The IRS In Freefall: The Scandal Over Delayed Approvals Of Certain Social Welfare And Charitable Institutions

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ABSTRACT

Much has been written about the 2013 IRS "scandal" that uncovered a flawed determination process targeting politically conservative applicants for tax-exempt status. This scandal triggered investigations, litigation and procedural changes for social welfare and charitable organizations. On September 28, 2017, a new report was issued by the Treasury Inspector General for Tax Administration (TIGTA) that modified the scope of the prior "scandal" and indicated that the determination process had targeted liberal applicants as well as conservatives. This article traces the fallout from the scandal and questions the procedural consequences for organizations seeking exempt status.

THE SCANDAL

In order to be officially recognized as tax-exempt under IRC 501 (c)(3) or IRC (c)(4), a nonprofit organization must file an application and meet specific criteria for the specific classification it seeks. Under IRC 501(c)(3), the charitable organization must show that it is "organized and operated" for an exclusively public purpose. The operated test requires that its organizing document contain language that: (i) limits

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its purpose; (ii) does not expressly permit activities that do not further that purpose; (iii) permanently dedicates its assets to charitable purposes; (iv) refrains from participating in political campaigns; (v) restricts lobbying activities to an insubstantial part of its total activities; (vi) ensures that no earnings inure to any private person; (vii) does not operate for the benefit of any private interest; and (viii) prohibits activities that are illegal or that violate fundamental public policy. This litany of activities is contained in IRS Form 1023's questions.

In order to be recognized under as tax-exempt under IRC 501(c)(4), a civic league or social welfare organization must also meet certain established criteria, even though it is required to file a Form 1024 in order to operate as an exempt organization. If the organization wants to obtain official recognition as a (c)(4), it may file the Form 1024 and demonstrate that its net earnings are devoted primarily to charitable, educational or recreational purposes. Here, too, no part of its net earnings can inure to the benefit of any private person. As a social welfare organization, it must operate primarily to further the common good and general welfare of the people of the community, i.e. through civic betterment and social improvements. It may not be involved in direct or indirect political activity or intervene in political campaigns for any candidate, but it is permissible to participate legally in some political activity if the organization can prove that it is primarily operated to promote social welfare. The term "social welfare" has been described in a 1981 CPE Text (training document) as a "catch all for presumptively beneficial nonprofit organizations that resist classification under the other exempting provisions of the Code."

The 2013 IRS "scandal" uncovered a flawed determination process.

The process for recognition can take months to be completed. Since more than 70,000 applications are received each year, the IRS aims at responding in somewhere between 2 and 12 months. Delays can and do occur. Frequently, these delays happen where an examiner is not yet assigned because of heavy workload or has questions that remain unanswered or that require additional documentation. In such cases, the IRS recommends calling to check on the status of the application or using its SELECT Check app on IRS. gov.

Much has been written about the 2013 IRS "scandal" that uncovered a flawed determination process targeting conservative "Tea Party" applicants for tax-exempt status. Nearly five years have passed since the scandal erupted. In that time, there have been several investigations, including Congressional and Department of Justice investigations, House Committee Reports, IRS resignations and retirements—as well as ongoing litigation. In response, the IRS has tried to distance itself from charges of political ideology and unfair treatment.

Recently, a new Review of Selected Criteria Used to Identify Tax-Exempt Applications for Review (Final TIGTA Report) was issued by the Treasury Inspector General for Tax Administration on September 28, 2017.[2] The objective of the Final TIGTA Report was to provide a historical account of the IRS's use of certain criteria to identify applications for review, and it showed a more even-handed approach in the determination process than had been previously thought.

2. Treasury Inspector General for Tax Administration, *Review of Selected Criteria Used to Identify Tax-Exempt Applications for Review*, Treasury.gov (Sept. 28, 2017), https://www.treasury.gov/tigta/auditreports/2017reports/201710054fr.pdf.

