted "reforms including new training and evaluation tools for board members, strengthened conflict-of-interest provisions, increased board oversight of real estate deals, and increased transparency of staff compensation and performance reviews."[130]

Finally, there is the behavior of nonprofit groups speaking out—or, more likely not—about specific misbehaving organizations or unacceptable practices as they occur. Isn't protection of the sector's reputation a duty of nonprofits themselves? The Independent Sector's Panel on the Nonprofit Sector energetic response to Senator Grassley's 2004 staff white paper culminated in a report containing 33 principles of self-regulation.[131] Some members of the working group, however, were disappointed that the principles are precatory only, and that the Nonprofit Panel could not achieve consensus around adopting a mechanism for certification and discipline. Deciding how to bell the cat is never easy.

Conclusion

The Internal Revenue Service does not have the resources to verify all tax exemptions on a routine basis. Rather, the IRS conducts a relatively small number of examinations (including targeted correspondence audits) of specific charities, either as part of a system of examining Forms 990 or pursuant to a particular compliance initiative (such as on political campaign activity, hospitals, and institutions of higher education).[132]

In 2009, the IRS's Exempt Organizations Division released a Governance Check Sheet[133] and a Governance Project Guide Sheet[134] for Completing the Project Check Sheet to be used by agents in examining Code section 501(c)(3) exempt organizations. The public can access these guidelines from a new webpage that explains: "A check sheet will be used by IRS' Exempt Organizations Examination agents to capture data about governance practices and the related internal controls of organizations being examined. The data will be included in a long-term study to gain a better understanding of the intersection between governance practices and tax compliance."[135] The webpage links to the Check Sheet and Guide Sheet and to other governance materials on the website,[136] notably an article entitled "Governance of Charitable Organizations and Related Topics"[137] included in the Life Cycle on-line educational tool for charities.

The IRS's recent focus on exempt-organization governance has attracted thoughtful commentary on both sides of the issue. Thomas Silk supports this endeavor of the IRS:

> It is not far-fetched to imagine a national scandal featuring a prominent charity in violation of standards of charitable governance but incorporated in a state with inadequate charitable enforcement. In the congressional hearings that might follow, the IRS would surely be in a far more defensible position if it had already gone forward to educate the charitable sector about

> the importance of good governance practices. Later legislation introduced by a supportive Congress may easily resolve any jurisdictional ambiguities about governance of charitable organizations and enforcement.[138]

On the other hand, Bonnie Brier (lead author of the 2008 ACT report quoted above) recently expressed skepticism that the described governance practices actually lead to good governance, and worries that charities will adopt them just to satisfy the IRS regardless of whether they are appropriate for the organization.[139] Marcus Owens, former top exempt organization official at the IRS, questions the IRS's authority to include governance questions on the Form 990. Senator Grassley responded to such objections by proposing legislation to provide statutory authority for the IRS to assert an interest in charity governance as an indicator of compliance with the federal tax-exemption regime.

I generally disagree with those critical of a role for the IRS in charity governance, at least to the extent these criticisms apply to the governance questions on the redesigned Form 990. Indeed, as described above, I submitted comments to the IRS on the 2007 draft of the redesigned Form 990, proposing for inclusion a series of questions on organizational structure and governance practices[140]—many of which were added in the final version. At that time, I had in mind the usefulness of the Form 990 to the governing board itself and to state regulators, to donors, to the media, and, yes, to researchers, even aside from what uses the IRS might make of the data. While recognizing the values of privacy discussed above, on balance I believe, these interests do not outweigh the benefits from transparency of the organization's governance structure to these outside constituencies. If a particular "best" practice is inappropriate in a particular case, the charity can and should provide an explanation on the Form 990. Thoughtful additional disclosure is an opportunity for the organization to demonstrate—if it can—how its structure and policies appropriately safeguard charitable assets.

Endnotes

1 Professor Law, Chicago-Kent College of Law, Illinois Institute of Technology. This essay grew out of my Norman A. Sugarman Lecture, "Governing in a Fishbowl: The Effects of Sunlight on Nonprofit Accountability," Mandel Center for Nonprofit Organizations, Case Western Reserve University (Cleveland, November 11, 2004). I appreciate comments received from Laura Brown Chisolm, Paul Feinberg, and students and other attendees. I am grateful for opportunities to present drafts at the Internal Revenue Service's 2011 Research Conference; the Chicago Bar Association Committee for Trade and Professional Associations Law (Chicago, January 11, 2011); the 38th Annual Conference of the Association for Research on Nonprofit Organizations and Voluntary Action (Alexandria, Virginia, Nov. 18, 2010); the Advanced Topics in Taxation Colloquium Series, Northwestern University School of Law (Chicago, April 19, 2010); and from Elizabeth Boris and discussant Joseph Cordes at the 2011 IRS-TPC Research Conference (Urban Institute, Washington, D.C., June 22, 2011).

This article cites portions of draft chapters I prepared for the American Law Institute as reporter of its project on Principles of the Law of Nonprofit Organizations. While Tentative Draft No. 1 (2007 and 2008) and Tentative Draft No. 3 (2011) (through 660) were approved by Council and the membership, they are subject to further revision and final approval.

The views in this paper do not necessarily represent those of the Internal Revenue Service. I thank Alan Plumley for permission to publish this article, in substantially identical form, in the 12 Fla. L. Rev. 183 (2012).

2 Evelyn Brody, *Charities in Tax Reform: Threats to Subsidies Overt and Covert*, 66 Tenn. L. Rev. 687, 694 (1999).

3 See Pub. L. 100-203, Sec. 10702(a), adding subsection (e) to Internal Revenue Code § 6104. In 1998 Congress replaced subsections (d) and (e) with the current subsection (d).

4 As I wrote in 1996:

The wealth of data demanded by the IRS inspired the following exchange between a member of the American Bar Association and the IRS's special assistant for exempt organization matters:

> *Mr. Gallagher*: Howard, what does the IRS do with all this stuff?

> *Mr. Schoenfeld*: It's not so much what the IRS does with all this stuff. It's also what the public does with all this stuff. That's an equal part, I think, of what the question should be.

But what, then, is the public to do with all this stuff?

Evelyn Brody, *Institutional Dissonance in the Nonprofit Sector*, 41 Vill. L. Rev. 433, 501 (1996) (citing the exchange in *Edited Transcript of the Morning Sessions of the August ABA EO Committee Meeting in New Orleans, Panel III, The Role of the IRS in Promoting Public Accountability of Exempt Organizations*, 10 Exempt Org. Tax Rev. 805 (Oct. 1994).

5 The closing agreements with Jimmy Swaggart Ministries, Pat Robertson's Christian Broadcasting Network, and Jerry Falwell's Old Time Gospel Hour not only required the payment of taxes, but also required the organizations to make changes in corporate governance and to publicize the general terms of the closing agreements. See *Public Statement, Jimmy Swaggart Ministries, Baton Rouge, Louisiana* (Dec. 17, 1991), 5 Exempt Org. Tax Rev. 205 (Feb. 1992); *Statement of Jerry Falwell Regarding Closing Agreement* (Feb. 17, 1993), 7 Exempt Org. Tax Rev. 876 (May 1993). See also Closing Agreement on Final Determination Covering Specific Matters (Oct. 1, 1993), available in LEXIS, Fedtax Library, Tax Notes Today File, as 97 TNT 251-24 (Dec. 1, 1997) (purporting to be between the IRS and the Church of Scientology, but never acknowledged by either party).

