

High-Stakes Word Search: Ensuring Fair and Effective IRS Centralization in Tax Exemption

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TABLE OF CONTENTS

Introduction.....	260
I. Background: The Determinations Process and IRS Targeting.....	263
A. The Tax-Exempt Determinations Process.....	266
1. Interpretation Issues in the Determinations Process	269
2. Social Welfare Organizations in the Wake of <i>Citizens United</i>	272
3. Benefits of Centralization	274
B. Examples of Acceptable Exempt Organization Targeting.....	275
1. Credit Counseling Organizations.....	276
2. Donor-Advised Funds.....	278
II. The Tea Party Scandal	280
A. Justification for Targeting by the IRS.....	283
B. Propriety of Tea Party Targeting	284
1. The Section 501/527 Gray Area.....	285
2. The Structure of the Tea Party	287
III. Curative Approaches to the Political Spending Problem....	289
A. The IRS's Stopgap Solution.....	290
B. Avoiding Inappropriate Criteria.....	293
C. An Argument for IRS Targeting Through the Audit Process	294
1. Open-Door Determinations and Targeting Through Auditing.....	295
2. Organizational Compliance	297
a. Promoting Compliance Through Third Parties	298
b. Strategic Publicity.....	299
Conclusion	301

INTRODUCTION

On May 10, 2013, Lois Lerner, then director of the Internal Revenue Service (IRS) Exempt Organizations unit, gave a speech revealing that the IRS had recently decided to review some organizations' applications for tax exemption with heightened scrutiny.¹ Lerner admitted that certain organizations were chosen for "centralization"—a process of assigning applications to a specialist who is better able to handle issues raised in the application—based on the presence of certain identifying terms in their applications, including "Tea Party" and "Patriots."² The purpose of centralization was to treat these applications consistently, but the process brought added delay in reaching a decision and introduced heightened scrutiny into the operations of these organizations.³ In her speech, "Ms. Lerner defended the practice of centralization, but admitted that referring cases for centralization based on their names and perceived political affiliations was wrong."⁴

Many in the political world shared Lerner's belief that the process, as applied in the context of Tea Party applications, was improper.⁵ Although the Acting Commissioner of the IRS claimed

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1. Lerner, in response to a request for updated information on the IRS's review of Tea Party organizations, admitted that "many [organizations] indicated that they were going to be involved in advocacy work." *Transcript of the May 10, 2013, ABA Tax Section's Exempt Organizations Committee Meeting*, THE EXEMPT ORG. TAX REV., Aug. 2013, at 119, 126 [hereinafter *ABA Transcript*]. Lerner continued by noting that the IRS's "line people in Cincinnati that handle the applications did what we call centralization of these cases. They centralized work on these in one particular group." *Id.* Steven Miller, the acting IRS commissioner, admitted that the question asked of Lerner was planted, "which gave Lerner the leeway to put the scandal into the public domain before the release of the TIGTA Report." *Washington Alert—Part I*, 59 FED. TAXES WEEKLY ALERT, May 23, 2013, art. 19. *See also* TREASURY INSPECTOR GENERAL FOR TAX ADMIN., INAPPROPRIATE CRITERIA WERE USED TO IDENTIFY TAX-EXEMPT APPLICATIONS FOR REVIEW 2 (May 14, 2013) [hereinafter *TIGTA Report*].

2. *See* Lily Kahng, *The IRS Tea Party Controversy and Administrative Discretion*, 99 CORNELL L. REV. ONLINE 41, 49 (2013); *see also* *Questions and Answers on 501(c) Organizations*, INTERNAL REVENUE SERV. (May 15, 2013), [http://www.irs.gov/uac/Newsroom/Questions-and-Answers-on-501\(c\)-Organizations](http://www.irs.gov/uac/Newsroom/Questions-and-Answers-on-501(c)-Organizations), archived at <http://perma.cc/6L48-HP9X>.

3. *See ABA Transcript, supra* note 1, at 119.

4. *More Details Emerge on IRS's Targeting of Conservative Groups Applying for Exempt Status*, 59 FED. TAXES WEEKLY ALERT, May 16, 2013, art. 2 [hereinafter *More Details Emerge on IRS's Targeting*].

5. Donald Tobin explained:

that the agency's actions "were in no way due to any political or partisan motivation,"⁶ many began to suspect that this was not true.⁷ Senate Finance Committee Chairman Max Baucus voiced his intention to subject the IRS to a full investigation, and Attorney General Eric Holder called for a criminal investigation by the FBI.⁸ On May 14—a mere four days after Lerner's speech—the Treasury Inspector General for Tax Administration released its report on the scandal, finding that the IRS had used "inappropriate criteria" in selecting certain applications for centralization.⁹

This Comment examines the methods employed by the IRS in selecting tax-exemption applications for centralized review.¹⁰ The IRS's resources are limited,¹¹ and in the pursuit of efficiency and

Some tax-exempt groups and politicians argued that the IRS improperly targeted conservative, politically active tax-exempt organizations for scrutiny, while others argued that the IRS had failed to enforce restrictions in the IRC regulating the political activity of tax-exempt organizations. The IRS's attempt—and some say ineptitude—in enforcing the code's political campaign restrictions caused a political crisis that rocked America's trust in the nonpartisan enforcement of the tax laws.

Donald B. Tobin, *The 2013 IRS Crisis: Where Do We Go From Here?*, 142 TAX NOTES 1120, 1120 (Mar. 10, 2014).

6. *More Details Emerge on IRS's Targeting*, *supra* note 4 (quoting Steven T. Miller, *IRS: We Should Have Done a Better Job*, USA TODAY (May 13, 2013, 9:13 PM), <http://www.usatoday.com/story/opinion/2013/05/13/irs-exempt-organizations-editorials-debates/2156991/>, archived at <http://perma.cc/KEZ3-WKB5>).

7. Kahng, *supra* note 2, at 42 ("A media firestorm ensued with fevered speculation about a hidden political agenda extending all the way to the White House.").

8. *Id.* The FBI investigation has since ended, with a finding that no laws were broken by the IRS. Steve Benen, *So Long, IRS 'Scandal'*, MSNBC (Jan. 14, 2014, 6:40 PM), <http://www.msnbc.com/rachel-maddow-show/so-long-irs-scandal>, archived at <http://perma.cc/667N-HR7Y>.

9. *See* TIGTA Report, *supra* note 1, at 43. The TIGTA report "has been criticized as sloppy and incomplete. It has since come to light that the IRS targeted conservative political groups, liberal political groups, and a variety of other groups for heightened scrutiny, although the TIGTA Report omitted these facts." Kahng, *supra* note 2, at 43.

10. Applications seeking recognition of exemption for social welfare organizations are a narrow subset of the work the IRS does and must be distinguished from the determinations and audit process that many readers are familiar with through the individual tax return system, which in many ways is quite different. *See infra* Part III.C.

11. The National Taxpayer Advocate, in its 2012 Annual Report to Congress, argued:

The significant and chronic underfunding of the IRS poses one of the most significant long-term risks to tax administration today. Because of funding shortages, the IRS is unable to answer millions of taxpayer

consistency, the IRS sometimes filters out applications that present a need for greater scrutiny.¹² However, the selection of specific applications for heightened scrutiny review brings with it the risk that the public will take issue with the selection methods used. This risk becomes even greater when the IRS examines social welfare organizations for impermissible levels of political campaign intervention.¹³ Any suggestion that the IRS is acting with political bias not only goes against its mission,¹⁴ but also threatens the public's trust.¹⁵ If it is proper for the IRS to target for centralized review similar organizations' tax exemption applications, it must do so in a way that minimizes the risk that the public will view it as acting with partisan motives.¹⁶ These risks can be reduced if the IRS adopts an open-door determinations process, allowing organizations to self-certify that they qualify for exemption, and moves its centralization practices exclusively to the audit process.¹⁷

telephone calls or timely process letters; the tax gap (*i.e.*, the amount of tax due but uncollected) stands at nearly \$400 billion each year. NAT'L TAXPAYER ADVOCATE, 2012 ANNUAL REPORT TO CONGRESS: EXECUTIVE SUMMARY 5 (2012), available at <http://www.taxpayeradvocate.irs.gov/userfiles/file/2012-Annual-Report-to-Congress-Executive-Summary.pdf>, archived at <http://perma.cc/ZCB2-DA5P>.

12. See *infra* Part II.A.

13. See *infra* Part I.A.2. "Political campaign intervention" refers to the subcategory of political spending that must not become an organization's primary activity in order to qualify for exemption as a social welfare organization. See *infra* Part I.A.1.

14. As stated on the IRS website, the IRS's mission is to "[p]rovide America's taxpayers top quality service by helping them understand and meet their tax responsibilities and enforce the law with integrity and fairness to all," going on to state that "[t]he IRS[s] role is to help the large majority of compliant taxpayers with the tax law, while ensuring that the minority who are unwilling to comply pay their fair share." *The Agency, its Mission, and Statutory Authority*, INTERNAL REVENUE SERV., <http://www.irs.gov/uac/The-Agency,-its-Mission-and-Statutory-Authority>, archived at <http://perma.cc/4578-BVGK> (last updated Feb. 12, 2014) [hereinafter *The Agency*].

15. Max Baucus, Chairman of the Senate Finance Committee, commented that the scandal was "an outrageous abuse of power and a breach of the public's trust." *More Details Emerge on IRS's Targeting*, *supra* note 4.

16. The author recognizes that use of the term "targeting" carries certain negative connotations and could be read to suggest that there was malicious intent behind selecting certain applications for further review. As used in this Comment, however, the term is meant in a neutral sense and is simply the mirroring of terminology used by countless others when speaking of the IRS's procedures. For discussion of whether such targeting was, in fact, proper, see *infra* Part II.B.

17. See *infra* Part III.C.

Part I of this Comment begins by examining the exempt organization determinations process—specifically in the context of section 501(c)(4) social welfare organizations—and the reasons why an application might be centralized for heightened scrutiny. It then highlights the effect of the Supreme Court’s *Citizens United* decision on the section 501(c)(4) application process and explores how the decision caused an increase in political spending by social welfare organizations. Part I concludes with an overview of past examples of targeting by the IRS, considering the IRS’s justifications for such targeting. Part II focuses on the Tea Party scandal, examining the gray area between sections 501 and 527 of the Internal Revenue Code and the structure of Tea Party organizations to evaluate whether—regardless of the criteria used—it was proper for the IRS to centralize the applications of Tea Party groups. Part III analyzes the immediate response to the Tea Party scandal and explains why the solution in place can only be a temporary one. Finally, this Comment concludes by advocating for an “open-door” determinations process for section 501(c)(4) organizations in which the IRS’s targeting endeavors would lie exclusively within the audit process. It then considers how this procedural shift could curtail an organization’s motivation to exploit new tax issues while also fostering compliance. By instituting these changes, the IRS could take advantage of the benefits of centralization while also reducing the risk that such methods might be attacked as unfair.

I. BACKGROUND: THE DETERMINATIONS PROCESS AND IRS TARGETING

The Internal Revenue Code (Code) allows organizations that meet certain criteria to obtain exemption from income taxes.¹⁸ To manage these requirements, the IRS established a “determinations” process whereby organizations can apply for recognition of their

18. I.R.C. § 501(a) (2012) (“An organization described in subsection (c) or (d) or section 401(a) shall be exempt from taxation under this subtitle.”). The Internal Revenue Manual makes this clear in the beginning of its chapter on the determinations process, stating:

An organization qualifies for exemption if it meets the requirements of the Code. However, an organization is subject to tax until it establishes that it qualifies for exemption, and most organizations find that filing an application for recognition of exemption is the least burdensome way to establish that they qualify.

IRM 7.25.1.1 (Nov. 1, 2003).

exemption.¹⁹ In order to receive such recognition from the IRS, an organization must have a purpose that fits squarely within one of the specific qualifying categories in the Code.²⁰ One of these specific categories, found in section 501(c)(4), is for “organizations . . . operated exclusively for the promotion of social welfare.”²¹ Treasury Regulations require that a social welfare organization be “primarily engaged in promoting in some way the common good and general welfare of the people of the community”²² rather than of a private group, in order to qualify for exemption.²³

Even if an organization is generally exempt from income tax, it may still be subject to additional laws for engaging in political activity.²⁴ Furthermore, the extent to which an organization can engage in political activity varies depending on the Code section under which the organization receives exemption:

Under the current regulatory structure, section 501(c)(3) churches and charities are entitled to receive contributions, which are deductible by the donors. Also, in most cases the income of section 501(c)(3) organizations is not subject to tax. However, section 501(c)(3) organizations are

19. See IRM 7.25.1.2.1 (Nov. 1, 2003). “[Exempt Organizations (EO)] Determinations issues determination letters on applications for recognition of exemption and on the tax consequences of completed transactions.” *Id.*

20. See INTERNAL REVENUE SERV., U.S. DEP’T OF TREAS., TAX-EXEMPT STATUS FOR YOUR ORGANIZATION, Pub. No. 557, 3 (Rev. Oct. 2013); see also IRM 7.25.1.1 (Nov. 1, 2003).