The "scandal" first came to light on May 10, 2013, when Lois Lerner, then Exempt Organization Director, admitted to a group of tax lawyers at an ABA meeting that the IRS had delayed and obstructed tax applications from conservative sounding applicants.[3] Four days later, on May 14, 2013, Michael E. McKenney, Acting Deputy Treasury Inspector General for Audit, issued a scathing report, concluding that the IRS had used inappropriate criteria to identify tax-exempt applications for review.[4]

THE FINAL AUDIT REPORT

The Final Audit Report (Report) presented the results of the Inspector General's review to determine whether the IRS had "(1) targeted specific groups applying for tax-exempt status; (2) delayed processing of targeted groups' applications; and (3) requested unnecessary information from targeted groups."[5] The audit was initiated following concerns voiced by members of Congress and reported in the media.

As a caveat to the Report, an attached Memorandum from Michael McKenney dated May 14, 2013, rejected the IRS's response to the Report. The IRS allegedly claimed the Report suggested that approvals of applications were evidence that the Exempt Organizations Determinations Unit (EO) should not have looked closely at those applications. The Inspector General bristled at that statement, arguing, "We disagree with this statement. Our objection was to the criteria used to identify these applications for review."[6] Per the accompanying Memorandum, the IRS also incorrectly claimed that all issues had been resolved; however, the Memorandum asserted that the Report's recommendations for corrective action had not been implemented and that a substantial number of exempt applications remained open even after three years and two election cycles.[7] The initial charges against the IRS asserted that the EO had developed and used "inappropriate criteria," including words messaging political causes and policy positions. Criteria for potential political cases included: Referencing "Tea Party," "Patriots" or "9/12 Project" in the case file; Case files which focused on education of the public by advocacy/lobbying to "make America a better place to live;" Coverage of "government spending, government debt or taxes;" and Inclusion of a "statements in the case file that criticize how the country is being run."[8]

This abusive practice did not start in 2013. It had originated in August 2010, with the first "Be on the Lookout (BOLO)" listing. EO specialists continued to expand and interpret the BOLO list to identify potential political cases based on the names and policy positions of applicants. The Report blamed IRS management for targeting specific groups, delaying processing for those groups and requiring the groups to provide unnecessary information. Over the investigatory period, the IRS continued to dodge the recommendations of the Report, claiming to refocus on the lobbying and advocacy activities of each organization. Progress in the investigation was elu-

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3. Michael Wyland, *IRS Targeting of Conservative Groups a Threat to Nonprofit Sector*, NONPROFIT QUARTERLY (May 13, 2013), https://nonprofitquarterly.org/2013/05/13/irs-targeting-of-conservative-groups-a-threat-to-whole-sector/.

4. Treasury Inspector General for Tax Administration, *Inappropriate Criteria were Used to Identify Tax-Exempt Applications for Review*, TREASURY.GOV (May 14, 2013), http://www.treasury.gov/tigta/auditreports/2013reports/201310053fr.html ("Report").

5. Treasury Inspector General for Tax Administration, *Memorandum [to "Report"] for Acting Commissioner, Tax-Exempt and Government Entities Division*, TREASURY.GOV (May 14, 2013), https://www.treasury.gov/tigta/auditreports/2013reports/201310053fr.html.

6. *Id*.

7. *Id*.

8. Report, *supra* note 4.

sive since unauthorized changes to the evaluation criteria were frequently made during the course of review.[9] Consequently, organizations which were potential political cases continued to experience significant processing delays with their applications.

The Report contained the recommendations of the Treasury Department, the IRS's responses and, where applicable, Comment by the Office of Audit. A summary of those recommendations follows:

Recommendation 1.

To ensure that the Director must approve all changes to criteria on the BOLO list before implementation and that a supporting memorandum is formalized in the Internal Revenue Manual. The IRS agreed with the recommendation.[10]

Recommendation 2.