6 Evelyn Brody, *A Taxing Time for the Bishop Estate: What Is the I.R.S. Role in Charity Governance?*, 21 U. Haw. L. Rev. 537 (1999) (Bishop Estate Symposium Issue). For the August 18, 1999 closing agreement between the Internal Revenue Service and the Kamehameha Schools / Bishop Estate (KSBE), go to www.ksbe.edu/newsroom/filings/final_v021029.pdf. This Closing Agreement required—in addition to a payment from KSBE to the IRS of $9 million plus interest (for a total of about $14 million)—significant governance reforms, as well as the Internet posting of the final Closing Agreement. The Closing Agreement did not cover any personal tax liability of the trustees.

7 Treas. Reg. § 53.4958-6.

8 See discussion in Part III.E, below. Senator Grassley's many press releases and accompanying documents are available at http://grassley.senate.gov/news/press_releases.cfm.

9 The 2007 draft Form 990 and related schedules, the draft instructions, and the comments on these drafts, along with educational material, are available at www.irs.gov/charities/charitable/article/0,,id=185892,00.html. See also the Urban Institute's Center on Nonprofits and Philanthropy and Harvard University's Hauser Center for Nonprofit Organizations, 17th Emerging Issues in Philanthropy Seminar, "IRS Form 990 Redesign" (Washington, D.C., Sept. 10, 2007), at which over 60 attendees, including representatives from the Internal Revenue Service and congressional staff, as well as from sector organizations, practitioners, and scholars, discussed the draft Form 990.

10 For example, a survey conducted by the charity watchdog BBB-Wise Giving Alliance suggested that the public does not accept fund raising costs over 15 percent, an unrealistically low number. *See* Grant Williams, *Watchdog Group Proposes Changes in Evaluating Charity Operations*, Chron. of Philanthropy, Jan. 24, 2002.

11 Report of the Independent Expert Group on Expenses 9 (Feb. 2010), available at www.ncvo-vol.org.uk/sites/default/files/ExpensesReportfinal.pdf. The study was prompted by a scandal that erupted in the United Kingdom over expense reimbursements claimed by members of Parliament. *Id*. at 16-17.

12 *Id*. at 50-51.

13 See generally Evelyn Brody, *Accountability and Public Trust*, in The State of Nonprofit America 479 (Lester M. Salamon, ed. 2004).

14 A.L.I., Principles of the Law of Nonprofit Organizations § 320(b)(8) (Tentative Draft No. 1, 2007 & 2008).

15 See *id*., § 340. The most common exceptions are for some personnel issues.

16 *Id*. § 320, comment g(6), suggests a list of documents that every board member should receive, including the current (and dated) versions of the charity's trust instrument or articles of incorporation; bylaws;

board policies applicable to board members (e.g., conflicts of interest, travel and expense reimbursement, and confidentiality, and any general ethical policy); a directory (with contact information) of board members and officers; charters of any board committees and committee assignments; an organizational chart and contact information for senior staff; the current budget and recent financial statements, including the outside's auditor's management letter; recent Forms 990; minutes of recent board meetings and, if applicable, of executive committee meetings; the charity's mission or vision statement, if prepared; and a schedule of dates and locations of upcoming meetings of the board and of the membership (if any).

17 See exploration of this issue in Evelyn Brody & John Tyler, *How Public Is Private Philanthropy?: Separating Reality from Myth* (Philanthropy Roundtable Monograph 2009), available at www.philanthropyroundtable.org/files/Public_Private%20Monograph_high%20res_Final.pdf, and updated as *Respecting Foundation and Charity Autonomy: How Public Is Private Philanthropy?*, 85 Chi.-Kent L. Rev. 571 (2010).

18 Francie Ostrower, Nonprofit Governance in the United States: Findings on Performance and Accountability from the First National Representative Study (Urban Institute 2007), available at www.urban.org/UploadedPDF/411479_Nonprofit_Governance.pdf.

19 Importantly, for the subset of charities dubbed "private foundations" by federal tax law are prohibited from entering into transactions with insiders—other than the payment of reasonable compensation for services rendered. I.R.C. § 4941 (Taxes on Self-Dealing). For a full discussion of interested transactions, see § 330 of the 2007 ALI draft Nonprofit Principle, *supra* note 14.

20 Ostrower, *supra* note 18, at 8 (footnote omitted). That study found: "among nonprofits engaged in financial transactions, most obtained goods at market value (74 percent), but a majority (51 percent) did report that they obtained goods below market cost. Under 2 percent reported paying above market cost. Keep in mind, too, that these are self-reports, and thus, if anything, the figures are likely to underreport transactions resulting in obtaining goods at above market value or at market value costs and overreport transactions resulting in obtaining goods below market cost." *Id.* (footnote omitted).

21 See, e.g., Michael W. Peregrine, Ralph E. DeJong & Timothy J. Cotter, *Transparency: What the EO Board Needs to Know about Executive Compensation*, 46 Exempt Org. Tax Rev. 23 (Oct 2004).

22 In contrast to questions asking whether the organization has written policies addressing conflicts of interest, whistleblowers, and document retention and destruction, and about participation joint ventures, the question relating to the process for determining the compensation of top management, officers, and key employees is rooted in statutory and regulatory requirements. See Code § 4958 (excess benefit transactions engaged in by 501(c)(3) and (c)(4) organizations). Treas. Reg. § 53.4958-6 sets forth a rebuttable presumption that a compensation arrangement or other transaction is reasonable if it is (1) approved in advance by an independent body acting for the organization (2) that obtained and relied on appropriate comparability data, and (3) that the body adequately documented its determination.

23 Form 990 (2008), Core Form, Part VI (Governance, Management, and Disclosure), line 10. It is unfortunate that this question does not allow for the alternative of review prior to filing by a board committee, as recommended in comments submitted on the draft redesign. Regrettably, many time-pressed charities will likely prefer to file under an extension than answer "no."

24 A charity might be expected to have to ensure that it preserves its tax exemption, but a charity may relinquish tax exemption "so long as the charitable organization's fiduciaries can demonstrate that they made a good faith determination that loss of exemption was in the best interests of the organization." Marion R. Fremont-Smith, "Relinquishing Tax Exemption: State and Federal Constraints," presented at the Nonprofit Forum, New York City (Oct. 16, 1991).

25 Compare the new requirement that Forms 990-T, on which an exempt organization reports its unrelated business taxable income, are now subject to public disclosure. See Part III, below.

26 This topic was the subject of an Emerging Issues in Philanthropy Seminar, sponsored jointly by the Urban Institute's Center on Nonprofits and Philanthropy and by Harvard University's Hauser Center for Nonprofit Organizations (Cambridge, Mass., Nov. 30, 2000).

[27] See Eugene Steuerle, *When Nonprofits Conduct Exempt Activities as Taxable Enterprises*. Emerging Issues in Philanthropy Seminar No. 4 (The Urban Institute and The Hauser Center for Nonprofit Organizations), available at www.urban.org/url.cfm?ID=310254.

[28] Fremont-Smith identifies New York, California, Massachusetts, Ohio, Illinois, Minnesota, and New Hampshire. Marion R. Fremont-Smith, Governing Nonprofit Organizations: Federal and State Law and Regulation 316-17 (Cambridge, Mass.: Belknap Press of the Harvard University Press 2004).

[29] *Id*. at 317 (identifying California, Mississippi, Minnesota and Oregon).