21. I.R.C. § 501(c)(4)(A) (2012).

22. Treas. Reg. § 1.501(c)(4)-1(a)(2)(i) (as amended in 1990).

23. See IRM 7.25.4.2 (Feb. 9, 1999) (“Organizations that promote social welfare should primarily promote the common good and general welfare of the people of the community as a whole. An organization that primarily benefits a private group of citizens cannot qualify for exemption.”); see also TAX-EXEMPT STATUS FOR YOUR ORGANIZATION, *supra* note 20, at 3. An IRS guidance publication directed at organizations applying for recognition of exemption begins a discussion of section 501(c)(4) social welfare organizations by specifying:

To establish that your organization is organized primarily to promote social welfare, you should submit evidence with your application showing that your organization will operate primarily to further (in some way) the common good and general welfare of the people of the community (such as by bringing about civic betterment and social improvements).

TAX-EXEMPT STATUS FOR YOUR ORGANIZATION, *supra* note 20, at 48.

24. See Ellen P. Aprill, *Nonprofits and Political Activity: Lessons from England and Canada*, 142 TAX NOTES 1114, 1116 (Mar. 10, 2014). For example, “[i]n some cases, registration and disclosure under the Lobbying Disclosure Act of 1995 may be required,” and “some political campaign interventions . . . come within the purview of the Federal Election Commission and are subject to campaign finance disclosure requirements.” *Id.*

completely prohibited from engaging in campaign-related political activities. . . . [U]nlike section 501(c)(3) organizations, social welfare organizations are not required to file a form with the IRS seeking recognition of their exempt status. They may seek recognition by filing a Form 1024, but they are not required to do so.²⁵

Although “[p]romoting social welfare does not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office,” a social welfare organization exempt under section 501(c)(4) is allowed to engage in some political activity as long as its *primary* activity is related to its exempt purpose.²⁶ Organizations described by section 501(c)(4) can thus engage in a wider variety of activities than can charitable, religious, and scientific organizations exempt under section 501(c)(3), which cannot engage in any campaign intervention.²⁷ When the IRS reviews an application, it is tasked with determining whether the organization primarily promotes social welfare for the community as a whole and whether it has engaged in an impermissible level of political activity.²⁸

25. Tobin, *supra* note 5, at 1122.

26. See TAX-EXEMPT STATUS FOR YOUR ORGANIZATION, *supra* note 20, at 48. After stating that social welfare does not include political activity, the IRS goes on to say that “if you submit proof that your organization is organized primarily to promote social welfare, it can obtain exemption even if it participates legally in some political activity on behalf of or in opposition to candidates for public office.” *Id.*

27. Section 501(c)(3) grants exemption for organizations “operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes,” in addition to several other categories. See I.R.C. § 501(c)(3) (2012). Unlike section 501(c)(4), section 501(c)(3) explicitly prohibits participation or intervention in a political campaign in support or opposition of any particular candidate. See *id.*; see also IRM 7.25.4.6 (Feb. 9, 1999) (“Organizations exempt under IRC 501(c)(4) are generally allowed greater latitude than that allowed to organizations exempt under IRC 501(c)(3). . . . Since the test for exemption under IRC 501(c)(4) is one of primary activities, an organization exempt under IRC 501(c)(4) may engage in substantial non-exempt activities.”).

28. According to explanations posted on the IRS website to address several questions surrounding the Tea Party scandal, the IRS stated that:

The IRS’s role is to determine whether an organization meets the legal requirements for tax-exempt status. One requirement relates to the amount of political campaign intervention (“political activity”) that tax-exempt organizations may engage in. Section 501(c)(3) organizations are prohibited from engaging in any political activity. Other organizations, including section 501(c)(4) organizations, may only engage in a limited amount of political activity.

Questions and Answers on 501(c) Organizations, *supra* note 2. One commentator argued that the IRS is not “particularly well suited” to regulate

A. The Tax-Exempt Determinations Process

Applications for recognition of section 501(c) exemption are handled by two groups within the IRS Exempt Organizations (EO) unit: EO Determinations and EO Technical.²⁹ EO Determinations is the group responsible for the initial review of applications.³⁰ The group receives roughly 70,000 applications for exemption every year, and these applications are initially handled by fewer than 200 employees.³¹ In order to handle the large volume of applications efficiently and consistently, the agents engage in some level of triage—termed “centralization” by the IRS—when processing applications.³² In response to increases in “the complexity of the

political campaign activity, stating that the IRS “has no particular expertise in campaign finance, and placing the IRS in the middle of this fray can only lead to distrust in the agency and accusations that the IRS’s decisions are based on a political agenda.” Tobin, *supra* note 5, at 1120–21. *See also* Kahng, *supra* note 2, at 51–52 (“We would do better to avoid giving the IRS responsibilities that are apt to be politically controversial, even if the risk of abuse is low and even if other agencies are not necessarily better equipped to carry out these responsibilities.”). Full consideration of whether the IRS should be completely removed from evaluating campaign finance, however, lies outside of the scope of this Comment.

29. *See* IRM 7.25.1.2.1 (Nov. 1, 2003). It should be noted that the IRS is currently in the process of reconsidering its operations in response to the Tea Party scandal, and it is possible that this could change in the future. DANIEL WERFEL, INTERNAL REVENUE SERV., CHARTING A PATH FORWARD AT THE IRS: INITIAL ASSESSMENT AND PLAN OF ACTION 8, 53 (2013), *available at* <http://www.irs.gov/pub/newsroom/Initial%20Assessment%20and%20Plan%20of%20Action.pdf>, archived at <http://perma.cc/79X-Q3TL> (“We have made a number of changes already, more are in the works, and more will develop as we learn additional information.”). However, the process as described in this Comment was the method used by the IRS before the scandal. *See id.*

30. IRM 7.25.1.2.1 (Nov. 1, 2003) (“EO Determinations issues determination letters on applications for recognition of exemption and on the tax consequences of completed transactions. EO Technical issues rulings on applications for recognition of exemption referred by EO Determinations and (in response to requests by exempt organizations) on the tax consequences of proposed transactions.”).

31. *See Questions and Answers on 501(c) Organizations, supra* note 2.

32. In an interview with the House Government Reform Committee, an IRS tax law specialist argued that centralization was necessary to handle a sudden influx of applications, “because there were so many at the same time” and there were concerns raised by political campaign intervention activities that might occur. H.R. COMM. ON OVERSIGHT AND GOVERNMENT REFORM, 113th CONG., NO EVIDENCE OF WHITE HOUSE INVOLVEMENT OR POLITICAL MOTIVATION IN IRS SCREENING OF TAX-EXEMPT APPLICANTS 28 (May 6, 2014) [hereinafter NO EVIDENCE OF WHITE HOUSE INVOLVEMENT], *available at* <http://democrats.oversight.house.gov/uploads/Cummings%20Report%20on%2039%20IRS%20Transcripts%20050614.pdf>, archived at <http://perma.cc/KFP3-FTGB>.

applications and concerns about potential abuse . . . over the last several years,”³³ EO Determinations has designated a screening group made up of its most experienced agents to review and categorize all applications.³⁴

A screening agent in EO Determinations filters out applications that fall within an unclear area of the Code or for which there is an absence of IRS guidance.³⁵ These applications cannot be completed through the ordinary screening process and are instead reviewed by experts at another group in the EO unit—EO Technical—who have enough experience and knowledge to handle the determination.³⁶ Revenue Procedure 2012-9 instructs IRS employees to refer cases “that present issues which are not specifically covered by statute or regulations, or by a ruling, opinion, or court decision published in the Internal Revenue Bulletin” to EO Technical.³⁷ In addition to reviewing centralized cases, EO Technical is also authorized to review determinations letters issued by EO Determinations for uniformity and consistency.³⁸ In this way, EO Technical becomes the arm of the IRS that is tasked with interpretation of tax law and its application to specific issues in the tax-exempt context, thus providing guidance to EO Determinations for handling future applications that implicate similar issues.³⁹

In addition to areas where the law and official guidance remain unclear, EO Technical reviews tax-exempt applications in “[c]ases where issues . . . may have *significant regional or national impact*.”⁴⁰ The potential impact of these “significant impact” cases means that any mistakes or misapplication of the law by the IRS

33. EXEMPT ORGANIZATIONS, INTERNAL REVENUE SERV., FY 2012 ANNUAL REPORT & FY 2013 WORKPLAN 14 (2012) [hereinafter FY 2012 ANNUAL REPORT], available at http://www.irs.gov/pub/irs-tege/FY2012_EO_AnnualRpt_2013_Work_Plan.pdf, archived at <http://perma.cc/HK37-H8BR>.

34. Upon receipt of an application, the screening group determines an application’s status by deciding whether it should be “forwarded to the centralized unassigned inventory for full development,” “returned to the organization because it is not substantially complete,” “approved on merit with no contact,” “identified as needing minor additional information or technical clarification before approval on merit,” or “identified for secondary screening.” IRM 7.20.2.3(3) (Aug. 24, 2012).

35. See *id.* (defining a category for applications “identified as needing minor additional information or technical clarification before approval on merit”).

36. See FY 2012 ANNUAL REPORT, *supra* note 33, at 14; IRM 7.25.1.2.1 (Nov. 1, 2003).

37. Rev. Proc. 12-9, 2012-2 I.R.B. 261, § 5.02.

38. *Id.* § 9.01.

39. FY 2012 ANNUAL REPORT, *supra* note 33, at 6.

40. IRM 7.20.1.4(1)(b) (Dec. 20, 2012) (emphasis added).

could have particularly damaging consequences. Isolating these cases to be worked by the same group not only makes certain that they are handled by more experienced specialists, but also ensures consistent application and provides better guidance to future organizations seeking tax exemption.⁴¹

EO Determinations is better able to efficiently process the voluminous number of applications it receives—many of which do not contain interpretation issues and can be handled relatively quickly—by transferring those involving novel interpretations of the law to EO Technical. Applications referred to EO Technical for full development “often take longer to process given the novel and complex issues involved,” which is usually a period of about five months from the time the applications are received by EO Technical.⁴²

The Internal Revenue Manual (Manual) directs EO Determinations staff to “expeditiously handle any case identified for EO Technical *to avoid delay in processing the case.*”⁴³ The Manual continues by stating that “[i]f possible, screeners and group managers [within EO Determinations] should attempt to identify cases that meet criteria for referral to EO Technical before they are assigned to a determination specialist.”⁴⁴ The application review function of EO Technical is only one of many hats worn by the group, but it makes up a significant portion of the group’s workload.⁴⁵ To a large extent, this heavy workload is due to two factors: the IRS’s interpretation of the phrase “primary purpose” and the Supreme Court’s decision in *Citizens United*.⁴⁶

41. See NO EVIDENCE OF WHITE HOUSE INVOLVEMENT, *supra* note 32.

42. See FY 2012 ANNUAL REPORT, *supra* note 33, at 14.

43. IRM 7.20.1.4(2) (Dec. 20, 2012) (emphasis added).

44. *Id.* The screening group is tasked with the sizable job of actively filtering out applications that will involve lengthy investigation based on “criteria for referral,” which not only lessens the workload of those in EO Determinations who must evaluate all residual applications, but also helps to minimize the amount of time an organization must wait for its application to make its way through both EO Determinations and EO Technical. *Id.*

45. FY 2012 ANNUAL REPORT, *supra* note 33, at 6. In addition to aiding EO Determinations in the application process, EO Technical also issues private letter rulings and technical advice memoranda, assists EO Examinations with the development of forms, and reviews all IRS publications in cooperation with EO Customer Education and Outreach. *Id.* Despite this myriad of duties, application review occupied 30% of EO Technical’s workload in fiscal year 2012. *Id.*

46. See *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 365 (2010).

1. Interpretation Issues in the Determinations Process

Although the Code grants exemption to organizations “operated exclusively for the promotion of social welfare,”⁴⁷ the term “exclusively” has not been read to require that *all* activity of social welfare organizations be related to the organization’s exempt purpose.⁴⁸ Instead, the IRS examines the activities of the organization, and as long as the organization is primarily engaged in exempt activities, its tax exemption will remain intact under section 501(c)(4).⁴⁹ Conversely, when an organization’s non-exempt political activity becomes its “primary” activity, section 501(c)(4) no longer grants exemption.⁵⁰

Political activity that is not exempt from taxation—which must not make up an organization’s *primary* activity—and political activity that is properly within the exempt purposes set out in the Code are distinct concepts. Specifically, a social welfare organization is allowed to engage in an unlimited amount of lobbying or general advocacy as long as that activity is in furtherance of the organization’s tax-exempt purpose.⁵¹ “Lobbying” refers to the attempted influence on specific legislation through contact with legislators or the encouragement of a particular position on a referendum; “general advocacy” includes attempts to “influence public opinion on issues germane to the organization’s tax-exempt purposes” as well as attempts to influence nonlegislative bodies and encourage nonpartisan voting.⁵² “Political campaign intervention,” in contrast, is described in Treasury Regulation 1.501(c)(4)-1 as “direct or indirect participation or intervention in political

47. I.R.C. § 501(c)(4)(A) (2012).

48. See *B.S.W. Grp., Inc. v. Comm’r*, 70 T.C. 352, 357 (1978) (“Rather, the critical inquiry is whether [the organization’s] primary purpose for engaging in its . . . activity is an exempt purpose, or whether its primary purpose is the nonexempt one of operating a commercial business producing net profits” for the organization.); see also Peter Molk, *Reforming Nonprofit Exemption Requirements*, 17 *FORDHAM J. CORP. & FIN. L.* 475, 489 (2012). Molk argues that “[t]he term ‘exclusively’ is not read in its strict sense, but instead has received a variety of interpretations over time,” and traces this “primary purpose test” to the early practice of allowing exemption for any charitable activity, “regardless of how this revenue was earned.” Molk, *supra*.

