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THE IRS AND NONPROFIT MEDIA:

A STEP FORWARD TOWARD CREATING A MORE INFORMED PUBLIC

TWO-YEAR STATUS REPORT ON THE COUNCIL ON FOUNDATIONS' NONPROFIT MEDIA PROJECT

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Council on Foundations

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COUNCIL on FOUNDATIONS

The Council on Foundations, formed in 1949, is the premier association of grantmaking foundations and corporations in the United States and abroad, and its members drive many of the most important dialogues in philanthropy.

The Council represents organizations with combined assets of nearly $300 billion and approximately $20 billion in giving.

The Council's mission is to provide the opportunity, leadership, and tools needed by philanthropic organizations to expand, enhance, and sustain their ability to advance the common good.

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Executive Summary

In 2013, the Council on Foundations (Council) released a report titled *The IRS and Nonprofit Media: Toward Creating a More Informed Public*. The report presented the findings of a working group of nonprofit tax and journalism experts convened at the recommendation of the Federal Communications Commission (FCC) to study whether Internal Revenue Service (IRS) rulings issued in the 1960s and 1970s were hampering efforts by nonprofit media organizations to obtain tax exemption under Section 501(c)(3).[1] The Council's report found that to be the case and recommended a set of modernized standards for the IRS to apply when ruling on exemption applications for nonprofit media organizations. Among other things, the report recommended that the IRS de-emphasize the relevance of operational distinctions between nonprofit and for-profit media organizations in the manner of distribution of content. This is critical since the business models of both nonprofit and for-profit organizations often involve the delivery of free content on the internet—a dissemination tool that did not exist when the original IRS rulings were issued.

At the time of the Council's report, many nonprofit media organizations were awaiting Section 501(c)(3) exemption from the IRS National Office. Their applications had been kept on hold—some for almost three years—pending a decision about how to apply outdated exemption standards to contemporary nonprofit media organizations. The Council's report brought added attention to this issue, and the log jam of pending exemption applications has since been broken. Since early 2013, more than 20 nonprofit media organizations have been granted Section 501(c)(3) exemption. This is good news for the sector, although the IRS has neither modernized its prior rulings nor explained their continuing relevance in the face of major changes in the industry.

This status report, coming two years after the Council's report, has three goals. First, it identifies some common themes identified in connection with a review of the applications for exemption of nonprofit media organizations that recently received Section 501(c)(3) status, including those held up at the IRS National Office. In particular, this report describes the types of organizations that have received exemption and the considerations that may have been involved in the IRS review of their applications. These common themes are as follows:

1. Many of the nonprofit media organizations indicate that they were formed, at least in part, to help fill the gap arising from reduced coverage on important public issues by commercial news organizations;

1 All section references are to the Internal Revenue Code of 1986, as amended.

2. While some of the nonprofit media organizations project receiving earned income such as through advertising or the sale of subscriptions, many of the organizations project the need to rely to a significant extent on grants and contributions; and

3. Although the nonprofit media organizations routinely answered “no” to questions on the IRS Form 1023 about whether they intended to engage in lobbying and/or campaign intervention, the IRS was reluctant to accept these answers at face value and often followed up to confirm that the organizations had a clear understanding of the applicable rules and limitations.

These common themes illustrate the important role of nonprofit media organizations in filling the “news gap” resulting from cutbacks in the for-profit media sector. They also reflect the lack of certainty as to the long-term revenue and sustainability model for nonprofit media organizations and the concern—perhaps unwarranted—by the IRS that nonprofit media organizations will become inappropriately involved in lobbying or campaign intervention.

Second, this status report provides an update on recent changes in the IRS exemption process and the implications for nonprofit media organizations. Among other changes, applications for exemption are no longer referred to the IRS National Office—which has traditionally handled emerging issues and complex cases—and, instead, are being worked at the field level. In addition, cases are being assigned based on the availability of agents rather than based on subject matter or agents’ prior experience with the relevant issues. Finally, cases are moving through the system relatively quickly as the IRS seeks to handle the processing of exemption applications on a timely basis after several years of ever-worsening backlogs. While the expeditious handling of exemption applications is welcome news, the other changes have the potential to create inconsistent treatment among similarly situated applicants because the assignment of applications will no longer be handled on a coordinated basis or made to agents based on experience with the subject matter.