[30] The webpage for this project is: www.uniformlaws.org/Committee.aspx?title=Protection%20of%20Charitable%20Assets%20Act.

[31] Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781 (1988); Maryland v. Joseph H. Munson Co., 467 U.S. 947 (1984); Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980).

[32] *Madigan v. Telemarketing Associates, Inc.*, 538 U.S. 600 (2003).

[33] Version v4.01 (May 2010) supports 37 jurisdictions (36 states and the District of Columbia), and includes supplemental forms required by 13 jurisdictions. Go to www.multistatefiling.org. This charitable-solicitation registration form resulted from a joint project of the National Association of State Charities Officials, the National Association of Attorneys General, and the Multi-State Filer Program, a consortium of nonprofits.

[34] Churches (and their integrated auxiliaries) and small public charities (normally, $5,000 or less in gross receipts) are exempt from having to apply for recognition of tax exemption under Code § 501(c)(3), and churches and most small public charities (normally, after a phase-in period for tax years ending in 2010, $50,000 or less in gross receipts) do not have to file the annual Form 990 or Form 990-EZ. The requirement to file an "e-postcard"—Form 990-N can be filed only online—applies to small charities, but not to churches. The new legislation additionally requires notification to the IRS when an exempt organization terminates its existence. See I.R.C. §§ 6033, 6652, and 7428, as amended by the Pension Protection Act of 2006 § 1223.

[35] The number of § 501(c)(3) exempt organizations appearing in the IRS Business Master File grew 350 percent from 1975 to 2001, and, as of 2004, stood at 1,010,365. See Joint Committee on Taxation, Historical Development and Present Law of the Federal Tax Exemption for Charities and Other Tax-Exempt Organizations (JCX-29-05, April 19, 2005) (citing to IRS Statistics of Income Division reports and the Business Master File). The 2009 IRS Data Book reports almost 1.2 million 501(c)(3) organizations. See IRS Data Book, 2009, Pub. 55B, Washington, D.C. (March 2010), at www.irs.gov/pub/irs-soi/09databk.pdf, at tables 24 and 25. (All private foundations, regardless of revenue level, must file, and the Pension Protection Act of 2006 requires supporting organizations and organizations with controlled entities to file Form 990 even if their gross receipts are less than $25,000.)

[36] To publicize the new filing requirement for small charities, the IRS identified and contacted 640,000 potential e-Postcard filers in its database; based on survey results and historical filing patterns, it expected 166,000 e-Postcard filers. *EO 2008 Annual Report and 2009 Work Plan* 12 (Nov. 2008), available at www.irs.gov/pub/irs-tege/finalannualrptworkplan11_25_08.pdf. Evidently, filings came in from organizations too small to have had to file an exemption application (and thus do not appear on the Business Master File). A 2010 national study found that the largest categories of nonfilers were human service organizations (29 percent), public and societal benefit organizations (22 percent), and education organizations (15 percent); volunteer-run organizations, often with changing addresses, predominated. Amy Blackwood and Katie L. Roeger, National Center for Charitable Statistics, *Here Today, Gone Tomorrow: A Look at Organizations that May Have Their Tax-Exempt Status Revoked* 2-3 (July 8, 2010), available at http://www.urban.org/publications/412135.html. For information identifying those organizations that automatically lost their exemption for failure to file—and providing a one-time opportunity for retroactive reinstatement—go to www.irs.gov/charities/article/0,,id=239696,00.html.

[37] Kirsten A. Grønbjerg, Kellie McGiverin-Bohan, Kristen Dmytryk, and Jason Simons, *IRS Exempt Status Initiative: Indiana Nonprofits and Compliance with the Pension Protection Act of 2006*, at p. 18, Indiana Nonprofits: Scope & Community Dimensions Briefing 2011: No. 1 (July 1, 2011 (revised July 29, 2011), available at http://www.indiana.edu/~nonprof/results/database/IRSRevocation.html. This report found that suffering the highest rates of revocation were cemeteries, advocacy organizations, and nonprofit business associations, while "[f]raternal organizations, veterans groups and other organizations with close connections to national groups were most successful in avoiding having their tax-exempt status revoked, suggesting that communications networks helped such groups comply with the law." *Id*. at 3.

[38] The exemption application, Form 1023, asked about organizational form and changes in organizational form should have been reported on the Form 990, but this process was unreliable. Note that the IRS did not redesign the simplified Form 990-EZ or the private foundation form, 990-PF.

[39] See Comment Letter from Evelyn Brody to IRS (Sept. 14, 2007), available at pages 24-28 of www.irs.gov/pub/irs-tege/redesignedform990commentsgeneral_9_14_07_i.pdf.

[40] See generally Elaine Waterhouse Wilson, *More Than You Ever Wanted to Know (or Tell!): Heightened Compensation Disclosure on the New Form 990*, 60 Exempt Org. Tax Rev. 273 (June 2008).

[41] Brody comment, *supra* note 39.

[42] Advisory Committee on Tax Exempt and Government Entities (ACT), *The Appropriate Role of the Internal Revenue Service with Respect to Tax-exempt Organization Good Governance Issues*, June 11, 2008, at 3, page 89 of the PDF available at www.irs.gov/pub/irs-tege/tege_act_rpt7.pdf.

[43] *Id*. at 29 (PDF at 115). The report cites to Dana Brakman Reiser, *There Ought to Be a Law: The Disclosure Focus of Recent Legislative Proposals for Nonprofit Reform*, 80 Chi.-Kent L. Rev. 559 (2005).

[44] For tax years beginning in 2008, an exempt organization with annual revenue of more than $25,000 and less than $1 million and assets of less than $2.5 million could file the simpler Form 990-EZ. For the 2009 year, the cutoff dropped to less than $500,000 of revenue and less than $1.25 million of assets. For 2010 and later, the lower end of the revenue breakpoint rises to more than $50,000 and the upper end drops to less than $200,000 (see note 36, above, for the Form 990-N "e-postcard") and less than $500,000 in assets. See Internal Revenue Service, Overview of Form 990 Redesign For Tax Year 2008 (Dec. 20, 2007), at 2, available at www.irs.gov/pub/irs-tege/overview__form__990__redesign.pdf.

[45] Rev. Proc. 2011-15 (Jan. 13, 2011), available at www.irs.gov/pub/irs-drop/rp-11-15.pdf.

[46] Note Urban Institute studies showing that a high percentage of Forms 990 are filled out by professionals. Fremont-Smith, *supra* note 28, at 457-58. Thus this is not a question of amateurs not knowing what they're doing.

[47] For example, in 2004, the Pennsylvania secretary of state filed suit against nonprofits and their officers for 1,200 false Forms 990's, which were also filed with the state. The 2007 settlements (available from the database in note 85, below) called for four national charities to pay $150,000 and to stop fund raising in Pennsylvania; the charities acknowledged that they did not report, among other things, H.R. Wilkinson as a key employee; related-party transactions; and relationships among officers, employees, directors or members.

[48] Advisory Committee on Tax Exempt and Government Entities (ACT), *Exempt Organizations: Group Exemptions—Creating a Higher Degree of Transparency, Accountability, and Responsibility*, June 15, 2011, starting at page 291 of the PDF available at www.irs.gov/pub/irs-tege/tege_act_rpt10.pdf.

[49] See generally Code § 6103.

[50] See generally Code § 6104.

[51] See Part III.E, below.