49. See Kahng, *supra* note 2, at 45 (“[S]ocial welfare organizations are not prohibited from engaging in campaign intervention . . . as long as it is not their primary activity.”).

50. See generally *id.*

51. TIGTA Report, *supra* note 1, at 2.

52. *Id.* at 2 nn.8–9. See also *Civic Leagues and Local Employee Associations*, U.S. Tax Rep. (RIA) ¶ 5014.13 (2013) (“Presentation of controversial opinions, or advocating social changes (as distinguished from participating in political campaigns) will not cause loss of exemption as a social welfare organization.”).

campaigns on behalf of or in opposition to any candidate for public office.”⁵³ This third category—political campaign intervention—is what must be limited for a social welfare organization to maintain its exemption.⁵⁴

The question of when an organization’s political campaign intervention has risen to the level of “primary” activity remains unsettled in the law.⁵⁵ Although there have been several attempts to insert some certainty into the process by placing a percentage threshold on an organization’s political activity in relation to its exempt activity,⁵⁶ there is no bright-line test for determining whether the political campaign activities of an organization constitute its “primary” activity.⁵⁷ Instead, the IRS has adopted a case-by-case approach that looks at the facts and circumstances of

53. Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii) (as amended in 1990). The IRS, in response to the Tea Party scandal, released a Notice of Proposed Rulemaking on November 29, 2013, proposing to replace this language in the Treasury Regulations to state that “[t]he promotion of social welfare does not include direct or indirect candidate-related political activity.” Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities, 78 Fed. Reg. 71,535, 71,537 (proposed Nov. 29, 2013) (to be codified at 26 C.F.R. pt. 1) [hereinafter Proposed Regulation]. Although the regulations propose to move away from use of the term “campaign intervention” in the context of social welfare organizations, both phrasings attempt to limit the political activity of social welfare organizations, and therefore preference of one guideline over the other does not alter this Comment’s analysis. *Id.*

54. TIGTA Report, *supra* note 1, at 2 n.9 (stating that “[g]eneral advocacy basically includes all types of advocacy other than political campaign intervention and lobbying,” thus suggesting that all political activity fits into one of these three categories).

55. Daniel Werfel, then acting IRS Commissioner, has recognized that “[o]ne of the significant challenges with the 501(c)(4) review process has been the lack of a clear and concise definition of ‘political campaign intervention.’” WERFEL, *supra* note 29, at 20. See also *More Details Emerge on IRS’s Targeting*, *supra* note 4 (referring to the law of 501(c)(4) organizations, especially in reference to political campaign intervention, as “unclear”).

56. See, e.g., April, *supra* note 24, at 1116 (“Nowhere has the IRS ever defined what constitutes primary activity, and some practitioners argue that 49 percent of a section 501(c)(4) organization’s activities can consist of candidate-related campaign intervention.”); WERFEL, *supra* note 29, at 24 (allowing certain organizations adversely affected by the targeting of Tea Party organizations to expedite their applications by certifying that their campaign activity makes up less than 40% of both their expenditures and time); Mariam Galston, *Vision Service Plan v. U.S.: Implications for Campaign Activities of 501(c)(4)s*, 53 EXEMPT ORG. TAX REV. 165, 167 n.20 (2006) (speculating that courts could interpret the requirement to mean “larger than de minimis but not too big,” or 10–15% of the organization’s expenditures or activities). Regulations proposed in November 2013 in response to the Tea Party scandal requested comments from the public regarding the amount of campaign-related activity that should be allowed. See Proposed Regulation, *supra* note 53.

57. See Tobin, *supra* note 5, at 1122.

each case in deciding whether a particular organization is primarily engaged in campaign intervention.⁵⁸

In the absence of a bright-line rule established by Congress, through legislation or the IRS itself, Determinations officials and organizations applying for exemption are left with little direction on how a particular case should and will be interpreted.⁵⁹ Without such guidance, there is a significant risk of inconsistency as individual reviewers likely have differing ideas of what facts and circumstances support a finding of exemption.⁶⁰ In an attempt to minimize this risk, the IRS directs EO Determinations to transfer cases to EO Technical when official guidance is absent or inconsistent.⁶¹

58. See TAX-EXEMPT STATUS FOR YOUR ORGANIZATION, *supra* note 20, at 23 (“Whether your organization is participating or intervening, directly or indirectly, in any political campaign on behalf of (or in opposition to) any candidate for public office depends upon all of the facts and circumstances of each case.”). The IRS has attempted to define the permissible amount of campaign intervention activity—at least in treatment of the applications at issue in the Tea Party scandal—as less than 40% of the organization’s time and expenditures. WERFEL, *supra* note 29, at 14.

59. See John F. Coverdale, *Legislating in the Dark: How Congress Regulates Tax-Exempt Organizations in Ignorance*, 44 U. RICH. L. REV. 809, 810–11 (2010) (“Congress ignores tax-exempt organizations for long periods of time until a scandal draws the attention of the press to a real or purported problem.”).

60. See NO EVIDENCE OF WHITE HOUSE INVOLVEMENT, *supra* note 32, at 13 (“The e-mail traffic indicated there were unclear processing directions and the group wanted to make sure they had guidance in processing the applications so they pulled them.”).

61. In an interview with the House Oversight and Government Reform Committee, the screening group manager who initiated the centralization of Tea Party applications explained the process:

[The case] would be then something we need to be aware of, and we need to hold those cases until we have further direction. . . . So, anyone [in the screening group] who would be looking at cases and if they had these same particular issues presented to them, that we needed to not let them maybe go into the general inventory as we were looking for consistency.

Interview by H.R. Comm. on Oversight and Gov’t Reform of Screening Group Manager, Exempt Org. Determinations Unit (Jun. 6, 2013), *available at* http://democrats.oversight.house.gov/images/user_images/gt/stories/IRS_Screening_Manager_Part_I.pdf, archived at <http://perma.cc/Q46G-AAYS>. By not putting these cases into the “general inventory,” the Manager was making the decision not to send the case to EO Determinations, but rather to refer it to EO Technical for full development. *Id.*

2. Social Welfare Organizations in the Wake of *Citizens United*

This risk of inconsistent treatment materialized in 2010, when the United States Supreme Court's decision in *Citizens United* ripped the political campaign intervention hole wide open and brought the proper interpretation of "primary purpose" into the spotlight.⁶² Justice Kennedy, writing for the majority, stated that "[n]o sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations."⁶³ If applied in the tax world, where a social welfare organization can lose its exemption for engaging in too much political campaign intervention, the Court's decision appears to strike quite a blow.⁶⁴ However, read narrowly, *Citizens United* only applies to corporations in the campaign finance context,⁶⁵ and "[n]owhere does *Citizens United* acknowledge the tax limits on political speech or address their constitutionality."⁶⁶

Regardless of whether the Court intended *Citizens United* to affect the tax-exempt system, it certainly did. The Court's limit on government regulation of political speech meant that more organizations could engage in political spending without

62. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

63. *Id.* at 365.

64. It appears unlikely that the Court would sustain a First Amendment challenge to IRS regulation of political spending. In *Regan v. Taxation With Representation*, 461 U.S. 540 (1983), the Supreme Court upheld limits on lobbying by section 501(c)(3) organizations. Additionally, the use of a compartmentalized exemption system—allowing varying levels of political activity—would arguably not violate the First Amendment:

As long as there is a reasonable outlet for the communication in question, the proposed regulation would not be a significant burden on speech. Organizations can engage in unlimited political speech. If the organization's primary purpose is to engage in election-related activity, it can organize as a section 527 political organization and disclose its donors and expenditures. The proposed regulation is all about basketing an organization into its correct regulatory home—be that as a charity, social welfare organization, business league, or political organization.

Tobin, *supra* note 5, at 1129.

65. Ellen P. Aprill, *Regulating the Political Speech of Noncharitable Exempt Organizations After Citizens United*, 10 ELECTION L.J. 363 (2011) [hereinafter Aprill, *Regulating the Political Speech*] ("*Citizens United* . . . rejected the notion that requiring a corporation to establish a corporate affiliate—even an affiliate that is no more than a separate bank account—in order to engage in political speech satisfies the First Amendment, at least for purposes of campaign finance law."). See also Aprill, *supra* note 24, at 1116 (explaining that *Citizens United* "struck down a provision of the federal campaign finance laws that prohibits corporations and unions from using their general treasury funds to make independent expenditures").

66. Aprill, *Regulating the Political Speech*, *supra* note 65, at 364.

repercussions.⁶⁷ Unlike a section 527 political action committee (commonly referred to as a “PAC”),⁶⁸ the organizations described in section 501(c)(4) are not required to disclose political expenditures.⁶⁹ Therefore, recognition as a social welfare organization is an attractive option for organizations planning to engage in this type of activity.⁷⁰ As a result, the *Citizens United* decision led to a rise in political spending by section 501(c)(4) social welfare organizations,⁷¹ and the Court’s silence on the implications of *Citizens United* for tax exemption of social welfare organizations added uncertainty to the meaning of “primary purpose” and the amount of permissible campaign intervention by exempt organizations.⁷²

Since 2009—the year before *Citizens United* was decided—there has been a significant increase in applications for tax-exempt status by section 501(c)(4) organizations engaged in political campaign activity, as well as an increase in candidate-oriented expenditures.⁷³ This sudden upswing in applications requiring review, and the heightened level of political activity generated by

67. In addressing the uncertainties that *Citizens United* seemed to provide for section 501(c)(4) organizations, Ellen Aprill explained:

The assertion in *Citizens United* that “[n]o sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations” seems difficult to reconcile with the statement in the Court’s opinion in *TWR* that “Congress is not required by the First Amendment to subsidize lobbying,” a statement that permitted limitations on one type of political speech, namely lobbying, in the context of the case.

Id. at 393–94 (quoting *Citizens United*, 558 U.S. at 365; *Regan*, 461 U.S. at 546).

68. See *infra* Part II.B.1.

69. *TIGTA Finds IRS Used Inappropriate Criteria to Identify Tax-Exempt Applications for Review*, 59 FED. TAXES WEEKLY ALERT, May. 23, 2013, art. 3 (“Code Sec. 501(c)(4) groups have the advantage of anonymity for their donors (unlike Code Sec. 527 political action committee (PAC) organizations).”).

70. See generally Tobin, *supra* note 5.

71. *TIGTA Finds IRS Used Inappropriate Criteria to Identify Tax-Exempt Applications for Review*, *supra* note 69 (“Reports indicate that corporate contributions to Code Sec. 501(c)(4) groups have proliferated since the Supreme Court’s *Citizens United* decision.”).

