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this report, as well as Richard Gano and Joshua Nozar for research assistance.

In this report, Aprill examines the use of the doctrine of charitable class in the tax law generally, as well as in the particular cases of disaster relief and first responders. She argues that the IRS should study the doctrine and issue precedential guidance on disaster relief, and she urges Congress to consider enacting special legislation for first responders.

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The notion of charitable class bedevils tax law. The IRS has issued no precedential guidance regarding its scope or application. After the terrorist attacks of September 11, 2001, Congress enacted special provisions applicable only to victims of that disaster. In response to statements in the legislative history of those provisions, the IRS has changed several of its positions regarding the doctrine of charitable class — changes announced only in a publication on disaster relief. Disaster relief continues to raise difficult issues involving charitable class for Congress as well as the IRS. In the 15 years since 9/11, Congress has enacted special legislation to permit a small group of California firefighters and two New York police officers to be treated as satisfying the charitable class requirements.

This report reviews the use of charitable class in tax law, including its relationship to trust law, with particular attention on establishing new charitable purposes and classes. It then discusses disaster relief, for both the 1995 Oklahoma City bombing and 9/11 terrorist attacks. That discussion includes consideration of the roles that crowdfunding and exemption based on “lessening the burden of government” play in addressing disasters. The report also examines special legislation that Congress has enacted for two small groups of first responders. It concludes by recommending that the IRS both undertake a study of charitable class in general and issue precedential guidance regarding charitable class in the context of disaster relief. It also urges Congress to consider holding hearings and enacting special legislation for first responders.

I. Introduction

Tax law faces various challenges regarding the doctrine of charitable class. Some of them are broad, and others are narrower. As a result of those challenges, tax law would benefit from clarification and guidance regarding the doctrine of charitable class. Both the history and current use of the doctrine underscore this need. The Restatement of Trusts has changed its approach to the doctrine, but the IRS has failed to issue any official guidance regarding the concept.

In the past 15 years, Congress has enacted legislation implicating charitable class, but that legislation has looked narrowly, not broadly. The Victims of Terrorism Tax Relief Act of 2001 (VTTRA)¹ included special rules regarding charitable organizations' efforts to aid those affected by the 9/11 attacks. It waived the requirement of a particularized determination of need for the victims of the 9/11 and later anthrax attacks. The waivers applied only for those specific victims. Charities have misunderstood the limitations of the VTTRA.

The VTTRA's legislative history directed the IRS to change its position on disaster relief provided by employer-sponsored foundations to their employees. It also called on the IRS to change its treatment of the concept of charitable class, at least for disaster relief. The most prolonged discussion of charitable class by the IRS now appears in an IRS publication first issued after enactment of the VTTRA.² The document carries no precedential weight.

In short, the concept of charitable class generally would benefit from a thorough and prolonged study from the IRS. The concept of charitable class for disaster relief needs more immediate attention, however.

Since enacting the VTTRA, Congress has passed two pieces of legislation that permitted small groups of first responders to be treated as if they were a charitable class: In 2006 it enacted the Fallen Firefighters Assistance Tax Clarification Act,³ and in 2015 it passed the Slain Officer Family Support Act.⁴ The first applied to funds collected for the families of five firefighters who lost their lives in a California fire. The second applied to monies raised for two ambushed New York City detectives. Similar congressional action in the future seems possible. We do not yet know, for example, whether a charitable class problem will arise in connection with efforts to aid the five Dallas police ambushed on July 7 or the three officers killed in Baton Rouge, Louisiana, on July 17.⁵

¹H.R. 2884 (Dec. 21, 2001). President George W. Bush signed the legislation on January 23, 2002 (Patti Mohr, "Bush Signs Law Giving Terrorist Victims Tax Relief," *Tax Notes*, Jan. 28, 2002, p. 409.).

²IRS Publication 3833, *Disaster Relief: Providing Assistance Through Charitable Organizations* (rev. Dec. 2014).