[52] See Brody & Tyler, *supra* note 17, at 597 nn.61 & 62 and accompanying text.

[53] Under federal election laws, because of the enhanced public interest in open and fair elections, generally all but the smallest donors and amounts contributed to federal political campaigns must be identified (some states have similar "clean government" rules); this result leads some strategists to

advise conducting issue-related advocacy through Internal Revenue Code § 501(c)(4) organizations. Issues relating to political activity and election law and regulation, including tax-law rules and filing requirements, are generally beyond the scope of this essay.

54 N.J. Stat. § 45:17A-24(f).

55 Go to www.guidestar.org. See also the Urban Institute's National Center for Charitable Statistics' website for filed Forms 990, along with statistical analysis, at http://nccs.urban.org.

56 Copies of Scanned EO Returns Available, www.irs.gov/charities/article/0,,id=150268,00.html.

57 See Cheryl Chasin, Debra Kawecki & David Jones, *Form 990*, Chapter G of FY2002 IRS EO Continuing Professional Education Text, available at www.irs.gov/pub/irs-tege/eotopicg02.pdf

58 For "EO Tax Law Training Articles" from FY1979 through FY2004, go to www.irs.gov/charities/article/0,,id=161088,00.html. These training materials are also available through a topical index, at www.irs.gov/pub/irs-tege/cpeindexbytopic.pdf.

59 The non-disclosure of the identity and contributions of donors to exempt organizations has made 501(c)(4) organizations, which can engage in political speech so long it is not their primary activity, a tempting vehicle for avoiding the disclosure requirements of federal election law. See the brief discussion in note 67, below, and accompanying text.

60 Joint Committee on Taxation, *General Explanation of Tax Legislation Enacted in the 109th Congress*. JCS-1-07, Jan. 17, 2007. Available at www.house.gov/jct/s-1-07.pdf.

61 The current version, revised in 2006, is available at www.irs.gov/pub/irs-pdf/f1023.pdf. It would be great if GuideStar could collect and post these once exemption is granted. The Forms 1023 (especially the ones filed electronically, when the IRS makes this process available) would provide an interesting database for study.

62 ACT, *supra* note 42, at 32-33 (pages 18-19 of the PDF) (footnotes omitted).

63 "Re-Engineering Form 1023 to Identify Problem Organizations Before Exemption Is Granted: Watch out for the "Penalties of Perjury" Statement" (November 3, 2004), at http://charitygovernance.blogs.com/charity_governance/2004/11/reengineering_f.html.

64 See United States v. Mubayyid, 658 F. 3d 35 (1st Cir. 2011), upholding convictions for filing false Forms 990 within the limitations period against defendant Mubayyid.

65 In an oral comment at the Senate Finance Committee Staff Roundtable held in Washington, D.C., on July 22, 2004 (which this author attended), attorney Douglas Mancino recommended that exempt organizations be required to report compensation on a more current basis, citing as precedent the quarterly filings required by the SEC of public companies.

66 IRS, *e-File for Charities and Nonprofits*, at www.irs.gov/efile/article/0,,id=108211,00.html.

67 *Id*.

68 See also GuideStar's service: "Gov@GuideStar offers a suite of tools designed specifically for government users of GuideStar data. These research and reporting tools enable government decision makers to perform critical tasks with greater ease and confidence."

69 2010 IRS Data Book tbl. 2 (released March 11, 2011), available at www.irs.gov/taxstats/article/0,,id=102174,00.html.

70 IRS Exempt Organizations FY 2010 Annual Report and FY 2011 Work Plan, Dec. 15, 2010, at 13, available at www.irs.gov/pub/irs-tege/fy2011_eo_workplan.pdf.

71 See Citizens United v. FEC, 130 S. Ct. 876 (2010); the proposed DISCLOSE Act (2010); and papers presented at "Nonprofit Speech in the 21st Century: Time for a Change?," the Annual Conference of the National Center on Philanthropy and the Law, New York University School of Law (New York City, Oct. 28-29, 2010).

72 Compare the constitutional limits on mandated speech, as set forth in the *Riley* trilogy discussed above. See generally Evelyn Brody, *Entrance, Voice, Exit: The Constitutional Bounds of the Right of Association*, 35 U.C.-Davis L. Rev. 821 (2002).

[73] U.S. Congress, Joint Committee on Taxation. 2000. *Study of Present-Law Taxpayer Confidentiality and Disclosure Provisions as Required by Section 3802 of the Internal Revenue Service Restructuring and Reform Act of 1998, Volume II: Study of Disclosure Provisions Relating to Exempt Organizations*. JCS-1-00, Jan. 28. Available at www.house.gov/jct/s-1-00vol2.pdf. Pages 89-90 of the report provide a background to Form 990 public disclosure.

[74] See Grant Williams, *Tax Report Shakes Up Charities*, Chron. of Philanthropy, March 9, 2000.

[75] Independent Sector Comments on Joint Committee on Taxation Study on Disclosure by Tax-exempt Organizations 3 (no date), available at www.independentsector.org/programs/gr/Comments.PDF.

[76] Separately, the Independent Sector "[took] issue with the JCT Report's characterization of tax exemption and the charitable deduction as government subsidies and the Report's view that the receipt of those subsidies creates a strong presumption in favor of increased disclosure." The Independent Sector pointed to "years of serious academic debate over whether the charitable exemption and deduction are appropriately viewed as special benefits or as structural necessities of a properly calculated income tax."

[77] *Id*. at 8. A few years later, the IRS included in its 2003 Exempt Organization Continuing Professional Education text a helpful set of Q&A's on how to fill out (and therefore read) the Form 990. Go to www.irs.gov/pub/irs-tege/eotopich03.pdf.

[78] Oral comment of Betsy Adler, then-chair of the Exempt Organizations Committee of the American Bar Association Tax Section, Senate Finance Committee Staff Roundtable (Washington, D.C., July 22, 2004) (author's notes).

[79] Evelyn Brody, *Agents Without Principals: The Economic Convergence of the Nonprofit and For-Profit Organizational Forms*, 40 N.Y.L. Sch. L. Rev. 457 (1996).

[80] Chasin, et al., *supra* note 56.

[81] For draft principles relating to enforcement, see § 610 (state attorneys general) and § 620 (Internal Revenue Service as charity regulator) in American Law Institute, Principles of the Law of Nonprofit Organizations (Tentative Draft No. 3, 2011) (approved through section 660).

[82] See Evelyn Brody, *Whose Public? Parochialism and Paternalism in State Charity Law Enforcement*, 79 Ind. L.J. 937 (2004).

[83] *Id*. Garry Jenkins conducted a survey, to which all but one of the states responded, finding that 74 percent of the states had one or fewer full-time-equivalent attorneys devoted to charitable oversight, and that 17 states assigned no attorneys to that function. Garry W. Jenkins, *Incorporation Choice, Uniformity, and the Reform of Nonprofit State Law*, 41 Ga. L. Rev. 1113, 1128-29 (2007). Legal staffs exceeding 2.5 FTE's are found in California (12), Connecticut (5), Illinois (7), Indiana (4), Massachusetts (6), Minnesota (5), New York (20.5), Ohio (10), Pennsylvania (12), and Texas (6). *Id*. at table 1.

[84] Recall Dr. Strangelove's complaint: "Deterrence is the art of producing, in the mind of the enemy, the fear to attack. The whole point of the Doomsday Machine is lost if you keep it a secret! Why didn't you tell the world, eh?!" See www.youtube.com/watch?v=cmCKJi3CKGE (The Doomsday Machine in *Dr. Strangelove*), at 3:50.