72. See Aprill, *Regulating the Political Speech*, *supra* note 65, at 372–75.

73. TIGTA Report, *supra* note 1, at 3. In its report on the Tea Party scandal, the Treasury Inspector General for Tax Administration listed figures released by the EO unit, showing an increase year-over-year in section 501(c)(4) applications from 1,751 (2009) to 3,357 (2012). *Id.* Additionally, the report stated that tax-exempt groups overall spent \$133 million on federal “candidate-oriented expenditures” (meaning those “specifically . . . advocating the election or defeat of clearly identified [f]ederal candidates”) in 2010, and that by 2012 that amount increased to \$315 million. *Id.* at 3 n.10.

these organizations after *Citizens United*, created a “perfect storm” for EO Determinations: an increased workload with a higher risk of excessive campaign intervention in an area of the tax law that is notoriously unclear.⁷⁴

3. Benefits of Centralization

The centralization of applications by the IRS improves overall efficiency within the determinations process.⁷⁵ One employee reviewing 20 applications is likely to work through those applications much more quickly when the applications share similar facts than if each application represents a different set of facts and circumstances from the others. EO Technical handles the applications with similar facts that require interpretation of the law and take longer to review, whereas EO Determinations is tasked with review of applications that entail a large variety of facts and circumstances, but that can be reviewed relatively quickly because they do not require interpretation of unsettled areas of law.⁷⁶

In addition to added efficiency, centralization improves consistency and certainty in the determinations process.⁷⁷ Aside from the obvious benefit of ensuring that similar cases are worked in the same way, centralization brings a degree of certainty to organizations seeking guidance on how the IRS is likely to respond to their applications.⁷⁸ An organization applying for recognition of exemption will have a much better idea of how much campaign activity it can engage in if it can get a sense of the IRS’s precedent in the area;⁷⁹ however, that precedent only materializes when IRS decisions are consistent, and centralization is the means to achieve that consistency.

Centralization of related applications is also a useful way for the IRS to handle new tax problems as they arise.⁸⁰ Although full development of cases involving these new problems—triggered through centralization—leads to a slower determinations process for those early cases, the consistency and efficiency brought by

74. Perhaps it would be better to place this “perfect storm” above a raging whirlpool within the Bermuda Triangle.

75. *More Details Emerge on IRS’s Targeting*, *supra* note 4.

76. See IRM 7.20.1.4 (Dec. 20, 2012).

77. See Interview with Screening Group Manager, *supra* note 61, at 63.

78. A screening group manager explained that “with this additional concern for high profile [cases] . . . we may want to really look at things for precedent setting, we may want to look at things for consistency setting.” *Id.* at 49.

79. See *id.*

80. Lois Lerner stated that centralization “helps with the learning curve, it helps with consistency.” *ABA Transcript*, *supra* note 1, at 126.

centralization help to minimize the period during which those applications have to be fully developed. Once the IRS reaches a decision on how a certain type of application should be processed and that precedent is communicated to EO Determinations, subsequent similar applications will experience less delay. While EO Technical examines these cases, EO Determinations is better able to review all of the applications that do not require novel interpretations of the law. By taking these applications out of the hands of EO Determinations, the IRS ensures that applications that can be processed quickly are not being unnecessarily delayed because of difficulties related to another organization.⁸¹ Once EO Technical has worked enough related cases, EO Determinations then has the guidance it needs to process these new cases itself, leaving EO Technical free to tackle the next major tax problem.

B. Examples of Acceptable Exempt Organization Targeting

Although the recent popularity of the Tea Party⁸² brought IRS targeting into the public spotlight, the scandal is not the first controversy surrounding IRS centralization methods,⁸³ nor is it the first time that the IRS has targeted similar organizations for efficient and consistent treatment of fresh legal problems.⁸⁴ The Tea Party targeting was just another iteration of a process that the

81. By sending applications requiring difficult determinations to a separate group for processing, EO Determinations is left with applications that can be processed quickly, with the implication that such a queue of “easier” applications would not be held up by those requiring more intensive determinations.

82. The Tea Party website states that the movement “has grown far beyond belief, from a handful of brave Patriots to tens of millions” since its formation on September 2, 2004. *About Us – Tea Party*, TEAPARTY, <http://www.teaparty.org/about-us/>, archived at <http://perma.cc/W7NX-YR93> (last visited June 30, 2014).

83. The IRS began to target individuals in 2011 and 2012 in response to concerns that individuals were donating to section 501(c)(4) social welfare organizations without reporting them as taxable gifts. *More Details Emerge on IRS’s Targeting*, *supra* note 4. Though the acting commissioner denied any political motivation, the fact that IRS enforcement in this area had previously been virtually nonexistent led to concerns. *Id.*

84. In Lerner’s remarks to the ABA on the Tea Party centralization, she explained:

[Centralization is] something that we do when we see an uptick in a new kind of application or something that we just haven’t seen before. You folks might remember back a couple of years ago we had credit counseling; we centralized those cases. We had mortgage foreclosure; we centralized those cases.

ABA Transcript, *supra* note 1, at 126.

IRS has used several times in the past, albeit on topics less interesting to the media than a Tea Party scandal. When certain categories of organizations posed common tax issues, their centralization allowed the IRS to ensure that common issues were handled similarly.⁸⁵

The Manual lists many types of cases that “may be categorized as reserved inventory for designated groups in EO Determinations . . . unless they are closed on merit.”⁸⁶ These cases implicate special legal issues, and as such, they are referred to a designated group within EO Determinations; a similar list exists for categories of cases to be referred to EO Technical.⁸⁷ Regarding two of these types of cases—credit counseling organizations and donor-advised funds⁸⁸—the IRS discovered particular abuses of the Code arising from new legal issues and responded with focused targeting of applications that demonstrated a risk of abuse.⁸⁹

1. Credit Counseling Organizations

Beginning in 2002, the IRS actively examined credit counseling organizations—designed to provide solutions to individuals’ financial problems—“to ‘attack,’ as the [IRS] put it, the tax-exempt credit counseling industry.”⁹⁰ This targeting, according to the IRS, arose from a “basic concern . . . that some exempt credit counseling organizations [had] abandoned their charitable mission in an inappropriate rush to collect exorbitant fees.”⁹¹

85. *Questions and Answers on 501(c) Organizations*, *supra* note 2 (“[C]ases meeting the selection criteria were centralized and assigned to designated employees developing expertise in the area so that they could be worked in a fair and consistent manner.”).

86. IRM 7.20.1.3(1) (Dec. 20, 2012). “Reserved inventory” simply means that the application requires closer examination before a determination can be reached.

87. *Id.* There are 40 distinct categories of cases listed in the Manual that may be referred to a designated EO Determinations group, including the less-than-helpful category of “[o]ther applications the Manager, EO Determinations, decides should be reserved.” *See id.* Additionally, there are 21 categories of specific EO Technical cases listed in IRM 7.20.1.4.1 (Dec. 20, 2012).

88. IRM 7.20.1.3(1) (Dec. 20, 2012).

89. Matthew T. Journy, George E. Constantine, & Jeffrey S. Tenenbaum, *The IRS Tax-Exempt Examination Process*, 21 TAX’N EXEMPTS 34 (2010).

90. *Id.* at 34. During this period “the Service ‘examined virtually every credit counseling organization in the country, and revoked the tax-exemption of over 40 percent of the industry, as measured by revenues.’” *Id.*

91. Grace Allison, *Exempt Organization Compliance at the IRS*, 20 TAX’N EXEMPTS 33, 35 (2008) (citing EXEMPT ORG., INTERNAL REVENUE SERV., FY 2008 EO IMPLEMENTING GUIDELINES 5 (2008)).

In *Consumer Credit Counseling Service of Alabama, Inc. v. United States*,⁹² the Tax Court held that debt management and creditor intercession activities—though merely adjunctive to the educational purposes that warranted section 501(c)(3) exemption in the first place—were “incidental to the agencies’ principal functions” and therefore would not threaten an organization’s exemption.⁹³ After this decision, the number of credit counseling organizations rose significantly.⁹⁴ Many of these organizations were initially granted exemption, but the IRS examined these organizations anew after determining that more recent applications were showing indicators of non-exempt activity.⁹⁵ The IRS actively sought to prevent these abuses over the next several years through both the audit and determinations processes.⁹⁶ When debt management plans began to “overshadow” an organization’s educational purpose—which is exempt—that exemption was in jeopardy.⁹⁷

The IRS itself made little, if any, attempt to hide its goal of stripping many of these organizations of exemption.⁹⁸ Commissioner Mark Everson stated in his testimony before the House Ways and Means Committee’s Subcommittee on Oversight:

Over a period of years, tax-exempt credit counseling became a big business dominated by bad actors. Our examinations substantiated that these organizations have

92. *Consumer Credit Counseling Serv. of Ala., Inc. v. United States*, 78-2 U.S. Tax Cas. (CCH) 9660 (D.D.C. 1978).

93. *Id.* at 3.

94. See Ronald D. Kerridge & Robert E. Davis, *Tax-Exempt Credit Counseling Organizations and the Future of Debt-Settlement Services*, 14 TEX. REV. L. & POL. 343, 350 (2010) (“In the years since [*Consumer Credit Counseling*], the number of organizations providing counseling and other services to debtors has grown substantially.” (citing David A. Lander, *Essay: A Snapshot of Two Systems That Are Trying to Help People in Financial Trouble*, 7 AM. BANKR. INST. L. REV. 161, 162 (1999))); *Consumer Credit Counseling*, 78-2 U.S. Tax Cas. (CCH) 9660.

95. Former IRS Commissioner Mark Everson, in a 2003 statement, said: “[W]e are finding credit counseling organizations that vary from the model approved in earlier rulings and court cases. We are seeing organizations whose principal activity is selling and administering debt management plans. . . . [I]t does not appear that significant counseling or education is being provided.” Kerridge & Davis, *supra* note 94, at 350.

96. See *id.* at 351 (“In addition to the revocations of exemption for many existing organizations, the IRS became much less likely to recognize exemption in connection with applications by newly formed entities seeking exempt status, granting exemption to only three of the 110 applicants between 2003 and 2006.”).

97. See *id.* at 351–52.

98. *Id.*

not been operating for the public good and don't deserve tax-exempt status. They have poisoned an entire sector of the charitable community.⁹⁹

The targeting of credit counseling organizations continues today,¹⁰⁰ and far from condemning the practice, Congress has recognized and even impliedly approved the practice by passing a statute placing new restrictions on credit counseling organizations.¹⁰¹

2. Donor-Advised Funds

A donor-advised fund (DAF) is a mechanism by which a taxpayer making a charitable contribution can receive a tax deduction for that donation before deciding how the donation will be used.¹⁰² This type of charitable-giving vehicle was first used around 1931—becoming steadily more popular since then¹⁰³—and “[i]n the early 1990s, a number of charities began operating DAFs as their primary or sole activity.”¹⁰⁴

Congress largely ignored donor-advised funds until articles surfaced in the press alleging abuses in a small number of such funds.¹⁰⁵ In a report on problems in the world of charitable giving,

99. *Id.* at 350–51 (citing Press Release, IRS Takes New Steps on Credit Counseling Groups Following Widespread Abuse (May 15, 2006)). One cannot help but wonder how the Tea Party scandal would have progressed if the Commissioner had followed Everson's lead and told the House of Representatives that Tea Party organizations “have poisoned an entire sector of the charitable community.” *Id.*

100. *See id.* at 364–65.

101. *See* I.R.C. § 501(q) (2012).

102. The IRS describes the donor-advised fund as:

[A] separately identified fund or account that is maintained and operated by a section 501(c)(3) organization, which is called a *sponsoring organization*. Each account is composed of contributions made by individual donors. Once the donor makes the contribution, the organization has legal control over it. However, the donor, or the donor's representative, retains advisory privileges with respect to the distribution of funds and the investment of assets in the account.

Donor-Advised Funds, INTERNAL REVENUE SERV., <http://www.irs.gov/Charities-&-Non-Profits/Charitable-Organizations/Donor-Advised-Funds>, archived at <http://perma.cc/AR7Z-NE52> (last updated Apr. 30, 2014). *See also* Coverdale, *supra* note 59, at 811.

103. *See* U.S. DEP'T OF THE TREASURY, REPORT TO CONGRESS ON SUPPORTING ORGANIZATIONS AND DONOR ADVISED FUNDS 21 (2011).

104. *See id.*

105. Coverdale, *supra* note 59, at 811 (citing Victoria B. Bjorklund, *Charitable Giving to a Private Foundation: The Alternatives, the Supporting Organization, and the Donor-Advised Fund*, 27 EXEMPT ORG. TAX REV. 107, 114 (2000); Ashlea Ebeling, *The Coming Charity Crackdown*, FORBES (Aug. 15, 2005), available at

Commissioner Mark Everson reported that “[the IRS was] aware that some promoters encourage clients to donate funds and then use those funds to pay personal expenses, which might include school expenses for the donor’s children, payments for the donor’s own ‘volunteer work’, and loans back to the donor.”¹⁰⁶ Everson also stressed the importance of addressing and reducing such abuses, arguing that “[i]f these abuses are left unchecked, I believe there is the risk that Americans not only will lose faith in and reduce support for charitable organizations, but that the integrity of our tax system also will be compromised.”¹⁰⁷

The IRS still recognizes the existence of these abuses and warns that organizations misusing their exemption can be subjected to varying degrees of IRS action, including the possible revocation of an organization’s exempt status.¹⁰⁸ These responses arise largely by way of the Pension Protection Act of 2006.¹⁰⁹ The Act “dealt with the concern that donor-advised funds might be used to retain control over closely-held businesses by subjecting donor-advised funds to the excess business holding rules applicable to private foundations.”¹¹⁰ The IRS thus began to look closely at such funds for signs that they were being used in those improper ways, with the Pension Protection Act providing

http://www.forbes.com/window/free_forbes/2005/0815/067.html, archived at <http://perma.cc/NUD6-LZ8C>).