³H.R. 6429 (Dec. 19, 2006).

⁴H.R. 1527 (Mar. 30, 2015).

⁵For those who wish to make deductible contributions to help the families of the Dallas officers, established charities for fallen Texas first responders, such as Assist the Officer Foundation and Guns and Hoses Foundation of North Texas, appear to be available. See Margaret Judson, "How to Donate to the Dallas Police Shooting Victims and Their Loved Ones," *Bustle*, July 8, 2016. There is also a GoFundMe page for Officer Mike Smith, one of the officers killed in the Dallas sniper attack, that had

(Footnote continued in next column.)

This report argues that despite all efforts to the contrary, these legislative and regulatory actions have confused rather than clarified the role of charitable class in tax exemption. Crowdfunding and other developments have heightened the need for the IRS to reconsider its position on the role of charitable class in obtaining tax exemption. It should do so in precedential authority, at least for disaster relief, if not more broadly. The report also proposes that rather than pass ad hoc legislation, Congress should consider a special legislative provision permitting first responders to be deemed part of a charitable class. Benefits permitted under that legislation could parallel provisions enacted after 9/11.

II. Charitable Class and Tax Exemption

The IRS, drawing on the common law of trusts, has taken for granted that a section 501(c)(3) organization must serve a charitable class. It has done so without clearly delineating what it means by charitable class and without exploring in any depth the relationship between charitable class and private benefit on the one hand, or between charitable class and charitable purpose on the other. As Francis R. Hill and Douglas M. Mancino, authors of a key reference on the taxation of exempt organizations, expressed in their comprehensive work, "the Service remains troubled by the complexities of the concept of a charitable class."⁶

A. Trust Law Background

As the Supreme Court has recognized, common law informs the law of federal tax exemption,⁷ and the tax requirement that beneficiaries constitute a charitable class traces back to the common law of trusts. The Supreme Court endorsed the requirement of a set of indefinite beneficiaries as early as 1882, when in upholding the validity of a charitable

raised more than its goal of \$225,000 as of September 6, 2016. Blogs have made suggestions about donations to charities for the Baton Rouge officers. See Alex Gladu, "How to Help the Baton Rouge Officer Shooting Victims in This Troubled Time," *Bustle*, July 17, 2016. A GoFundMe page has also been established for the Baton Rouge victims, as well as a CrowdRise fund under the auspices of a nonprofit called Planting Peace. See *infra* Section III.F for further discussion of fundraising for Orlando victims, crowdfunding, and charitable class.

⁶Hill and Mancino, *Taxation of Exempt Organizations*, para. 3.02[7] (2016 Cumulative Supp. No. 1).

⁷See *Bob Jones University v. United States*, 461 U.S. 574 (1983). In that case, the Court found "unmistakable evidence that underlying all relevant parts of the Code is the intent that entitlement to tax exemption depends on meeting certain common-law standards of charity." *Id.* at 586. It also wrote, "The origins of [tax] exemption lie in the special privileges that long have been extended to charitable trusts." *Id.* at 588.

trust, it wrote that trusts for public charitable purposes “may, and indeed must, be for the benefit of an indefinite number of persons; for if all the beneficiaries are personally designated, the trust lacks the essential element of indefiniteness, which is one characteristic of a legal charity.”⁸

The Restatement (Second) of Trusts stated as black-letter law that the property and income of a charitable trust must benefit a sufficiently large and indefinite charitable class rather than specific private individuals.⁹ It asserted, “A trust is not a charitable trust if the persons who are to benefit are not of a sufficiently large or indefinite class so that the community is interested in the enforcement of the trust.”¹⁰

Commentators have rejected the reasoning of the Second Restatement regarding the required size of a charitable class. George C. Bogert and Ronald Chester contend that the large or indefinite class requirement represents “a misrepresentation of the nature of the charitable trust.” They emphasize that the public is the beneficiary of a charitable class:

