

# A CRITICAL ANALYSIS OF THE CHARITABLE GIVING ACT OF 2005 AND THE CHARITABLE AID, RECOVERY, AND EMPOWERMENT ACT OF 2005

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## I. INTRODUCTION

“[D]ivine justice weighs the sins of the cold-blooded and the sins of the warm-hearted in different scales. Better the occasional faults of a Government that lives in a spirit of charity than the constant omission of a Government frozen in the ice of its own indifference.”<sup>1</sup> Whether providing aid for disaster relief to tsunami victims<sup>2</sup> or helping to procure affordable housing,<sup>3</sup> charitable organizations provide essential services to those in need either for free or at a reduced price. In order to continue operations, charitable organizations rely heavily on contributions from individuals and businesses.<sup>4</sup>

In response to the ever-increasing demand for charitable donations, the United States House of Representatives introduced the Charitable Giving Act of 2005.<sup>5</sup> Likewise, the United States Senate introduced the Charitable Aid, Recovery,

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<sup>1</sup> WILLIAM E. LEUCHTENBURG, *FRANKLIN D. ROOSEVELT & THE NEW DEAL: 1932-1940* 333 (1963).

<sup>2</sup> See Lesly C. Hallman, *Red Cross, Red Crescent Rallies to Support Countries Devastated by Earthquake, Tsunami*, at [http://www.redcross.org/article/0,1072,0\\_440\\_3879,00.html](http://www.redcross.org/article/0,1072,0_440_3879,00.html) (last visited Mar. 6, 2006).

<sup>3</sup> See <http://www.habitat.org>.

<sup>4</sup> See The Non-Profit Times, *Special Report: The NPT Top 100*, at <http://www.nptimes.com/Nov05/Special%20Report.pdf> (last visited January 30, 2006) (detailing the sources of income for the top 100 United States charities).

<sup>5</sup> H.R. 3908, 109th Cong. (2005) (hereinafter the “Charitable Giving Act”). Originally, the House of Representatives introduced a previous version of this Act in 2003 entitled the Charitable Giving Act of 2003, H.R. 7, 108th Cong. (2003) (hereinafter “H.R. 7”). Although the 2003 version of this act passed in the House of Representatives, it was never enacted. The majority of the sections of both Acts, however, is similar. *Compare* Charitable Giving Act *with* H.R. 7.

and Empowerment Act of 2005 (the “CARE Act”).<sup>6</sup> Congress introduced these acts “[t]o provide incentives for charitable contributions by individuals and businesses”<sup>7</sup> and for other purposes, including reforming the Internal Revenue Code of 1986, as amended (the “Code”), to improve the oversight of tax-exempt organizations.<sup>8</sup> While both Acts have major sections related to charitable giving that are virtually identical, each act contains other sections aimed at meeting the respective Act’s goals.<sup>9</sup> This article will explain the major changes to the Internal Revenue Code<sup>10</sup> proposed by each act and discuss whether the changes would accomplish the articulated goals.

## II. CHARITABLE GIVING INCENTIVES

Significantly, the Charitable Giving Act and the CARE Act provide incentives to increase charitable giving. This article examines these incentives by focusing on whether individuals or businesses would primarily benefit from the changes.

### A. Individuals

To increase individual contributions to charities, the Charitable Giving Act and the CARE Act allow certain individuals to deduct charitable contributions without itemizing and also allow the elderly to make charitable contributions directly from their individual retirement accounts (“IRAs”). In addition, the CARE Act provides enhanced deductions to individuals who donate their ownership rights in literary, musical, artistic, and scholarly compositions and increases the mileage deduction for charitable volunteers. Finally, to increase contributions of land and water rights for conservation purposes, the CARE Act provides increased tax

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<sup>6</sup> S. 1780, 109th Cong. (2005) (hereinafter the “CARE Act”). Originally, the Senate introduced a previous version of this Act in 2003 entitled the CARE Act of 2003, S. 476, 108th Cong. (2003) (hereinafter “S. 476”). Although the 2003 version of this Act passed in the Senate, it was never enacted. The majority of the sections of both Acts, however, is similar. *Compare* CARE Act *with* S. 476.

<sup>7</sup> CARE Act, *supra* note 6; Charitable Giving Act, *supra* note 5.

<sup>8</sup> *See* CARE Act, *supra* note 6, at tit. II.

<sup>9</sup> *Compare* Charitable Giving Act, *supra* note 5, *with* CARE Act, *supra* note 6.

<sup>10</sup> This article does not purport to discuss every change made by the Charitable Giving Act and the CARE Act but rather discusses the changes within each bill that the author finds important to discuss.

benefits to landowners for donations of land for conservation purposes and to land and/or water rights owners for the sale of those rights for conservation purposes.

### **1. Charitable Deduction for Non-Itemizers**

Under the current tax system, an individual must itemize deductions to deduct charitable donations.<sup>11</sup> The Charitable Giving Act and the CARE Act allow individuals who do not itemize their deductions to receive a deduction for charitable donations.<sup>12</sup> If an individual whose filing status is other than married filing jointly donates at least \$250 to charity, that individual may deduct up to \$500 of his or her charitable contributions from his or her adjusted gross income without itemizing.<sup>13</sup> If a married couple filing jointly donates at least \$500 to a charity, the couple may deduct an amount up to \$1,000 without itemizing.<sup>14</sup> Section 170 of the Code, however, would still limit the amount of these deductions.<sup>15</sup>

This section should provide incentives for charitable giving by individuals. Currently, donations from individuals constitute approximately seventy-five percent of the donations made to charities,<sup>16</sup> while approximately seventy percent of tax-paying Americans do not itemize deductions on their tax returns.<sup>17</sup> Although when asked, most Americans state that they donate to charity because they value the cause and not for personal benefit,<sup>18</sup> a study conducted by the Internal Revenue Service

<sup>11</sup> I.R.C. §§ 63(a), 170 (2006); *see also* I.R.C. § 63(c) (2006) (defining standard deduction for individuals who do not itemize deductions).

<sup>12</sup> Charitable Giving Act, *supra* note 5, at § 101(a); CARE Act, *supra* note 6, at § 101(a).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *See* I.R.C. § 170(b)(1)(A)-(F) (specifying contribution limitations for individuals).

<sup>16</sup> GIVING USA FOUNDATION, GIVING USA 2004 8 (2004). In 2003, individuals donated approximately \$179 billion to charities. *Id.*

<sup>17</sup> Ayelish McGarvey, *Of Little Faith*, THE AM. PROSPECT, Apr. 1, 2005, at 8.

<sup>18</sup> According to a survey conducted in 1999, when asked what their motivation was for donating, individuals cited overwhelmingly five answers: (1) "being personally asked to give by someone they knew well (77%);" (2) "having volunteered at the organization (63%);" (3) "being asked by clergy to give (61%);" (4) "reading or hearing a news story;" and (5) "being asked at work to give (46%)." Independent Sector, *Household Giving*, at [http://www.independentsector.org/GandV/s\\_hous.htm](http://www.independentsector.org/GandV/s_hous.htm) (last visited Mar. 6, 2006).

from 1981 until 1986 proves otherwise.<sup>19</sup> In 1985, Americans who do not itemize deductions on their tax returns were allowed to deduct fifty percent of their charitable contributions.<sup>20</sup> In 1986, non-itemizers were allowed to deduct 100 percent of their charitable contributions.<sup>21</sup> Charitable contributions rose from \$9.5 billion in 1985 to \$13.4 billion in 1986, an increase of forty percent.<sup>22</sup>

## **2. IRA Contributions to Charity**

The Charitable Giving Act and the CARE Act also provide tax incentives for an individual who makes donations out of his or her individual retirement account (“IRA”).<sup>23</sup> Under the current system, an individual generally must include withdrawals of money from his or her IRA as income,<sup>24</sup> regardless of whether the individual donates any of the released funds to charity.<sup>25</sup> Under the Charitable Giving Act and the CARE Act, if an individual is at least 70 ½ years old and the charitable donation is made directly from the trustee of his IRA<sup>26</sup> to a qualified charitable organization,<sup>27</sup> that amount is not included as gross income to the individual.<sup>28</sup>

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<sup>19</sup> Independent Sector, Comparison of Giving by Itemizers and Nonitemizers, *at* [http://www.independentsector.org/programs/gr/waysmeans\\_attachc.htm](http://www.independentsector.org/programs/gr/waysmeans_attachc.htm) (last visited Mar. 6, 2006).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> Charitable Giving Act, *supra* note 5, at § 102; CARE Act, *supra* note 6, at § 102.