106. Mark W. Everson, *IRS Commissioner Testimony: Charitable Giving Problems and Best Practices*, IR-2004-81 14 (Jun. 22, 2004), available at <http://www.irs.gov/pub/irs-news/ir-04-081.pdf>, archived at <http://perma.cc/97Q-RZ4W>. Everson went on to declare that over 100 organizations were in the process of being examined for such abuses at the time of his statement. *Id.*

107. *Id.* at 2.

108. The Internal Revenue Service’s web page on donor-advised funds explains:

The IRS is aware of a number of organizations that appeared to have abused the basic concepts underlying donor-advised funds. These organizations, promoted as donor-advised funds, appear to be established for the purpose of generating questionable charitable deductions, and providing impermissible economic benefits to donors and their families (including tax-sheltered investment income for the donors) and management fees for promoters.

Donor-Advised Funds, *supra* note 102. The website goes on to outline possible recourse for such abuses, including disallowance of exemption for fund payments, excise taxes on sponsoring organizations, donors, and managers, and revocation or denial of exemption. *Id.*

109. The Pension Protection Act, as codified, is located throughout various sections of Title 29 of the United States Code.

110. Coverdale, *supra* note 59, at 828.

guidance on the consequences awaiting a donor-advised fund upon a finding that it had engaged in non-exempt activity.¹¹¹

The decision to target a certain group of organizations for heightened scrutiny often arises when the IRS faces a quick increase in applications resulting from a change or clarification in the relevant law.¹¹² A Tax Court case holding that debt management functions would not threaten exemption caused an increase in applications, which resulted in the targeting of credit counseling organizations.¹¹³ The shift of donor-advised funds to the primary activity of many organizations led to the targeting of those activities for scrutiny.¹¹⁴ And the uncertainty in the tax law created by the U.S. Supreme Court's *Citizens United* decision caused a rapid increase in applications for section 501(c)(4) exemption, necessitating a similar targeting of related organizations.¹¹⁵ EO Determinations staff were simply unable to process the applications based on existing guidance and precedent,¹¹⁶ and this sort of targeting is likely to arise again whenever a new tax issue arises, not just in the context of political spending.

II. THE TEA PARTY SCANDAL

Not long after *Citizens United* opened the door to greater levels of political activity by social welfare organizations,¹¹⁷ Congress—along with several organizations that had applied for exemption but had not yet received determinations—began to question the IRS's motivations for centralizing particular applications.¹¹⁸

111. *See id.* at 828–35.

112. For example, “[t]he involvement of major investment houses and their aggressive advertising led both to the rapid growth of donor-advised funds and to increased awareness of these previously little-known entities.” *Id.* at 822.

113. *See supra* Part I.B.1.

114. *See supra* Part I.B.2.

115. *See supra* Part I.A.2.

116. IRM 7.20.2.3(3) (Aug. 24, 2012) (“Screeners review the application package to determine, based on the facts in the case and clearly established legal precedent (statute, tax treaty, the Code, regulations, revenue rulings, court decisions) whether the case should be . . . forwarded to the centralized unassigned inventory for full development.”).

117. *See supra* Part I.A.2.

118. In a report on the investigation into inappropriate IRS targeting, the Treasury Inspector General for Tax Administration explained:

During the 2012 election cycle, some members of Congress raised concerns to the IRS about selective enforcement and the duty to treat similarly situated organizations consistently. In addition, several organizations applying for I.R.C. § 501(c)(4) tax-exempt status made

Specifically, in early 2012, a group of Senate Republicans “questioned whether Tea Party and other conservative groups applying for exempt status were subjected to heightened scrutiny.”¹¹⁹

On May 10, 2013, Lois Lerner, the director of the IRS Exempt Organizations unit, acknowledged that the IRS had indeed targeted Tea Party and other conservative organizations’ applications for centralization and full development.¹²⁰ In a report released after investigation of the IRS’s actions, the Treasury Inspector General for Tax Administration (TIGTA) found that “[t]he Determinations Unit developed and began using criteria to identify potential political cases for review that inappropriately identified specific groups applying for tax-exempt status based on their names or policy positions instead of developing criteria based on tax-exempt laws and Treasury Regulations.”¹²¹ Specifically, the IRS searched for applications containing the words “Tea Party,” eventually expanding its criteria to include applications that contained the terms “Patriots,” “9/12,” or those that espoused certain policy positions.¹²² These targeted applications were then centralized and sent to EO Technical where they were subjected to heightened scrutiny and a lengthier determinations process.¹²³ Lerner explained that “[the screening agents] did it because they were working together, this was a streamlined way for them to refer to

allegations that the IRS . . . targeted specific groups applying for tax-exempt status.

TIGTA Report, *supra* note 1, at 3.

119. *More Details Emerge on IRS’s Targeting*, *supra* note 4. In addition to this allegation by a group of Senate Republicans, another group of Democrats also called on the IRS to investigate existing exempt organizations for impermissible levels of political campaign intervention. *Id.*

120. *ABA Transcript*, *supra* note 1, at 126.

121. TIGTA Report, *supra* note 1, at 5.

122. *Id.* TIGTA later elaborated on the criteria used: “‘Tea Party,’ ‘Patriots’ or ‘9/12 Project’ is referenced in the case file”; “Issues include government spending, government debt or taxes”; “Education of the public by advocacy/lobbying to ‘make America a better place to live’”; and “Statement in the case file criticize [sic] how the country is being run.” *Id.* at 6. Another source stated that “the criteria being used by employees include[d] ‘Tea Party,’ ‘Patriots,’ ‘9/12 Project,’ ‘Government Spending,’ ‘Government Debt,’ ‘Taxes,’ ‘make America a better place to live,’ and cases with statements that criticize how the country is being run.” *More Details Emerge on IRS’s Targeting*, *supra* note 4.

123. *ABA Transcript*, *supra* note 1, at 126 (“[I]n some cases, cases sat around for awhile. They also sent some letters out that were far too broad.”).

the cases. They didn't have the appropriate level of sensitivity about how this might appear to others. And it was just wrong."¹²⁴

To explain its targeting of Tea Party organizations, EO officials argued that "organizations may not understand what constitutes political campaign intervention or may provide vague descriptions of certain activities that the EO function knows from past experience potentially involve political campaign intervention," and because of this there is a higher need to isolate these applications for full development.¹²⁵ After the screening group within EO Determinations flagged the first case in this category in 2010, the screening group manager "initiated the first effort to gather similar cases in order to ensure their consistent treatment" and decided to escalate the cases to EO Technical.¹²⁶ The manager denied that there was any political motivation for his actions and instead explained:

The reason that the case was elevated to EO Technical was based upon, you know, the high-profile issue. The agent appropriately identified the issue as not being fully developed, and that it should be gone into the inventory and assigned for that purpose. It wasn't the purpose of [sic] the difficulty of those issues that was the—you know, the reason that I elevated it to my manager. It was more the high-profile part of the case.¹²⁷

The screening group manager felt that he should escalate these cases in order to ensure consistency¹²⁸ because the determinations specialists did not have adequate guidance on how to handle them.¹²⁹

124. *Id.*

125. TIGTA Report, *supra* note 1, at 10.

126. NO EVIDENCE OF WHITE HOUSE INVOLVEMENT, *supra* note 32, at 11.

127. H.R. COMM. ON OVERSIGHT AND GOVERNMENT REFORM, PRELIMINARY STATUS UPDATE ON COMMITTEE INVESTIGATION OF "INAPPROPRIATE CRITERIA" USED BY IRS TO EVALUATE APPLICATIONS FOR TAX EXEMPT STATUS (Jun. 9, 2013) [hereinafter PRELIMINARY STATUS UPDATE] (quoting Interview with Screening Group Manager, *supra* note 61, at 148).

128. In his interview with House Committee staff, the screening group manager stated: "Now, is it prudent for us to then make sure, for consistency purposes, that these cases are worked by the same folks or the same group? The determination was yes, it is." Interview with Screening Group Manager, *supra* note 61, at 78.

129. The House Oversight Committee, in a report finding no evidence of political bias in the Tea Party targeting scandal, quoted a D.C. tax law specialist, saying, "[t]his is purely cases that, unfortunately, Cincinnati didn't have enough guidance on. That (c)(4) area is a very, very difficult area, and there's not much guidance." NO EVIDENCE OF WHITE HOUSE INVOLVEMENT, *supra* note 32, at 3.

Former acting IRS Commissioner Steven Miller apologized for the IRS's actions shortly after the release of the TIGTA report on the scandal,¹³⁰ saying that “[p]artisanship or even the perception of partisanship has no place at the IRS. . . . It cannot even appear to be a consideration in determining the tax exemption of an organization.”¹³¹ He then stated that the targeting was the result of “foolish mistakes” by individuals who were “trying to be more efficient in their workload selection.”¹³² Miller resigned shortly after the release of the report, and President Barack Obama appointed Daniel Werfel to replace him.¹³³

A. Justification for Targeting by the IRS

TIGTA, in a report related to the Tea Party scandal finding that the IRS centralization methods were improper, stated that:

The mission of the IRS is to provide America's taxpayers top quality service by helping them understand and meet their tax responsibilities and by applying the tax law with integrity and fairness to all. . . . IRS employees accomplish this mission by being impartial and handling tax matters in a manner that will promote public confidence.¹³⁴

TIGTA's use of the IRS's own mission statement highlights several important considerations when justifying the IRS's actions: consistent and fair application of the tax laws, impartiality, and promotion of public confidence.¹³⁵ It is through this lens that the IRS must construe the Code.

“[The Supreme] Court has long recognized the primary authority of the IRS and its predecessors in construing the Internal Revenue Code,”¹³⁶ and with that authority Congress has given the IRS broad discretion to interpret the tax laws.¹³⁷ The Court has stated that such wide discretion is necessary because “[i]n an area as complex as the tax system, the agency Congress vests with administrative responsibility must be able to exercise its authority to meet changing conditions and new problems.”¹³⁸ Thus, although

130. *Washington Alert—Part I*, *supra* note 1.

131. *Id.*

132. *Id.*

133. *New IRS Report Shows Steps Taken to Fix Problems Relating to Recent Tax-Exempt-Status Scandal*, 59 FED. TAXES WEEKLY ALERT, June 27, 2013, art. 5 [hereinafter *New IRS Report*].

134. TIGTA Report, *supra* note 1, at 6.

135. *See id.*

136. *Bob Jones Univ. v. United States*, 461 U.S. 574, 596 (1983).

137. *See id.*

138. *Id.*

Congress is charged with creating the tax law, that law does not address every conceivable situation, and it becomes the duty of the IRS, as administrators of the Code, to decide what the Code means and how to adapt it to changing circumstances.¹³⁹

But is it reasonable to target related organizations when uncertainty arises in the tax law? The IRS has limited resources with which to carry out its duty to administer the entire Code.¹⁴⁰ With such a task before the IRS, it is certainly reasonable to expect that it would find ways to isolate similar applications and work them together. In addition to the added efficiency such a system affords, targeting allows the IRS to carry out its delegated duties to the American citizenry while also holding true to its own mission to “enforce the law with integrity and fairness to all.”¹⁴¹ Working similar applications together ensures one coherent position in a world where a lack of guidance on a new issue creates the risk of inconsistent treatment by lower-level agents.

B. Propriety of Tea Party Targeting

Although the IRS is authorized to target similar organizations when new issues arise, the more specific question remains whether the IRS was authorized to target Tea Party organizations in the way that it did, and if technically authorized, how the IRS should alter its practices to avoid future scandal. Targeting of similar applications was not a new process for the IRS, but the means by which that targeting was achieved in the context of the Tea Party differs from other examples in one important respect: credit

139. *Id.* In *Bob Jones University v. United States*, the Court stated: Congress, the source of IRS authority, can modify IRS rulings it considers improper; and courts exercise review over IRS actions. In the first instance, however, the responsibility for construing the Code falls to the IRS. Since Congress cannot be expected to anticipate every conceivable problem that can arise or to carry out day-to-day oversight, it relies on the administrators and on the courts to implement the legislative will. Administrators, like judges, are under oath to do so.