This class is the conduit or medium through which the settlor desires the public benefits to flow. The class members do not constitute the beneficiaries of the trust but are rather those through whom the settlor intends that social or community benefits shall be achieved. . . . Furthermore, the class must be such that the conferring of benefits upon it will result in the advancement of some public interest.¹¹

Scott on Trusts observes:

A trust may fail because the class of persons who are to benefit is so narrow that the community has no interest in the performance of the trust. It is a question of degree whether the class is large enough to make the performance of the trust sufficient to benefit the community so that it will be upheld as a charitable trust.¹²

That is, a charitable trust is distinguished from a private trust in part on a practical ground of enforcement. A charitable class does not have identified beneficiaries to enforce the trust’s terms. It thus must be of interest to the community as a whole in order to ensure enforcement by the community’s representative in the form of the attorney general. Still, normative concerns underlie this practical

consideration. Special treatment is given to charitable trusts because they advance a sufficiently large segment of the public.

Perhaps because of critiques of the treatment of charitable class in the Second Restatement, the Restatement of the Law (Third), Trusts has moved its discussion of the concept from black-letter law to commentary on the section enumerating charitable purposes. According to section 28 of the Third Restatement, charitable purposes include: “(1) the relief of poverty; (2) the advancement of knowledge or education; (3) the advancement of religion; (4) the promotion of health; (5) governmental or municipal purposes; and (6) other purposes that are beneficial to the community.”¹³ The Draft American Law Institute Restatement of the Law, Charitable Nonprofit Organizations adopts the definition and list of charitable purposes found in the Third Restatement.¹⁴ It emphasizes that this definition includes not only long-standing specific purposes, such as relief of poverty and promotion of health, but also “other purposes that are beneficial to the community.” The ALI Draft Restatement remarks that the Third Restatement “draws from common law by incorporating the important concept that charitable purpose evolves over time to take into account the changing needs of different communities. . . . There is a clear intent that the charitable class will evolve over time.”¹⁵

The Third Restatement revisits the issue of charitable class only in commentary on its list of charitable purposes. That is, it views charitable class as an aspect of charitable purpose and not an independent requirement. Comment *a* states that charitable purposes “accomplish objects that are beneficial to the community — i.e., to the public or indefinite members thereof.”¹⁶ Comment *c* focuses on indefinite beneficiaries: “A charitable trust can be created although it has no definite or definitely ascertainable beneficiary.”¹⁷ The ALI reporters’ notes on section 28 recommend recalling section 375 of the Second Restatement, the charitable class requirement.¹⁸

As this change of the charitable class requirement from black-letter law to commentary reveals, charitable class and charitable purpose are closely related. As discussed further below, case law and the IRS rely too frequently on traditional charitable

⁸*Russell v. Allen*, 107 U.S. 163, 167 (1883).

⁹Restatement (Second) of Trusts, sections 375 and 376 (1959).

¹⁰*Id.* at section 375.

¹¹Bogert and Chester, *The Law of Trusts and Trustees*, section 363 (3d ed. 2005).

¹²Austin Wakeman Scott and William Franklin Fratcher, *Scott on Trusts*, section 375 (4th ed. 1989).

¹³Restatement of the Law (Third) Trusts, section 28 (2003).

¹⁴Draft ALI Restatement of the Law, Charitable Nonprofit Organizations, section 1.01, gen. cmt. 1 (Apr. 13, 2016).

¹⁵*Id.* at section 1.01, cmt. d.

¹⁶Restatement of the Law (Third), Trusts, section 28, cmt. a (2003).

¹⁷*Id.* at section 28, cmt. d.

¹⁸*Id.* at section 28, reporters’ notes.

purposes in defining charitable class. Moreover, the uneasy history of the charitable class doctrine in tax law underscores the need for precedential guidance regarding its application.