<sup>24</sup> I.R.C. § 408(d)(1) (2006). It is important to note that this is generally the case with IRAs because, generally, most contributions to IRAs are excluded from income. *Id.* § 219(a). However, with regard to a ROTH IRA, withdrawals are not includable in gross income. *Id.* § 408A(d). Rather, an individual does not receive an exclusion for contributions made to ROTH IRAs. § 408A(c).

<sup>25</sup> It is important to note that the individual can still receive a charitable deduction for any subsequent transfer of the withdrawn funds to a charity. I.R.C. § 170(a)(1) (2006).

<sup>26</sup> Charitable Giving Act, *supra* note 5, at § 102(a); CARE Act, *supra* note 6, at § 102(a).

<sup>27</sup> *Id.* A qualified charitable organization is one described under section 170(c) of the Code or a split-interest entity. *Id.* Both acts define split-interest entity as

- (i) a charitable remainder annuity trust or a charitable remainder unitrust (as such terms are defined in section

This section, however, will not provide an effective incentive for individuals to donate to charity. While providing a tax benefit for charitable contributions has historically been effective at increasing charitable giving,<sup>29</sup> this section has one major flaw that will prevent it from providing a significant increase in charitable giving. Under this section, an individual who is at least 70 ½ years old may make a tax-free distribution from an IRA to an organization described under section 170 of the Code.<sup>30</sup> However, an individual born in 1940 who would not be eligible to donate until 2010 has an average life expectancy of only 62.9 years.<sup>31</sup> On average, an individual must have been born no earlier than 1970 in order to live long enough to take advantage of this section.<sup>32</sup> In fact, in the year 2000, only 12.4 percent of the United States population was age 65 or older.<sup>33</sup> Further, only 5.9 percent of the population was age 75 or older in 2003.<sup>34</sup> While these percentages may increase due

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- 664(d)) which must be funded exclusively by qualified charitable distributions,
  - (ii) a pooled income fund (as defined in section 642(c)(5)), but only if the fund accounts separately for amounts attributable to qualified charitable distributions, and
  - (iii) a charitable gift annuity (as defined in section 501(m)(5)).

*Id.*

<sup>28</sup> *Id.* Under the CARE Act, an individual would be able to take advantage of this section at age 59 ½ years if the donation was made to a split-interest entity. CARE Act, *supra* note 6, at § 102(a). This section has no bearing on withdrawals from ROTH IRAs because withdrawals from ROTH IRAs are generally excluded from gross income. I.R.C. § 408A(d) (2006).

<sup>29</sup> *See supra* notes 19-22 and accompanying text.

<sup>30</sup> CARE Act, *supra* note 6, at § 102; Charitable Giving Act, *supra* note 5, at § 102. The CARE Act's version does allow for individuals who are at least 59 ½ years old to exclude from their income any donation made in compliance with the section to a split-interest entity. CARE Act, *supra* note 6, at § 102(a).

<sup>31</sup> Infoplease, *Life Expectancy at Birth by Race and Sex, 1930–2002*, at <http://www.infoplease.com/ipa/A0005148.html> (last visited Mar. 6, 2006).

<sup>32</sup> *Id.* (1970 is the first year in which the life expectancy exceeded 70 ½ years).

<sup>33</sup> U.S. Dept. of Commerce, *Profiles of General Demographic Characteristics: 2000 Census of Population and Housing*, at <http://www.census.gov/prod/cen2000/dp1/2khus.pdf>.

<sup>34</sup> *Id.*

to the aging baby boomer population, the average life expectancy for those baby boomers is still less than 70 ½ years.<sup>35</sup>

### **3. Literary, Musical, Artistic, & Scholarly Composition Contributions**

The CARE Act increases the deduction amount for “[c]ontribution[s] of [l]iterary, [m]usical, [a]rtistic, and [s]cholarly [c]ompositions.”<sup>36</sup> Currently, if an individual donates his or her rights to literary, musical, artistic, or scholarly compositions that he or she has composed, the tax deduction that he or she may take is limited to the basis that he or she has in the work.<sup>37</sup> The CARE Act allows the individual to deduct the fair market value of the work at the time of contribution.<sup>38</sup> The contribution, however, must be a qualified contribution,<sup>39</sup> and the individual may not carry over the deduction into subsequent years.<sup>40</sup>

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<sup>35</sup> See *supra* note 31. A baby boomer is an individual born in the years 1946 through 1965. RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 149 (2d ed. 1987). One possible solution to this problem would be to lower the age at which an individual may contribute pursuant to this section.

<sup>36</sup> CARE Act, *supra* note 6, at § 108(a).

<sup>37</sup> I.R.C. § 170(e)(1); see S. REP. NO. 108-11, at 32 (2003). This report is based on the CARE Act of 2003. Throughout this article, I will refer to reports that discuss both the Charitable Giving Act of 2003 and the CARE Act of 2003 while elaborating on the Charitable Giving Act and the CARE Act. I have done so because, for the most part, the sections of the 2005 bills and their 2003 counterparts are identical.

<sup>38</sup> CARE Act, *supra* note 6, at § 108(a).

<sup>39</sup> A qualified artistic charitable contribution is defined as:

[A] charitable contribution of any literary, musical, artistic, or scholarly composition, or similar property, or the copyright thereon (or both), but only if—

(i) such property was created by the personal efforts of the taxpayer making such contribution no less than 18 months prior to such contribution,

(ii) the taxpayer—(I) has received a qualified appraisal of the fair market value of such property in accordance with the regulations under this section, and (II) attaches to the taxpayer’s income tax return for the taxable year in which such contribution was made a copy of such appraisal,

This section should increase charitable giving of compositions by individuals. Before 1969, individuals could deduct from their income the fair market value of their compositions that they donated to charity.<sup>41</sup> In 1969, individuals could no longer deduct the fair market value; they could deduct only the cost of creating the art.<sup>42</sup> As a result, “donations of self-created artistic, literary, and musical works to museums and libraries have virtually ceased.”<sup>43</sup> This change in the law is no doubt

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(iii) the donee is an organization described in subsection (b)(1)(A) [of I.R.C. § 170],

(iv) the use of such property by the donee is related to the purpose or function constituting the basis for the donee’s exemption under section 501 (or, in the case of a governmental unit, to any purpose or function described under section 501(c)),

(v) the taxpayer receives from the donee a written statement representing that the donee’s use of the property will be in accordance with the provisions of clause (iv), and

(vi) the written appraisal referred to in clause (ii) includes evidence of the extent (if any) to which property created by the personal efforts of the taxpayer and of the same type as the donated property is or has been— (I) owned, maintained, and displayed by organizations described in subsection (b)(1)(A) [of I.R.C. § 170], and (II) sold to or exchanged by persons other than the taxpayer, donee, or any related person.

CARE Act, *supra* note 6, at § 108(a).

<sup>40</sup> *Id.*

<sup>41</sup> Douglas J. Bell, Note, *Changing I.R.C. § 170(E)(1)(A): For Art’s Sake*, 37 CASE W. RES. L. REV. 536, 538-39 (1987).

<sup>42</sup> *See id.* at 539. Interestingly, in 1969, former President Nixon contributed his Vice-Presidential papers to charity. Tax History Project, *President Nixon’s Troublesome Tax Returns*, at <http://www.taxhistory.org/thp/readings.nsf/cf7c9c870b600b9585256df80075b9dd/f8723e3606cd79ec8526ff6006f82c3?opendocument> (last visited Mar. 9, 2006). Former President Nixon took a deduction of \$600,000 for his charitable contribution. *Id.* To eliminate this type of abuse, section 108 of the CARE Act specifically prohibits an individual who is “an officer or employee of any person (including any government agency or instrumentality)” from deducting the fair market value of “any charitable contribution of any letter, memorandum, or similar property which was written, prepared, or produced by or for...the...officer or employee...unless such letter, memorandum, or similar property is entirely personal.” CARE Act, *supra* note 6, at § 108(a).