[85] Available at www.portal.state.pa.us/portal/server.pt/gateway/PTARGS_0_0_84867_0_0_43/http;/pubcontent.state.pa.us/publishedcontent/publish/cop_general_government_operations/dos/am/content/charities/consent_agreements_and_adjudications.html?qid=83559484&rank=10.

[86] Go to www.law.columbia.edu/center_program/ag/policy/CharitiesProj/.

[87] Go to www.law.columbia.edu/center_program/ag/policy/CharitiesProj/events/conference/ConferenceMar08.

[88] IRS Exempt Organizations FY 2010 Annual Report, *supra* note 69, at 6. See also the Government Accountability Office report for a 2005 House Ways and Committee Hearing, *Tax-Exempt Sector: Governance, Transparency, and Oversight Are Critical for Maintaining Public Trust* 17 (GAO-05-561T 2005) ("From fiscal year 2000 through 2004, IRS staffing for overseeing tax-exempt entities stayed relatively flat as measured by the number of FTE staff assigned to oversee tax-exempt entities.").

Despite its mind-boggling potential workload, TE/GE's enforcement activities reach only a small fraction. *EO Tax Journal* editor Paul Streckfus commented of the data on compliance reported on page 2 of EO's FY 2010 Annual Report: "The graph tells us that in FY 2009—of 16,960 returns examined—6,773 pertained to compliance checks and 10,187 pertained to traditional examinations." He adds: "[O]f those 10,187 returns examined, only 3,445 were Forms 990 and 990-EZ. The rest were mostly employment tax returns (4,582) and 990-Ts (962). . . . [M]ost audits involve more than one year, so an audit of one organization may involve multiple 990s. My best guess was that this translated to 1,723 organizations being subject to a traditional audit in FY 2009. . . . Regardless, we are talking a .002 audit rate, not 2%, but .2 %, pretty close to infinitesimal, especially when you exclude targeted audits [of colleges and hospitals]. . . ." *EO Tax Journal 2010-185* (Dec. 16, 2010).

89 It took a series of Freedom of Information Act lawsuits by Tax Analysts, publisher of *Tax Notes* magazine and the *Exempt Organization Tax Review*, to compel the IRS to release these items.

90 Fremont-Smith, *supra* note 28, at xiv.

91 Tax Analysts v. Internal Revenue Service, 350 F.3d 100, 104-05 (D.C. Cir. 2003). The court described the legislative history: "Congress passed the Tax Reform Act [of 1976] to protect taxpayer privacy while requiring the IRS to disclose written determinations. Our holding advances that purpose: the IRS must disclose determinations denying or revoking tax exemptions, but do so in redacted form, thus protecting the privacy of the organizations involved. The Treasury regulations, in contrast, keep denials and revocations completely secret, preventing the very monitoring of the IRS that the Tax Reform Act was designed to facilitate." *Id*. at 104.

92 Rev. Proc. 2011-9, 2011-2 I.R.B. 283 (Jan. 10, 2011), at § 8.02.

93 Because a closing agreement is a "bilateral agreement signed by both IRS and taxpayer," it was "not issued by" the IRS and thus was not subject to the clause of Code § 6104(a)(1)(a) making disclosable information issued by IRS with respect to organization's application for tax-exempt status. Tax Analysts v. Internal Revenue Service, 2004 U.S. Dist. LEXIS 28032, 93 AFTR 2d 1250, n.2 (D.D.C. 2004), *citing to prior decision at* 53 F. Supp. 2d 449, 452-53 (D.D.C. 1999). This litigation ended when the D.C. Circuit upheld the district court's refusal to compel the Service to disclose the closing agreement referred to in a press release issued by the Christian Broadcasting network.

94 The IRS Chief Counsel's office notified its attorneys of the procedures to follow "when advising Internal Revenue Service employees concerning a determination that publicizing a closing agreement between a taxpayer and the Internal Revenue Service advances tax administration." When the parties agree that "public disclosure of a closing agreement (or any of its terms)" is warranted, in general, it would be through an IRS news release, or a jointly authored statement, which would be released at the time the closing agreement is executed." Chief Counsel Notice CC-2008-014 (April 14, 2008).

95 Determination Letter 20044033E (April 5, 2004) (released Oct. 18, 2004).

96 Author's estimate. The FY 2010 Annual Report makes no mention of either revocation or denial numbers, nor of closing agreements. In earlier years, the IRS finalized 78 closing agreements with § 501(c) organizations in fiscal year 1999; 72 in fiscal year 1998; and 65 in fiscal year 1997. See Joint Comm. on Taxation, *Study of Present-Law Taxpayer Confidentiality and Disclosure Provisions as Required by Section 3802 of the Internal Revenue Service Restructuring and Reform Act of 1998, Volume II: Study of Disclosure Provisions Relating to Tax-Exempt Organizations* 38 n.97 (JCS-1-00, Jan. 28, 2000), available at www.house.gov/jct/s-1-00vol2.pdf (citing the IRS Exempt Organization Return Inventory and Classification System). In fiscal year 1999, the IRS revoked the exempt status of 97 organizations, of which 20 were exempt under § 501(c)(3); in fiscal year 1998, the IRS revoked the exemption of 97 organizations, 38 of which were described in § 501(c)(3); and in fiscal year 1997, the IRS revoked the exemption of 89 organizations, 38 described in § 501(c)(3). *Id*. at 27 n.56 (citing the IRS Audit Information Management System, Tables 41 and 42).

97 ACT, *supra* note 42, at 34, n.116 (page 120 of PDF).

98 Go to www.irs.gov/app/picklist/list/WrittenDeterminations.html. While the website makes it possible to sort determination letters by something called the UIL number, the letters are coded in obscure and

unhelpful ways. For example, UIL 501.06-02 begins helpfully, under Code section 501, but "06-02" means "Conduct of Business for Profit." This category is to be distinguished from "501.06-02 Conduct of Business for Profit." And what to make of "501.03-30 Organizational and Operational Tests" and "Profit v Not for Profit"? Moreover, categorical assignments do not seem to be made with great care. For example, Determination Letter 200634046 (Aug. 25, 2006), which involves a nonprofit corporation that lost its exemption on grounds of private inurement, is filed under "501.03-04 Unincorporated Associations." Of course, no single category is going to be helpful when the reasons for revocation are manifold.

[99] Leading practitioner and author Bruce Hopkins maintains a collection of citations, organized by the reason for denial or revocation (or for continued exemption), at www.nonprofitlawcenter.com/resources.php.

[100] In the case of private rulings, the redactors, in the first instance, are the requesting taxpayers themselves.

[101] In comments on the Joint Committee's 2000 disclosure study, the Independent Sector "strongly oppose[d]," among other JCT recommendations, those that would require the Service to make unredacted disclosure of written determinations and related file documents, closing agreements and audit results, exemption applications at the time of filing, and Forms 990-T (for its unrelated business taxable income) and 1120 (of any affiliated organizations of tax-exempt organizations). The Independent Sector supported, assuming technical refinement, giving greater flexibility for IRS information sharing with state charity regulators, a proposal enacted in the Pension Protection Act, as described below.

[102] Determination Letter 2010-52-022 (release date Oct. 5, 2010).