B. Regulations, Rulings, and the IRM

The applicable tax regulations do not explicitly refer to charitable class. Regulations promulgated in 1959 and retroactive to years beginning after December 31, 1953, simply provide that an organization will not qualify for exemption under section 501(c)(3) unless “it serves a public rather than a private interest.”¹⁹

In theory, the notion of charitable class is tied closely to the requirement of public benefit. In practice, IRS guidance has emphasized forbidden private benefit. Professor John Colombo has written that at least until the latter half of the 1970s, “private benefit referred to a lack of a sufficiently-broad charitable class.”²⁰ Since then, however, the IRS has expanded the meaning of impermissible private benefit.²¹ As a leading EO guide observes, “The private benefit doctrine is boundless; its use by the IRS is pliant.”²² Colombo now understands the notion of private benefit as encompassing situations in which the charitable entity enters into transactions with for-profit entities to provide its core services or to confer competitive advantages on the for-profit’s business activities.²³

Three examples of organizations serving private rather than public benefit were added to reg. section 1.501(c)(3)-1(d)(1) in 2008.²⁴ In the first example, an educational organization focused on the genealogy of one family. The second involved an art gallery that exhibited the work of unknown but promising artists and received a 10 percent commission from any sales. In the third example, an educational organization conducted seminars and lectures, all of which were licensed at a fair market value rate from a for-profit company owned by a single individual. As Colombo has pointed out, the first example reiterates “the classic common-law version of private benefit that relates to the size of the charitable class,” but the other two examples adopt

a different interpretation of private benefit — giving for-profit entities a competitive advantage.²⁵ The emphasis in this report is on the private benefit doctrine as far as it overlaps with issues of charitable class. However, it is important to remember that whatever might have been the case in the past, the doctrines of charitable class and private benefit are not now coextensive.

Unlike the regulations, the Internal Revenue Manual explicitly sets forth a charitable class requirement. It ties charitable class to the traditional and narrow meaning of impermissible private benefit: an insufficiently large set of beneficiaries. In its “Charitable Class Requirement” section, last revised in 1999, the IRM stipulates, “A charitable organization or trust must be set up for the benefit of individuals, not for specific persons. A trust or corporation organized and operated for the benefit of specific individuals is not charitable.”²⁶ The IRM gives two examples of organizations conferring private benefit that prevents exemption: a trust established for the benefit of an aged clergyman and his wife and a trust to pay a specific sum to all individuals enrolled in a particular school on a particular day.²⁷ It contrasts that case with a foundation set up to award scholarships solely to undergraduate members of a designated fraternity, which was found to be exempt as a charitable foundation.²⁸ None of the authorities cited by the IRM uses the term “charitable class,” although all of their analysis rests on the breadth of the class of beneficiaries.

Surprisingly, the IRM does not cite Rev. Rul. 67-325.²⁹ That ruling concluded that organizations providing recreational facilities are ineligible for tax exemption or deductible contributions “if they serve less than the entire community on the basis of race” because “providing a community recreational facility is in the general class of purposes which are recognized only where all the members of the community are eligible for direct benefits.” The revenue ruling, citing trust law, recognizes that “certain purposes have been deemed to be beneficial to the community as a whole even though the class or classes of possible beneficiaries eligible to receive a direct benefit from the dedication of property to the particular purpose do not include all the members of the community.” Importantly, however, it recognizes that a charitable organization can benefit the entire community.

¹⁹Reg. section 1.501(c)(3)-1(d)(1)(ii); T.D. 6391.

²⁰Colombo, “In Search of Private Benefit,” 58 *Fla. L. Rev.* 1063, 1069 (2006).

²¹See Andrew Megosh et al., “Topic H., Private Benefit Under IRC 501(c)(3),” IRS Exempt Organizations Continuing Professional Education (EO CPE) Text for Fiscal 2001 (Sept. 6, 2000); and Megosh et al., “Overview of Private Inurement/Private Benefit Issues in IRC 501(c)(3),” IRS EO CPE Text for Fiscal 1990 (Dec. 29, 1989).