Finally, the status report concludes that, although the log jam has broken, the problem identified by the Council’s report has not been fully addressed. Since the IRS has not withdrawn or modernized the outdated guidance from the 1960s and 1970s, there can be no assurance that the difficulties experienced by nonprofit media organizations in the past will not reappear. Indeed, recent changes in the assigning and processing of exemption applications may make that more likely since there will be significantly less issue coordination. We suggest two courses of action to address this concern. The first is to continue asking the Treasury Department to include a project to update the standards for nonprofit media organizations on the priority guidance plan. The Council and others have made this request for the past several years, and continuing to do so will serve as a reminder to the Treasury Department that the existing guidance is outdated and new guidance is needed when (and if) some other pressing priority projects have been completed. The principles set forth in the Council's 2013 report serve as an important starting point for updating such guidance. The second is to develop a checklist for new nonprofit media organizations to follow when preparing their exemption applications. Such a checklist would help ensure that new applications include the required information to support their exemption, which may be particularly important if the cases are assigned to an IRS agent who has no experience with these cases and may have a tendency to revert to the IRS positions reflected in the outdated revenue rulings that are still on the books.

Background

In 2011, the FCC released *Information Needs of Communities: the Changing Media Landscape in a Broadband Age*, which highlights the state of media organizations. The FCC report documents the "shortage of local, professional accountability reporting" in communities across the United States as a result of a digital revolution that has "upended traditional news industry business models."[2] The report indicates that commercial news organizations have less financial resources to support investigative journalism projects involving lengthy documents and records searches, as well as stories requiring reporters to develop comprehensive knowledge of particular subjects. Not surprisingly, this has led to reduced coverage of many issues that have important civic value—such as schools, health care, the environment, and local public affairs—which can lead to less government responsiveness and accountability.[3] The report emphasizes the unique role that nonprofit media organizations can play in filling this gap in coverage, and recommends that tax and journalism experts study the possibilities for tax exemption for nonprofit media organizations.[4]

Following the FCC report, the Council received a generous grant from the John S. and James L. Knight Foundation to convene a working group of nonprofit tax and journalism experts to study nonprofit media organizations and the requirements for tax exemption. The group reviewed the state of the law and released its findings in the 2013 report, which concluded that outdated IRS rulings are an impediment for nonprofit media organizations seeking tax exemption. The report recommends that the IRS modernize the exemption standards for nonprofit media organizations by shifting the focus away from the operational distinctions between nonprofits and for-profits and, instead, evaluating whether an organization is engaged primarily in educational activities that provide a community benefit, as opposed to advancing private interests.[5]

The report was released at a time when the exemption applications of nonprofit media organizations were subject to intense scrutiny by the IRS, resulting in significant delays. The report highlights the experiences of many nonprofit media organizations responding to extensive questions and requests from the IRS, including questions about an organization's advancement of charitable and educational purposes and requests for copies of the organization's website, board minutes, and financial statements. This level of questioning often coincided with substantial processing delays. A 2013 article in *Forbes* described the 26-month-long delay experienced by the *San Diego Newsroom*

2 Federal Communications Commission, *Information Needs of Communities: the Changing Media Landscape in a Broadband Age 5* (July 2011), available at: http://www.fcc.gov/info-needs-communities#download.

3 Federal Communications Commission Report, at 5.

4 Federal Communications Commission Report, at 353.

5 Council on Foundations and the Knight Foundation, Report of the Nonprofit Working Group, *The IRS and Nonprofit Media: Toward Creating a More Informed Public 2* (2013), available at: http:/www.cof.org/sites/default/files/documents/files/Nonprofit-Media-Full-Report-03042013.pdf.

in connection with its application for exemption as the case was transferred from the IRS staff in Cincinnati, where it was originally assigned, to the IRS National Office in Washington, D.C. where it was sent for more substantive review.[6] For some organizations, the IRS exemption process was so difficult that they decided to forgo applying for exemption or simply shut down their operations altogether. For example, the operator of the *Oshkosh Community News Network*, a nonprofit media organization, shut down, in part because of the uncertainty regarding the tax laws during this time.[7]

IRS delays in processing all exemption applications have eased considerably in the past year, and the particular log jam facing nonprofit media organizations has been resolved. However, the lack of clarity regarding the standards for tax exemption of nonprofit media organizations continues to exist, and the IRS has yet to update its guidance. This leaves nonprofit media organizations with continued uncertainty about the boundaries of their Section 501(c)(3) exemptions. It also leaves the IRS with no clear standards to apply when evaluating applications for exemption for nonprofit media organizations.

