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AUTHORS:

Matthew T. Journy
mtjourny@Venable.com
202.344.4589

Yosef Ziffer
yziffer@Venable.com
410.244.7550

Jeffrey S. Tenenbaum
jstenenbaum@Venable.com
202.344.8138

TOOLS FOR BYPASSING IRS DELAYS IN EO APPLICATIONS

Organizations and their representatives missed opportunities to mitigate the consequences of the IRS' delays and requests for inappropriate information.

Recently, the IRS admitted that it employed inappropriate criteria to select certain applications for recognition of tax-exempt status for additional review. Just a few days after this admission, on May 14, 2013, the Treasury Inspector General for Tax Administration (TIGTA) issued a report (the "TIGTA Report"),[1] concluding that, due to ineffective management, the Service: (1) developed inappropriate criteria to identify applications for additional review, (2) substantially delayed processing certain applications, and (3) issued unnecessary information requests as a result of such criteria and delays. Further, the TIGTA Report noted that the specialists charged with reviewing the selected applications "lacked knowledge" about the permissible activities of tax-exempt organizations described in **Sections 501(c)(3) and (c)(4)**.[2] Predictably, in the aftermath of the TIGTA Report's publication, Congress and many sectors of the media have continued to rehash the particulars of this "scandal," looking to assign blame and find deeper connections between the Service's inappropriate criteria and other parts of the federal government, including the White House.

The purpose of this article is not to add to the noise surrounding the scandal. It will neither identify the parties at fault nor find the link between President Obama and the IRS selection of Tea Party organizations for additional scrutiny. It will not join the chorus of voices on either side of the aisle nor will it analyze who bears ultimate responsibility for the Service's internal structure and process. Rather, recognizing that the Service's inappropriate administration of tax-exemption qualification matters is not limited to the 296 completed applications reviewed under this program, and will not be entirely eliminated in the future, this article will discuss how organizations subject to extended IRS reviews can substantially mitigate the adverse effects of inappropriate enforcement efforts by the Service. Insofar as mismanagement, significant delays, and misinformed determinations specialists are potential issues in any IRS enforcement effort, practitioners must be equipped to combat the organizational ineffectiveness and bureaucratic inefficiency that can otherwise result in harm to clients applying for recognition of tax-exempt status.

Using the TIGTA Report as a point of departure, the discussion below identifies specific issues in the Service's review of requests for recognition of tax-exempt status and lists many of the common harms that can result from the Service's inappropriate actions. In that context, it then discusses proactive measures available to would-be

tax-exempt organizations to help them mitigate the harms caused by inappropriate IRS delays or inquiries.

Issues identified in the TIGTA Report

Notwithstanding the general media attention devoted to the Service's use of inappropriate criteria to select organizations for additional review, other issues highlighted in the TIGTA Report should generate greater concern on account of their potential to cause substantial harm to organizations. Indeed, the Code limits the extent to which organizations described in Sections 501(c)(3) and (c)(4) may engage in lobbying activities and intervene in political campaigns. As such, it is a legitimate function of the Service to exercise additional scrutiny when information within an application, including the organization's name, indicates that the subject organization may be engaged in an inappropriate amount of political campaign activity. Of the issues noted by the TIGTA Report, the mere existence of additional review prior to approval was not highlighted as an issue of concern. In fact, while it determined that 91 out of 296 completed applications did not indicate significant political intervention,[3] the TIGTA Report estimated that an additional 185 applications should have been identified by the IRS for additional review, but were not.[4] Thus, although the TIGTA Report noted that the method used by the IRS gave "the appearance that the IRS is not impartial in conducting its mission,"[5] mere identification of organizations meriting further review is not unusual or particularly remarkable. Rather, the greatest harm arose from ineffective management and a determinations unit whose specialists lacked sufficient knowledge. This resulted in the Service's failure to make determinations on cases for, in some cases, more than two years, as well as its request for inappropriate information in its review of these entities.

The IRS took too long

The cover letter to the TIGTA Report noted that "many organizations had not received an approval or denial letter for more than two years after they submitted their applications. Some cases have been open during two election cycles (2010 and 2012)."[6] This is substantially longer than the Service's stated goal "of processing applications within 121 days."[7] In fact, through its review of these applications for tax-exempt status, the Service failed to close more than half of the cases identified for additional review.

Through this exemption application review program, the Service identified 296 complete applications for additional review because the applications indicated that the organization may be engaged in an impermissible amount of political activity.[8] Of the 296 organizations identified, 108 (approximately 36%) received a determination letter recognizing tax-exempt status.[9] In addition to the 108 examinations that were closed upon the recognition of tax-exempt status, 28 organizations withdrew their applications. Finally, as of the close of the TIGTA investigation, 160 cases (approximately 54%) remained open and had been open between 206 and 1,138 calendar days, with the average length of time being 574 days as of 12/17/12.[10]

The Service did not explain why it failed to close more than half of the cases that it identified for additional review. It is notable, however, that the Service failed to issue a single adverse determination to any organization whose application was identified for additional review. Moreover, the TIGTA Report makes no reference to any proposed adverse determinations, written protests, or any other actions by the Appeals Division. This suggests that not only did the Service fail to issue final adverse determination letters, but it failed to even issue any proposed adverse determination letters. What makes the absence of any adverse or proposed adverse determination letters so troubling is the fact that these cases were identified for additional review because the Service's initial review indicated a significant risk that these organizations should not be recognized as exempt under either Section 501(c)(3) or (c)(4). In other words, the Service failed to even propose the issuance of a single adverse determination after spending an average of 574 days on cases that were identified because of a substantial risk that the applicants would not satisfy the requirements for tax-exempt status. That leaves observers to draw their own conclusions, three of which are: (1) the "cynical supposition" that the Service's administration of these cases was so inept that it incorrectly identified almost 300 organizations as demonstrating a substantial likelihood of failing to qualify for tax-exempt status, only to conclude that the organizations are, in fact, exempt; (2) the "conspiracy theorist's supposition" that the Service deliberately delayed the issuance of any determinations, adverse or otherwise, for some unknown, nefarious reason; and (3) the authors' supposition that the Service, unsure of about the litigating hazards of its position relating to proposed adverse determinations, deliberately added layer after layer of administrative review so as to avoid having to issue any ruling to these organizations.

There is no evidence to support any of the suggested suppositions. The first and second are hopefully, and likely, incorrect. With respect to the third possibility, however, this would not be the first time that the Service decided to confront uncertainty in litigation by adding multiple layers of administrative review and substantial delay in the hopes that an organization awaiting a determination letter or subject to a proposed revocation letter simply goes away. Recently, in the credit counseling compliance project, several organizations waited so long-nearly a decade-to receive a final determination letter relating to their examination that they actually filed a petition for a declaratory judgment in the Tax Court prior to receiving a final adverse determination letter. Additionally, when one considers the many errors identified in the TIGTA Report-inappropriate selection of organizations for additional review, the request of unnecessary and inappropriate data regarding the political activities of individuals working with these organizations, and the improper disclosure of taxpayer information-it is not inconceivable that the Service was more than a little concerned about the litigating hazards created by its review of these applications.