[103] For example, in a 2008 letter denying recognition of tax-exempt status under § 501(c)(3), the IRS set out "12 specific conditions" for recognizing an LLC under the organizational test of section 501(c)(3); while the letter cited no authority for these conditions, they appear in McCray & Ward L. Thomas, *Limited Liability Companies as Exempt Organizations—Update*, IRS Exempt Organizations Continuing Professional Education Text for FY 2001, at www.irs.gov/eo.

[104] ACT Report, *supra* note 42, at 3 (page 89 of the PDF).

[105] *Id*. at 33 (page 119 of the PDF).

[106] *Id*. at 3 (page 89 of the PDF).

[107] Rev. Rul. 2006-27; 2006-1 C.B. 915.

[108] I.R.C. § 501(q), added by the Pension Protection Act of 2006.

[109] See also Rev. Proc. 2011-9, *supra* note 91, at § 8.03 (citation omitted; emphasis added): "The Service may notify the appropriate State officials of a refusal to recognize an organization as tax-exempt under § 501(c)(3). The notice to the State officials may include a copy of a proposed or final adverse determination letter or ruling the Service issued to the organization. In addition, *upon request by the appropriate State official*, the Service may make available for inspection and copying the exemption application and other information relating to the Service's determination on exempt status." Separately, the IRS may disclose to appropriate state officials "the name, address, and identification number of any organization that has applied for recognition of exemption under section 501(c)(3)." *Id*. at 8.04. In calendar year 2009, the Service made 334 disclosures to state officials under § 6104(c). Internal Revenue Service, *Disclosure Report for Public Inspection Pursuant to Internal Revenue Code Section 6103(p)(3)(C)*, at 3, published by the Staff of the Joint Committee on Taxation (JCX-25-10) (April 15, 2010), available at www.jct.gov/publications.html?func=startdown&id=3680.

[110] See Notice of Prop. Rulemaking, *Disclosure of Information to State Officials Regarding Tax-Exempt Organizations*, REG-140108-08, 76 Fed. Reg. 13932-13937 (Mar. 15, 2011).

[111] Moreover, the comment letter states: "Those states that have entered into such agreements have limited their receipt of information to paper documents to avoid the substantial burdens of maintaining safeguards required for the maintenance of electronic data, since an audit of the statewide data center would be required. It is truly regrettable that [appropriate state officers] find themselves having to forego the efficiencies and other benefits of electronic information technology, especially as they strive to modernize their own systems."

[112] Staff of the U.S. Senate Finance Committee, *Discussion Draft for Hearing on Charity Oversight and Reform: Keeping Bad Things from Happening to Good Charities* (June 22, 2004), available at http://finance.senate.gov/imo/media/doc/062204stfdis.pdf.

[113] Available at www.nonprofitpanel.org. See also Part IV, below.

[114] These letters and, often, the responses, can be found in the press releases pages at http://grassley.senate.gov.

[115] See generally Transcript of Remarks of Dean Zerbe, CLE Program on Representing and Managing Tax-Exempt Organizations, Georgetown University Law Center, April 24, 2008, in 13 EO Tax J. 38, 39 (July/August 2008) (setting forth reflections on the congressional oversight process and goals by a former key tax aid to Senator Grassley).

[116] See "Review of Media-Based Ministries," Memorandum to Senator Grassley from Theresa Pattara and Sean Barnett 16-32 (Jan. 6, 2011), *available through* http://grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=30359. Attorney Marcus Owens, on behalf of one of the target churches, had written to Senators Baucus and Grassley on November 27, 2007: "If a [Senate] subpoena were issued, the Church and its members could be afforded certain confidentiality protections, which, like the privacy protections of section 6103, would reduce the likelihood of any public discourse regarding its religious beliefs." This letter is available on LEXIS in the Fedtax Library, Tax Notes Today file, as *Attorney Urges Grassley to Defer to IRS on Ministry Inquiry*, 2007 TNT 235-29, Dec. 6, 2007.

[117] Panel on the Nonprofit Sector, *Principles for Good Governance and Ethical Practice: A Guide for Charities and Foundations*, Principle #7 (Oct 2007), available at www.nonprofitpanel.org/report/principles/Principles_Guide.pdf. See generally John Tyler's forthcoming monograph, "Philanthropic 'Transparency': The Good, the Bad and the Useful" (Philanthropy Roundtable, Mar. 4, 2011 draft).

[118] Go to www.fordfoundation.org/about/governance. Annual reports are available at www.fordfoundation.org/about/annualreports, and its latest financial statement is available at www.fordfoundation.org/about/financials.

[119] Only Princeton's webpage survives. See www.princeton.edu/robertson.

[120] See the governance material posted at www.si.edu/about/regents.

[121] See, for example, the Getty's governance page at www.getty.edu/about/governance/. The posted material includes the Getty's mission statement, trust indenture, bylaws, board of trustees, board committees, trust officers and program directors, policies, financial information, annual and other reports, and the California attorney general's 2006 investigative report and the 2008 closure of the state's monitoring process.

[122] Available at http://philanthropy.com/free/update/update.htm.

[123] Available at www.nonprofitissues.com.

[124] Available at http://lawprofessors.typepad.com/nonprofit/.

[125] Available at www.charitygovernance.com.

[126] See the collections in Marion R. Fremont-Smith and Andras Kosaras, *Wrongdoing by Officers and Directors of Charities: a Survey of Press Reports 1995-2002*, 42 Exempt Org. Tax Rev. 25 (Oct. 2003); Marion R. Fremont-Smith, *Pillaging of Charitable Assets: Embezzlement and Fraud*, 46 Exempt Org. Tax Rev. 333 (Dec. 2004).

[127] See the Implementation Guide available at www.give.org. As explained in the preface to the Standards: "The overarching principle of the BBB Wise Giving Alliance Standards for Charity Accountability is full disclosure to donors and potential donors at the time of solicitation and thereafter. However, where indicated, the standards recommend ethical practices beyond the act of disclosure in order to ensure public confidence and encourage giving. As voluntary standards, they also go beyond the requirements of local, state and federal laws and regulations." Note that I have served on the board of the BBB Wise Giving Alliance since 2006.

[128] See, e.g., the Evangelical Council for Financial Accountability, "Seven Standards of Responsible Stewardship," www.ecfa.org/Standard 5, titled Transparency, reads: "Every member shall provide a copy of its current financial statements upon written request and provide other disclosures as the law may require. The financial statements required to comply with Standard 3 must be disclosed under this Standard. A member must provide a report, upon written request, including financial information on any specific project for which has sought or is seeking gifts."

[129] The most common reason for termination was failure to submit renewal information. Go to www.ecfa.org/FormerMembers.aspx.

[130] Council on Foundation, *Council Restores Membership of Getty Trust*, CFSource, Volume III, Issue 10 (May 2006), available at www.cof.org/Council/newsletter.cfm?ItemNumber=4285&navItemNumber=2499. Note that the press release is no longer posted on the Council's website!

[131] Panel on the Nonprofit Sector, *supra* note 117.

[132] See also Commissioner Shulman's Nov. 28, 2008 talk to Independent Sector: "We're . . . taking other proactive action like starting to check up on young exempt organizations to ensure that after a few years in operation they are in fact fulfilling an exempt purpose." Speech available at www.irs.gov/newsroom/article/0,,id=188567,00.html.

[133] Go to www.irs.gov/pub/irs-tege/governance_check_sheet.pdf.