6 David King, "How the IRS Stonewalled and Bullied My Non-Profit News Site," Forbes, available at: http://www.forbes.com/sites/dking/2013/05/22/how-the-irs-stonewalled-and-bullied-my-non-profit-news-site/.

7 Council on Foundations Report, at 12.

Current Standards for Section 501(c)(3) Tax Exemption

Nonprofit media organizations must meet the basic standards for tax exemption under Section 501(c)(3). First, they must be organized and operated for tax-exempt purposes, such as charitable, scientific, and educational purposes. Charitable purposes include advancing education; relieving the poor and distressed or the underprivileged; and promoting social welfare by reducing neighborhood tensions, eliminating prejudice and discrimination, and combating community deterioration and juvenile delinquency.[8] Educational purposes include "the instruction of the public on subjects useful to the individual and beneficial to the community,"[9] and many nonprofit media organizations advance tax-exempt purposes on this basis. The fact that an organization advocates a particular position or viewpoint does not prevent it from advancing educational purposes if the organization "presents a sufficiently full and fair exposition of the pertinent facts as to permit an individual or the public to form an independent opinion or conclusion."[10]

In Revenue Ruling 67-4, now nearly 50 years old, the IRS set forth a four-part test for identifying whether an organization whose sole or primary activity is the publication of information is organized and operated for exempt purposes. This test, which remains the principal published guidance for nonprofit media organizations, looks at whether (1) the content of the publication is educational, (2) the preparation of materials follows methods generally accepted as "educational," (3) the distribution of the materials is necessary or valuable in achieving the organization's exempt purposes, and (4) the manner in which the distribution is accomplished is distinguishable from ordinary commercial practices. While the organization described in Revenue Ruling 67-4 qualified for Section 501(c)(3) exemption, the IRS subsequently ruled in Revenue Ruling 77-4 that an organization whose sole activity involved preparing and publishing a newspaper with content catered to an ethnic community did not qualify for exemption because its "only activities are preparing and publishing a newspaper, soliciting advertising, and selling subscriptions to that newspaper in a manner indistinguishable from ordinary commercial publishing practices."

Nonprofit media organizations must also comply with other restrictions on their activities under Section 501(c)(3):

8 Treas. Reg. § 1.501(c)(3)-1(d)(2).

9 Treas. Reg. § 1.501(c)(3)-1(d)(3).

10 Treas. Reg. § 1.501(c)(3)-1(d)(3). Although this "full and fair exposition" test has been deemed unconstitutionally vague by the United States Court of Appeals for the District of Columbia Circuit, the IRS did not acquiesce in a subsequent case and released Revenue Procedure 86-43, which provides that the IRS will look at the method used by an organization to develop and present its views, and that the method used by an organization to prepare its content is not educational if it fails to provide a factual foundation for the viewpoint or position being advocated or if it fails to provide a development from the relevant facts that would materially aid a listener in a learning process.

- No part of the organizations' net earnings may inure to the benefit of any private shareholder or individual;

- The organizations may not be organized or operated for the benefit of private interests, such as designated individuals, the creator or his or her family, shareholders, or persons directly or indirectly controlled by such interests (any such benefits must be qualitatively and quantitatively incidental to an organization's exempt purposes);

- "No substantial part" of the organizations' activities may consist of lobbying, which may be assessed by making an election under Section 501(h) (note, however, that private foundations cannot engage in lobbying activities);

- Organizations may not support or oppose candidates for public office (although they may engage in nonpartisan voter education activities); and

- Organizations cannot engage in substantial nonexempt activities (if such activities generate income, they are often subject to the unrelated business income tax).

Finally, Section 501(c)(3) organizations are classified as either public charities or private foundations. Public charities generally are characterized by the fact that they receive or are related to an organization that receives significant public support, while private foundations tend to receive funding from a more limited number of sources. Public charities are further characterized to include Section 509(a)(1) organizations (which tend to derive support from grants and contributions) and Section 509(a)(2) organizations (which tend to derive support from program service revenue). Most nonprofit media organizations want to obtain classification as a public charity because donors receive more favorable tax treatment, and charities are not subject to a number of excise taxes, including the prohibition on lobbying.