Unnecessary and inappropriate information

The issues relating to the Service's review of these organizations were not limited to delays of time. Its actions during that review were equally problematic. The report noted a "lack of management review, at all levels" and also that the "Determinations Unit specialists lacked knowledge" about permissible activities for tax-exempt entities described in Sections 501(c)(3) and (c)(4).[11] As a result of this lack of management review and knowledgeable Determinations Unit specialists, the TIGTA Report counted 98 organizations that received inappropriate and unnecessary requests for additional information.[12] Specifically, the TIGTA Report noted that the Service's requests for additional information included seven questions that were not necessary to make a determination of an organization's tax-exempt status, including:

- The names of donors.
- A list of all issues important to the organization and the organization's position regarding such issues.
- The roles and activities of the audience and participants other than members in a particular activity, and the type of conversations and discussions members and participants had during the activity.
- Whether an officer, director, etc., has run or will run for public office.
- The political affiliation of any officer, director, speaker, candidates supported, etc., and, their relationship with an identified political party.
- Information regarding employment, other than for the organization, including hours worked.
- Information regarding activities of other organizations, not just the relationship of such organizations to the applicant.

Consequences of the inappropriate actions

Tax advisors, beyond providing technical expertise, strive to position clients to realize their business, programmatic, and operational goals. Since "timing is everything," they risk angering and alienating clients if the time and logistical complexities of legal or regulatory requirements prevent those clients from achieving their desired outcomes. This phenomenon manifests itself regularly when clients must be informed that their applications for recognition of tax-exempt status will likely take six to 12 months, if not longer, to be processed by the IRS.[13] Moreover, on top of the standard processing delays that have become the "new normal" at the IRS, the further delays caused by the questioning tactics identified in the TIGTA Report added further insult to injury. Far beyond the universe of potential Section 501(c)(3) and (c)(4) organizations, many constituencies suffer as a result of the Service's present inability to process exemption applications expeditiously.

The delays and inappropriate information requests had a unique effect on three groups: (1) the organizations under review that applied for Section 501(c)(3) status, (2) the organizations that applied for Section 501(c)(4) status, and (3) the contributors to and officers of these organizations.

Applying for Section 501(c)(3) status

For an organization applying for recognition of tax-exempt status under Section 501(c)(3), protracted delays in IRS

review can prevent the organization from timely commencing its operations and, in some instances, jeopardize the organization's long-term viability.

As a practical matter, many new organizations awaiting confirmation of tax-exempt status commence fundraising activities even while their applications are pending. When engaging individual or corporate donors, the applicant organization can often provide sufficient comfort that its tax-exempt status will eventually be recognized. So long as an organization has applied for tax-exempt status within 27 months following the month of its formation, assuming that the IRS ultimately grants recognition of exemption, such recognition will apply retroactively to the organization's date of incorporation. More often than not, this information satisfies individual or corporate donors and such donors willingly take the small "leap of faith" that the IRS will, in fact, issue a favorable determination letter. Thus, the donors make contributions and claim charitable deductions, and in hindsight it eventually becomes clear that such contributions were made to a charitable organization exempt under Section 501(c)(3).

This approach, however, does not typically succeed with potential donations from private foundations (PFs) or donor-advised funds (DAFs). PFs and DAFs are subject to rules that prohibit taxable expenditures, and grants to organizations that are not classified under Section 501(c)(3) count as taxable expenditures unless the grantor (i.e., the PF or sponsoring organization that houses the DAF, as the case may be) exercises expenditure responsibility over those grants. Generally, as a matter of practice, PFs and sponsoring organizations simply refuse to award grants until a grantee demonstrates that the IRS has recognized it as a Section 501(c)(3) organization (and, in the case of PF grantors, as a public charity). Thus, newly-formed organizations may encounter increased difficulty in generating donations from otherwise-willing donors. This is particularly true as DAFs grow in popularity and more potential donors establish DAFs and choose to conduct their charitable giving through those vehicles.

For organizations whose early-stage operations require such grants-whether to hire staff, conduct programs, acquire charitable-use assets, or procure work space-the prolonged delay in receiving an IRS determination letter can severely handicap their development. Moreover, for publicly visible organizations whose creation and expected operations are well known to the communities they purport to serve, the ongoing delay as a result of IRS refusals to issue a determination letter can deteriorate public confidence and threaten the entity's viability.

In addition to initial inability to obtain adequate funding, prolonged delay in receiving a determination letter can also curtail the organization's ability to engage in certain activities and/or subject the organization to potential liabilities from which it would otherwise be protected. For example, many states impose their own registration requirements on new charities. This can be a requirement for procuring state-level tax-exemption, conducting fundraising activity, or transacting purchases free of sales tax. In many cases, as part of its registration process, a state will require the applicant organization to produce a copy of an IRS determination letter. Thus, if the IRS review process stretches over many months or years, the organization may be forced to delay its fundraising (or, alternatively, conduct fundraising in violation of state requirements), just as it must pay thousands of dollars in sales tax in connection with necessary purchases, transactions, and the like.

Similarly, several states have for years prohibited organizations from engaging in credit counseling activities within the state unless the organization was recognized as exempt under Section 501(c)(3). Recognition of exemption under Section 501(c)(3) protects organizations from lawsuits for violation of the Credit Repair Organizations Act,[14] which provides a private right of action for violations of its provisions. Thus, during an extended delay in reviewing an organization's application for recognition of tax-exempt status, an organization may be unable to participate in the very activities for which it was organized or may be subject to laws from which it would otherwise be exempt.

Finally, organizations victimized by unduly delayed IRS reviews stand to incur tens of thousands of dollars, if not more, in increased legal and other professional expenses. This is particularly true in circumstances like those considered in the TIGTA Report-multiple Service reviews of an application and requests for a substantial amount of additional information that may be inappropriate and unnecessary to determine the organization's tax-exempt status. In such situations, tax advisors spend significant time challenging IRS agents in response to unwarranted requests and in addressing lengthy lists of questions and demands for additional information. The applicant organization often feels that it has no choice but to incur these costs, because it sees no other option but to adhere to the Service's demands. For many new organizations, the resulting bills can throw yet another wrench into the process of beginning operations on solid financial footing.