Id. at 596–97.

140. Then acting IRS Commissioner Daniel Werfel, in remarks before the American Institute of Certified Public Accountants, highlighted the IRS’s difficulties in performing its functions with such limited resources, claiming:

It is vital for the IRS to receive adequate resources going forward in order for us to deliver on our dual mission of enforcing the tax laws and providing excellent customer service, and so it is fair to ask whether the IRS can meet its objectives for sustained excellence in enforcement and taxpayer service in the budget environment we are in.

Danny Werfel, Acting Commissioner, Internal Revenue Serv., Remarks Before the American Institute of Certified Public Accountants (Nov. 6, 2013).

141. *The Agency*, *supra* note 14.

counseling organizations and donor-advised funds do not appear to be selected for review based on the organizations' names.¹⁴²

In the case of campaign intervention by social welfare organizations, after examining the existing data filed by exempt organizations, the Exempt Organizations unit “developed indicators of potential noncompliance that allow[ed] [EO] to better focus [its] resources.”¹⁴³ The IRS developed the criteria for selecting these organizations with the aim of filtering out similar applications for review based on evidence of political campaign intervention.¹⁴⁴ Consequently, these indicators of noncompliance eventually led to searches for organizations that mentioned certain names,¹⁴⁵ all of which suggested a significant conservative political bias on the part of the IRS. After a screening group manager centralized the first Tea Party case and sent it to EO Technical, he then “instructed his Screening Agents to identify additional cases that were similar based on their facts and circumstances.”¹⁴⁶ The targeting of Tea Party groups in this way originated in part as a result of the gray area that exists between a social welfare organization exempt through section 501(c)(4) and a political organization exempt through section 527, as well as the overall structure of the Tea Party.

1. The Section 501/527 Gray Area

Social welfare organizations engaging in campaign intervention operate within a gray area between section 501(c)(4) and another type of organization: section 527 political organizations.¹⁴⁷ Section 527 political organizations are those organized “to receive contributions or to expend funds for exempt activities including the selection, nomination, election, or appointment of candidates for public or party office.”¹⁴⁸ Like social welfare organizations, section 527 organizations “are tax exempt, and contributions to the organizations are not deductible by donors.”¹⁴⁹ The major difference between the two organizations developed in 2000 when Congress added provisions

142. See *supra* Part I.B.

143. FY 2012 ANNUAL REPORT, *supra* note 33, at 23.

144. NO EVIDENCE OF WHITE HOUSE INVOLVEMENT, *supra* note 32, at 28.

145. TIGTA Report, *supra* note 1, at 6. The terms included “Tea Party,” “Patriots,” and “9/12 Project.”

146. PRELIMINARY STATUS UPDATE, *supra* note 127.

147. See I.R.C. § 527 (2012).

148. *Taxation of Political Organizations*, U.S. TAX REP. (RIA) ¶ 5274 (2013).

149. Tobin, *supra* note 5, at 1122.

requiring disclosure by section 527 organizations of donors and expenditures:

Independent advocacy organizations that wanted to avoid the disclosure provisions in section 527 then sought to organize under other code provisions, principally as social welfare organizations or business leagues. The main hurdle for political groups was that to qualify for exempt status as a social welfare organization or a business league, their primary purpose needed to be consistent with their exempt purpose. It is this attempt to circumvent congressional intent regarding political organizations' disclosure of contributions and expenditures that created most of the current regulatory mess.¹⁵⁰

Because of this disclosure requirement, many groups "have strong incentives to organize as tax-exempt entities that are not subject to the disclosure provisions, most notably social welfare organizations and business leagues."¹⁵¹

Far from being a binary determination—placing an organization completely within either section 501(c)(4) or section 527 for purposes of taxation—the Code allows social welfare organizations to engage in *some* political campaign intervention while remaining within section 501(c)(4), and the organization is "taxed to the extent it actually operates as a political organization"¹⁵² under section 527(f).¹⁵³ This gray area gives the IRS an interest in the discovery of any political campaign activity whatsoever by social welfare organizations, not just at times when it can comfortably be said that political activity has become the organization's primary purpose.

Regardless of the amount of political activity, the IRS is required to investigate to ensure an organization is paying necessary taxes,¹⁵⁴ as well as complying with disclosure requirements if the organization is actually a section 527 political organization.¹⁵⁵ In addition, given the political nature of the goals

150. *Id.* at 1123.

151. *Id.* at 1120.

152. *Taxation of Political Organizations*, *supra* note 148.

153. I.R.C. § 527(f)(1) (2012). This provision of the Code imposes a tax on political campaign activity by section 501 organizations, requiring the organization to report as taxable income the lesser of its net investment income for the year or its political campaign spending. *Id.* The ease of avoiding a tax on political campaign activity by simply keeping investment income low, although interesting, is an issue that lies outside of the scope of this Comment.

154. *Id.* § 527(f).

155. Political campaign organizations must provide notice to the IRS before their exemptions will be recognized, *id.* § 527(i), and must disclose certain expenditures and contributions. *Id.* § 527(j).

of Tea Party organizations,¹⁵⁶ any method of filtering out organizations engaged in political spending is likely to result in the investigation of many Tea Party groups. Because the IRS was authorized to look at these types of fact situations together, such centralization was not necessarily improper. The Tea Party applications just happened to be included among the influx of applications that screening agents did not have enough guidance on how to process.¹⁵⁷ Any impropriety on the part of the IRS did not arise from the fact that Tea Party applications were centralized, but instead from within the criteria used to isolate such applications.

2. *The Structure of the Tea Party*

The IRS understood that filtering the cases based on searches for certain terms was not the sole basis for centralizing applications for full development. According to a manager for EO Technical, using the “Tea Party” term “was really just an efficient way to refer to this issue,” and the IRS agents “all understood that the real issue was campaign intervention.”¹⁵⁸ The manager’s understanding was that cases were still being reviewed without consideration of the organizations’ political leanings, despite use of these search term criteria.¹⁵⁹

156. The Tea Party website outlines the purposes for which the Tea Party initially formed:

The Tea Party includes those who possess a strong belief in the foundational Judeo-Christian values embedded in our great founding documents. We believe the responsibility of our beloved nation is etched upon the hearts of true American Patriots from every race, religion, national origin, and walk of life sharing a common belief in the values which made and keep our beloved nation great. This belief led to the creation of the modern-day Tea Party.

About Us – Tea Party, TEAPARTY, <http://www.teaparty.org/about-us/>, archived at <http://perma.cc/W7NX-YR93> (last visited June 30, 2014).

157. In an interview on the centralization of Tea Party organizations, an IRS tax law specialist denied that Tea Party groups were specifically targeted, saying:

Cincinnati had [] a giant influx at a certain period of time of applications that were applying for (c)(4) mostly, some for (c)(3)s, and that had what they thought was kind of a political campaign advocacy component, and didn’t really know how to move forward or if there was a problem, because there were so many at the same time, and with the little guidance out there, what to exactly do, because of the concerns raised by political campaign intervention activities that might occur.

NO EVIDENCE OF WHITE HOUSE INVOLVEMENT, *supra* note 32, at 28.

158. *Id.* at 37.

159. *Id.*

The shorthand use of “Tea Party” to target a group of similar applications arose when a screening group member escalated the first Tea Party application to EO Technical and instructed screening agents to search for additional similar cases.¹⁶⁰ One of these agents described the process that led to the development of the search terms:

When I looked at the initial Tea Parties that were in house, the applications when they come in, I would see that they had Web sites. So I would look at the Web sites. Then I would see other names I noticed that there were hundreds of these things. . . . maybe thousands. And I saw some other names. So some of those names I used, some of those terms, to find the Tea Parties. . . . I had to watch my queries and zero in on what I wanted.¹⁶¹

Anyone with experience in research can relate to this situation. One begins a search, often not expecting to find what he is looking for immediately. Instead, that initial search reveals other, more specific search terms, which the researcher then incorporates into subsequent searches to ultimately discover useful sources. Here, the screening agent was handed a Tea Party application and instructed to find similar ones. The Tea Party search term was the agent’s way of separating a group of applications with signs of political activity from the rest of the applications as efficiently as possible.¹⁶²

It is entirely logical that visiting the website for one of these organizations could lead to a belief that any similarly named organization’s application would also require centralization. The website for the Tea Party Patriots, for example, states that the movement has grown to thousands of groups since its founding in 2009.¹⁶³ It openly welcomes new members, and in describing why people join the Tea Party, the website asks, “Would you like to have more influence in realigning our Federal, State and Local Government with the US Constitution?”¹⁶⁴ The Patriots then go on to describe a vast network of local, state, and national coordinators

160. *Id.*

161. PRELIMINARY STATUS UPDATE, *supra* note 127, at 10.

162. *Id.* The Screening Agent mentions in his interview that at one point he attempted to search for just the term “tea,” but that did not help much, as it also returned results containing the term “teacher,” a category of applications quite separate from the Tea Party applications. *Id.*

163. *Getting Started*, TEA PARTY PATRIOTS, <http://www.teapartypatriots.org/get-started/>, archived at <http://perma.cc/6MWW-4RHJ> (last visited Oct. 18, 2013).

164. *Id.*

and explain that even though each group is independent, all share the organization's core values.¹⁶⁵ Not only do the Tea Party Patriots tout their connections with a wide network of other organizations, but they also state that such organizations seek influence in realigning government with the Constitution.¹⁶⁶ For a screening group agent tasked with searching for campaign intervention, this type of description makes the decision to search for other Tea Party applications seem like an obvious one.

III. CURATIVE APPROACHES TO THE POLITICAL SPENDING PROBLEM

On May 13, 2013, President Barack Obama—in response to Lois Lerner's speech to the American Bar Association and the resulting accusations of political bias—said, “If you've got the IRS operating in anything less than a neutral and nonpartisan way, then that is outrageous, it is contrary to our traditions. And people have to be held accountable, and it's got to be fixed.”¹⁶⁷ However, a report of findings by the Democratic staff in the House Oversight and Government Reform Committee concluded that there was no evidence of political bias in the targeting of these organizations and that the centralization was no more than an attempt to ensure that these applications were being processed in the same way.¹⁶⁸

Meanwhile, there was movement in the administration of the IRS as Acting Commissioner Steven Miller stepped down in response to the scandal and was replaced by Daniel Werfel.¹⁶⁹ One of Werfel's first assignments as the new Acting Commissioner was to compile a report detailing the actions of the IRS as they related

165. *Id.*

166. *Id.*

167. *More Details Emerge on IRS's Targeting*, *supra* note 4.

168. NO EVIDENCE OF WHITE HOUSE INVOLVEMENT, *supra* note 32, at 13. In giving its findings, the Committee reported:

Despite an extremely aggressive investigation involving more than a half million pages of documents and 39 interviews of IRS and Treasury employees, the overwhelming evidence before the Committee reveals no political motivation or White House involvement in the screening of tax-exempt applications. . . . The e-mail traffic indicated there were unclear processing directions and the group wanted to make sure they had guidance on processing the applications so they pulled them.

Id. Lily Kahng argues that “[t]he evidence thus far indicates that the IRS may have been tone-deaf and feckless but was not motivated by a political agenda.” Kahng, *supra* note 2, at 44.

169. Zachary A. Goldfarb & Aaron Blake, *Daniel Werfel Replaces Miller as Acting IRS Commissioner*, WASH. POST, <http://www.washingtonpost.com/blogs/post-politics/wp/2013/05/16/daniel-werfel-to-replace-miller-as-acting-irs-commissioner/>, archived at <http://perma.cc/X7X3-7MXA> (last visited June 3, 2014).

to the scandal.¹⁷⁰ This report includes Werfel's initial findings and sets out a plan for handling the existing backlog of applications selected for review and avoiding future scandal.¹⁷¹ Although Werfel largely agreed with TIGTA's findings that inappropriate criteria were used,¹⁷² he was careful to point out that full investigation of the targeting and the implementation of a long-term solution would take time.¹⁷³

A. The IRS's Stopgap Solution

Werfel's report highlighted that the IRS's immediate priority was to handle the significant backlog of applications that had been waiting as long as three years for a determination.¹⁷⁴ On June 25, 2013, the EO unit released a memorandum providing interim guidance for certain applications still awaiting determination.¹⁷⁵ The memorandum established a special process for the expedited handling of applications that had been pending for more than 120 days as of May 28, 2013, where there were indicators that the organization may be involved in political campaign intervention.¹⁷⁶

Under this new approach, qualifying applications were reviewed immediately for private inurement,¹⁷⁷ and if that review

170. *New IRS Report*, *supra* note 133.