<sup>43</sup> Bell, *supra* note 41, at 548. One example the author gives to prove this point is that, in the three years prior to 1969, “the Museum of Modern Art in New York received 321 paintings, sculptures,

the cause of this dramatic decrease. If current law allows for deductions equaling the fair market value of the work, donations should increase back to pre-1969 levels. This is especially important for museums, which acquire eighty percent of all works by donation.<sup>44</sup>

#### **4. Donations and Sales for Conservation Purposes**

The CARE Act also expands the deduction amount for donations of real property for conservation purposes.<sup>45</sup> If an individual donates land for qualified conservation purposes, that individual does not pay taxes on the transfer; rather, he or she receives a tax deduction.<sup>46</sup> That deduction is subject to certain contribution base limitations.<sup>47</sup> The CARE Act removes the limitation with respect to qualified conservation contributions and allows deduction of a larger percentage.<sup>48</sup> Under the

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drawings, and prints donated by ninety-seven artists. In the three years following [the enactment of the current law in 1969], donations dwindled to twenty-eight works from fifteen artists, and those works consisted primarily of prints.” *Id.*

<sup>44</sup> *Id.* at 547.

<sup>45</sup> CARE Act, *supra* note 6, at § 105.

<sup>46</sup> I.R.C. § 170(a) (2006); *see* S. REP. NO. 108-11, at 21 (2003). An individual may also benefit from the increased exclusion under this section when he or she sells or exchanges stock in a qualifying land or water corporation to a qualifying organization that takes a controlling interest in that corporation where “ninety percent of the fair market value of the assets of the corporation at the time of transfer consist of land or water rights that were held by the corporation for at least five years before the transfer.” CARE Act, *supra* note 6, at § 106(a). Section 106 of the CARE Act defines “controlling interest” for use in this section as ownership of ninety percent of the total voting power and value of the stock of a corporation. *Id.*

<sup>47</sup> *Id.* Currently under I.R.C. § 170(b)(1)(C)(i), an individual may take deductions of no more than thirty percent of his or her adjusted gross income for contributions of capital gain property to an organization listed in section 170(b)(1)(A) of the Code. I.R.C. §§ 170(b)(1)(C)(i), (b)(1)(F). “For purposes of this subsection, contributions of capital gain property to which...[section 170(b)(1)(C)(i)] applies shall be taken into account after all other charitable contributions (other than charitable contributions to which subparagraph (D) [of § 170(b)(1)] applies).” I.R.C. § 170(b)(1)(C)(i) (2006).

<sup>48</sup> CARE Act, *supra* note 6, at § 105(a); *see* S. REP. NO. 108-11, at 23. For individuals, this section would increase the contribution base percent amount to fifty percent from thirty percent, while for qualified ranchers or farmers, this section would allow a deduction up to 100 percent of their total contribution base. *See* CARE Act, *supra* note 6, at § 105(a); S. REP. NO. 108-11, at 23.



CARE Act, an individual may carry over any portion of the contribution that exceeds his or her yearly limitation for 15 years, rather than 5 years.<sup>49</sup>

“Some landowners[, however,] may want their land to be protected for conservation purposes but cannot afford simply to donate either the land or an easement on the land.”<sup>50</sup> To alleviate this problem, the CARE Act provides for a limited exclusion “of the gain on sales or exchanges of land or water interests to eligible entities for conservation purposes.”<sup>51</sup> Currently, when an individual sells land held as a capital asset,<sup>52</sup> that individual must pay tax on the gain recognized on the sale.<sup>53</sup> To encourage the sale of land or water interests for qualified conservation purposes, the CARE Act allows a landowner to exclude twenty-five percent of the gain on the sale of such land.<sup>54</sup> To qualify for this exclusion, an individual must transfer his or her “entire interest...in the land or water rights, or [rights] that constitute qualified real property interests as defined in section 170(h) [of the Code]”<sup>55</sup> to a qualified organization<sup>56</sup> that will use the property for qualified purposes.<sup>57</sup>

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<sup>49</sup> CARE Act, *supra* note 6, at § 105(a); *see* S. REP. NO. 108-11, at 23. Under the current version of the Code, an individual may carry over any excess amount over his or her contribution base limit the following five years. I.R.C. § 170(b)(1)(C)(ii) (2006). Under section 105 of the CARE Act, the individual may carry the excess amount forward up to fifteen years. CARE Act, *supra* note 7, at § 105(a).

<sup>50</sup> S. REP. NO. 108-11, at 25.

<sup>51</sup> CARE Act, *supra* note 6, at § 106.

<sup>52</sup> *See* I.R.C. § 1221(a) (2006) for the definition of “capital asset.”

<sup>53</sup> *See* I.R.C. §§ 1(h), 1221 (2006).

<sup>54</sup> CARE Act, *supra* note 6, at § 106(a).

<sup>55</sup> S. REP. NO. 108-11, at 25 (2003).

<sup>56</sup> “[A] qualified organization [is] defined as a Federal, State, or local government, or an agency or department thereof or a section 501(c)(3) organization that is organized and operated primarily to meet a qualified conservation purpose.” S. REP. NO. 108-11, at 27; *see* CARE Act, *supra* note 7, at § 106(a).

<sup>57</sup> For this the purposes of this section, a qualified purpose is:

- (i) the preservation of land areas for outdoor recreation by, or the education of, the general public,

These sections fail to provide incentives because landowners are already donating or selling their lands for conservation purposes at a dramatically increasing rate. In 1990, 887 local and regional land trusts protected 1.9 million acres.<sup>58</sup> In 2003, the number of land trusts increased to 1537, a 73.28 percent increase from 1990, while the acreage protected increased to nearly 9.4 million acres, a staggering 394.73 percent increase from 1990.<sup>59</sup> While these sections may provide some increase in charitable giving of land, the effects should be relatively minimal given the current rate at which individuals are donating or selling lands to land trusts for conservation.

### **B. Businesses**

The Charitable Giving Act and the CARE Act do not limit their incentives to individuals alone. To increase business contributions to charities, the Charitable Giving Act would allow corporations to deduct an increased amount of gross income for charitable contributions.<sup>60</sup> Further, while both acts would provide a tax incentive to certain businesses by allowing them to take an enhanced deduction

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(ii) the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem,

(iii) the preservation of open space (including farmland and forest land) where such preservation is—

(I) for the scenic enjoyment of the general public, or

(II) pursuant to a clearly delineated Federal, State, or local governmental conservation policy, and will yield a significant public benefit.

I.R.C. § 170(h)(4)(A)(i)-(iii) (2006); *see* CARE Act, *supra* note 6, at § 106(a) (requiring that donee must write a letter of intent stating that it will use the property sold for one of the purposes listed under I.R.C. § 170(h)(4)(A)(i)-(iii)); S. REP. NO. 108-11, at 28.

<sup>58</sup> Konrad Liegel & Gene Duvernoy, *Land Trusts: Shaping the Landscape of Our Nation*, 17-FALL NAT. RESOURCES & ENV'T 95, 96 (2002).

<sup>59</sup> Land Trust Alliance, *National Land Trust Census*, at <http://www.lta.org/aboutlt/census.shtml> (last visited Mar. 9, 2006).

<sup>60</sup> Charitable Giving Act, *supra* note 5, at § 103(a).

for charitable contributions of food inventory,<sup>61</sup> the CARE Act would also provide a tax incentive to businesses by allowing them to take an enhanced deduction for charitable contributions of book inventories.<sup>62</sup>

### **1. Corporation Cap Increase**

Currently, under section 170(b)(2) of the Code, a corporation may not deduct more than ten percent of its gross income for charitable contributions.<sup>63</sup> The Charitable Giving Act will increase the deduction percentage from the current rate to eleven percent in 2005, twelve percent in 2006, thirteen percent in 2007, fourteen percent in 2008, fifteen percent in 2009, and twenty percent in 2013.<sup>64</sup>

This section fails to provide effective incentives for charitable giving by corporations. In 2003, corporations donated approximately \$13.46 billion annually to charity, which was 5.6 percent of the total income received by charities that year.<sup>65</sup> Although this amount may appear staggering, most corporations do not donate an amount equal to their contribution percentage limits. For example, Wal-Mart, the nation's largest corporation and corporate contributor, donated \$170 million in 2004, which constituted only .99 percent of Wal-Mart's 2004 operating income.<sup>66</sup> ExxonMobil, the nation's second largest corporation, donated \$106 million in 2004, which was .41 percent of its 2004 operating income.<sup>67</sup> Albertson's, the nation's largest corporate donor by percentage of operating income in 2002, donated only 2.86 percent of its 2001 operating income.<sup>68</sup> Likewise, Target, the nation's largest

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<sup>61</sup> *Id.* at § 104(a); CARE Act, *supra* note 6, at § 103.