Applying for Section 501(c)(4) status

Many of the problems listed above for potential Section 501(c)(3) organizations may also be encountered by newly-formed Section 501(c)(4) entities. For instance, the professional expenses and problems related to unnecessary requests for information affect organizations seeking recognition of exempt status under either Section 501(c)(3) or (c)(4). Moreover, while Section 501(c)(4) organizations do not seek to secure tax-deductible charitable contributions from donors, they may nevertheless encounter political donors or contractors that insist on verifying the organization's tax-exempt status prior to making a contribution or entering into a contract. This is a very important consideration for donors in light of the Supreme Court's decision in *Citizens United v. F.E.C.*,558 US 310, 175 L Ed 2d 753 (2010), and the role of Section 501(c)(4) entities in campaign financing. For these reasons, some of the organizations whose applications were identified for additional review, and whose determination was delayed by two election cycles, quite possibly had filed their applications with the specific purpose of addressing the concerns of potential donors. As such, new Section 501(c)(4) organizations may find themselves every bit as hamstrung in commencing operations as their Section 501(c)(3) counterparts that rely on grants from PFs or DAFs.

The common denominator in these situations? Undue delay on the part of the IRS causes real economic harm to the very organizations that, as a matter of policy, Congress has determined to be socially beneficial and therefore deserving of tax-exempt status. As a result, in its role as gatekeeper to ensure that fraudulent organizations do not inappropriately procure tax-exempt status for unsanctioned purposes, the IRS has instead effectively prevented individuals, families, and communities from accessing the benefits of organizations that seek tax-exempt status legitimately.

Finally, as the TIGTA Report noted, the "Determinations Unit specialists lacked knowledge of what activities were allowed by I.R.C. 501(c)(3) and I.R.C. 501(c)(4) tax-exempt organizations."[15] As such, the individuals charged with reviewing and making determinations of the exempt status of these applicants lacked a sufficient understanding of the law. This resulted in the Service's request for inappropriate and unnecessary information, which in turn increased the expense, delay, and adverse impact of the additional review. Additionally, by subjecting themselves to the extended review by individuals lacking sufficient knowledge of Section 501(c)(4), any of these organizations that satisfied the requirements for recognition of tax-exempt status were at risk of receiving a proposed adverse determination simply as a result of the reviewer's lack of adequate knowledge about the acceptable activities of organizations described in Section 501(c)(4).

Contributors and organization officers

In addition to the applicant organizations themselves, the contributors to, as well as the directors and officers of, such organizations likewise suffered adverse effects from the Service's requests for additional information. The focus of the additional information requests noted in the TIGTA report was on the identities of these individuals, as well as their political leanings and activities. The additional information requested by the Service focused on private information and, by virtue of including it in the administrative record for a tax-exempt organization, made such information publicly available. Thus, the Service's actions could have resulted in inappropriately publicizing the private speech and beliefs of individual citizens, simply on account of such individuals' association with an organization applying for recognition of exemption.

By exposing the private beliefs and activities of individual citizens to the public record, the Service's actions, intentionally or unintentionally, risked creating a "chilling effect" on the free speech of individuals whose private views became public. This is especially true with respect to donors to the Section 501(c)(4) applicants. With the recent changes to the legal landscape for organizations that engage in political activities, resulting in the rise of "super PACs," a primary appeal of making contributions to Section 501(c)(4) organizations was the anonymity that such contributions afforded donors. As such, it is reasonable to assume that a significant portion of the donors to Section 501(c)(4) organizations made contributions to those particular organizations specifically because they wanted to contribute to a cause in which they believe, but without being publicly linked to that cause. By effectively forcing organizations to publicly disclose the names of such donors, the Service eliminated the benefit of anonymity, which may in turn discourage individuals from fully participating in the political process in the future. Regardless of whether one believes that individuals or organizations should be able to make indirect anonymous contributions to political campaigns through Section 501(c)(4) organizations, the law currently allows such activity. The Service's

directive, as provided by the Code, is to enforce the law. Thus, by requesting and disclosing certain taxpayer information which identified the political beliefs and identities of individual citizens, the Service abused its authority.

What was done to mitigate organizational harm?

The TIGTA Report notes that, as of 12/17/12, 160 of the 296 identified organizations had yet to receive any determination from the Service, notwithstanding that the *average* delay had reached 574 days. Of the cases that remained open, 70 organizations applied for recognition of exempt status under Section 501(c)(3) and 90 organizations applied for recognition of Section 501(c)(4) status. However, despite the long delay and availability of other remedies, it appears as though few, if any, of these organizations took any action to expedite or remove the review of these applications from the Service's purview.

The TIGTA Report noted that, as of 5/31/12, the declaratory relief provided by Section 7428 was available to 32 of the organizations selected for review-approximately 46% of open Section 501(c)(3) cases-because those cases "were open more than 270 calendar days, and the organizations had responded timely to all requests for additional information."[16] Additionally, as of 12/17/12, only 3 of the 260 cases had been open for less than 271 days.[17] Thus, notwithstanding the fact that requests for more than 95% of the organizations seeking exemption under Section 501(c)(3) had been open for more than 270 days without a determination from the IRS, the TIGTA Report noted that "none of these organizations had sued the IRS, even though they had the legal right."[18]

As discussed below, the right to seek a declaratory judgment relating to tax-exempt status is reserved for organizations that apply for tax-exempt status under Section 501(c)(3). That being said, a different potential remedy remained available to organizations that applied for recognition of exempt status under Section 501(c)(4) -the fact that organizations described in Section 501(c)(4) are not actually required to file an application seeking recognition of tax-exempt status. Such organizations can simply self-certify that they do in fact qualify for such tax-exempt status. As such, any organization that had applied for tax-exemption under Section 501(c)(4) could have withdrawn its application and avoided the risk and expense associated with the Service's extremely long and burdensome review. However, despite the ease of such an action, the TIGTA Report noted that 90 organizations continued to wait on the Service for more than 200 days, with some waiting more than 1,100 days. Only 28 organizations opted to withdraw their application from IRS review.[19]

Finally, the TIGTA Report noted that 98 organizations received information requests that sought "irrelevant (unnecessary) information because of a lack of managerial review."[20] While 27 of these organizations were subsequently informed by the Service that they need not respond to such information requests, at least 71 organizations were required to respond. Also, while the TIGTA Report does not indicate what portion of the organizations provided the requested information, it appears that many organizations did so.[21] The TIGTA Report does not contain a record of any organizations expressly refusing to provide such information.

Based on the information provided in the TIGTA report, it appears that these organizations failed to take any significant action to curtail the extended IRS review of their applications or avoid responding to the overbroad and inappropriate information requests.

Was there any advantage to enduring the review?

With so many organizations enduring the Service's extended review of their applications for exempt status, it is important to ask why these organizations subjected themselves to that review and whether there were any potential benefits from doing so. The authors are not aware of any advantages of undergoing a prolonged IRS review. First, there is no tax or other advantage to being "under IRS review" as opposed to being recognized as exempt.[22] Second, after more than a year in a state of limbo without any correspondence from the IRS, the organizations should have begun to wonder whether the Service would provide an unbiased review of their applications. In fact, the TIGTA investigation arose because several organizations complained to members of Congress about the Service's biased treatment. Thus, if these organizations were already questioning whether the IRS was biased, it may have been in their best interest to remove their cases from the Service's review by seeking a declaratory judgment from a less biased judge or by self-certifying their Section 501(c)(4) status.