171. WERFEL, *supra* note 29.

172. *See generally id.*

173. *Id.* at 7 (“[A]lthough there is a desire for immediate answers regarding the circumstances that led to the inappropriate treatment of taxpayers identified in the TIGTA Report, such expediency must be carefully balanced with the need to engage in thorough and fair fact-finding.”).

174. *Id.* at 22 (“Appropriately resolving the cases that have been in the queue for action and resolution for unacceptable periods of time is a top priority for the IRS.”). Werfel then stated that 132 applications had been previously categorized as “potential political cases” and were pending for more than 120 days as of May 28, 2013, making them eligible for interim expedited processing. *Id.* The TIGTA report, on the other hand, identified 160 potential political cases that had been pending for more than 120 days (with all of the applications experiencing a delay of at least 181 days, and 129 having been in development for more than a year), with the average delay being 574 days, which is longer than the average delay for other categories of full-development applications. TIGTA Report, *supra* note 1, at 15.

175. INTERNAL REVENUE SERV., U.S. DEP'T OF THE TREASURY, INTERIM GUIDANCE ON OPTIONAL EXPEDITED PROCESS FOR CERTAIN EXEMPTION APPLICATIONS UNDER SECTION 501(C)(4) (June 25, 2013) [hereinafter INTERIM GUIDANCE], available at http://www.irs.gov/pub/foia/ig/spder/TEGE_07_0613_08.pdf, archived at <http://perma.cc/6PQM-EEPY>.

176. *Id.*

177. *Id.* Code section 501(c)(4) does not grant exemption “unless no part of the net earnings of such entity inures to the benefit of any private shareholder or individual.” I.R.C. § 501(c)(4)(B) (2012). Although this “private inurement”

found no such inurement, the organization could elect to participate in the “expedited option.”¹⁷⁸ This process allows an organization to receive a favorable determination by self-certifying to the IRS that during the current, previous, and all future tax years, the organization has devoted, does devote, and will devote at least 60% of both its expenditures and total time to its social welfare purposes and “less than 40% of both the organization’s total expenditures and its total time . . . on direct or indirect participation or intervention in any political campaign on behalf of (or in opposition to) any candidate for public office.”¹⁷⁹ Organizations that qualify but choose not to self-certify that their political activity is below a certain level—presumably because their figures rise above the threshold level but still feel that they are entitled to exemption—are still able to pursue the traditional facts-and-circumstances test.¹⁸⁰

This expedited processing, however, is not permanent and only applies to a limited group of applications.¹⁸¹ Specifically, in order for an application to be eligible for expedited review, it must meet two requirements: (1) the application must have been identified previously by the IRS as a potential political case; and (2) the application must have been pending for at least 120 days as of May 28, 2013.¹⁸² Essentially, the date and delay requirements isolate applications that were the focus of the TIGTA Report.¹⁸³ Thus, the

requirement is an important element of exemption for social welfare organizations, discussion of its nuances lies outside of the scope of this Comment.

178. “By letter to the applicant, Exempt Organizations Determinations will provide an optional expedited process for all pending applications for which there are no indications of private inurement.” INTERIM GUIDANCE, *supra* note 175.

179. WERFEL, *supra* note 29, at 24. Werfel expected that organizations choosing this self-certification option would receive a determination within two weeks of self-certification. *Id.* He was careful, however, not to guarantee this response time, warning that “due to the fact that some of these determinations represent difficult and complex judgments, some [applications] may still take longer to resolve than others.” *Id.* at 23.

180. *Id.* at 25. “Organizations that wish to be evaluated under all the facts and circumstances rather than to conduct their own measurements retain that option via Path 1,” which represents the traditional determinations process. *Id.*

181. Although there is no specific end date to the interim process, it only applies to applications pending before a certain date, necessarily limiting the group of applications subject to the interim guidance to a discrete group. *Id.* at 22.

182. *Id.*

183. Werfel, when describing the expedited process in his report on the scandal, stated:

IRS's solution is merely a stopgap and not meant to apply beyond the scandal.¹⁸⁴

Offering two options to organizations applying for recognition of their tax-exempt status—self-certification or a facts-and-circumstances review—can jeopardize the goals of consistency that motivate the IRS to target related organizations in the first place. It runs counter to the IRS's goal of consistency to allow pending applications to be split into two separate groups: one of which is determined by organizations themselves, and the other is reviewed by the agency's trained tax specialists who can better call upon the resources within the IRS for guidance.

New issues require new standards, and any attempt at creating a bright-line rule that can adequately address all exempt applications appears to do little to reduce the necessity of centralization. As long as cases are centralized when a new issue arises, there exists the potential for allegations of IRS political bias. As a result, the expedited-processing safe harbor—though useful when looking at the cases that are the subject of this particular scandal—cannot be easily adapted for general applicability without being vulnerable to the same risks that the current regime also faces. By that same logic, proposed section 501(c)(4) regulations issued in November 2013—requesting comments on the amount of campaign intervention that should be allowed—will do little to solve future nonpolitical interpretation issues. Additionally, “[i]f the final regulations do not apply similar requirements to all section 501(c) organizations other than charities, groups will simply reorganize under another code provision.”¹⁸⁵ These ad hoc remedial measures can be effective within specific application categories, but they do little to address fresh problems as they arise.

[W]e have defined the “priority backlog” for our *initial* focus to be 501(c)(4) applications that have been previously identified as “potential political cases”—i.e., the focus of the TIGTA audit—and that were submitted to the IRS for initial review more than 120 days prior to May 28, 2013 (the first week of new leadership at the IRS).

Id.

184. Werfel points out that the applications at issue in the TIGTA Report are the subject of the IRS's “initial focus” and that this expedited processing “is not available to other applicants at this time.” *Id.*

185. Tobin, *supra* note 5, at 1128. Tobin continues by pointing out that “[g]roups are already contemplating using section 501(c)(6) business leagues and section 501(c)(19) veterans organizations as a way to engage in campaign-related activity, and section 501(c) contains many opportunities for organizations that could be used as an end run around the regulation.” *Id.*

B. Avoiding Inappropriate Criteria

The IRS is charged with administering the Tax Code, and in doing so it is authorized to look at related organizations together when those organizations operate in an uncertain area of the law.¹⁸⁶ Tea Party organizations were among those in this category, engaging in political activity that—even if ultimately not threatening exemption—warranted closer inspection by the IRS. Agents tasked with finding these related applications developed search terms that would reliably and efficiently locate those needing full development.¹⁸⁷ At every step of the process, the IRS was acting within its authority, in pursuit of its mission to “enforce the law with integrity and fairness to all.”¹⁸⁸ In this case, the IRS needed to subject a group of applications to a lengthier determinations process in order to ensure the fairness it promises.

Although there is justification for the IRS’s targeting of Tea Party and similar organizations, many have agreed that the methods used for such targeting were not ideal.¹⁸⁹ Despite an absence of evidence of political bias,¹⁹⁰ the IRS would benefit from taking steps to ensure that future targeting does not raise concerns that the IRS is acting with a partisan motive.¹⁹¹ However, the problem then becomes how the IRS should structure its procedures so as to effectively filter applications that must be fully developed without inviting criticism that such an investigation is motivated by political bias.

186. See *supra* Part III.

187. See *supra* Part II.B.2.

188. *The Agency*, *supra* note 14.

189. See, e.g., TIGTA Report, *supra* note 1, at 5 (finding that targeting organizations based on certain terms in the exemption application was “inappropriate”); WERFEL, *supra* note 29, at 6 (“Significant management and judgment failures occurred . . . that contributed to the inappropriate treatment of certain taxpayers applying for tax exempt status.”); *More Details Emerge on IRS’s Targeting*, *supra* note 4. Former IRS Commissioner Steven Miller “stated that centralizing cases ‘made sense,’ but agreed that the way in which they were centralized was improper.” *More Details Emerge on IRS’s Targeting*, *supra* note 4.

190. NO EVIDENCE OF WHITE HOUSE INVOLVEMENT, *supra* note 32, at 3.

191. Werfel’s report stated: “A critical component of our action plan is to implement necessary controls to permanently address the problems with the tax exempt application process, as identified in the TIGTA report.” WERFEL, *supra* note 29, at 14.

C. An Argument for IRS Targeting Through the Audit Process

“Whether this scandal will ultimately bring about clearer guidance or new legislation in the Code Sec. 501(c)(4) arena, derail IRS efforts to police the political activities of Code Sec. 501(c)(4) groups, or distract Congress from its larger goals of tax reform remains to be seen.”¹⁹² Although Congress may act to bring more certainty to the permissible level of political intervention by section 501(c)(4) organizations, passing legislation can be a lengthy process.¹⁹³ Additionally, any legislation enacted to address the campaign intervention problem is not likely to have broad enough applicability to address future tax problems as they arise; after all, the passing of the Pension Protection Act, although it did have a significant effect on donor-advised funds,¹⁹⁴ did not aid the IRS in handling future tax issues. Therefore, the IRS should use the wide discretion given to it by Congress to take its own steps to reduce the risk of further “inappropriate” criteria.¹⁹⁵

Specifically, the IRS should consider adopting an open-door determinations process for recognition of exemption.¹⁹⁶ This open-door process would allow organizations to self-certify that they operate according to the tax law and recognize exemption in the absence of obvious application deficiencies—similar to the expedited determination process that the IRS is currently using for the initial backlog of applications.¹⁹⁷ As a second prong of this approach, in order to address the problems created by such a self-certification system, the IRS should continue to engage in targeted centralization of applications through the examination (audit) process rather than the determinations process. By doing so, the IRS would be better able to develop proper selection criteria, thus maintaining consistency and efficiency in the processing of

192. *More Details Emerge on IRS's Targeting*, *supra* note 4.

193. *See, e.g.*, Molly Ball, *It's Been 951 Days Since the Senate Passed a Major New Law*, THE ATLANTIC (Feb. 20, 2013, 6:30 AM), <http://www.theatlantic.com/politics/archive/2013/02/its-been-951-days-since-the-senate-passed-a-major-new-law/273197/>, archived at <http://perma.cc/GK9J-4V95>.

194. *See supra* Part I.B.2.

195. *See* *Bob Jones Univ. v. United States*, 461 U.S. 574, 596 (1983).

196. The use of the word “recognition” here is deliberate. While many organizations do not have to apply for an exemption itself, but instead apply for recognition of the exemption granted to them by law, section 501(c)(3) organizations must apply for and be granted exemption. This Comment’s proposed solution would not apply in the latter case, but only to applications that are little more than a request for the IRS to acknowledge that the organization is exempt.

197. *See supra* Part III.A.

applications whenever new issues arise while also minimizing the risk of future cries of partisanship and unfairness by the public.

1. Open-Door Determinations and Targeting Through Auditing

As opposed to the determinations process, whereby every application is reviewed to some extent, the examinations process is more limited.¹⁹⁸ To illustrate with the individual income tax return process, the audit as it is known today used to be performed on every single return.¹⁹⁹ However, as the number of overall returns increased after the revival of the income tax in 1913, the ability of the Bureau of Internal Revenue—the IRS’s predecessor—to give individual attention to each return decreased.²⁰⁰ By 1918, “the problem confronting the Bureau . . . was to devise an administrative system by which an accumulation of approximately 4,000,000 income returns of individuals and corporations could be audited and any additional tax due could be discovered, assessed, and collected in the briefest possible time.”²⁰¹ The Bureau stopped attempting to individually audit each return, and from that arose the current system of self-assessment, requiring taxpayers to account for their tax liability on their own, subject to audit.²⁰² Thus, the need for a selective audit system arose from a rapid increase in workload for an agency with limited resources.²⁰³ As with individual tax returns, tax-exempt organization applications often experience rapid increases in activity, making it impossible for the IRS to fully examine each application to determine initial tax consequences.²⁰⁴ By allowing organizations to secure exemption by self-certifying that they are eligible, those organizations will not be forced to wait until the IRS is able to

198. In 2011, 1.3% of returns filed by tax-exempt organizations were selected for audit. *Do Nonprofits Really Need to Worry About IRS Audits?*, NOLO, <http://www.nolo.com/legal-encyclopedia/do-nonprofits-really-need-worry-about-irs-audits.html>, archived at <http://perma.cc/EE4T-KS2L> (last updated May 2013).

199. Bryan T. Camp, *Theory and Practice in Tax Administration*, 29 VA. TAX REV. 227, 234 (2009).

200. *Id.* at 237.