To develop procedures to better document the reasons certain applications are chosen for review, e.g. specific political campaign intervention or other reasons based on past experience. The IRS proposed alternative corrective action to improve its screening procedures without causing an adverse impact on timeliness. The Office of Audit rejected the IRS alternative, noting that these applications had already been open for an average of 574 days and that Recommendation 2 would hardly impact negatively on their timeliness.[11]

Recommendation 3.

To develop training programs to be held before each election cycle designed to teach examiners how to handle potential political intervention matters. The IRS agreed with the recommendation and committed to developing a training program and a schedule.[12]

Recommendation 4.

To require the EO Director to develop a process by which assistance from the Technical and Guidance Units would be requested, so that formal guidance in Regulations, Revenue Rulings, Revenue Procedures, Notices and Announcements would apply. The IRS agreed to develop a formal process to request assistance.[13]

Recommendation 5.

To develop guidance for specialists processing requests for exemption involving potentially significant political campaign intervention. The guidance would be posted to the internet for purposes of transparency. The IRS countered with an alternative position. The Office of Audit rejected the IRS's alternative proposal.[14]

Recommendation 6.

To develop workshops before each election cycle, including discussions of differences between politician campaign intervention and general advocacy. The IRS accepted this recommendation.[15]

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9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*

Recommendation 7.

To provide oversight to ensure that potential political cases that have been in process for three years are quickly approved or denied. The IRS agreed, but stated that it is an ongoing project and is being closely monitored.[16]

Recommendation 8.

To require the EO Acting Commissioner to recommend to IRS Chief Counsel that guidance on how to measure the primary activity of (c)(4) organizations should be included in Treasury's Priority Plan. The IRS agreed to share this recommendation with IRS Chief Counsel and the Department of Treasury's Office of Tax Policy.[17]

Recommendation 9.

To require the EO Director to do training regarding the wording of questions in additional information request letters and to identify what information should be requested. The IRS accepted this recommendation.[18]

THE ISSA REPORT

On December 23, 2014, the House Oversight and Government Reform Committee Chair, Darrell Issa, issued a staff report ("Issa Report") entitled *The Internal Revenue Service's Targeting of Conservative Tax-Exempt Applicants: Report of Findings for the 113th Congress*.[19] The Report was based on the Committee's review of 1.3 million pages of documents and 52 transcribed interviews with IRS, Treasury and DOJ employees. The report cited "flagrant and pervasive management failures by Washington officials" for contributing to the misconduct. It assigned part of the blame for the scandal to the Treasury Department and stated the department "secretly considered potential regulations on the political speech of 501(c)(4) non-profits."[20] Its conclusion reads in part:

> *Conservative organizations were not just singled out because of their political beliefs—they were targeted by IRS officials and employees who expressed a general loathing toward them even while begrudgingly admitting that those organizations were in compliance with the only thing the IRS should care about: the federal tax code.*[21]

THE LITIGATION

A number of cases were promptly filed to contest the IRS targeting. Among the most frequently cited are *True the Vote, Inc.* v. *Internal Revenue Service*; *Linchpins of Liberty* v. *United States*; *United States* v. *NorCal Tea Party Patriots*; and *Freedom Path* v. *Lerner*.[22]

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16. *Id*.
17. *Id*.
18. *Id*.
19. U.S. House of Representatives Committee on Oversight and Government Reform, Darrell Issa (CA-49), Chairman, *The Internal Revenue Service's Targeting of Conservative Tax-Exempt Applicants: Reports of Findings for the 113th Congress, Staff Report* (December 23, 2014), https://oversight.house.gov/wp-content/uploads/2014/12/December-2014-IRS-Report.pdf ("Issa Report").
20. *Id*. at ii-iii.
21. Issa, *supra* note 19 at 208-09. *See also ISSA Releases Report on IRS Targeting as 113th Congress Concludes*, (December 23, 2014), https://oversight.house.gov/release/issa-releases-report-irs-targeting-113th-congress-conclu.
22. *True the Vote, Inc.* v. *Internal Revenue Service*, 71 F.Supp. 3d 219 (D. D.C 2014), *aff'd* in part and *rev'd* in part by *True the Vote* v. *Lerner*, 831 F.3d 551 (D.C. Cir. 2016) *cert. denied* 137 S.Ct. 1068 (2017); *Linchpins of Liberty* v. *United States*, 71 F.Supp. 3d 236 (D. D.C. 2014), *aff'd* in part and *rev'd* in part by *True the Vote* v.