[134] Go to www.irs.gov/pub/irs-tege/governance_guide_sheet.pdf. Anecdotally, at least some agents have begun their examinations by asking the organizations to fill out the governance check sheet.

[135] Go to www.irs.gov/charities/article/0,,id=216068,00.html.

[136] Go to www.irs.gov/charities/article/0,,id=178221,00.html.

[137] Go to www.irs.gov/pub/irs-tege/governance_practices.pdf

[138] Thomas Silk, *Good Governance Practices for 501(c)(3) Organizations: Should the IRS Become Further Involved?*, 57 Exempt Org. Tax Rev. 183, 183 (Aug. 2007), and, for different audiences, 107 J. Tax'n 45 (June 2007) and 10 Int'l J. Not-for Profit Law (Dec. 2007).

[139] Bonnie Brier, "The New Governance Project of the Exempt Organizations Division of the Internal Revenue Service," paper presented at the Nonprofit Forum (New York City, Feb. 24, 2010).

[140] Brody, note 39 *supra*.

Appendix

SUMMARY AND GOVERNANCE PAGES OF CORE FORM OF REDESIGNED FORM 990 (2007 DRAFT AND 2008 FINAL VERSIONS)

Form **990**

Department of the Treasury
Internal Revenue Service (77)

Return of Organization Exempt From Income Tax

Under section 501(c), 527, or 4947(a)(1) of the Internal Revenue Code (except black lung benefit trust or private foundation)

▶ The organization may have to use a copy of this return to satisfy state reporting requirements.

OMB No. 1545-0047

20XX

Open to Public Inspection

Draft as of 06/14/2007

A For the 20XX calendar year, or tax year beginning , 20XX, and ending , 20

B Check if applicable:
- ☐ Address change
- ☐ Name change
- ☐ Initial return
- ☐ Termination
- ☐ Amended return
- ☐ Application pending

Please use IRS label or print or type. See Specific Instructions.

C Name of organization

Number and street (or P.O. box if mail is not delivered to street address) | Room/suite

City or town, state or country, and ZIP + 4

D Employer identification number

E Telephone number ( )

F Name and address of Principal Officer:

G Website: ▶

H Enter amount of gross receipts $

I Accounting method: ☐ Cash ☐ Accrual ☐ Other ▶

J Books
In care of
Located at
Telephone number ( )

K Organization type (check only one) ▶ ☐ 501(c) ( ) ◀ (insert no.) ☐ 4947(a)(1) or ☐ 527

L Year of Formation:

M State of legal domicile ▶

Part I Summary

Activities & Governance

1 Briefly describe the organization's mission: ____________________

2 List the organization's three most significant activities and the activity codes (Part IX):
a ________ Code ________ b ________ Code ________ c ________ Code ________

3	Enter the number of members of the governing body (Part III, line 1a)	3	
4	Enter the number of independent members of the governing body (Part III, line 1b)	4	
5	Enter the total number of employees (Part VIII, line 9a)	5	
6	Enter the number of individuals receiving compensation in excess of $100,000 (Part II, line 2)	6	
7	Enter the highest compensation amount reported on Part II, Section A (sum of columns D and E)	7	
8a	Enter officer, director, trustee, and other key employee compensation (Part V, line 5, column (B))	8a	
b	Divide line 8a by line 17 ________ %		
9a	Enter total gross unrelated business revenue from Part IV, line 14, column (C)	9a	
b	Enter net unrelated business taxable income from Form 990-T, line 34	b	
10	Check this box ☐ if the organization discontinued its operations or disposed of more than 25% of its assets and attach Schedule N.		

			Amount	% of Total
Revenues	11	Contributions and grants (Part IV, line 1g, column (A))		
	12	Program service revenue (Part IV, line 2g, column (A))		
	13	Membership dues and assessments (Part IV, line 3, column (A))		
	14	Investment income (Part IV lines 4, 5, 6, 8, 10d)		
	15	Other revenue (Part IV, lines, 3, 7, 9d, 11c, 12c, and 13e, column (A))		
	16	Total revenue add lines 11 through 15 (must equal Part IV, line 14, column (A))		100%
Expenses	17	Program service expense (Part V, line 24, column (B))		
	18	Management and general expenses (Part V, line 24, column (C))		
	19a	Fundraising expenses (Part V, line 24, column (D))		
	19b	Percentage of contributions (divide line 19a by line 11) ____%		
	20	Total expenses (must equal Part V, line 24, column (A))		100%
	21	Net income (line 16 minus line 20)		

			Beginning of Year	End of Year
Net Assets or Fund Balance	22	Total assets (Part VI, line 17)		
	23	Total liabilities (Part VI, line 27)		
	24a	Net assets or fund balances line 22 minus line 23		
	24b	Total expenses (line 20) as percentage of net assets (line 24a) %)		

Gaming & Fundraising	(I) Gross Revenue	(II) Expenses	(III) Net to organization	(IV) Divide column (III) by column (I)
25 Gaming	(Schedule G, Part II, line 1 column (d))	(Schedule G, Part III, line 7)	(Schedule G, Part II, line 8)	%
26 Fundraising (other than gaming)	(Schedule G, Part I, line 1b column (III) total)	(Schedule G, Part I, line 1b column (IV) total)	(Schedule G, Part I, line 1b column (V) total)	%

For Privacy Act and Paperwork Reduction Act Notice, see the separate instructions. Cat. No. 11282Y Form **990** (20XX)

Form 990 (20XX) Page 4

Part III Statements Regarding Governance, Management, and Financial Reporting

			Yes	No
1a	Enter the number of members of the governing body 1a			
b	Enter the number of independent members of the governing body 1b			
2	Did the organization make any significant changes to its organizing or governing documents? If "Yes", briefly describe these changes.	2		
3a	Does the organization have a written conflict of interest policy?	3a		
b	If "Yes," how many transactions did the organization review under this policy and related procedures during the year? 3b			
4	Does the organization have a written whistleblower policy?	4		
5	Does the organization have a written document retention and destruction policy?	5		
6	Does the organization contemporaneously document the meetings of the governing body and related committees through the preparation of minutes or other similar documentation?	6		
7a	Does the organization have local chapters, branches or affiliates?	7a		
b	If yes, does the organization have written policies and procedures governing the activities of such chapters, affiliates and branches to ensure their operations are consistent with the organization's? . . .	7b		
8	Does an officer, director, trustee, employee or volunteer prepare the organization's financial statements? Indicate whether an independent accountant provides any of the following services: Compilation ☐ Review ☐ Audit ☐	8		
9	Does the organization have an audit committee?	9		
10	Did the organization's governing body review this Form 990 before it was filed?	10		

11 How do you make the following available to the public? Check all that apply.

Organizing/Governing Documents	☐ n/a	☐ website	☐ other website	☐ office	☐ other	________
Conflict of Interest Policy	☐ n/a	☐ website	☐ other website	☐ office	☐ other	________
Form 990	☐ n/a	☐ website	☐ other website	☐ office	☐ other	________
Form 990-T	☐ n/a	☐ website	☐ other website	☐ office	☐ other	________
Financial Statements	☐ n/a	☐ website	☐ other website	☐ office	☐ other	________
Audit Report	☐ n/a	☐ website	☐ other website	☐ office	☐ other	________

12 List the states with which a copy of this return is filed:

Form 990 (20XX)

Form **990**

Department of the Treasury
Internal Revenue Service

Return of Organization Exempt From Income Tax

Under section 501(c), 527, or 4947(a)(1) of the Internal Revenue Code (except black lung benefit trust or private foundation)

► The organization may have to use a copy of this return to satisfy state reporting requirements.