²²Bruce R. Hopkins, *The Law of Tax-Exempt Organizations* 607 (9th ed. 2007).

²³Colombo, *supra* note 20, at 1066.

²⁴Reg. section 1.501(c)(3)-1(d)(1)(iii).

²⁵Colombo, *supra* note 20, at 1102-1103.

²⁶IRM section 7.25.3.3.7.

²⁷*Id.*, citing *Pasadena Methodist Foundation v. Commissioner*, 2 T.C.M. 905 (1943); and Rev. Rul. 57-449, 1957-2 C.B. 51.

²⁸Rev. Rul. 56-403, 1956-2 C.B. 307.

²⁹1967-2 C.B. 113.

The IRM limits its discussion to situations in which the number of beneficiaries is too small to constitute a charitable class, a situation that arises frequently and is discussed further below. The IRM fails, however, to address an equally pressing problem: determining whether a class with a large number of individuals constitutes a charitable class, also discussed below. It focuses on impermissible private benefit but does not grapple with what constitutes required public benefit. The IRM equates private benefit with lack of a broad charitable class. It ignores that both the doctrine of charitable class and that of private benefit reach more broadly than the IRM's analysis allows.

In short, current IRS guidance fails to clarify the relationship between private benefit and charitable class. The discussion of charitable class in the IRM lacks precedential authority. Moreover, it is incomplete in its analysis of charitable class. Important issues regarding charitable class include, but are not limited to, having too small a set of beneficiaries.

C. Small Numbers of Beneficiaries

Organizations with only a few beneficiaries, no matter how individually deserving, pose frequent challenges. Several cases figure prominently. The IRS and commentators often cite *Wendy L. Parker*³⁰ in setting out the tax requirement of charitable class.³¹ In the case, a foundation was established to aid coma victims, a seemingly open-ended class, by providing them services, equipment, and funds. The foundation's officers and directors were the father, mother, and brother of Wendy L. Parker, herself a coma victim. The exemption application represented that 30 percent of the foundation's income was expected to be spent for Parker. The Tax Court denied exemption on the basis that this large benefit to the relative of the foundation's officers and directors constituted benefit to a private person in violation of the inurement prohibition.

As with the authorities cited in the IRM, *Wendy L. Parker* never uses the term "charitable class." The IRS, however, has adopted the case as an illustration of the charitable class requirement. LTR 200851037, for example, denied exemption to an organization dedicated to providing an alternative to institutional care for a single mentally and physically handicapped person who was related to the

directors of the organization. The letter ruling found this situation to be like that in *Wendy L. Parker*. It stated, "Without serving any charitable class, you cannot be organized and operated for charitable purposes within the meaning of 501(c)(3) of the Code." The letter ruling added that "a charitable organization or trust must be set up for the benefit of an indefinite class of individuals, not for specific persons. A trust or corporation organized and operated for the benefit of specific individuals is not charitable, regardless of whether the individuals served are part of a charitable class."

In a more recent private letter ruling, LTR 201509039, the IRS relied in part on the notion of charitable class and the authority of *Wendy L. Parker* to deny tax exemption to a nonprofit corporation organized to offer capital to small businesses in local economies following natural or man-made disasters.³² Citing the case, the ruling asserted, "In order for an organization to fulfill a charitable purpose, it generally must assist a charitable class of individuals. If an organization allows its activities to benefit individuals beyond a charitable class, then it is not a charitable organization." According to the IRS, the applicant did not restrict the beneficiaries of its activities to a charitable class: "Small businesses in areas affected by a disaster are not a charitable class, *per se*." The organization failed the charitable class requirement because it did not plan to determine the financial needs of its potential recipients.³³

Another recent letter ruling, LTR 201552034, revoked the exemption of an organization that according to its proposed activities, intended to assist individuals with disabilities — unquestionably a charitable class. In fact, the organization provided assistance to one individual. Citing *Wendy L. Parker*, in which preselecting a particular individual as a beneficiary gave rise to impermissible private benefit, the letter ruling concluded that exemption should be revoked on the basis of private inurement. However, the letter ruling did not describe the beneficiary's relationship to officers, directors, or other insiders.