Common Themes in Exemption Applications of New 501(c)(3) Nonprofit Media Organizations

The good news is that the lengthy delays associated with the IRS review of exemption applications from nonprofit media organizations appear to be over. Although the IRS has not updated its decades-old guidance, it has nevertheless moved forward to issue favorable exemptions to a number of nonprofit media organizations. This report presents some of the common themes in the exemption applications of a sample of nonprofit media organizations that recently received Section 501(c)(3) exemption, including those in the group that had been held up at the IRS National Office. These organizations are listed in Appendix A.

This report identifies the following common themes in the applications: (1) nonprofit media organizations often indicated that they were formed, at least in part, to help fill the gap arising from reduced coverage on important public issues by commercial news organizations; (2) while some of organizations projected receiving earned income, such as through advertising or the sale of subscriptions, many projected the need to rely to a significant extent on grants and contributions; and (3) although the nonprofit media organizations routinely answered "no" to questions on the Form 1023 about whether they intended to engage in lobbying and/or campaign intervention, the IRS often followed up to ensure that the organizations had a clear understanding of the applicable rules and limitations.

Each of these themes is discussed below in greater detail.

1. FILLING THE GAP IN COVERAGE OF IMPORTANT PUBLIC ISSUES

The FCC report recognized that nonprofit media organizations could play a crucial role in providing news and information to communities on important public topics. Most of the nonprofit media organizations that have recently received exemption promote charitable and educational purposes by providing educational content that fills the gap arising from the reduced coverage of public topics by commercial news organizations. Their content typically fits one or more of the following broad categories: (1) in-depth investigative reporting; (2) news and information for ethnic, minority, and low-income communities; or (3) regional, state, and local news and information.

A) IN-DEPTH, INVESTIGATIVE REPORTING

The FCC report indicates that commercial news organizations have dropped stories involving in-depth, investigative reporting due to more recent financial pressures. For example, Mark Silverman, former editor of the *(Nashville) Tennessean*, states, "What you tend to cut is the day in, day out beat reporting – or the city council meeting, or doing three days of reporting on the immigration bill instead of one. . . . There's less time to invest in in-depth coverage."[11] The same editor pointed to a story he wanted to feature on the failures of a state board that regulates incompetent doctors but decided not to pursue because the paper could not incur the costs of such a labor-intensive investigation.[12] The declining coverage of stories involving in-depth, investigative reporting is also evidenced by the number of members of the Investigative Reporters and Editors Association, which dropped by over 1,000 from 2003 to 2010.[13]

Many of the recently exempt Section 501(c)(3) nonprofit media organizations are filling this void by offering in-depth, investigative stories, often in recognition that the costs of such reporting require philanthropic support. For example, the *Rocky Mountain Investigative News Network* provides in-depth reporting on state and local stories in Colorado that do not typically get covered through the traditional news media due to the lack of time, resources, and/or skills. Similarly, the *American Media Institute* seeks to inform the public by providing news and research through investigative journalism that relies on a classic investigative unit process combined with cutting edge new media. The *American Media Institute* applied for exemption because it recognized that its costs could not be sustained by advertising alone. On a website page featured in its application, the *American Media Institute* provides that it is a nonprofit because the cost per story is "too high to be recovered with web ads and other digital revenue streams."

B) NEWS AND INFORMATION FOR ETHNIC, MINORITY OR LOW-INCOME COMMUNITIES

The FCC report highlights the lack of commercial coverage on issues particularly relevant to ethnic and minority communities, stating that "several studies have indicated that mainstream media do not adequately cover African-American and other minority communities."[14] The report notes the dearth of news reporters and staff who are minorities, citing Milton Coleman, former president of the American Society of Newspaper Editors, who states that, "at a time when the U.S. Census shows that minorities are 36 percent of the U.S. population, newsrooms are going in the opposite direction."[15] The

11 Federal Communications Commission Report, at 44.
12 Federal Communications Commission Report, at 12.
13 Federal Communications Commission Report, at 11.
14 Federal Communications Commission Report, at 252.
15 Federal Communications Commission Report, at 253.

report emphasizes the important role of digital media in increasing coverage that is relevant to these communities, and it appears that nonprofit media organizations are filling some of these gaps.