<sup>62</sup> CARE Act, *supra* note 6, at § 104(a).

<sup>63</sup> I.R.C. § 170(b)(2) (2006).

<sup>64</sup> Charitable Giving Act, *supra* note 5, at § 103(b).

<sup>65</sup> GIVING USA FOUNDATION, *supra* note 16, at 83.

<sup>66</sup> *See* WAL-MART STORES, INC., 2005 ANNUAL REPORT 10, 33 (2005). In 2004, Wal-Mart had an operating income of \$17.1 billion. *Id.* at 33.

<sup>67</sup> *See* EXXONMOBIL CORP., 2004 SUMMARY ANNUAL REPORT 32, 38 (2005). In 2004, ExxonMobil Corporation had an operating income of \$25.3 billion. *Id.* at 40.

<sup>68</sup> GIVING USA FOUNDATION, *supra* note 16, at 92.

corporate donor by percentage of income in 2001, donated only 2.51 percent of its 2000 operating income.<sup>69</sup>

## **2. Contributions of Food Inventory**

The Charitable Giving Act and the CARE Act allow any type of business entity to deduct charitable contributions of food inventory.<sup>70</sup> Generally, a donor can deduct the fair market value of a non-cash charitable contribution.<sup>71</sup> However, the Code limits the deduction for contributions of certain property, such as inventory, to the basis the taxpayer has in the property.<sup>72</sup> A corporation, however, may take an enhanced deduction for contributing its non-capital assets to certain qualified charitable organizations if the donee meets certain criteria.<sup>73</sup> A corporation may take

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<sup>69</sup> *Id.*

<sup>70</sup> Charitable Giving Act *supra* note 5, at § 104; CARE Act, *supra* note 6, at § 103. A version of this section has been enacted as part of the Katrina Emergency Tax Relief Act of 2005, Pub. L. No. 109-73, § 305, 119 Stat. 2016, 2025. However, the Katrina Emergency Tax Relief Act of 2005 does not apply to contributions of food inventory after December 31, 2005. *Id.*

<sup>71</sup> Treas. Reg. § 1.170A-1(c) (2006).

<sup>72</sup> I.R.C. § 170(e)(1)(A) (2006).

<sup>73</sup> I.R.C. § 170(e)(3) (2006). This enhanced deduction is “equal to the lesser of (1) basis plus one-half of the item’s appreciated value...or (2) two times basis.” STAFF OF JOINT COMM. ON TAXATION, 108TH CONG., DESCRIPTION OF THE CHAIRMAN’S AMENDMENT IN THE NATURE OF A SUBSTITUTE TO H.R. 7, THE “CHARITABLE GIVING ACT OF 2003” 12 (Comm. Print 2003) (citing I.R.C. § 170(e)(3)).

A qualified organization is “an organization which is described in [I.R.C.] section 501(c)(3) and is exempt under section 501(a)...(other than a private foundation, as defined in section 509(a), which is not an operating foundation, as defined in section 4942(j)(3)).” § 170(e)(3)(A). A corporation may take this enhanced deduction if:

- (i) the use of the property by the donee is related to the purpose or function constituting the basis for its exemption under section 501 and the property is to be used by the donee solely for the care of the ill, the needy, or infants;
- (ii) the property is not transferred by the donee in exchange for money, other property, or services;
- (iii) the taxpayer receives from the donee a written statement representing that its use and disposition of the property will be in accordance with the provisions of clauses (i) and (ii); and

this deduction only if it contributes stock in trade or property which would be considered inventory, depreciable property used in the corporation's trade or business, or any real property used in the corporation's trade or business.<sup>74</sup> Currently, businesses other than corporations may take a deduction for charitable donations of food inventory equal to their cost basis in the inventory.<sup>75</sup> Under the Charitable Giving Act and the CARE Act, all forms of businesses may take an enhanced deduction for donations of food inventory if the donee uses the donation to care for "the ill, the needy, or infants."<sup>76</sup> Further, the food must be "apparently wholesome food."<sup>77</sup>

This section should increase charitable contributions of food inventory because it expands the types of business entities that may take an enhanced deduction for certain contributions of food inventory.<sup>78</sup> As such, businesses that

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- (iv) in the case where the property is subject to regulation under the Federal Food, Drug, and Cosmetic Act, as amended, such property must fully satisfy the applicable requirements of such Act and regulations promulgated thereunder on the date of transfer and for one hundred and eighty days prior thereto.

§ 170(e)(3)(A)(i)-(iv).

<sup>74</sup> I.R.C. §§ 170(e)(3)(A), § 1221(a)(1) (2006).

<sup>75</sup> § 170(e)(1).

<sup>76</sup> CARE Act, *supra* note 6, at § 103; Charitable Giving Act, *supra* note 5, at § 104. Even though section 103 of the CARE Act and section 104 of the Charitable Giving Act are substantially similar, there is one difference between the two sections that is worth noting. Under section 103 of the CARE Act, any business entity may take an enhanced deduction that is the lesser of two times basis or the fair market value of the food inventory it contributes. CARE Act, *supra* note 6, at § 103. Section 104 of the Charitable Giving Act does not allow for this increase in the enhanced deduction. Charitable Giving Act, *supra* note 5, at § 104. The Charitable Giving Act maintains the current enhanced deduction for corporations. *Id.*; see I.R.C. § 170(e). As a result, I would recommend enacting the CARE Act's version of this section.

<sup>77</sup> CARE Act, *supra* note 6, at § 103; Charitable Giving Act, *supra* note 5, at § 104. Pursuant to the Charitable Giving Act, the meaning of "apparently wholesome food" is defined in section 22(b)(2) of the Bill Emerson Good Samaritan Food Donation Act. Under that act, "apparently wholesome food" means "food that meets all quality and labeling standards imposed by Federal, State, and local laws and regulations even though the food may not be readily marketable due to appearance, age, freshness, grade, size, surplus, or other conditions." 42 U.S.C. § 1791(b)(2) (2005).

<sup>78</sup> I.R.C. § 170(e)(3)(A)(i) (2006); CARE Act, *supra* note 6, at § 103; Charitable Giving Act, *supra* note 5, at § 104. This article concluded earlier that an increase on the charitable contribution cap for

normally do not get to take advantage of the current enhanced deduction would be able to do so. Thus, while total donations by corporations may not rise, the amount of food inventory donated should rise because of the enlarged pool of business entities allowed to take advantage of the enhanced deduction. This increase could not come at a better time. Although giving to human services organizations<sup>79</sup> increased in 2003 “by an estimated 1.3 percent [(-1.0 percent adjusted for inflation)]” from 2002,<sup>80</sup> and giving to health-related institutions<sup>81</sup> increased 8.2 percent, adjusted for inflation, from 2002,<sup>82</sup> donations of food inventory have not kept up with the increasing demand for emergency food.<sup>83</sup> If the law were to change to allow for all businesses to receive this enhanced deduction, the increases in donations of food should help compensate for the increasing need for emergency food.

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corporations would not increase charitable giving. Here, however, it concludes that an enhanced deduction for contributions of food inventory would increase charitable giving. The reason for this difference in conclusions is because while one section increases a limit that is currently not being maximized, the other section expands who may receive an increased tax benefit for an activity.

<sup>79</sup> “[H]uman services organizations include[]...organizations formed to strengthen public protection services, provide disaster relief or training to avoid disasters, offer social services, supply basic needs for food or shelter,...[and] promote healthy development of youth.” GIVING USA FOUNDATION, *supra* note 16, at 131.

<sup>80</sup> *Id.*

<sup>81</sup> “[H]ealth-related institutions include[]...nonprofit organizations providing health care services, mental health care and crisis intervention, or education, treatment, research, or support for specific disorders and diseases.” *Id.* at 122.