Two other 2015 private letter rulings relied on *Wendy L. Parker* to deny exemption. As in *Wendy L. Parker* itself, the denials were based on substantial private benefit, with no explicit discussion of charitable class. LTR 201511026 and LTR 201519035

³⁰*Wendy L. Parker Rehabilitation Foundation Inc. v. Commissioner*, T.C. Memo. 1986-348. See Hill and Mancino, *supra* note 6, at para. 4.02[1][c] (size of charitable class); and Hopkins, *supra* note 22, at 182 n.190.

³¹See LTR 201552034; LTR 201509039; LTR 201507023; LTR 201235022; and Janet Gitterman and Marvin Friedlander, "Disaster Relief — Current Developments," IRS EO CPE Technical Instruction Program for Fiscal 2003.

³²The organization also failed to qualify for exemption because it operated for a commercial purpose and did not restrict expenditures to accomplishment of exempt purposes.

³³For further discussion of businesses as charitable beneficiaries, see *infra* note 119.

involved organizations founded exclusively to benefit a single preselected autistic individual. The organizations failed to qualify as tax exempt.

The 2015 case of *Educational Assistance Foundation*³⁴ also followed *Wendy L. Parker*. The district court upheld the IRS's decision to revoke the exemption of the Educational Assistance Foundation because it operated in a manner that inured to the benefit of a single family. It had awarded its scholarships exclusively to descendants of nieces and nephews of the decedent from whose estate the foundation was established. The foundation's board of directors was composed of three of the decedent's descendants and the executor. The district court, while not using the precise term "charitable class," described *Wendy L. Parker* as establishing the principle that "prohibited inurement may still occur even if a charitable beneficiary is a member of a larger class that would otherwise qualify the organization for tax-exempt status."³⁵

Too small a group of beneficiaries, particularly when the group consists of a few individual beneficiaries related to insiders who can be identified, presents a comparatively easy case for denial of exempt status. In those cases, issues of charitable class are closely related to issues of private inurement. Even when inurement is not a problem, if an organization seeks to benefit a small number of individuals, it fails to benefit the public as a whole. Other charitable class issues, however, require a deeper and more direct examination of what public benefit is required for exemption.

D. Large Numbers of Beneficiaries

The authorities discussed in the last section all involve a small and definite class of beneficiaries as well as the specter of private inurement. However, as Hill and Mancino point out, "It is important to recognize that the mere size of the class being served does not determine whether the class constitutes a charitable class."³⁶ Thus, in *Columbia Park*,³⁷ the Tax Court affirmed the IRS's denial of exemption as a section 501(c)(3) entity for a civic organization that was projected to serve a population of 110,000 in a planned community. The Tax Court, without using the term "charitable class," concluded, "Petitioner benefits from what is merely an aggregation of homeowners and tenants bound

together in a structural unit formed as an integral part of a plan for the development of real estate. We do not perceive such a group of people as the 'community at large' within the 'charitable' context because it lacks a sufficient public element."³⁸ The case stands for the proposition that notions of charitable class implicate not only quantitative questions but also qualitative questions of charitable purpose.³⁹ The doctrine of charitable class cannot be separated from questions of charitable purpose.⁴⁰

In connection with the concept of charitable class, the IRS also often cites *American Campaign Academy*,⁴¹ which itself cites and builds on the principle of *Columbia Park* that size alone does not determine charitable class.⁴² *American Campaign Academy* involved a school founded to train campaign professionals. The court affirmed the denial of exemption under section 501(c)(3). It found that despite the absence of any formal partisan placement program, the school served Republican entities and candidates more than incidentally. There was no evidence that any of its graduates had worked for Democratic candidates, and almost all graduates went to work for Republican campaigns.