True the Vote

True the Vote is an institution self-described as "the nation's largest nonpartisan voters' rights and election integrity organization.[23] In 2014, it initiated litigation alleging it was part of a systemic targeting of conservative organizations by the IRS that caused unwarranted delay, as well as heightened review and scrutiny in its application for tax-exempt status as a 501(c)(3).[24] The district court granted the government's motion to dismiss for lack of subject matter jurisdiction, determining the controversy had become moot when the IRS issued True the Vote's determination letter.

Linchpins of Liberty

In *Linchpins of Liberty*, 41 organizations filed a similar lawsuit claiming they were discriminated against by the distribution of the IRS BOLO (Be On The Lookout) list.[25] Before the district court's opinion was issued, the IRS announced it had voluntarily suspended the challenged IRS scheme and had stopped use of the BOLO list.[26] Partially based on this announcement, and in part because some of the plaintiffs had received determination letters by the time of litigation, the district court granted the government's motion to dismiss for mootness.

Both *True the Vote* and *Linchpins for Liberty* were overturned in 2016. In a single decision addressing both cases, the D.C. Circuit Court of Appeals reversed the dismissal of actions for injunctive and declaratory relief, stating that voluntary cessation of the controversial practices had never occurred and the cases were not moot. On remand, both cases continued with litigation on discovery issues. In April 2017, the IRS was ordered to provide the plaintiffs in *True the Vote* and *Linchpins of Liberty* with their respective agency case files. The court's Order allowed the plaintiffs to continue discovery related to the current status of the IRS's application process and to past acts of alleged discrimination associated with the alleged illegal targeting scheme.[27]

In August of 2017, Judge Walton of the D.C. District Court further clarified the discovery order, including interrogatories for the government to answer in the Order itself.[28] The interrogatories cover disclosure of why the plaintiffs' applications were delayed, names of the IRS employees involved in the delays, whether any further action was taken beyond normal monitoring after the granting of the plaintiffs' exempt status, and information on the actions taken by the IRS to redress the alleged discriminatory practices. The latest round of discovery was due in October 2017.

NorCal Tea Party

The Sixth Circuit in *NorCal Tea Party Patriots* also weighed in on the timeliness of the IRS's response to discovery. The plaintiffs alleged that the IRS had targeted citizens for mistreatment based on political views and sought from the IRS the names

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Lerner, 831 F.3d 551 (D.C. Cir. 2016) *cert. denied* 137 S.Ct. 1068 (2017); *United States* v. *NorCal Tea Party Patriots*, 817 F.3d 953 (6th Cir. 2016); *Freedom Path, Inc.* v. *Lerner*, Civil Action No. 3:14-CV-1537-D, 2016 U.S. Dist. LEXIS 68760 (N.D. Tex 2016).

23. Truethevote, http://truethevote.org/aboutus, (last visited September 25, 2017).

24. *True the Vote, Inc., supra* note 22.

25. *Linchpins of Liberty, supra* note 22.

26. *Id*. at 240-41.

27. *True the Vote* v. *IRS*, Civil Action No. 13-734 (RBW), 2017 U.S. Dist. LEXIS 73630 (D.D.C. Apr. 12, 2017); *Linchpins of Liberty*, Civil Action No. 13-777 (RBW), 2017 U.S. Dist. LEXIS 73629 (D.D.C. Apr. 12, 2017).