<sup>82</sup> *Id.*

<sup>83</sup> U.S. CONFERENCE OF MAYORS, HUNGER & HOMELESSNESS SURVEY 9, 18 (Dec. 2004), at <http://www.usmayors.org/uscm/hungersurvey/2004/onlinereport/HungerAndHomelessnessReport2004.pdf>. While “requests for emergency food assistance increased in 96 percent” of the cities surveyed by an average of 14 percent in 2004, “[t]he level of resources such as food...available to emergency food assistance facilities...increased in 42 percent of the cities [surveyed], decreased in 42 percent of the cities [surveyed] and remained the same in 16 percent.” *Id.* See, e.g., Dana Bartholomew, *Food Banks Hungry: Crisis Looms for Needy as Donations Plummet*, THE DAILY NEWS OF L.A., Dec. 20, 2000, at NEWS (reporting lack of donations to match ever growing emergency food needs in Los Angeles); Editorial, *A Time to Share*, BALT. SUN, Nov. 23, 1994, at 12A (reporting 25 percent decrease in food donations by supermarkets and other stores in Baltimore).

### **3. Contributions of Book Inventories**

Finally, the CARE Act allows corporations to take an enhanced deduction for certain contributions of book inventories.<sup>84</sup> Under the current Code, a taxpayer may take a deduction equal to his or her basis in the property for donations of inventory.<sup>85</sup> In certain situations, corporations may claim an enhanced deduction in the donated property when the donee complies with four criteria.<sup>86</sup> The CARE Act modifies this enhanced deduction by including a special section for contributions of book inventories by corporations.<sup>87</sup> If a corporation donates any of its book inventory to a qualified organization,<sup>88</sup> the corporation may take an enhanced deduction if the donee complies with certain criteria.<sup>89</sup> This enhanced deduction will

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<sup>84</sup> CARE Act, *supra* note 6, at § 104. A similar version of this section of the CARE Act has been enacted as part of the Katrina Emergency Tax Relief Act of 2005, Pub. L. No. 109-73, § 306, 119 Stat. 2016, 2025 (2005). However, the version enacted under the Katrina Emergency Tax Relief Act of 2005 does not apply to charitable contributions of book inventories after December 31, 2005. *Id.*

<sup>85</sup> I.R.C. § 170(e)(1)(A); *see* S. REP. NO. 108-11, at 17 (2003).

<sup>86</sup> *See supra* note 73.

<sup>87</sup> CARE Act, *supra* note 6, at § 104(a).

<sup>88</sup> Under this section, a qualified organization is:

- (1) an educational organization that normally maintains a regular faculty and curriculum and normally has a regularly enrolled body of...students in attendance...;
- (2) a public library; or
- (3) an organization described in section 501(c)(3) (except for private nonoperating foundations), that is organized primarily to make books available to the general public at no cost or to operate a literacy program.

S. REP. NO. 108-11, at 18; *see* CARE Act, *supra* note 6, at § 104(a).

<sup>89</sup> Under this section, in order for a corporate donor to take this deduction, the donee must:

- (1) use the property consistent with the donee's exempt purpose;
- (2) not transfer the property in exchange for money, other property, or services; and
- (3) provide the [donor] a written statement that the donee's use of the property will be consistent with such requirements and also that the books are suitable, in terms of currency, content, and quantity, for use in the donee's educational

be the lesser of the fair market value<sup>90</sup> of the donated property or twice the basis of the donated property.<sup>91</sup>

Currently, corporations may receive an enhanced deduction for donations of book inventories only when they donate to organizations that care for “the ill, the needy, or infants.”<sup>92</sup> Otherwise, corporations receive the same deduction as other business entities: a deduction equal to the basis the business entity has in the inventory.<sup>93</sup> While some corporations may donate portions of their book inventories for charitable purposes already, donations should increase due to the CARE Act, especially because businesses may receive an enhanced deduction by donating to educational institutions rather than donating only to organizations that care for “the ill, the needy, or infants”—organizations that do not normally need books.<sup>94</sup>

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programs and that the donee will use the books in such educational programs.

S. REP. NO. 108-11, at 18-19; CARE Act, *supra* note 6, at § 104(a).

<sup>90</sup> The fair market value of the donation is defined as a price:

- (I) determined using the same printing and edition,
- (II) determined in the usual market in which such a book has been customarily sold by the taxpayer, and
- (III) for which the taxpayer can demonstrate [satisfactorily] that the taxpayer customarily sold such books in arm’s length transactions within 7 years preceding the contribution.

CARE Act, *supra* note 6, at § 104(a).

<sup>91</sup> *Id.*

<sup>92</sup> I.R.C. § 170(e)(3)(A)(i).

<sup>93</sup> § 170(e)(1).

<sup>94</sup> The Joint Committee on Taxation estimates that this section will cost the federal government \$283 million in revenue over ten years. JOINT COMM. ON TAXATION, 108TH CONG., ESTIMATED REVENUE EFFECTS OF THE CHAIRMAN’S MODIFICATION TO THE “CARE ACT OF 2003” 1 (Comm. Print 2003). Although this article concluded earlier that an increase on the cap of charitable contributions by corporations will not have an effect on charitable giving, it concludes here that a deduction for book inventories should increase charitable giving. The author notes that, while this section, along with the section providing a deduction for contributions of food inventories, will likely



This should be excellent news to educational institutions because they need any increase in support that they can get. In 2003, giving to educational institutions decreased by an estimated “.8 percent (-3.0 percent adjusted for inflation), following the prior year’s dip of 2.0 percent (adjusted for inflation).”<sup>95</sup> Further, public schools have begun fundraising campaigns to retain teachers and save vital programs that their states may eliminate due to budget crises.<sup>96</sup> Likewise, public libraries need additional assistance. In the past thirty-four months, library funding cuts have topped \$158 million.”<sup>97</sup> If these institutions do not have to buy as many books, they may spend their budgeted money in other vital areas, such as employee compensation.

### III. TAX REFORM AND IMPROVEMENTS

Not only do the Charitable Giving Act and CARE Act aim to promote charitable giving, but they also attempt to reform the Code to improve the oversight of tax-exempt organizations. Both acts address how charitable organizations spend their money for political causes. In addition, the Charitable Giving Act modifies what administrative expenses private foundations may treat as qualifying expenses. The CARE Act expands the definition of written determinations, requires non-profit organizations to disclose web addresses and alternate names, requires public notification of Form 990s, penalizes Form 990 preparers for certain errors, and expands the amount of information received by state officials.

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increase contributions of book and food inventories, neither provision, separately or together, will have an impact on corporations’ charitable giving that will necessitate an increase in the limit for charitable contributions by corporations. As stated earlier, the increase of the cap on charitable contributions by a corporation increases a limit that is not currently being maximized. This section expands to whom a corporation may donate book inventories and receive an increased tax benefit. In other words, this section incentivises a new activity rather than increasing a limitation that is not currently being maximized.

<sup>95</sup> GIVING USA FOUNDATION, *supra* note 16, at 106. When calculating these amounts, the Giving USA Foundation included “contributions to schools (preschool through grade 12), vocational and technical training programs, state-run or nonprofit institutions of higher education, adult or continuing education programs, libraries (including public libraries), student services and organizations, and alumni associations.” *Id.*

<sup>96</sup> *Id.* at 109.

<sup>97</sup> American Library Association, *Library Funding*, at <http://www.ala.org/ala/news/libraryfunding/libraryfunding.htm> (last visited Mar. 7, 2006). In response to these state budget cuts, public libraries have reduced the amount of books purchased. *See, e.g.,* The Library of Virginia, *Impact of Budget Cuts on Public Libraries*, at <http://www.lva.lib.va.us/whatwedo/ldnd/cuts.htm> (last visited Mar. 7, 2006).

### A. Lobbying Expenditures

Charitable organizations may use lobbying to improve society's awareness of important social issues or educate legislators about important social issues. If an organization overuses lobbying or lobbies inappropriately, however, it may lose its tax-exempt status.<sup>98</sup> Section 501(h) of the Code allows a tax-exempt organization to spend up to a certain amount on lobbying efforts before being penalized on such expenditures or losing its tax exempt status.<sup>99</sup> These lobbying efforts are broken

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<sup>98</sup> I.R.C. § 501(h) (2006).

<sup>99</sup> Under section 501(h) of the Code,

exemption from taxation under subsection (a) shall be denied because a substantial part of the activities of such organization consists of carrying on propaganda, or otherwise attempting, to influence legislation, but only if such organization normally—

(A) makes lobbying expenditures in excess of the lobbying ceiling amount for such organization for each taxable year, or

(B) makes grass roots expenditures in excess of the grass roots ceiling amount for such organization for each taxable year.