Another consideration for organizations that applied for Section 501(c)(3) status should have been the impact of removing the case from the Service's review. By forcing the issue before a court of applicable jurisdiction, these organizations could have brought public attention to their plight long before the TIGTA Report was published in June 2013. Also, this could have worked as a diversion in the review of their cases. The mere fact that these organizations were selected for review is an indication of the existence of some questions regarding their qualification for tax-exempt status. By bringing a case to court after such an extended period of inaction, the initial question that would be presented to the court would relate to the Service's unexplained delays, rather than any questions pertaining to the organization's qualification for tax-exempt status. This would have put the Service in the position of needing to justify its substantial delays in a public forum, which would have accomplished one of two things. The more likely result is that the IRS would have been prompted to settle the case to avoid the public embarrassment that has unfolded in the aftermath of the TIGTA Report. Alternatively, litigation would have brought public attention to the Service's practices years before the TIGTA Report was published.

What could have been done?

As representatives of tax-exempt organizations, advisors' responsibilities exceed merely navigating the IRS administrative process and responding to requests for information when the IRS eventually reviews an application. Rather, they are responsible for achieving the results that best serve the clients' interests. As such, to the extent that additional avenues-inside the IRS and out-provide possible means to achieve the desired results in an effective and efficient manner, advisors should at a minimum present those options to clients for their consideration. Moreover, clients must be given the information and context necessary for them to make an informed decision on whether to pursue such options, particularly when they represent a departure from common practice.

Declaratory judgment

Once it became clear that the IRS review of applications of Section 501(c)(3) organizations was not going to be approved under the standard process, organizations confident of their position should have considered seeking a declaratory judgment.

Under Section 7428, the United States Tax Court, the United States District Court for the District of Columbia, and the United States Court of Federal Claims have concurrent jurisdiction to issue a declaratory judgment in the case of an actual controversy with respect to a determination or the Service's failure to make a determination regarding the initial qualification of an organization described in Section 501(c)(3). It is important to note that this remedy is available for Section 501(c)(3) organizations only; it is not available to other types of exempt organizations, including those described in Section 501(c)(4).

To meet the jurisdictional requirements necessary to obtain a declaratory judgment, Section 7428(a) provides that there must be "(1) an actual controversy (2) involving a determination or a failure to make a determination by the Secretary (3) with respect to an organization's initial or continuing qualification or classification as an exempt organization."[23] Additionally, Section 7428(b) provides that a declaratory judgment shall not be issued unless the court "determines that the organization involved has exhausted administrative remedies available to it within the Internal Revenue Service."

Actual controversy. Generally, courts have interpreted the "actual controversy" requirement to mean that "the power to issue declaratory judgments does not extend to advisory opinions on abstract or hypothetical facts, which do not involve any case or controversy."[24] As such, courts have determined that they lack jurisdiction over cases in which the Service has "not spoken finally with regard to [the] petitioner's status";[25] and that they do not have jurisdiction over cases in which the Service merely threatens revocation if an organization engages in a particular activity in the future.[26] Finally, the courts have ruled that the scope of their jurisdiction to issue declaratory judgments is limited to controversies related to initial or continuing classification "with respect to exempt status, the private foundation status or the private operating foundation status (as defined in 4942(j)(3)) of an organization."[27] As such, courts have determined that they lack jurisdiction over questions of donor deductibility of charitable contributions.[28]

With respect to the organizations discussed in the TIGTA Report, the issue under consideration within the IRS was whether the organizations were exempt under Section 501(c)(3). Thus, any dispute over such matters would constitute a controversy over which the courts have jurisdiction pursuant to Section 7428 .

Failure to make a determination. Under Section 7428(a)(2), in order for a court to have jurisdiction to make a declaratory judgment due to the Service's failure to make a determination, an organization must first make a request for such a determination. Generally, this is done by submitting a Form 1023, "Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code ."

Courts considering this issue have noted that neither the statute nor the regulations defines either a "failure to make a determination" or a "request for a determination."[29] However, courts considering whether a request for a determination was made have all recognized that the filing of a substantially complete application within the meaning of Regs. 601.201(n)(7)(iv)(a) and (b) is a "request for a determination."[30] When considering whether the Service has failed to make a determination, the courts have looked to the legislative history of Section 7428, which provides that the courts will have jurisdictional authority over an issue where the Service has failed to act on a request for a determination.[31]

In the present situation, the reason for the substantial delays was the Service's identification of each of these entities based on the information provided in the Form 1023. As such, it is clear that the organizations in question made a "request for determination." Moreover, the TIGTA Report noted that the Service had failed to act with respect to any of these requests for a determination since the Service failed to make a determination with respect to these organizations.

Exhaustion of administrative remedies. An organization is deemed to have exhausted its administrative remedies as of the earlier of: (1) the notice of a final determination or (2) the expiration of the 270-day period after filing its application for recognition of tax-exempt status. Specifically, Section 7428(b)(2) provides that an organization "shall be deemed to have exhausted its administrative remedies with respect to a failure by the Secretary to make a determination with respect to such issue at the expiration of 270 days after the date on which the request for such determination was made if the organization has taken, in a timely manner, all reasonable steps to secure such determination." In *BBS Associates*, 74 TC 1118, 2 EBC 2413 (1980), noting the Service's failure to issue a determination of tax-exempt status after 21 months, the court concluded that the applicant organization had exhausted its administrative remedies after an "inordinately long delay by the [Service] in processing the petitioner's application and arriving at a final determination."[32]

Although the 270-day period creates a presumption that an organization has exhausted its administrative remedies, the expiration of 270 days alone does not satisfy the jurisdictional requirements for a declaratory judgment.[33] An organization must have also taken, "in a timely manner, all reasonable steps to secure a ruling or determination."[34] When determining whether an organization has exhausted its administrative remedies under this standard, the courts have looked to the legislative history, one court noting that the purpose of this requirement is "to provide the Court with a full and complete administrative record on which to base its decision."[35] Moreover, the legislative history provides that an organization will not have exhausted its administrative remedies "if the organization fails to comply with a *reasonable* request by the Service to supply the necessary information on which to make a determination."[36] However, these additional requirements have not been read to require organizations that have not received a determination within 270 days to wait to file a petition for declaratory judgment until they have had the opportunity to exhaust all administrative remedies within the Service.

In *Gladstone Foundation*, 77 TC 221, 226 (1981), the court noted that Section 7428 "was intended to provide a remedy for hardships caused by undue administrative delays."[37] As such, in considering cases where 270 days have lapsed, courts have not looked to whether organizations have exhausted every potential administrative remedy. Rather, courts have looked to whether the organization "has taken timely, reasonable steps to secure a determination."[38] Thus, in the present situation, as of the publication of the TIGTA Report, the organizations discussed in the report likely would have been deemed to have exhausted their administrative remedies as of the expiration of 270 days, even though the organizations whose exemption was under consideration within the Service had not completed all available administrative processes within the Service.