28. *Linchpins of Liberty*, Civil Action No. 13-777 (RBW) 2017 U.S. Dist. LEXIS 152578 (D.D.C. Aug. 17, 2017).

of those groups who were included in the IRS "Be on the Lookout" list.[29] The question had reached the Sixth Circuit on a petition for writ of mandamus by the IRS in its effort to avoid the lower court's order to release those names. Commenting that the IRS has only "compounded the conduct" that gave rise to the litigation by its refusal to comply with the district court order, the court denied the petition for the writ of mandamus.[30] The court's opinion concluded with an order for the IRS to comply with the discovery orders "without redactions, and without further delay."[31]

Freedom Path

Freedom Path, Inc. v. *Lerner* was filed in the Northern District of Texas after the other cases. Freedom Path also claimed that its application for tax-exempt status was targeted for unconstitutional and unlawful treatment based on its political views.[32] The plaintiff's suit included claims for violations of the First and Fifth Amendments. In considering a motion to dismiss, the court rejected the government's assertion that claims under the First and Fifth Amendments were moot, distinguishing *Freedom Path* from the original *True the Vote* and *Linchpins* decisions, which were later overturned. The court in Texas found that the Freedom Path claims were not moot because the organization was still waiting on its determination letter and had alleged in its complaint ongoing use by the IRS of the discriminatory BOLO lists. In further proceedings, the district court denied the plaintiff's motion for partial summary judgment, rejecting its claim that the alternative "facts and circumstances" test was unconstitutionally vague or overbroad.[33] That test, which contains 11 factors focused on the campaign activities of an organization, is used by the IRS to determine whether applicants qualify as tax-exempt and whether organizations otherwise exempt from federal income tax may be subject to tax for specific expenditures.[34] The *Freedom Path* decision was issued in July 2017. The next steps in that litigation are still to unfold.

Despite the IRS's public claim that its internal procedures are now corrected, litigation discovery as to the truth of this statement continues. The discovery response by the IRS to the August 2017 Order by Federal Judge Reggie Walton (presiding judge in both the *True the Vote* and *Linchpins of Liberty*) was due October 16, 2017. It is yet to be seen if the IRS will disclose which employees were involved in targeting conservative applicants for "special handling" or offer assurance that the Service is no longer engaged in such acts.[35] Most recently, it has been reported that another suit has been filed by sixteen Tea Party groups challenging some of the new procedural changes instituted by the IRS in response to the whole scandal.[36] These changes are discussed below.

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29. *Nor Cal Tea Party Patriots, supra* note 22 at 955.
30. *Id*.
31. *Id*. at 965.
32. *Freedom Path, Inc.* v. *Lerner*, Civil Action No. 3:14-CV-1537-D, 2016 U.S. Dist. LEXIS 68760 (N.D. Tex. May 25, 2016).
33. *Freedom Path, Inc.* v. *Internal Revenue Service*, Civil Action No. 3:14-CV-1537-D, 2017 U.S. Dist. Lexis 104970 (N.D. Tex. Jul. 7,2017).
34. *Id*. at *6.
35. *See* Stephen Dinan, *'Lay it on the line': Judge in tea party case orders IRS to disclose employee names, reasons*, The Washington Times, (Aug. 17, 2017) http://www.washingtontimes.com/news/2017/aug/17/judge-in-tea-party-case-orders-irs-to-disclose-emp/; Hans von Spakovsky, *Why Are Trump's Justice Department Appointees Protecting the IRS?*, The Daily Signal, (Aug. 23, 2017), http://dailysignal.com/2017/08/23/trumps-justice-department-appointees-protecting-irs/.
36. Caroline Levine, *New Tea Party Suit Filed against IRS: When will it be Over?*, Nonprofit Quarterly (Sep. 26, 2017), http://nonprofitquarterly.org/2017/09/26/new-tea-party-suit-filed-irs-alleged-discrimination/.