. . . .

For purposes of this subsection—

(A) Lobbying expenditures. The term "lobbying expenditures" means expenditures for the purpose of influencing legislation (as defined in section 4911(d)).

(B) Lobbying ceiling amount. The lobbying ceiling amount for any organization for any taxable year is 150 percent of the lobbying nontaxable amount for such organization for such taxable year, determined under section 4911.

(C) Grass roots expenditures. The term "grass roots expenditures" means expenditures for the purpose of influencing legislation (as defined in section 4911(d) without regard to paragraph (1)(B) thereof).

(D) Grass roots ceiling amount. The grass roots ceiling amount for any organization for any taxable year is 150 percent of the grass roots nontaxable amount for such organization for such taxable year, determined under section 4911.

into two major categories: lobbying expenditures and grass roots expenditures.<sup>100</sup> Under section 501(h), a tax-exempt organization may spend up to the “lesser of \$1 million or an amount determined as a percentage of an organization’s exempt purpose expenditures”<sup>101</sup> on its lobbying expenditures without being subject to tax but may only spend twenty-five percent of that amount on grass roots lobbying.<sup>102</sup> If an organization exceeds one or both of these limitations, it will be subject to tax, and it may lose its tax-exempt status if it normally exceeds these limitations.<sup>103</sup> While the limitations remain in place on lobbying efforts, the Charitable Giving Act eliminates the separate limitation on grass roots lobbying.<sup>104</sup>

This section should improve the oversight of tax-exempt organizations. Grass roots campaigns are vital to gaining public support for the important issues that charitable organizations seek to promote.<sup>105</sup> By allowing charitable organizations to expend more of their total lobbying expenditures on grass roots initiatives, the law allows these organizations to reach a wider audience and create a more informed public. Further, the Internal Revenue Service would have to ensure only that these

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§ 501(h)(1)-(2). Under section 4911 of the Code, influencing legislation means:

(A) any attempt to influence any legislation through an attempt to affect the opinions of the general public or any segment thereof, and

(B) any attempt to influence any legislation through communication with any member or employee of a legislative body, or with any government official or employee who may participate in the formulation of the legislation.

I.R.C. § 4911(d)(1)(A)-(B) (2006).

<sup>100</sup> I.R.C. § 501(h)(1) (2006); JOINT COMM. ON TAXATION, *supra* note 73, at 45.

<sup>101</sup> JOINT COMM. ON TAXATION, *supra* note 73, at 45; I.R.C. § 4911(c)(2) (2006).

<sup>102</sup> § 4911(c)(4); *see also* JOINT COMM. ON TAXATION, *supra* note 73, at 45-46.

<sup>103</sup> § 501(h); *see also* JOINT COMM. ON TAXATION, *supra* note 73, at 46.

<sup>104</sup> Charitable Giving Act, *supra* note 5, at § 205(a); *see* JOINT COMM. ON TAXATION, *supra* note 73, at 48.

<sup>105</sup> *See, e.g.*, Joan H. Krause, *Reconceptualizing Informed Consent in an Era of Health Care Cost Containment*, 85 IOWA L. REV. 261, 379 (1999) (discussing the importance of grass roots lobbying to enacting specialized breast cancer informed consent statutes).

organizations are not exceeding their total lobbying expenditures limit rather than both the lobbying and grass roots expenditures limits.

Although this section improves the oversight of certain tax exempt organizations, it does have some negative implications. The Code's current limitation on the lobbying activities of tax-exempt organizations "stem[s] from the Congressional policy that the United States Treasury should be neutral in *political affairs and that substantial activities directed to attempts to influence legislation or affect a political campaign should not be subsidized.*"<sup>106</sup> Any increase in grass roots spending limits is inconsistent with this policy.

### **B. Streamlining Private Foundations**

The Charitable Giving Act also attempts to improve the oversight of tax-exempt private foundations under the Code.<sup>107</sup> Generally, a private foundation must distribute its income for the year "before the first day of the second (or any succeeding) taxable year following [the current] taxable year (if such first day falls within the taxable period)" to avoid paying a tax on the income.<sup>108</sup> The Code defines "undistributed income" as the distributable amount of income of a private foundation less any qualifying distributions,<sup>109</sup> which include administrative expenses related to making "contributions, gifts, and grants."<sup>110</sup> The Code, however, places maximum limits on the amount of administrative expenses that a private foundation

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<sup>106</sup> Christian Echoes Nat'l Ministry, Inc. v. United States, 470 F.2d 849, 854 (10th Cir. 1972) (emphasis in original).

<sup>107</sup> Charitable Giving Act, *supra* note 5, at § 105. Although this section attempts to reform the Code to improve oversight of private foundations, the Charitable Giving Act includes this section under the "Charitable Giving Incentives" title. Charitable Giving Act, *supra* note 5, at tit. I. Because it will have no effect on charitable giving, and because it attempts to reform the Code, it is included within this article's discussion of the sections of the Charitable Giving Act related to tax reform and improvements. Section 105 also modifies other parts of the Code relating to private foundations, but those parts are beyond the scope of this article. See Charitable Giving Act, *supra* note 5, at § 105. For a definition of private foundations, see I.R.C. § 509(a) (2006).

<sup>108</sup> I.R.C. § 4942(a) (2006).

<sup>109</sup> § 4942(c). See § 4942(d) for the definition of "distributable amount" and "qualifying distribution."

<sup>110</sup> § 4942(g)(4).

may take into account.<sup>111</sup> The Charitable Giving Act removes the limits on grant administrative expenses.<sup>112</sup>

This change will not improve the oversight of private foundations. One major problem that exists with the oversight of private foundations relates to “abuses of the public trust by foundations,” or, more specifically, the reporting of excessive or inappropriate administrative costs.<sup>113</sup> According to a report compiled by the National Committee for Responsive Philanthropy, from 1989 to 1999, trustee fees, staff salaries, and benefits constituted approximately forty-four percent of

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<sup>111</sup> The limitations are as follows:

A) In general. The amount of the grant administrative expenses paid during any taxable year which may be taken into account as qualifying distributions shall not exceed the excess (if any) of—

(i) .65 percent of the sum of the net assets of the private foundation for such taxable year and the immediately preceding 2 taxable years, over

(ii) the aggregate amount of grant administrative expenses paid during the 2 preceding taxable years which were taken into account as qualifying distributions.

§ 4942(g)(4).

<sup>112</sup> Charitable Giving Act, *supra* note 5, at § 105(c)(1). Under the pertinent part of this section, the following expenses are not qualifying distributions:

(i) Any administrative expense which is *not directly attributable* to direct charitable activities, grant selection activities, grant monitoring and administration activities, compliance with applicable Federal, State, or local law, or furthering public accountability of the private foundation.

(ii) Any compensation paid to a disqualified person to the extent that such compensation exceeds an annual rate of \$100,000.

*Id.* (emphasis added).

<sup>113</sup> GIVING USA FOUNDATION, *supra* note 16, at 74. In 2003, several newspapers reported that private foundations “reported administrative costs considered excessive or inappropriate or other potential abuses of the public trust by foundations.” *Id.* In response to these reports, “[t]he attorneys general of California, Massachusetts, and New York” began probes of foundations’ operations. *Id.*

private foundations' overhead payouts.<sup>114</sup> According to the Internal Revenue Service, in 2000, approximately thirty-nine percent of private foundation operating expenses consisted of directors' salaries, salaries of other personnel, and benefits.<sup>115</sup> Although the Charitable Giving Act does not allow deduction of any amount exceeding \$100,000 paid to a disqualified individual, it allows full deduction of any administrative expense that directly relates to "direct charitable activities, grant selection activities, grant monitoring and administration activities, compliance with applicable Federal, State, or local law, or furthering public accountability of the private foundation."<sup>116</sup> This section will not reduce the current administrative overspending by private foundations because it only limits the deductibility of the salaries of disqualified individuals. It continues to allow private foundations to deduct the full amount of other administrative salaries. As a result, a private foundation could have a larger amount of qualifying distributions and, thus, a smaller amount of undistributed income than it would otherwise have had under the Code.