Many of the newly exempt Section 501(c)(3) nonprofit media organizations focus on news and information relevant to ethnic and minority communities. For example, the *Epoch Times Philadelphia* is a Chinese-language newspaper offered to the Chinese-reading members of the Greater Philadelphia area. The exemption application explains that the newspaper "helps ethnic Chinese residents and citizens to understand the world around them and to integrate into U.S. society, while helping them to preserve their cultural heritage." Similarly, the exemption application for *New Michigan Media* indicates that it seeks to increase the visibility of ethnic and minority news in the Detroit metropolitan area, create a stronger voice for ethnic and minority concerns in the region, increase understanding among ethnic and minority communities, and help ethnic and minority media share resources and become more financially viable. Some organizations focus on news and information relevant to individuals with particular religious backgrounds, while others provide stories involving low-income communities. The *South Side Newspaper Project* "brings balanced, honest, and creative coverage" to Syracuse's South Side, a low-income community. Similarly, the *(Memphis) Bridge* features stories, articles, and artwork by people with experiences of homelessness.

Many of these nonprofit media organizations conduct additional educational activities in the communities they serve. For example, the exemption application of *New Michigan Media* indicates that the organization conducts trainings on investigative reporting, hosts seminars and conferences, and facilitates opportunities for representatives of ethnic media to appear on television and other news outlets. Similarly, the exemption application for *Epoch Times Philadelphia* states that it will conduct seminars and forums and participate in community events.

C) PROVIDING REGIONAL, STATE, OR LOCAL NEWS AND INFORMATION

The FCC report highlights the important role of nonprofit media organizations in bringing coverage to regional, state, and local communities. It cites a 2009 report commissioned by the Columbia University School of Journalism in which the authors state, "What is under threat is independent reporting that provides information, investigation, analysis, and community knowledge, particularly in the coverage of local affairs."[16] The report provides examples of the decline of state and local news: the *Baltimore Sun* produced 32 percent fewer stories in 2009 than in 1999 and 73 percent fewer than in 1991;

16 Federal Communications Commission Report, at 11.

from 2004 to 2011, the number of reporters at the *Raleigh (NC) News and Observer* dropped from 250 to 103 with reduced coverage of topics such as courts, schools, legal affairs, agriculture, environment, and state education; and, in California, the number of statehouse reporters dropped from 35 to 15.[17]

Local news plays an important role in educating communities and encouraging civic engagement. A recent Pew Research Center study conducted in association with the John S. and James L. Knight Foundation found that, across three disparate metro areas in the United States, nearly nine in ten residents follow local news closely, and about half do so very closely.[18] The study also examined trends associated with the sharing of news and found that about two-thirds of the residents in each city discuss local news in person a few times a week or more.[19]

Some of the new Section 501(c)(3) nonprofit media organizations are making up for the decline in coverage of state and local affairs by focusing on news and information that is relevant for regional, state, or local communities. For example, *New Marlborough 5 Village News, Inc.*, a publication based in a township in rural Massachusetts, provides information relevant to its residents and landowners, including reports on town government and the schools, a calendar of events, information about town meetings, local history, and occasional pieces of prose or poetry. Similarly, the *Patagonia Regional Times* is a monthly news publication that highlights local issues and the contributions of local talent for the Mountain Empire communities of Canelo, Elgin, Patagonia, and Sonoita in Santa Cruz County, Arizona. Finally, the *Nevada News Bureau* seeks to bring statewide news and information to residents of Nevada by investigating and reporting on news related to the activities of the state and municipal governments, including legislation, judicial rulings, and executive actions.

Although the IRS has not issued any guidance about its rationale for approving the applications for exemption of nonprofit media organizations after such a long period of scrutiny, it is clear that many of these organizations are meeting an important public need by helping to fill the gap arising from the reduced coverage of important topics by commercial news organizations in communities across the country.

2. SOURCES OF FINANCIAL SUPPORT

A second common theme associated with the applications for exemption of new Section 501(c)(3) nonprofit media organizations is the need to rely on grants and contributions for financial sustainability. This underscores the importance of obtaining Section 501(c)

17 Federal Communications Commission Report, at 11.
18 Pew Research Center, Local News in a Digital Age 4 (Mar. 5, 2015), *available at*: http://www.journalism.org/files/2015/03/PJ_MediaEcology_completereport.pdf
19 Pew Research Center, Local News in a Digital Age 4 (Mar. 5, 2015), *available at*: http://www.journalism.org/files/2015/03/PJ_MediaEcology_completereport.pdf