2017 FINAL TIGTA REPORT

As the litigation continues to work its way through the courts, another bombshell dropped on September 28, 2017, when the Final TIGTA Report was issued.[37] The newest report presents a historical account of the IRS's use of 17 select criteria developed and used in determining EO status.[38] The report based its conclusions on information gathered from interviews with current and past IRS employees, as well as electronic and paper documentation. The report found that both liberal and conservative applicants were targeted for special review based on perception of potential political involvement. The selected criteria referred to organizations that had certain phrases in their names: ACORN Successors (Association of Community Organizations for Reform Now); Border Patrol; CA Politics; Emerge; Green Energy; Healthcare Legislation; Medical Marijuana; Occupied Territory Advocacy; Occupy; Paying National Debt; Pink Slip Program; Progressive; Rally Patriots, and We the People.[39] The Final Report was prompted by interest expressed by members of Congress regarding the IRS's treatment of organizations applying for tax-exempt status. TIGTA found that most of the criteria actually used by the IRS involved issues such as potential fraud, abuse and links to terrorist—and not political campaign intervention.[40] The recent TIGTA Report did not make any recommendations, since procedures that were in place when the 17 criteria were used are no longer in effect.

PROCEDURAL CHANGES

Following the brouhaha over improper IRS conduct, both 501(c)(4) and 501(c)(3) organizations were subject to new rules and regulations. Although the misconduct primarily focused on 501(c)(4) organizations, commonly known as social welfare organizations, charitable organizations , those organized under Section 501(c)(3), were swept along for the ride.[41]

Procedural Changes: Social Welfare Organizations

Following the revelations of the IRS misconduct, 501(c)(4) social welfare organizations became subject to new rules intended to remove any suspicion of unfair treatment due to political philosophies. The changes reflect the statutory requirements contained in the *Protecting Americans from Tax Hikes Act* (PATH Act) of 2015.[42]

The PATH Act added §506 to the Internal Revenue Code (Code). That section requires social welfare organizations (§501(c)(4) entities) to notify the IRS within 60 days of their formation that they intend to operate as social welfare organizations. Prior to the addition of Section 506, no such mandatory notification existed. Neither the notification nor the IRS's acknowledgment contains a determination of the organization's tax-exempt status. Under new §506(f), an organization may request that the IRS issue a separate determination that it qualifies for tax-exempt status.[43]

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37. Treasury Inspector General for Tax Administration, *supra* note 2.

38. *Id*. The final report focused on the use of 17 criteria out of a total of 259 criteria used to identify applications for further review.

39. *Id*. at 10, figure 4.

40. That allegation was the subject of the 2013 Audit Report.

41. The IRS defines §501(c)(4) social welfare organizations, in part, as a civic league or organization "not organized for profit but operated exclusively for the promotion of social welfare." 26 U.S.C. §501(c)(4).

42. Protecting Americans from Tax Hikes Act of 2015, Pub. L. No. 114-113, Division Q of the Consolidated Appropriations Act, 2016. Final, Temporary and Proposed Regulations issued in Rev. Proc. 2016-41, 2016-30 I.R.B 165 (Jul. 25, 2016); REG-101689-16, 2016-30 I.R.B. 170. T.D. 9775, 2016-30 I.R.B. 159.

43. 26 USC §506(f).