Self-certification

Section 7428 does not apply to Section 501(c)(4) entities[39], and therefore its provisions do not extend to any entity that has submitted a submitted Form 1024 for recognition of exemption under Section 501(c)(4) (or any other 501(c) classification[40]). As such, organizations that file a Form 1024 are not permitted to seek a declaratory judgment in situations where the IRS refuses to issue a determination. Nevertheless, while a declaratory judgment is not available to such organizations, there are other options to avoid unreasonable IRS demands or delays. In particular, Section 501(c)(4) organizations can make use of the fact that they generally are not required to seek an IRS determination on their tax-exempt status, and need not await a formal IRS determination at all. Such organizations can instead "self-certify" as tax-exempt.

Section 508(a) requires most organizations seeking treatment as Section 501(c)(3) organizations to notify the Service of their intent to be treated as exempt by filing a Form 1023. However, Section 508(a) does not extend to other types of Section 501(c) tax-exempt entities. Therefore most such organizations may, of their own volition, determine that they meet the applicable parameters of a desired category of tax-exemption and conduct their business accordingly.[41] Indeed, the Internal Revenue Manual states that actual tax-exempt status arises as a matter of law; an IRS determination letter merely provides formal recognition of such status.[42] Thus, while Section 501(c)(4) organizations must file an annual Form 990 information return, they need not formally apply for tax-exempt status by submitting Form 1024. Nevertheless, many organizations opt to file Form 1024 in any event, whether for "peace of mind," to avoid future IRS allegation of taxable status, or to demonstrate formal IRS recognition for other purposes (*e.g.*, as a condition of obtaining state-level exemption, or to satisfy the needs of a potential contributor or contract-party).

Organizations subject to lengthy IRS delays or inappropriate questioning in response to a Form 1024 submission could opt to rely on self-certification and withdraw their previously submitted applications. Doing so would effectively end the IRS review, thus saving the financial and human resources that would otherwise be devoted to responding to the Service's inquiries. Similarly, to the extent that the IRS poses questions that may involve sensitive information, such as the identities of certain individuals as well as their political leanings and political activities, withdrawal of the application allows the organization to ensure that such information remains confidential and does not become inappropriately disclosed and thereby part of a publicly disclosed record. Of greatest importance, cancelling the organization's request for recognition of exemption avoids the risk that an under-informed determinations specialist, perhaps one not adequately familiar with the rules governing Section 501(c)(4) organizations, will incorrectly issue an adverse determination letter, refusing to recognize the organization's tax-exempt status.

Notwithstanding these potential benefits, the organization should confer with counsel to ensure that a decision to terminate a request for recognition of exemption will not unwittingly subject it to other, undesired consequences. For example, if state-level income tax exemption requires the organization to produce a copy of a favorable IRS determination letter, the potential state-level tax exposure may mandate that the organization proceed with its request for federal recognition. Similarly, depending on the organization's business model and expected sources of revenues, a favorable IRS determination letter may prove necessary.

However, once it became clear that the IRS review of applications of Section 501(c)(4) organizations were not going to be reviewed under the standard process for review of Forms 1024, organizations that were not seeking a determination letter to satisfy a donor or contractor requirement should have evaluated their reasons for filing a Form 1024 and considered whether it was in their best interest to withdraw their applications and self-certify their status as Section 501(c)(4) organizations. In the face of a prolonged IRS review, such as the one to which that the applicants at issue were subjected, self-certification offers distinct advantages.

Refuse to provide inappropriate information

When dealing with requests for information related to applications for tax-exempt status, advisors must remain knowledgeable and aware of: (1) the type of information that the IRS needs in order to make the requested determination, and (2) the purpose for which additional information is being requested. As such, upon receiving a request for information that the IRS does not need in order to make a determination, or whose purpose appears

unclear, advisors should ask the IRS for clarity about the function of the requested information. In some instances, it may be appropriate to protect clients' interests by advising them not to provide such information.

The mere fact that the IRS requests information does not mandate that such information be shared. In some instances, the intended information is not clearly represented by the request and a discussion with the IRS may provide insight into the actual information desired or the previously unknown reason that the information is requested. Alternatively, after informing the IRS that a particular request is inappropriate, the IRS may choose to withdraw its request. By limiting the scope of information provided to the IRS, attorneys can help clients protect donors and other key individuals, as well as limit the likelihood that the IRS will rely on inappropriate information to make an adverse determination.

In the case of Section 501(c)(3) applicants, the refusal to provide information requested by the Service may raise concerns related to whether such a refusal may prevent an organization from obtaining a declaratory judgment under Section 7428 . However, though organizations are required to exhaust their administrative remedies, the legislative history and cases interpreting this statute are in agreement that the exhaustion of administrative remedies only requires organizations "to comply with a *reasonable* request by the Service to supply the *necessary* information on which to make a determination."[43] Therefore, the exhaustion of administrative remedies standard does not require organizations to respond to requests that are neither reasonable nor necessary, such as those discussed in the TIGTA Report.

Aftermath

In the aftermath of the Service's review of these issues, two significant developments have occurred. First, the IRS responded to criticism over its handling of certain Section 501(c)(4) cases by creating a process for expedited treatment of the organizations subject to this review program. Second, several of the organizations have acted on the TIGTA Report's advice and brought cases seeking a declaratory judgment, as well as other relief, in district courts throughout the country.

IRS response

In response to the well-publicized mishandling of Form 1024 applications, the IRS has recently offered a streamlined "hybrid" approach, combining the self-certification model with a formal recognition of tax-exempt status. For organizations whose applications had, as of 5/28/13, been pending for more than 120 days, so long as these applications do not raise questions of private inurement, the IRS has issued or will issue Letter 5228[44], which invites the applicant organizations to "self-certify" and make the following representations under penalties of perjury:

- The organization devotes 60% or more of its spending and time to activities that promote "social welfare" within the meaning of Section 501(c)(4).
- The organization devotes less than 40% of its spending and time to political campaign intervention.
- The organization certifies that the above-stated percentage threshold apply for past, present, and anticipated future activities of the organization.

If an organization is able and willing to make these representations, it may return the appropriate signed pages to the IRS. The IRS has committed to issue a favorable determination letter within two weeks of receiving the signed representations. Organizations desiring to take advantage of this expedited process must return their signed representations within 45 days. That being said, this expedited process is optional, and organizations may choose to continue seeking recognition of tax-exemption under their previously submitted Form 1024 through normal processes.

Tax litigation

One purpose of this article is to explain that more should have been done by organizations and their representatives to obtain a quicker determination from the IRS, including seeking a declaratory judgment from a court of appropriate jurisdiction. As such, it may be surprising that the authors do not believe that the majority of claims that have been filed to date as a result of this exemption application review program are viable cases. Nevertheless,

based on an analysis as to whether a court will have jurisdiction over the issues raised in the complaints that have been filed since the publication of the TIGTA Report, it appears that many of the claims may not prove successful.