OMB No. 1545-0047

2008

Open to Public Inspection

A For the 2008 calendar year, or tax year beginning , 2008, and ending , 20

B Check if applicable:
☐ Address change
☐ Name change
☐ Initial return
☐ Termination
☐ Amended return
☐ Application pending

Please use IRS label or print or type. See Specific Instructions.

C Name of organization

Doing Business As

Number and street (or P.O. box if mail is not delivered to street address) | Room/suite

City or town, state or country, and ZIP + 4

D Employer identification number

E Telephone number ( )

G Gross receipts $

F Name and address of principal officer:

H(a) Is this a group return for affiliates? ☐ Yes ☐ No

H(b) Are all affiliates included? ☐ Yes ☐ No
If "No," attach a list. (see instructions)

I Tax-exempt status: ☐ 501(c) ( ) ◄ (insert no.) ☐ 4947(a)(1) or ☐ 527

J Website: ►

H(c) Group exemption number ►

K Type of organization: ☐ Corporation ☐ Trust ☐ Association ☐ Other ►

L Year of formation:

M State of legal domicile:

Part I Summary

Activities & Governance

1 Briefly describe the organization's mission or most significant activities:

2 Check this box ► ☐ if the organization discontinued its operations or disposed of more than 25% of its assets.

3	Number of voting members of the governing body (Part VI, line 1a)	3	
4	Number of independent voting members of the governing body (Part VI, line 1b)	4	
5	Total number of employees (Part V, line 2a)	5	
6	Total number of volunteers (estimate if necessary)	6	
7a	Total gross unrelated business revenue from Part VIII, line 12, column (C)	7a	
b	Net unrelated business taxable income from Form 990-T, line 34	7b	

			Prior Year	Current Year
Revenue	8	Contributions and grants (Part VIII, line 1h)		
	9	Program service revenue (Part VIII, line 2g)		
	10	Investment income (Part VIII, column (A), lines 3, 4, and 7d)		
	11	Other revenue (Part VIII, column (A), lines 5, 6d, 8c, 9c, 10c, and 11e)		
	12	Total revenue—add lines 8 through 11 (must equal Part VIII, column (A), line 12)		
Expenses	13	Grants and similar amounts paid (Part IX, column (A), lines 1–3)		
	14	Benefits paid to or for members (Part IX, column (A), line 4)		
	15	Salaries, other compensation, employee benefits (Part IX, column (A), lines 5–10)		
	16a	Professional fundraising fees (Part IX, column (A), line 11e)		
	b	Total fundraising expenses (Part IX, column (D), line 25) ►		
	17	Other expenses (Part IX, column (A), lines 11a–11d, 11f–24f)		
	18	Total expenses. Add lines 13–17 (must equal Part IX, column (A), line 25)		
	19	Revenue less expenses. Subtract line 18 from line 12		
			Beginning of Year	**End of Year**
Net Assets or Fund Balances	20	Total assets (Part X, line 16)		
	21	Total liabilities (Part X, line 26)		
	22	Net assets or fund balances. Subtract line 21 from line 20		

Part II Signature Block

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. Declaration of preparer (other than officer) is based on all information of which preparer has any knowledge.

Sign Here

► Signature of officer | Date

► Type or print name and title

Paid Preparer's Use Only

Preparer's signature ► | Date | Check if self-employed ► ☐ | Preparer's identifying number (see instructions)

Firm's name (or yours if self-employed), address, and ZIP + 4 ► | EIN ► | Phone no. ► ( )

May the IRS discuss this return with the preparer shown above? (see instructions) ☐ Yes ☐ No

For Privacy Act and Paperwork Reduction Act Notice, see the separate instructions. Cat. No. 11282Y Form 990 (2008)

Form 990 (2008) Page 6

Part VI **Governance, Management, and Disclosure** *(Sections A, B, and C request information about policies not required by the Internal Revenue Code.)*

Section A. Governing Body and Management

For each "Yes" response to lines 2–7b below, and for a "No" response to lines 8 or 9b below, describe the circumstances, processes, or changes in Schedule O. See instructions.

			Yes	No
1a	Enter the number of voting members of the governing body 1a			
b	Enter the number of voting members that are independent 1b			
2	Did any officer, director, trustee, or key employee have a family relationship or a business relationship with any other officer, director, trustee, or key employee?	2		
3	Did the organization delegate control over management duties customarily performed by or under the direct supervision of officers, directors or trustees, or key employees to a management company or other person?	3		
4	Did the organization make any significant changes to its organizational documents since the prior Form 990 was filed?	4		
5	Did the organization become aware during the year of a material diversion of the organization's assets?	5		
6	Does the organization have members or stockholders?	6		
7a	Does the organization have members, stockholders, or other persons who may elect one or more members of the governing body?	7a		
b	Are any decisions of the governing body subject to approval by members, stockholders, or other persons?	7b		
8	Did the organization contemporaneously document the meetings held or written actions undertaken during the year by the following:			
a	The governing body?	8a		
b	Each committee with authority to act on behalf of the governing body?	8b		
9a	Does the organization have local chapters, branches, or affiliates?	9a		
b	If "Yes," does the organization have written policies and procedures governing the activities of such chapters, affiliates, and branches to ensure their operations are consistent with those of the organization?	9b		
10	Was a copy of the Form 990 provided to the organization's governing body before it was filed? All organizations must describe in Schedule O the process, if any, the organization uses to review the Form 990	10		
11	Is there any officer, director or trustee, or key employee listed in Part VII, Section A, who cannot be reached at the organization's mailing address? *If "Yes," provide the names and addresses in Schedule O*	11		

Section B. Policies

			Yes	No
12a	Does the organization have a written conflict of interest policy? *If "No," go to line 13*	12a		
b	Are officers, directors or trustees, and key employees required to disclose annually interests that could give rise to conflicts?	12b		
c	Does the organization regularly and consistently monitor and enforce compliance with the policy? *If "Yes," describe in Schedule O how this is done*	12c		
13	Does the organization have a written whistleblower policy?	13		
14	Does the organization have a written document retention and destruction policy?	14		
15	Did the process for determining compensation of the following persons include a review and approval by independent persons, comparability data, and contemporaneous substantiation of the deliberation and decision:			
a	The organization's CEO, Executive Director, or top management official?	15a		
b	Other officers or key employees of the organization?	15b		
	Describe the process in Schedule O. (see instructions)			
16a	Did the organization invest in, contribute assets to, or participate in a joint venture or similar arrangement with a taxable entity during the year?	16a		
b	If "Yes," has the organization adopted a written policy or procedure requiring the organization to evaluate its participation in joint venture arrangements under applicable federal tax law, and taken steps to safeguard the organization's exempt status with respect to such arrangements?	16b		

Section C. Disclosure

17 List the states with which a copy of this Form 990 is required to be filed ▶ ____

18 Section 6104 requires an organization to make its Forms 1023 (or 1024 if applicable), 990, and 990-T (501(c)(3)s only) available for public inspection. Indicate how you make these available. Check all that apply.

☐ Own website ☐ Another's website ☐ Upon request

19 Describe in Schedule O whether (and if so, how), the organization makes its governing documents, conflict of interest policy, and financial statements available to the public.

20 State the name, physical address, and telephone number of the person who possesses the books and records of the organization: ▶ ____

Form 990 (2008)