The PATH Act also amended §6652(c)(4) of the Code and provided a penalty for failure to file the notification within a prescribed period. Failure to file may result in a penalty of $20 per day for as long as the failure continues, not to exceed $5,000.[44] Social welfare organizations established after Dec. 18, 2015, when the Path Act was enacted, are subject to this requirement. Organizations established before that date that had not applied for a determination or filed an annual return or notice were required to submit a new notification within 180 days from June 15, 2016, although some transition relief is available. Notice 2016-09 extends the period without penalties for 60 days after issuance of the implementing regulations.[45] Organizations established between Dec. 18, 2015, and July 8, 2016, are relieved from the notification requirement if they applied for a determination of tax-exempt status or filed at least one annual Form 990. An organization formed during the interim period, but not qualifying for relief, has additional time to submit its notification. Under §506(d) and the temporary regulations, the 60-day notice period may be extended for "reasonable cause."[46]

The notification may only be submitted in electronic form on Form 8976, *Notice of Intent to Operate under Section 501(c)(4)*.[47] This form is available at an online registration/ submission portal along with a $50 User Fee.[48] To complete, the organization must provide its name, address, employer identification number, date of formation, state or other jurisdiction and month in which its annual accounting period ends. The organization must also specify its purpose as a social welfare organization, a civic league, or a local association of employees. The IRS will send an acknowledgment of receipt within 60 days after it receives a completed and properly submitted Form 8976. Caution: the acknowledgment should not be confused with a confirmation of successful transmission.

Procedural Changes: Charitable Organizations

Even though the process of determining the status of §501(c)(3) "charitables" was not at issue in the IRS scandal, there have also been significant changes to their procedures for recognition. An abbreviated Form 1023-EZ (Streamlined Application for Recognition of Exempt Status under Section 501(c)(3) of the Internal Revenue Code) has emerged as the new standard for charitable registration.[49]

This form is heralded as being an improvement over the prior Form 1023, which was lengthy and at times tedious. In contrast, the 1023-EZ is shorter, cheaper and more efficient. Instead of an $850 User Fee, the 1023-EZ costs $250.[50] Unlike the 1023, it does not require a *pro forma* budget for past years and one year going forward, detailed information about extent and types of programs, or in-depth questions about excess benefit transactions/relationships with disqualified persons and compensation. Like Form 8976, used by 501(c)(4) social welfare organizations, the 1023-EZ is

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44. 26 USC §6652(c)(4)(A); Rev. Proc. 2016-41, 2016-30 I.R.B. 165.
45. Rev. Notice 2016-09, 2016-6 I.R.B. 306.
46. *Id.*; 26 U.S.C. §506(d).
47. Rev Proc. 2016-41, 2016-30 I.R.B. 165.
48. *See* Internal Revenue Service, *Electronically Submit Your Form 8976, Notice of Intent to Operate Under Section 501(c)(4)*, https://www.irs.gov/charities-non-profits/electronically-submit-your-form-8976-notice-of-intent-to-operate-under-section-501c4 (IRS Instructions on Form 8976).
49. Internal Revenue Service, *About Form 1023-EZ, Streamlined Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code*, http://www.irs.gov/forms-pubs/about-form-1023ez, (Form 1023EZ Instructions).
50. *Id. See also* Internal Revenue Service, *About Form 1023, Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code*, http://www.irs.gov/forms-pubs/about-form-1023.

submitted online with a User Fee paid through Pay.gov. Determinations are frequently issued within a month. In contrast, the original Form 1023 was submitted in hard copy with numerous attachments and schedules. The IRS often demanded additional information regarding the organization, thereby causing increased delays. It was not uncommon for the determination process to take longer than a year, far exceeding the specified time period, and opening the door for suits seeking to enforce the allowable time period.

The new 1023-EZ requires only general information: Identification of Applicant; Organizational Structure; Specific Activities (in broad terms); Foundation Classification; Reinstatement after Revocation (if applicable); and a Signature.

The questions do not require any description or verification other than a check in the box. The first step before proceeding in the application process is review of an Eligibility Worksheet.[51] The second step is review of a checklist known as the National Taxonomy of Exempt Entities (NTEE Codes). The applicant must identify the specific Code applicable to its exempt purpose. Both the Eligibility Worksheet and the NTEE Codes require only checks in a box. There is no room or opportunity for explanation or discussion. The entirety of the application process can be completed in minutes.