(3) exemption, raises questions about the long-term sustainability model of these organizations, and highlights the need for greater certainty about the impact of earned revenue on an organization's tax-exempt status. The findings in a recent report from the John S. and James L. Knight Foundation are consistent with this theme. The report explains that, while overall revenue for nonprofit media organizations has grown since 2011, they "remain very reliant on foundation funding, and few appear to be rapidly approaching a sustainable business model."[20]

Most organizations reported grants and contributions as their primary source of revenue, and many did not reference the most obvious potential sources of earned revenue, such as advertising or subscriptions. Some of the hesitancy to develop and report earned revenue strategies may be the result of the outdated IRS guidance. As noted above, the fourth prong of Revenue Ruling 67-4 requires nonprofits to distribute their publications in a manner distinguishable from ordinary commercial publications. In Revenue Ruling 77-4, an organization did not qualify for exemption because it solicited advertisements and sold subscriptions "in a manner indistinguishable from ordinary commercial publishing practices." It is interesting to note, however, that the IRS approved the applications of organizations that projected rather significant sources of earned revenue and drew some important distinctions between nonprofit media organizations and this outdated guidance. For example, one organization reported over 91 percent of revenue from advertising during 2011. Although the IRS requested more information, the revenue did not prevent the organization from qualifying as a Section 501(c)(3) organization or a Section 509(a)(1) public charity. In a memo to file, the IRS noted that the "organization receives a substantial amount of advertising income but that it appears it may meet the 10% facts and circumstances test [applicable to Section 509(a)(1) public charities] after operating for five years." The IRS stated that the organization could be distinguished from the example in Revenue Ruling 77-4 because it distributed its publication for free and the content was prepared by volunteers as opposed to paid staff.

Similarly, even though many of the organizations offered news content for free to the public, some organizations also reported revenue from subscription fees for home or on-line deliveries. For example, one organization indicated that it distributed the paper free of charge on its website and at various locations throughout the town, but, one year, it reported approximately 52 percent paid subscription revenue. Another nonprofit media organization made its content available for free on its website, but the organization also used a variety of paid models for the distribution of its content, including subscriptions, sales at local retailers, and paid on-line or home delivery.

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20 John S. and James L. Knight Foundation, *Gaining Ground: How Nonprofit News Ventures Seek Sustainability 4 (2015), available at:* http://features.knightfoundation.org/nonprofitnews-2015/pdfs/KF_NonprofitNews2015.pdf.

The absence of earned revenue strategies in many of the applications for exemption is interesting because new Section 501(c)(3) nonprofit media organizations often failed to hit the financial targets described in their applications, as evidenced by the lower revenue reported on their subsequent Forms 990 or 990-EZ. Some of the disparity may be attributable to the delay in receiving exemption since many donors are reluctant to make contributions to organizations that do not yet have Section 501(c)(3) status. However, the substantial dependence on philanthropic support points to larger questions about the long-term revenue and sustainability models of nonprofit media organizations and underscores the importance of greater clarity about the impact of earned revenue strategies on an organization's tax-exempt status.

3. COMPLYING WITH THE LIMITATIONS ON LOBBYING ACTIVITIES AND THE POLITICAL CAMPAIGN PROHIBITION

A final theme in the exemption applications of nonprofit media organizations is that many organizations—particularly those focused on providing state and regional information to communities—cover topics involving legislation, legislators, and elections. A significant issue for the IRS was whether the organizations demonstrated a comprehensive understanding of the limitations on lobbying, the prohibition on political campaign activities, and the rules on permissible voter education activities. The IRS often asked organizations to confirm whether they planned to engage in lobbying activities and whether they were making the Section 501(h) lobbying election, even if they stated that they were not planning to engage in lobbying.

Similarly, the IRS sought confirmation of an organization's understanding of the restriction on political campaign activities, regardless of whether it answered "no" as to whether it would engage in these activities on its exemption application. Revenue Ruling 2007-41 is the primary source of guidance on prohibited political campaign intervention and permissible voter education activities by Section 501(c)(3) organizations. The IRS would often require an applicant to review the ruling and provide statements (1) acknowledging that the organization understands the political campaign prohibition, (2) representing that its conduct will conform to that allowed by Revenue Ruling 2007-41, (3) declaring that it will not post articles on its website that would violate the prohibition, (4) confirming that it will not publish or distribute material that would violate the prohibition, and (5) confirming whether it has at all times refrained from publishing or distributing any material that would violate the prohibition.