201. U.S. TREASURY DEP’T, *THE WORK AND JURISDICTION OF THE BUREAU OF INTERNAL REVENUE* 97 (1948).

202. Camp, *supra* note 199, at 239.

203. Regarding the benefits of a self-assessment tax collection system, Andrew Okello argued that “[t]he most cost effective systems of collecting taxes are those that induce the vast majority of taxpayers to meet their tax obligations voluntarily.” Andrew Okello, *Managing Income Tax Compliance Through Self-Assessment* 4 (Int’l Monetary Fund, Working Paper No. WP/14/41, 2014).

204. *See supra* Part I.

fully evaluate their application before reaping the benefits of the tax exemption to which organizations believe they are entitled.

If the IRS leaves initial determinations to the organizations themselves, the targeting of applications at the audit stage would invite less criticism. By opting to stay silent at the determination stage, the IRS's decision to audit would be its first analysis of an organization's activities. In contrast, the determinations process today requires an IRS decision at the initial stages of an organization's exemption, leaving the IRS to reverse its own previous decision when it discovers that a misunderstanding of the law or new legal issue has resulted in the incorrect recognition of exemption. Instead, by moving the entire inquiry to the audit process, a decision to revoke exemption would not be inconsistent with previous IRS determinations, and the goals of consistency and efficiency would remain intact. Doing so would give the IRS much-needed time to develop calculated methods for singling out particular organizations before targeting takes place and would not require organizations to wait for that to happen before their exemption is recognized. Many section 501(c)(4) organizations already operate without seeking IRS recognition first, meaning the system is already largely self-certifying. By making the process completely self-certifying, the IRS can remove itself entirely from that initial determination and instead focus its time and resources on audit selection.²⁰⁵

The audit process brings with it an expectation of heightened scrutiny. Most are familiar with audits: a time when the IRS digs deeper into a taxpayer's activities to ensure that the taxpayer is acting within the requirements of the Code.²⁰⁶ The IRS website itself explains that "[a]n IRS audit is a review/examination of an organization's or individual's accounts and financial information

205. Tax administration under a self-assessment system simply shifts IRS scrutiny from pre-filing to post-filing. Okello, *supra* note 203, at 11. Okello further explains:

The tax administration relies more on post-filing controls such as risk-based audits, collection enforcement measures, and prosecution of tax evaders. Tax administrations operating self-assessment systems adopt targeted verification approaches (e.g., through information sharing, data matching, and risk-based desk and field audits) to verify the information contained in tax returns.

Id.

206. Granted, popular media does not exactly look fondly on the added scrutiny involved in an audit. For a good example, Season 2, Episode 22, of the popular sitcom "Roseanne" focuses on the main characters as they prepare their annual income tax returns. Every time the word "audit" is mentioned, it is followed by scary music, as if to liken the audit to a horror film. *Roseanne: April Fool's Day* (ABC television broadcast Apr. 10, 1990).

to ensure information is being reported correctly, according to the tax laws, to verify the amount of tax reported is accurate.”²⁰⁷ The website continues by explaining that this examination involves a request for additional documentation and suggests that such an examination can potentially involve some delay.²⁰⁸ By reserving the targeting of potentially political social welfare organizations for the audit process, the IRS could cut down on complaints about the level of scrutiny and delay involved in examining organizations at the determination stage. There would still be heightened scrutiny and lengthy delays in some cases, but within the context of the audit, those side effects are expected instead of looked upon as a sign that something is going wrong.

2. Organizational Compliance

A concern inherent in a system of self-certification is that organizations will “cheat the system” by certifying that their political activity is within a permissible level when it actually is not, choosing to gamble on the chance that their activity will be overlooked by the audit process. This concern is understandable: the IRS audit rate for tax-exempt organizations currently hovers around a mere 1.3%.²⁰⁹ With audit rates so low, and an even lower chance that an audit will result in a revocation of exemption,²¹⁰ one would certainly expect that organizations might be willing to just take the risk in exchange for the benefits of noncompliance.

Despite what may be expected, self-certification at the initial application level is unlikely to bring forth a flood of compliance problems. First, oversight by other agencies and the public in general—coupled with the potential that one of those outside parties could even convince the IRS to audit an organization—

207. *IRS Audits*, INTERNAL REVENUE SERV., <http://www.irs.gov/Businesses/Small-Businesses-%26-Self-Employed/IRS-Audits>, archived at <http://perma.cc/6RPF-HF9Q> (last updated June 20, 2014).

208. *Id.*

209. *Do Nonprofits Really Need to Worry About IRS Audits?*, *supra* note 198. Stephen Fishman, in his article on the Tea Party scandal, stated that “the real scandal is that hardly any nonprofits of any type ever get audited by the IRS,” *id.*, and supported his argument with statistics of IRS audit rates:

In 2012, for example, [the IRS] examined only 10,743 of the 798,903 returns filed by tax-exempt organizations in 2011. Thus, only about 1.3% of all nonprofits filing returns were audited. In 2011, the odds of being audited were about the same: 11,699 of 858,865 returns filed in 2010 were audited, for an audit percentage of 1.3%.

Id.

210. *Id.* Fishman speculated that “[t]here’s probably a better chance that a nonprofit’s office will be hit by a meteor than lose its tax exemption.” *Id.*

could dissuade organizations from opting to take a questionable tax position.²¹¹ Second, a system of strategic publicity of IRS enforcement successes would create the perception that the IRS is well-equipped to fully enforce the Code and that the risk of audit is higher than IRS resources allow.²¹² With these additional tools—oversight by outsiders and strategic publicity—the IRS could effectively reduce, if not cancel, any increase in noncompliance that would otherwise occur in a completely open and unregulated determinations process. When coupled with the benefits of targeting through auditing, the IRS becomes better suited to engage in efficient administration of the Code while also gaining the time necessary to develop criteria for targeting that do not run the risk of drawing suspicion of unfairness.

a. Promoting Compliance Through Third Parties

The IRS has shown that it is willing to consider well-founded arguments from outside parties that a particular individual should be audited.²¹³ The IRS “allows returns to be selected through . . . referrals from other federal and state government agencies if these returns can be shown to have a greater audit potential than a DIF-selected return.”²¹⁴ This third-party access to the audit process is particularly useful in the tax-exempt context. Tax-exempt organizations, by reason of their existence as organizations, are subject to greater scrutiny by the public, other agencies, and watchdog groups than the scrutiny to which an individual taxpayer is normally subjected. For example, political organizations are subject to certain disclosure requirements by the Federal Election Commission,²¹⁵ and private citizens are often willing to criticize

211. See *infra* Part III.C.2.a.

212. See *infra* Part III.C.2.b.

213. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/GGD-99-30, TAX ADMINISTRATION: IRS' RETURN SELECTION PROCESS 4 (1999) (including among the categories of returns selected for audit “referrals of potentially noncompliant returns that come from both inside and outside IRS”).

214. *Id.* at 1. “DIF” refers to the IRS Discriminant Function: “an automated system for scoring individual tax returns according to their audit potential.” *Id.* DIF scores are calculated using mathematical formulas created through intensive examination of returns and designed to search for reliable indicators of tax noncompliance. *Selection of Returns for Audit*, FED. INC. TAX'N OF INDIV. § 47.01 (current through 2013). Since the DIF is a mathematical process, and the problems at issue with centralization would be difficult—if not impossible—to reduce to mathematical formulas, discussion of the DIF as a solution is outside the scope of this Comment.

215. Tobin, *supra* note 5, at 1125.

organizations that appear to be abusing their exemptions.²¹⁶ On the part of the organizations, this public scrutiny serves two purposes with respect to compliance. First, an organization's mere presence under the public eye might encourage it to decide against a questionable tax position for fear of being caught. The second purpose bolsters the first: an organization would be even more likely to avoid the temptation to "test the waters" of the tax law if it knows that those outside parties could also convince the IRS to examine the organization a little more closely.

In a classroom, a teacher might ask a student to "watch the class" for a few minutes while the teacher steps out; whereas normally students would immediately misbehave once the teacher leaves the room, they instead think twice about breaking the rules because they know someone is watching them who will report their actions to the teacher upon the teacher's return. Similarly, by allowing outside parties to "watch the class," the IRS can promote organizational compliance and honest self-certifications. In fact, these outside influences have already played a part in the targeting of political section 501(c)(4) organizations: as watchdog groups contacted the IRS with reports of impermissible levels of political activity, the IRS used that information to further refine its indicators of noncompliance to better filter out organizations needing extra examination.²¹⁷

b. Strategic Publicity

In addition to outside influence from watchdog groups and other agencies, a system of strategic publicity of audit successes would promote compliance in the application process. Self-certification for organizations is similar to the self-assessment system present in the individual-income-tax world, of which President John F. Kennedy said: "For voluntary self-assessment to be both meaningful and productive of revenues, the citizens must not only have confidence in the fairness of the tax laws, but also in [the] uniform and vigorous enforcement of these laws."²¹⁸ Strategic publicity would encourage

216. For example, many have taken issue with the National Football League's status as a tax-exempt "professional football league" under section 501(c)(6). See Brian Frederick, *Why Does the National Football League Deserve Tax-Exempt Status?*, THE HUFFINGTON POST (Mar. 8, 2012, 2:38 PM), http://www.huffingtonpost.com/brian-frederick/nfl-tax-exempt_b_1321635.html, archived at <http://perma.cc/YYS2-YZ7M>.

217. FY 2012 ANNUAL REPORT, *supra* note 33, at 23.

218. John F. Kennedy, Special Message to Congress on Taxation (Apr. 20, 1961) (transcript available at <http://millercenter.org/president/kennedy/speeches/speech-5669>, archived at <http://perma.cc/7VC4-JYH8>).

that necessary confidence in vigorous enforcement, despite the lack of sufficient resources to actually enforce every single tax misstep.²¹⁹

The phrase “strategic publicity” refers to a system by which the IRS publicizes specific examples of its successes as a means to promote overall compliance in the absence of sufficient resources to broaden enforcement efforts.²²⁰ “[B]ehavioral research suggests that specific examples of tax enforcement are likely to influence individuals’ perceptions of certain elements of the tax system, which, in turn, may affect their decisions to comply with the tax law.”²²¹ By disclosing examples of the IRS’s successful enforcement of the Code’s requirements, organizations would perceive a higher risk of being caught if they decide to apply for an unwarranted exemption—even if that risk is no higher than it is now—and a risk-averse organization might make the decision to err on the side of safety.²²²

If the IRS projects itself as well-equipped to effectively enforce abuses when a new issue arises, other organizations—even ones that derive their exemption from a different Code section—might be hesitant to take advantage of future tax uncertainties before receiving guidance from the IRS, regardless of what that uncertainty might be. Thus, the strategic publicity of political organization audit successes, in addition to promoting compliance among other political organizations, could also dissuade other organizations from attempting to gain undue benefit from perceived tax uncertainties. By engaging in this policy of strategic publicity, coupled with targeted audits motivated in part by third-party oversight,²²³ the IRS can effectively reduce the risk of noncompliance in an open-door determinations system.

219. Arguing that “voluntary compliance is best achieved through a system of self-assessment,” Andrew Okello states that taxpayers are more likely to comply when the tax administration “creates strong deterrents to non-compliance through effective audit programs and consistent use of penalties,” and “is transparent and seen by the public to be honest, fair, and even-handed in its administration of the tax laws.” Okello, *supra* note 203, at 4. A selective-publicity approach would allow the IRS to better manufacture this public perception in the absence of sufficient resources to consistently audit all instances of noncompliance.

220. See generally Joshua D. Blank, *In Defense of Individual Tax Privacy*, 61 EMORY L.J. 265 (2011).

221. *Id.* at 289.

222. *Id.* at 298 (“After encountering salient examples of specific taxpayers whom the government has detected, individual taxpayers who might otherwise be inclined to claim a questionable tax position may overestimate the IRS’s capacity to detect abuse.”).

223. See *supra* Part III.C.2.a.

CONCLUSION

In an environment where operating budgets shrink as workloads increase at an alarming rate, it is necessary for the IRS to develop ways to better administer and enforce the Tax Code so as to maximize the benefit of its limited resources. To ensure fair and consistent application of the tax law while avoiding the risk of future allegations of impropriety, the IRS should open up the determinations process to self-certification by organizations and move the targeting process to the audit function of the IRS. By engaging in audit-level targeting of similar organizations, the IRS would procure more time to create a coherent approach as new issues or perceived abuses arise. Additionally, the audit process is widely understood to involve heightened scrutiny and delay, which were both problems complained of by Tea Party organizations; however, that complaint would lose some of its force if the organization were able to have its exemption recognized through self-certification in the meantime. By using the audit process to evaluate whether an organization qualifies for exemption, instead of attempting such an evaluation at both the determinations and examinations level, the IRS can continue to benefit from centralization while reducing the impression that it is acting with bias, whether that bias be political or otherwise.

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