### **C. Expanding Definition of Written Determinations**

One of the goals of the CARE Act is to increase public information about tax-exempt organizations.<sup>117</sup> Currently, the Internal Revenue Service cannot disclose tax returns and return information, except in limited circumstances authorized by the Code.<sup>118</sup> The Internal Revenue Service may disclose some of the supporting documents for an organization's application for exempt status.<sup>119</sup> Further, the Service will disclose any "written determinations"<sup>120</sup> it has issued to tax-exempt

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<sup>114</sup> GIVING USA FOUNDATION, *supra* note 16, at 75.

<sup>115</sup> *Id.*

<sup>116</sup> Charitable Giving Act, *supra* note 5, at § 105(c)(1).

<sup>117</sup> *See* CARE Act, *supra* note 6.

<sup>118</sup> I.R.C. § 6103(a) (2006).

<sup>119</sup> I.R.C. § 6104(a)(1) (providing for release of supporting documents unless the information contained in those documents "relates to any trade secret, patent, process, style of work, or apparatus, of the organization, ...[or] information...the public disclosure of which...would adversely affect the national defense").

<sup>120</sup> "The term 'written determination' means a ruling, determination letter, technical advice, memorandum, or Chief Counsel advice." *Id.* § 6110(b)(1)(A). "Closing agreements, which are final and conclusive written agreements entered into by the IRS and a taxpayer in order to settle the taxpayer's tax liability with respect to a taxable year, do not constitute written determinations." S. REP. NO. 108-11, at 38 (2003) (citing I.R.C. §§ 6103(b)(2)(D), 6110(b)(1)(B) (2003)).

organizations.<sup>121</sup> The Service must redact certain information from these determinations to maintain the privacy of the organizations.<sup>122</sup> There are certain types of documents that would normally be included in this exception but for being designated outside the scope of the definition of “written determinations.”<sup>123</sup> Under the CARE Act, “any written determination and related background file document relating to an organization described under subsection (c) or (d) of section 501...or a political organization described in section 527” must be disclosed pursuant to section 6110 of the Code.<sup>124</sup>

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<sup>121</sup> I.R.C. § 6110(a) (2006).

<sup>122</sup> § 6110(c); S. REP. NO. 108-11, at 38.

<sup>123</sup> Section 6110 of the Code states that no provision of section 6110 will apply to any document “to which section 6104...applies.” § 6110(f)(1). Thus, certain documents that would not be disclosed under section 6104 of the Code will not be disclosed under section 6110. Included in this limitation are:

- (1) Unfavorable rulings or determination letters...issued in response to applications for tax exemption,
- (2) Rulings or determination letters revoking or modifying a favorable determination letter...,
- (3) Technical advice memoranda...relating to a disapproved application for tax exemption or the revocation or modification of a favorable determination letter,
- (4) Any letter or document filed with or issued by the Internal Revenue Service relating to whether a proposed or accomplished transaction is a prohibited transaction under section 503,
- (5) Any letter or document filed with or issued by the Internal Revenue Service relating to an organization’s status as an organization described in section 509(a) or 4942(j)(3), unless the letter or document relates to the organization’s application for tax exemption, and
- (6) Any other letter or document filed with or issued by the Internal Revenue Service which, although it relates to an organization’s tax exempt status as an organization described in section 501(c) or (d), does not relate to that organization’s application for tax exemption, within the meaning of paragraph (d).

Treas. Reg. § 301.6104(a)-1(i)(1)-(6) (2006).

<sup>124</sup> CARE Act, *supra* note 6, at § 201(a).

These disclosures should improve oversight of tax-exempt organizations because they “will provide additional guidance to taxpayers as to the views of the IRS on certain issues.”<sup>125</sup> These issues include unfavorable rulings rejecting, revoking, or modifying tax exemption and technical advice memoranda on those issues; “whether a proposed or accomplished transaction is a prohibited transaction;” an organization’s status as a private or operating foundation; and information that relates to an organization’s tax-exempt status that does not relate to its application for tax-exempt status.<sup>126</sup> Even though this section publicly discloses rejections of applications for tax-exempt status, it should not discourage organizations from filing as tax-exempt organizations or requesting written determination letters. The Internal Revenue Service must redact these written determinations to conceal the affected organization’s identity.<sup>127</sup> Further, these determinations provide insight to organizations on how the Internal Revenue Service will treat certain issues so that they may plan accordingly and avoid the same mistake as previous organizations.

#### **D. Public Notification of Form 990**

The CARE Act also provides that the Internal Revenue Service will notify the public of the extent to which the Form 990<sup>128</sup> for a tax-exempt organization is available to the public.<sup>129</sup> Generally, a Form 990 must be filed annually by a corporation exempt under section 501 of the Code, a political organization,<sup>130</sup> or a

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<sup>125</sup> S. REP. NO. 108-11, at 39 (2003).

<sup>126</sup> Treas. Reg. § 301.6104(a)-1(i)(1)-(6) (2006).

<sup>127</sup> I.R.C. § 6110(c) (2006).

<sup>128</sup> IRS Form 990 is the “Return of Organization Exempt from Tax.”

<sup>129</sup> CARE Act, *supra* note 6, at § 204.

<sup>130</sup> If, however, the political organization is a qualified state or local political organization, it must file a Form 990 only when its gross receipts exceed \$100,000. To become a qualified state or local political organization, the organization must meet certain criteria, which are:

1. The organization’s exempt functions are solely for the purpose of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any state or local public office or office in a state or local political organization.



nonexempt charitable trust under section 4947(a)(1) of the Code that has gross receipts in excess of \$25,000.<sup>131</sup> Currently, when one of these exempt organizations files its Form 990, the Internal Revenue Service makes the form available to the public.<sup>132</sup> Under the CARE Act, the Internal Revenue Service “shall notify the public in appropriate publications or other materials” that the information is available.<sup>133</sup>

While this section appears to provide for improved oversight, in fact, it does not. In its Form 990, a tax-exempt organization must provide information relating to how it is generating revenue, expending revenue, what services it provided, and how many people benefited from these services.<sup>134</sup> This information is vital for the public to make an informed decision on whether to donate.

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2. The organization is subject to state law that requires it to report the information that is similar to that required on Form 8872.
  3. The organization files the required reports with the state.
  4. The state makes such reports public and the organization makes them open to public inspection in the same manner that organizations must make Form 8872 available for public inspection.

Internal Revenue Service, Instructions for Form 990 and Form 990-EZ 1 (2004).

<sup>131</sup> In order for an organization’s gross receipts to be considered less than \$25,000, the organization must be

- i. Up to a year old and has received, or donors have pledged to give, \$37,500 or less during its first tax year;
- ii. Between 1 and 3 years old and averaged \$30,000 or less in gross receipts during each of its first 2 tax years; or
- iii. Three (3) years old or more and averaged \$25,000 or less in gross receipts for the immediately preceding 3 tax years (including the year for which the return would be filed).

Internal Revenue Service, *supra* note 132, at 3.

<sup>132</sup> See I.R.C. § 6104(b) (2006).

<sup>133</sup> CARE Act, *supra* note 6, at § 204(a).

<sup>134</sup> See IRS Form 990.

Although this section will require the Internal Revenue Service to inform the public that this form is available for public inspection, it fails to improve oversight for two reasons. First, this section fails because the Senate makes the false assumption that the public will view these forms. While the CARE Act requires the Internal Revenue Service to “notify the public in appropriate publications or other materials,” it does not define what is an “appropriate publication” or “other material.”<sup>135</sup> Further, the section does not require the Internal Revenue Service to publish a description of a Form 990. It is likely that most of the public does not know what a Form 990 is.<sup>136</sup> The individuals who do know what a Form 990 is are likely already aware that Form 990s are available for inspection .

Second, many tax-exempt organizations are reporting their fundraising costs inaccurately.<sup>137</sup> As such, Form 990s will provide the public with inaccurate information on how these organizations spend their money, which may affect giving. An individual who might donate to an organization after viewing its Form 990 may not donate to the organization if it had accurately reported its information on the form.

#### **E. Disclosure of Web Addresses and Alternate Names**

Under the CARE Act, if a tax-exempt organization must file an information return pursuant to section 6033 of the Code, it must disclose all names under which it operates as well as list all website addresses of the organization.<sup>138</sup> Under the

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<sup>135</sup> CARE Act, *supra* note 6, at § 204(a). One possible solution would be to actually name which publications the information should be published, e.g., NEW YORK TIMES, WASHINGTON POST, USA TODAY, OR WALL STREET JOURNAL.