Since the TIGTA Report was published, three cases have been filed by organizations seeking declaratory, injunctive, and other relief resulting from the Service's review of applications identified for additional review. *NorCal Tea Party Patriots v. IRS, et al.* ("*NorCal Tea Party*")[45] is a class action filed in the U.S. District Court for the Southern District of Ohio seeking monetary damages resulting from the prolonged IRS review of the exemption applications. *True the Vote, Inc. v. IRS, et al.* ("*True the Vote*")[46] was filed in the U.S. District Court for the District of Columbia seeking declaratory, injunctive, and monetary relief. Also filed in the U.S. District Court for the District of Columbia was *Linchpins of Liberty, et al, v. U.S., et al.* ("*Linchpins of Liberty*")[47], which seeks declaratory, injunctive, and monetary relief on behalf of 25 organizations that were subject to the Service's prolonged examination of their applications for tax-exempt status.[48]

Filed on a behalf of a single organization that made a request for tax-exempt status that was not acted on, the *True the Vote* case provides the closest example of a traditional suit for declaratory judgment. The case was filed in a court of appropriate jurisdiction, the U.S. District Court for the District of Columbia, and the claim for relief expressly seeks a declaration that the organization qualifies both as an organization described in Section 501(c)(3) and as a public charity described in Sections 509(a)(1) and 170(b)(1)(A)(vi). In addition to declaratory relief, the complaint filed by True the Vote seeks: (1) a declaration that the Service's policies were unconstitutional, (2) a permanent injunction prohibiting IRS enforcement using similar policies, (3) a permanent injunction prohibiting the Service from illegally inspecting True the Vote's return information, (4) an order that the Service must implement the recommendations of the TIGTA Report, (5) damages for each unauthorized inspection of True the Vote's return information, (6) actual and punitive damages related to True the Vote's expenses related to the Service's review of its Form 1023, and (7) reasonable attorney fees.

The *Linchpins of Liberty* case represents a far less traditional request for declaratory judgment. First, it was filed on behalf of 25 organizations, two of which applied for recognition of Section 501(c)(3) status while 23 applied for recognition of Section 501(c)(4) status. Second, the grounds for the declaratory relief are primarily focused on the Service's alleged violations of the plaintiffs' constitutional rights-specifically the First and Fifth Amendments-though the complaint does seek Section 7428 declaratory relief as well. In addition to the declaratory relief and constitutional issues, the plaintiffs requested a declaration that the Service violated the Administrative Procedures Act (APA)[49] as well as an injunction that permanently prohibits the Service from unlawfully targeting the plaintiffs and compelling the Service to recognize the plaintiffs' tax-exempt status. Also, similar to the complaint in *True the Vote*, the complaint in the *Linchpins of Liberty* case seeks damages for the unauthorized inspection of return information, actual and punitive damages related to the Service's prolonged review of the plaintiffs' applications for tax-exempt status, and reasonable attorney fees. Finally, the *Linchpins of Liberty* complaint demands a jury trial.

Taken separately, with respect to the declaratory and injunctive relief requested, a court is far more likely to have the jurisdictional authority over the *True the Vote* case than over the *Linchpins of Liberty* case, because the *True the Vote* complaint is related to a single organization entitled to the declaratory relief requested pursuant to statutory authority, Section 7428 . On the other hand, the *Linchpins of Liberty* complaint includes only two organizations that are entitled to the statutory relief provided by Section 7428, and 23 organizations that fail to qualify for such relief because they sought recognition of exempt status under Section 501(c)(4), not Section 501(c)(3). Additionally, because of the multitude of plaintiffs and myriad issues raised in the *Linchpins of Liberty* complaint, the complaint is unable to clearly demonstrate the court's jurisdiction over the two plaintiffs who would otherwise be entitled to the declaratory relief. Taken together, these cases present a variety of interesting though ultimately untenable arguments seeking declaratory and other relief, including: (1) a declaration and injunction based on violations of the plaintiffs' constitutional rights, (2) a declaration and injunction based on violations of the APA, (3) declaratory relief sought by organizations that applied for recognition of Section 501(c)(4) status, and (4) a request for a jury trial.

Declaratory and injunctive relief based on violations of constitutional rights

The constitutional violations raised in these complaints include violations of the Free Speech Clause of the First Amendment, violations of the Due Process Clause of the Fifth Amendment, and violations of the right to free association implicit in the First and Fifth Amendments. Courts have considered these issues before, ruling that the

Service's denial of exemption does not violate these rights and, in light of the limitations of the Anti-Injunction Act (AIA)[50] and the Declaratory Judgment Act (DJA)[51], the court lacks authority to enjoin the Service from enforcement of the Code pursuant to such claims.

First, the specific issue of whether denial of tax-exempt status was a violation of First or Fifth Amendments was considered by the D.C. Circuit in *Taxation with Representation of Washington v. Blumenthal*, 48 AFTR 2d 81-5244, 81-1 USTC ¶9329 (D.C. Cir., 1981). In *Taxation with Representation*, the court rejected the argument that the failure to grant an organization's tax-exempt status violated either the First or Fifth Amendments. With respect to the First Amendment, the court noted that it was bound by a prior decision in which it cited the Supreme Court's decision in *Cammarano*, 3 AFTR 2d 697, 358 US 498, 3 L Ed 2d 462, 59-1 USTC ¶9262, 1959-1 CB 666 (1959)[52], holding that the taxpayers were "not being denied a tax deduction because they engage in constitutionally protected activities, but are simply being required to pay for those activities entirely out of their own pockets as everyone else engaging in similar activities is required to do."[53]

Second, the relief requested with respect to each of these counts is a declaratory judgment regarding the rights of the parties. However, in its 1974 decision in *"Americans United," Inc.*, 33 AFTR 2d 74-1289, 416 US 752, 40 L Ed 2d 518, 74-1 USTC ¶9439, 1974-2 CB 401 (1974), the U.S. Supreme Court considered very similar arguments and expressly determined that it lacked the jurisdictional authority to grant such declaratory relief. Specifically, the Court ruled that such relief was prohibited by the DJA, which generally authorizes suits for declaratory judgment in cases of actual controversy "except with respect to federal taxes,"[54] and the AIA, which generally provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed."[55] Based on these provisions, the Court expressly determined that it lacked the jurisdictional authority to grant the requested relief, even though the it included a lengthy discussion about the harm to which the plaintiffs were subjected, going so far as to suggest that Congress act to permit such suits. Shortly thereafter, Congress passed Section 7428 to provide an express exception to the DJA in cases of an actual controversy relating to an organization's initial or continuing qualification for tax-exempt status under Section 501(c)(3). Therefore, based on the Supreme Court's express ruling in *"Americans United," Inc.*, it is clear that the courts lack jurisdiction to grant the requested declaratory and injunctive relief granted in the present cases.