On September 28, 2017, the IRS published its 2018 Work Plan. The Plan states that EO will implement revisions to Form 1023-EZ, including a required activity description and additional questions on gross receipts, assets threshold and foundation classification. As a result of these changes, EO anticipates that the average processing time for the 1023-EZ will increase. EO will also undertake predetermination reviews of a statistical sample of 1023-EZ applications and continue to analyze data from these forms.[52]

FALLOUT FROM THE SCANDAL

The IRS scandal continues to reverberate. The DOJ recently announced that it would not prosecute Lois Lerner (the EO Director who took the Fifth when called to testify before Congress).[53] Judge Walton's Order for disclosure and assurances from the IRS is due in October 2017.[54] Litigation may continue in Texas for *Freedom Path*; and the IRS is still due to respond to the Sixth Circuit's Order in *Norcal*. While concerns about the IRS misconduct remain, the procedural changes to the 501(c)(4) determination processes are now established, as is the 1023-EZ for 501(c)(3) charitable entities.

There is a nagging question, however, regarding the efficacy of these changes as they relate to the 1023-EZ form used by charitable entities. While on its face it seems to accomplish its purpose, a question arises regarding the level of future IRS oversight of the charitable sector. Was this procedural change a gut reaction to the flagrant mishandling of the (c)(4)'s during 2010-2013?

Is it possible that the charitable sector will be overwhelmed by facile determinations? Will some of these newly minted and undocumented "charities" operate

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51. Internal Revenue Service, *Instructions for Form 1023-EZ*, https://www.irs.gov/pub/irs-pdf/i1023ez.pdf, (1023-EZ Form and Eligibility Worksheet).

52. Internal Revenue Service, *Tax Exempt and Government Entities FY 2018 Work Plan*, https://www.irs.gov/pub/irs-tege/tege_fy2018_work_plan.pdf.

53. Stephen Ohlemacher, "Trump DOJ declines to charge Lois Lerner, a key figure in IRS Scandal," (September 8, 2017), http://www.chicagotribune.com/news/nationworld/politics/ct-lois-lerner-irs-doj-20170908-story.html

54. *Linchpins of Liberty*, Civil Action No. 13-777 (RBW) 2017 U.S. Dist. LEXIS 152578 (D. D.C. Aug. 17, 2017).

without controls? The IRS has long been regarded as "border patrol" for the charitable sector—policing its activities and scrutinizing its operations under the "organized and operated tests." Absent adequate oversight, what might the charitable sector look like? Since there is no National Charities Bureau, will monitoring duties fall to understaffed State Attorneys General? Or to equally understaffed IRS employees? Might the streamlined 1023-EZ with its diminished accountability give free reign to organizations that are either ignorant of the governing rules and prohibitions or indifferent to their effect? One could argue that the requirement for charitable entities to fill out a Form 990 informational return might address these concerns. But 990s achieve this goal only to the extent that they report accurate information, and many charitable entities are exempt from the 990 disclosure process.[55]

This lingering concern may be the final fallout from the scandal. At a time when the charitable sector has grown in size and influence, has the IRS actually abdicated its responsibilities? Today's charities operate differently than they did 50 years ago. They are innovative, multifaceted, sophisticated and highly skilled. They are continually testing new ways of doing business in mixed joint ventures, public-private partnerships, tech transfers, social entrepreneurship, shared workspaces, collaborative facilities and shifts in program funding. As they spread their wings—and continue to grow—they also increase their emerging risks. Has the fallout from the 2013 scandal affected the IRS to the extent that it is no longer willing or able to provide necessary guidance on what it takes to be a charity in today's environment?

One lesson from the scrutiny of the past five years may be that the determination process must be based on merit and not on unfounded perceptions of political leanings or other subjective criteria.

55. *See* Internal Revenue Service, *About Form 990, Return of Organization Exempt from Income Tax*, https://www.irs.gov/forms-pubs/about-form-990.