<sup>136</sup> To help solve this problem, a brief description of what a Form 990 is could be included with the publication announcing that Form 990s are available for public inspection.

<sup>137</sup> GIVING USA FOUNDATION, *supra* note 16, at 196. In a study of nonprofit administrative and fundraising costs, “[j]ust about half of the organizations in the study reported all fees paid to a professional fundraising consultant as a fundraising expense, and 10 percent reported professional fees as a combination of fundraising and some other type of expense.” *Id.* Further, thirty-nine percent of the organizations examined included these expenses as other costs, allocating none to fundraising. *Id.* A possible solution to this problem would be to designate where this type of expense should be allocated.

<sup>138</sup> CARE Act, *supra* note 6, at § 202(a).

current Code, a tax-exempt organization does not have to disclose such information.<sup>139</sup>

At first glance, it appears that this section will improve oversight because the public will be better able to scrutinize a tax-exempt organization if it the names under which the organization does business and the organization's website addresses. Currently, Form 990 provides the website address of the organization but does not include alternate websites that the organization maintains or other names under which the organization does business.<sup>140</sup> By having this information, the public can conduct better research on certain tax-exempt organizations. This section, however, fails for the same reasons that the previous section regarding public notification of Form 990s failed.<sup>141</sup>

### **F. Penalties for Form 990 Preparers**

Further, the CARE Act imposes penalties on preparers of Form 990 if the preparer makes an omission or misrepresentation in the form or "recklessly or intentionally misrepresents any information or recklessly or intentionally disregards any rule or regulation with respect to such return."<sup>142</sup> Currently, the Code provides tax preparer penalties for misrepresentations and omissions relating to the determination of tax liability.<sup>143</sup> The Code, however, does not penalize tax preparers committing those types of errors on a Form 990.<sup>144</sup> The CARE Act enacts fines for preparers of Form 990 comparable to those for tax preparers who understate tax liability under section 6694 of the Code.<sup>145</sup>

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<sup>139</sup> See I.R.C. § 6033 (2006); S. REP. NO. 108-11, at 39-40 (2003).

<sup>140</sup> IRS Form 990.

<sup>141</sup> See *supra* notes 137-39 and accompanying text.

<sup>142</sup> S. REP. NO. 108-11, at 46.

<sup>143</sup> See I.R.C. § 6694 (2006).

<sup>144</sup> See *id.*

<sup>145</sup> CARE Act, *supra* note 6, at § 206(a). Under this section, tax preparers of Form 990 would incur a penalty of \$250 for any omission or misrepresentation of "any information with respect to such return which was known or should have been known by such person." *Id.* If the preparer "recklessly or intentionally misrepresents any information or recklessly or intentionally disregards any rule or regulation with respect to such return shall pay a penalty of \$1,000." *Id.*

Although this section appears to improve oversight, it will have little effect on preparers for two reasons. First, the penalty amount is not significant enough to deter this type of conduct. On average, a senior level tax accountant would have to work approximately 6.3 hours to earn enough before taxes to pay for this fine,<sup>146</sup> while an entry level tax accountant would have to work approximately 11.6 hours.<sup>147</sup> Given the small amount of time these individuals would have to work to earn enough money to pay this fine, this section will not act as a deterrent. Second, under this section, the Internal Revenue Service may not fine a Form 990 preparer if the mistake is a minor, inadvertent one, but the section does not define “minor, inadvertent omission.”<sup>148</sup> Thus, a Form 990 preparer will not know if his or her conduct constitutes a “minor, inadvertent omission,” which means that the section provides more confusion than improvement.

### **G. Expansion of Information to State Officials**

In addition to providing improved oversight by federal agencies, the CARE Act may facilitate improved oversight by state officials. Under the Code, the Secretary of the Treasury must “notify the appropriate State officer”<sup>149</sup> of certain

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<sup>146</sup> On average, a senior level tax accountant earns \$80,298. Salary.com, *Salary Wizard*, at <http://www.salary.com>. Based on a 2000 hour work year, that tax accountant makes approximately \$40.15 per hour. Thus, 6.3 hours multiplied at that rate is equal to \$252.95.

<sup>147</sup> On average, an entry level tax accountant earns \$43,214. *Id.* Based on a 2000 hour work year, that tax accountant makes approximately \$21.61 per hour. Thus, 11.6 hours multiplied at that rate is equal to \$250.68.

<sup>148</sup> CARE Act, *supra* note 6, at § 206(a).

<sup>149</sup> Under the Code, “[T]he term ‘appropriate State officer’ means the State attorney general, State tax officer, or any State official charged with overseeing organizations of the type described in section 501(c)(3).” I.R.C. § 6104(c)(2). The CARE Act modifies the definition of “appropriate State officer” to mean:

- (i) the State Attorney General,
- (ii) in the case of an organization to which [§ 6104(c)(1)] applies, any other State official charged with overseeing organizations of the type described in 501(c)(3), and
- (iii) in the case of an organization to which [§ 6104(c)(3)] applies, the head of an agency designated by the State attorney general as having primary responsibility for overseeing the solicitation of funds for charitable purposes.

CARE Act, *supra* note 6, at § 205.

actions taken by the Internal Revenue Service.<sup>150</sup> The CARE Act expands the amount of information the Secretary of the Treasury may give to the appropriate state official.<sup>151</sup>

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<sup>150</sup> I.R.C. § 6104(c) (2006). The actions of which the Secretary must notify the State Official are:

- (A) ...a refusal to recognize such organization as an organization described in section 501(c)(3), or of the operation of such organization in a manner which does not meet, or no longer meets, the requirements of its exemption,
- (B) ...the mailing of a notice of deficiency for any tax imposed under section 507 or chapter 41 or 42, and
- (C) at the request of such appropriate State officer, make available for inspection and copying such returns, filed statements, records, reports, and other information, relating to a determination under subparagraph (A) or (B) as are relevant to any determination under State law.

§ 6104(c)(1)(A)-(C).

<sup>151</sup> CARE Act, *supra* note 6, at § 205. This section provides that the Secretary of the Treasury may, upon request, release to the appropriate State official:

- (i) a notice of proposed refusal to recognize such organization as an organization described in section 501(c)(3) or a notice of proposed revocation such organization's recognition as an organization exempt from taxation,
- (ii) the issuance of a letter of proposed deficiency of tax imposed under section 507 or chapter 41 or 42, and
- (iii) the names, addresses, and taxpayer identification numbers of organizations which have applied for recognition as organizations described in section 501(c)(3).

§ 205(a). The Secretary of the Treasury may also disclose “[r]eturns and return information of organizations with respect to which information is disclosed under...[(i) through (iii) above].” *Id.*

The section also provides for release of returns and return information of section 501(c)(2), (4), (6), (7), (8), (10), and (13) organizations “to the extent necessary in[] the administration of State laws regulating the solicitation or administration of the charitable funds or charitable

The primary purpose behind these new disclosures is to better “protect the public’s interest in assuring that organizations that have been given the benefit of tax-exemption operate consistently with their exempt purposes.”<sup>152</sup> Because the Internal Revenue Service may disclose certain information to the appropriate state officer “for the purpose of, and only to the extent necessary in, the administration of State laws regulating such organizations,”<sup>153</sup> this section should improve oversight by state officials because they will now receive information necessary to enforce and administer state law. Without this information, a state official could make an adverse decision under state law against a tax-exempt organization when he or she might not have done so if he or she had access to all pertinent information.

#### IV. CONCLUSION

Charitable organizations need increases in funding to maintain necessary and vital aid to those in need of their services. The Charitable Giving Act and the CARE Act have attempted to provide incentives for charitable giving by individuals and businesses as well as to serve other purposes, which include improving oversight of tax-exempt organizations. Unfortunately, both Acts provide mixed results in meeting their stated goals. While many sections aimed at increasing charitable giving and tax reform meet their goals, many sections do not. However, it is possible to improve the deficient sections, and Congress should address those problems before it enacts the Acts.

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assets of such organizations” and for the release of return and return information to “civil administrative and civil judicial proceedings pertaining to the enforcement of State laws regulating [the applicable tax-exempt organization] in a manner prescribed by the Secretary.”  
*Id.*

<sup>152</sup> S. REP. NO. 108-11, at 43 (2003).

<sup>153</sup> CARE Act, *supra* note 6, at § 205(a).