One example involved a news organization that sought to fill the "existing gap in state house, government, and public policy reporting" as a public service to the citizens of a particular state. It also offered a political news blog in order to provide "a source of nonpartisan news and analysis for readers, not favoring one political party or candidate over another and not endorsing or opposing candidates." Although the exemption application indicated that the organization would not engage in political campaign activities, the IRS scrutinized its activities closely, including the organization's website and videos posted to the website. By the time the IRS review was complete, the application (including all correspondence) totaled more than 150 pages.

Although the IRS seemed to accept that the reporting covered by nonprofit media organizations may involve legislation, legislators, and elections, the applications for exemption revealed that these organizations nevertheless must demonstrate their commitment to complying with the limitations on lobbying and political campaign activities.

After a period of uncertainty, the IRS finally broke through the log jam and issued determination letters recognizing nonprofit media organizations as exempt under Section 501(c)(3). The applications for exemption of nonprofit media organizations were subject to intense scrutiny and review by the IRS National Office, but the IRS eventually concluded that these organizations qualified for exemption. The common themes associated with the applications for exemption that were submitted during this time give some clues about the types of organizations that qualify for exemption and the considerations involved in their applications. However, outdated rulings from the 1960s and 1970s continue to be the official source of guidance on the tax-exempt status of nonprofit media organizations, and nonprofit media organizations need more certainty about the activities they can conduct in this digital age.

Recent Changes to the IRS Exemption Process

The need for updated guidance regarding the Section 501(c)(3) standards for nonprofit media organizations comes at an important time. Shortly after the IRS National Office worked through the applications for exemption of nonprofit media organizations, the IRS went through a major restructuring, dubbed the "Realignment." The Realignment involved transferring the legal work and tax law specialists from the Tax-Exempt & Government Entities Division (TEGE) to the Office of Chief Counsel. This has meant that most of the legal guidance related to exempt organizations matters now comes out of the Office of Chief Counsel, although TEGE's Division Counsel oversees a group of field attorneys who can assist examiners and determinations specialists on analyzing exempt organizations matters.

During the time of significant IRS scrutiny, many of the applications for exemption of nonprofit media organizations had been transferred from the IRS field office in Cincinnati to the IRS National Office in Washington, D.C. due to the identification of complex legal issues. The Realignment has eliminated this responsibility for the IRS National Office, and the IRS National Office no longer will review applications for exemption. Instead, applications will be reviewed by determinations specialists working in IRS field offices in Cincinnati, California, or Baltimore. If these specialists need technical assistance or legal advice, they will get it from the field attorneys who report to the Division Counsel or by submitting a request to the Office of Chief Counsel.

The IRS has also revamped its processing of applications for exemption. Between April and September of 2014, the IRS reduced its 270-day-old inventory by 91% and, in fiscal year 2014, it more than doubled the number of applications it closed from previous years.[21] Determinations specialists have indicated that cases are now being assigned based on the time availability of agents rather than their subject matter expertise. And, in July 2014, the IRS released the Form 1023-EZ, a 2½-page version of the application for exemption that can be filed by organizations with gross receipts of up to $50,000 and assets of up to $250,000.[22] The IRS processes these applications quickly, following up with organizations within 90 days from the date of submission as opposed to the 180-day waiting period for organizations that apply with the Form 1023.

Although the Realignment brings some positive changes to the processing of applications for exemption, it also means that the applications for exemption of nonprofit media organizations will not be centralized. Instead, they will be reviewed by determinations

21 Tamera Ripperda, Internal Revenue Service, Director, Exempt Organizations, *Comments at the Washington Non-Profit Legal & Tax Conference,* March 19, 2015.

22 The organization must project that its annual gross receipts will not exceed $50,000 in any of the next three years, and its annual gross receipts must not have exceeded $50,000 in any of the past three years. Instructions for Form 1023-EZ (Rev. August 2014), available at: http://www.irs.gov/pub/irs-pdf/i1023ez.pdf.

specialists on an ad hoc basis without regard to the specialists' expertise. This means that fewer specialists in the field will have a deep understanding of the nuances associated with the ability of nonprofit media organizations to qualify for exemption. The net effect is that the Realignment may create a risk of inconsistent treatment of the applications of very similarly situated organizations. This is more likely since IRS specialists reviewing exemption applications could, in the absence of modernized guidance, resort to applying the outdated standards in Revenue Ruling 67-4.