Declaratory and injunctive relief based on violation of the APA

Obtaining declaratory and injunctive relief based on violations of the APA is also problematic. The relief sought includes a declaration of the rights of the parties and a permanent injunction that: (1) prohibits the IRS from future enforcement and (2) mandates that the IRS immediately recognize as exempt plaintiffs that are not currently recognized as exempt.

Generally, the APA provides that a "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof," and allows courts to issue an injunction against a federal regulatory agency where there is a violation of an agency's published administrative procedures that causes irreparable harm to a taxpayer.[56] However, section 702(2) provides that the APA does not confer authority to grant relief if any other statute "expressly or impliedly forbids the relief which is sought."

The situation presented here is similar to the situation that the Supreme Court considered in *Bob Jones University v. Simon*, 33 AFTR 2d 74-1279, 416 US 725, 40 L Ed 2d 496, 74-1 USTC ¶9438, 1974-1 CB 354 (1974). In *Bob Jones University*, the Supreme Court ruled that a suit seeking an injunction pertaining to an organization's tax-exempt status "falls squarely within the literal scope of the AIA."[57] Thus, courts will generally lack the authority to issue such an injunction unless one of the express exceptions to the AIA is met. As the claims asserted in the *Linchpins of Liberty* case were not made pursuant to one of the express exceptions to the AIA, similar to *Bob Jones University*, it is unlikely that the plaintiffs will be able to obtain the requested injunctive relief.

There is one non-statutory exception to the AIA prohibition. In *Enochs v. Williams Packing & Navigation Co.*, 9 AFTR 2d 1594, 370 US 1, 8 L Ed 2d 292, 62-2 USTC ¶9545, 1962-2 CB 349 (1962), the Supreme Court ruled that, if one of the express statutory exceptions did not apply, courts lack the authority to issue an injunction unless the taxpayer can

show both that: (1) the proposed government action will cause irreparable injury "such as the ruination of the taxpayer's enterprise," and (2) "it is clear that under no circumstances could the government ultimately prevail."[58] The *Linchpins of Liberty* complaint does not appear to satisfy this "extraordinary circumstances" exception created by the Supreme Court in *Williams Packing & Navigation*. Therefore, the court will most likely lack the authority to grant the injunctive relief requested under the APA.

Declaratory relief requested by Section 501(c)(4) applicants

In the *Linchpins of Liberty* case, 23 of the 25 plaintiffs fail to meet these requirements. Only two of the plaintiffs applied for recognition of Section 501(c)(3) status; the others applied for recognition of Section 501(c)(4) status. As such, as discussed above, all but two of the plaintiffs in this suit are not entitled to the requested relief under Section 7428 .

Request for a jury trial

The *Linchpins of Liberty* complaint requested a jury trial. However, pursuant to *Synanon Church*, 51 AFTR 2d 83-979, 557 F Supp. 1329, 83-1 USTC ¶9230 (DC D.C., 1983), a jury trial is not permitted in declaratory judgment cases brought under Section 7428 .

To summarize, the *True the Vote* and *Linchpins of Liberty* cases raise many interesting questions related to the Service's review of applications identified for additional review. However, due to the courts' limited authority to enjoin the Service under the AIA or to issue declaratory judgments against the Service under the DJA, it is unlikely that a court will consider the merits of many of the issues raised in these cases.

Conclusion

During the Service's review of the exemption applications of organizations deemed to be at risk of engaging in impermissible political activities, the organizations and their representatives could have better availed themselves of methods to mitigate the consequences of the Service's substantial delays and requests for inappropriate information. While it may be too late to undo harm that has already befallen those organizations, a better understanding of non-traditional options available to tax-exempt organizations can be used by future applicants to avoid falling prey to similar circumstances.

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For questions or more information, please contact Matthew T. Journy at *mtjourny@Venable.com*; Yosef Ziffer at *yziffer@Venable.com*; or Jeffrey S. Tenenbaum at *jstenenbaum@Venable.com*.

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[1] Treasury Inspector General for Tax Administration, "Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review," (5/14/13), Reference Number 2013-10-053 ("TIGTA Report"), available at www.treasury.gov/tigta/auditreports/2013reports/201310053fr.pdf.

[2] TIGTA Report, *supra* note 1 at 18.

[3] TIGTA Report, *supra* note 1 at 10.

[4] TIGTA Report, *supra* note 1 at 9. It appears as though 19 of these organizations were recognized as exempt under Section 501(c)(3) and 89 were recognized as exempt under Section 501(c)(4).

[5] TIGTA Report, *supra* note 1 at 6.

[6] TIGTA Report, *supra* note 1 at 11.

[7] TIGTA Report, *supra* note 1 at 1.

[8] TIGTA Report, *supra* note 1 Report at 10.

[9] TIGTA Report, *supra* note 1 at 14.

[10] TIGTA Report, *supra* note 1 at 11.

[11] TIGTA Report, *supra* note 1 at 18.

[12] TIGTA Report, *supra* note 1 at 20.

[13] www.irs.gov/Charities-&-Non-Profits/Where-Is-My-Exemption-Application.

[14] 15 U.S.C. 1679 *et seq.*

[15] TIGTA Report, *supra* note 1 at 18.

[16] TIGTA Report, *supra* note 1 at 16.

[17] TIGTA Report, *supra* note 1 at 15.

[18] TIGTA Report, *supra* note 1 at 16.

[19] The TIGTA Report does not indicate the portion, if any, of the 28 withdrawn applications that were applications for recognition of tax-exempt status under Section 501(c)(4). Additionally, the report does not provide any information related to the reason such applications were withdrawn.

[20] TIGTA Report, *supra* note 1 at 18.

[21] It is clear that some of the organizations responded to the unnecessary requests because the TIGTA Report noted that "EO function officials informed us that they decided to destroy all donor lists that were sent in for potential political cases that the IRS determined it should not have requested." TIGTA Report, *supra* note 1 at 19.

[22] It is notable that there may be several advantages to being a taxable organization as opposed to being an exempt organization, including a lack of operational oversight by the IRS and the freedom to engage in a variety of activities that are impermissible for tax-exempt organizations. However, such advantages are not relevant here because each of the organizations in question applied for recognition of tax-exempt status. As such, the comparison at issue is not between a taxable organization and an exempt organization; rather, it is the comparison between an organization recognized as exempt and one that is seeking recognition of that status.

[23] Gladstone Foundation, 77 TC 221, 226 (1981).

[24] AHW Corp., 79 TC 390, 396 (1982) (holding that the court lacked jurisdiction to issue a declaratory judgment with respect to whether an organization recognized as exempt could engage in a particular activity without jeopardizing its exempt status).

[25] *Id.* at 393.