Conclusion

It has been two years since the Council's working group report, and there is good news: the IRS has been ruling favorably on the applications for exemption of many nonprofit media organizations and has been processing the applications more quickly. Although the log jam has been broken, the problem identified by the Council's report has not been fully addressed. Since the IRS has not withdrawn or modernized the outdated guidance, there can be no assurance that the difficulties experienced by nonprofit media organizations in the past will not reappear. Indeed, recent changes in the processing of exemption applications may make that more likely since applications will not be centralized or assigned based on experience with the issue.

We suggest two courses of action to address this concern. First, it remains appropriate to continue asking the Treasury Department to include a project to update the standards for nonprofit media organizations on the priority guidance plan. The Council and others have made this request for the past several years, and continuing to do so will serve as a reminder to the Treasury Department that the existing guidance is outdated and new guidance is needed. When it comes to this new guidance, the Council's 2013 report serves as an important starting point. The report emphasizes that, instead of focusing on meaningless operational distinctions, the IRS should evaluate whether a nonprofit media organization is engaged primarily in educational activities that provide a community benefit, as opposed to advancing private interests, and whether it is organized and managed as a nonprofit, tax-exempt organization. The report also provides that factors indicating an organization is pursuing educational rather than private purposes might include the following:

- In determining its editorial strategy, the organization uses as its primary criterion whether its content directly or indirectly furthers purposes that are educational as defined by Section 501(c)(3).
- The organization provides information on important public issues or the performance of public institutions.
- The organization has procedures in place to ensure that editorial decisions or content are not determined by private interests.
- Exhortations to purchase unrelated or third-party goods or services do not constitute most of the organization's content or communications.
- The organization has a governing board that is independent of private interests and generally representative of the community it serves.

- No part of the earnings of a tax-exempt, nonprofit media entity should inure to the benefit of a private shareholder or individual.

- The organization must not officially endorse or oppose any candidate for public office.

The report also lists factors that are now obsolete when determining whether an entity is qualified for tax-exempt status and should *not* be part of an IRS determination, including the overall manner or medium by which the editorial content is gathered, collected, displayed, or disseminated; whether or not a fee or other payment is required; and whether or not an organization is supported by grants.

Second, it may be helpful to develop a checklist for new nonprofit media organizations to follow when preparing their exemption applications. Such a checklist would help ensure that new exemption applications include the required information to show that they meet the Section 501(c)(3) requirements. This may be particularly important if the cases are assigned to an IRS agent who is not experienced in these cases and may have a tendency to revert to the IRS positions reflected in the outdated revenue rulings. In addition, the IRS does not preclude nonprofit media organizations from qualifying to file the Form 1023-EZ, so some organizations may want to identify whether they meet the applicable standards for using this more streamlined application.

Nonprofit media organizations are making vital contributions to society by providing coverage on important public topics that are being abandoned by commercial organizations, such as investigative and in-depth pieces on the state of health care and schools or stories that explore the experiences of minority, ethnic, or low-income communities. Although nonprofit media organizations are providing news and information that is useful to individuals and beneficial to communities, the field would continue to benefit from updated IRS guidance on the standards for their exemption as well as a checklist to help them prepare exemption applications.

Appendix A

NONPROFIT MEDIA ORGANIZATIONS THAT HAVE RECENTLY RECEIVED SECTION 501(C)(3) EXEMPTION

American Media Institute

The Arlington Community News Lab

The Cyntimental Logic News

The Daily Caller News Foundation

Epoch Public Media Seattle

Epochtimes Philadelphia

EWTN News, Inc.

Future of Journalism Foundation

Hispanic Link

Investigative News Network

Journalism That Matters

The Lens

The Light and Salt Christian Newspaper

Memphis Street Newspaper Organization

Michigan Women's Media, Inc.

Nevada News Bureau, Inc.

New Marlborough 5 Village News, Inc.

New Michigan Media

Newspaper Tree Corp.

Out of Eden Walk

Patagonia Regional Times, Inc.

Pennsylvania Center for Investigative Reporting

Philadelphia Public Interest Information Network, Inc.

Philipstown.info

Rocky Mountain Investigative News Network

San Diego Newsroom

San Francisco Jewish Community Publications, Inc. d/b/a Jewish News Weekly of Northern California

San Francisco Public Press

South Side Newspaper Project

The Sandisfield Times, Inc.

Sunshine Center for Public Service Reporting, Inc.

West View Media