[26] See New Community Senior Citizen Housing Corp., 72 TC 372 (1979); AHW Corp., *supra* note 24; Urantia Foundation, 50 AFTR 2d 82-5465, 684 F2d 521, 82-2 USTC ¶9512 (CA-7, 1982).

[27] CREATE, Inc., 47 AFTR 2d 81-641, 634 F2d 803, 81-1 USTC ¶9152 (CA-5, 1981).

[28] *Id.*

[29] Anclote Psychiatric Ctr., 98 TC 374, 377.

[30] See N.Y. County Health Services Review Org., 45 AFTR 2d 80-1552, 80-1 USTC ¶9398, 80-1553 (D.C. Cir., 1980) (holding that "[u]ntil such time as the Service either rules on plaintiff's Form 1023 request for determination, or fails to act on such a request within 270 days of its filing, this Court lacks subject matter jurisdiction"); B.H.W. Anesthesia Foundation, 72 TC 681 (1979); Natl Paralegal Inst. Coalition, TC Memo 2005-293, RIA TC Memo ¶2005-293, 90 CCH TCM 623 (2005).

[31] Staff of the Joint Committee on Taxation, *General Explanation of the Tax Reform Act of 1976* (hereinafter, "the Blue Book"), page 405.

[32] BBS Associates, 74 TC 1118, 2 EBC 2413, 1122 (1980).

[33] See Prince Corp., 67 TC 318, 1 EBC 1229 (1976) (interpreting Section 7476, the employee-plan counterpart to Section 7428, rejecting the petitioner's argument that the Code creates a per se test for exhaustion of administrative remedies based on the mere lapse of 270 days); Clawson, TC Memo 1993-174, RIA TC Memo ¶93174, 17 EBC 1193, 65 CCH TCM 2452, (holding that even when the Service made an adverse determination, the court lacked jurisdiction to issue a declaratory judgment because the taxpayer did not exhaust its administrative remedies because it failed to protest the proposed revocation); Natl Paralegal Inst. Coalition, *supra* note 30 (holding that the "exhaustion of administrative remedies is predicated on the filing of a 'substantially completed' application" and that where an organization fails to file a completed application or take any steps to perfect the incomplete application, the organization has not exhausted its administrative remedies); McManus, 93 TC 79 (1989) (holding that even when the Service made an adverse determination, the court lacked jurisdiction to issue a declaratory judgment if the taxpayer did not take any steps to obtain a favorable ruling).

[34] Reg. 601.201(n)(7)(v)(b).

[35] Gladstone Foundation, *supra* note 23.

[36] The Blue Book at 405 (emphasis added); see also Animal Protection Inst., 42 AFTR2d 78-5850 (Ct. Cl. 1978) (noting that the exhaustion of administrative remedies only required that organizations supply "any *reasonable* information requested by the Service").

[37] Gladstone Foundation, *supra* note 23 at 236.

[38] Anclote Psychiatric Ctr., *supra* note 29 at 382; see also Gladstone Foundation, *supra* note 23 at 235 (stating that an organization "may be deemed to have exhausted its administrative remedies due to [the Service's] purported failure to process its request expeditiously"); Prince Corp., *supra* note 33 at 328 (holding that "[a]fter 270 days have passed a petitioner need only demonstrate that progress is severely hampered due to causes beyond its control").

[39] See Christian Coalition of Florida, Inc., 108 AFTR 2011-7157 (CA-11, 2011) (holding that the court lacked jurisdiction to issue a declaratory judgment under Section 7428 to an organization seeking Section 501(c)(4) status because "it is clear that Congress has granted organizations claiming 501(c)(4) tax-exempt status fewer avenues for judicial relief than those organizations seeking 501(c)(3) status").

[40] For purposes of this discussion, the authors will focus on Section 501(c)(4) organizations.

[41] Notwithstanding this general rule, based on sections other than Section 508, certain other types of tax-exempt entities may not self-certify. Such organizations include Section 501(c)(4) credit-counseling agencies, as well as organizations seeking exemption under Sections 501(c)(9), (c)(17), and (c)(20).

[42] IRM 7.25.1.1(1). In this regard, note that both Form 1023 and Form 1024 are titled "Application for *Recognition* of Exemption" (emphasis added).

[43] The Blue Book at 405 (emphasis added), See also Animal Protection Inst., Inc., *supra* note 36 (noting that the exhaustion of administrative remedies only required that organizations supply "any *reasonable* information requested by the Service").

[44] Available at www.irs.gov/pub/irs-tege/letter5228.pdf.

[45] NorCal Tea Party Patriots, number 1:2013cv00341, 5/20/13, available at http://dockets.justia.com/docket/ohio/ohsdce/1:2013cv00341/163188/.

[46] True the Vote, Inc., number 1:2013cv00734, 5/21/13, available at http://dockets.justia.com/docket/district-of-columbia/dcdce/1:2013cv00734/160085/.

[47] Linchpins of Liberty, number 1:2013cv00777, 5/29/13, available at http://dockets.justia.com/docket/district-of-columbia/dcdce/1:2013cv00777/160174/.

[48] The discussion of these cases will focus on the *True the Vote* and *Linchpins of Liberty*. While the *NorCal Tea Party* case presents a variety of unique issues and questions that warrant discussion and analysis, such questions are unrelated to the exemption issues involved with the Service's review of tax-exemption applications that are the focus of this article. The *NorCal Tea Party* class action suit does not seek declaratory relief related to its qualification for tax-exempt status and was filed in a court that lacks jurisdictional authority to grant such declaratory relief. As such, it involves issues that are beyond the scope of this article. Additionally, the discussion of the *True the Vote* and *Linchpins of Liberty* cases will be limited to the declaratory and injunctive relief requested in these complaints because the request for monetary relief also is beyond the scope of this article.

[49] 5 U.S.C. section 551 *et seq.*

[50] Section 7421.

[51] 28 U.S.C. Section 2201.

[52] Cited in "American United," Inc., 31 AFTR 2d 73-582, 477 F2d 1169, 73-1 USTC ¶9165 (D.C. Cir., 1973), *rev'd on other grounds* 33 AFTR 2d 74-1289, 416 US 752, 40 L Ed 2d 518, 74-1 USTC ¶9439, 1974-2 CB 401 (1974).

[53] Cammarano, 3 AFTR 2d 697, 358 US 498, 3 L Ed 2d 462, 59-1 USTC ¶9262, 1959-1 CB 666 (1959).

[54] 28 U.S.C. Section 2201.

[55] Section 7421.

[56] 5 U.S.C. Section 702.

[57] Bob Jones University v. Simon, 33 AFTR 2d 74-1279, 416 US 725, 40 L Ed 2d 496, 74-1 USTC ¶9438, 1974-1 CB 354 (1974).

[58] Enochs v. Williams Packing & Navigation Co., 9 AFTR 2d 1594, 370 US 1, 8 L Ed 2d 292, 62-2 USTC ¶9545, 1962-2 CB 349 (1962).