The court distinguished the primary private benefit provided to students (a charitable class) from the secondary private benefit provided to their eventual employers (not a charitable class). The benefit to students was a necessary byproduct of the school's educational charitable purpose. The benefit to the Republican Party was not. That secondary benefit was substantial enough to require the denial of exemption on the basis that the entity

³⁸*Id.*, 88 T.C. at 18.

³⁹Changes in the law and IRS practice after the events of 9/11 may undermine the holding of this case. "The conclusion in *Columbia Park & Recreation Association v. Commissioner* is subject to question in light of Congress' recent affirmation that it is appropriate for employers to provide financial and other assistance to the employees of [a] corporation in the event of disasters such as natural disasters and terrorist attacks." Hill and Mancino, *supra* note 6, at para. 4.02[1][c]. The authors also observe, however, that the private benefit provided to members of a private residential community could itself form a basis for the denial of exemption. *Id.* I agree. See Section III.D *infra* for further discussion of changes in the applicable law.

⁴⁰This issue is discussed further below, in Section II.E. Not all agree with this assertion. Rochelle Korman, for example, objects to conflation of charitable purpose with charitable class. Korman, "Charitable Class and Need: Whom Should Charities Benefit," at 10 (2002) (paper presented at a conference of the New York University National Center on Philanthropy and the Law). Colombo, however, ties charitable class to charitable purpose. In his view, "a charitable purpose requires serving a broad charitable class." Colombo, *supra* note 20, at 1103.

⁴¹*American Campaign Academy v. Commissioner*, 92 T.C. 1053 (1989).

⁴²*Id.* at 1076.

³⁴*Educational Assistance Foundation for the Descendants of Hungarian Immigrants in the Performing Arts v. United States*, 111 F. Supp.3d 34 (D.D.C. 2015).

³⁵*Id.* at 41.

³⁶Hill and Mancino, *supra* note 6, at para. 4.02[1][c].

³⁷*Columbia Park and Recreation Association Inc. v. Commissioner*, 88 T.C. 1 (1987), *aff'd in unpublished opinion*, 838 F.2d 465 (4th Cir. 1988).

served a private rather than public purpose. *American Campaign Academy* demonstrates that violation of the charitable class requirement can occur even when beneficiaries are unrelated to insiders.

Two recent private letter rulings involving technology further illustrate the IRS's reliance on *American Campaign Academy*. In LTR 201114036, an organization sought exemption as a school providing services to other section 501(c)(3) organizations "seeking to develop expertise in virtual organizational design and leadership." All its activities were to be conducted in or to support a particular virtual collaborative environment, one of 300 virtual collaborative environments. Among its reasons for denying exemption, the IRS, citing *American Campaign Academy*, concluded that the entity provided "an exclusive secondary benefit" to the virtual collaborative environment and its members, a benefit that was impermissible because they did not constitute a charitable class.

In LTR 201505040, the organization seeking exemption was formed to develop free and open-source software using a particular software environment. Anyone could use the software developed. Relying on *Columbia Park* and *American Campaign Academy*, the IRS determined that the members of the public did not constitute a charitable class. Although the public is indefinite, the public as such does not exhibit "charitable characteristics," such as being poor, distressed, or underprivileged, as required for a charitable class. That is, according to this private letter ruling, although charitable activities must involve a group large enough to benefit the public, a charitable class does not necessarily exist when benefits extend to the public as a whole.⁴³

Given both that the purpose of a charitable organization is to benefit the public and that charitable purposes change over time, this interpretation of the charitable class requirement is questionable. As the Draft ALI Restatement comments, "The term 'community' in the definition of charitable purposes . . . is coterminous with the word 'public.'"⁴⁴ Hill and Mancino assert, "Charitable exemption is available if the organization conducts activities that benefit the entire public."⁴⁵ Community foundations also raise the issue of benefit to the public. Although community foundations generally make grants to other EOs that most often serve traditional

charitable classes, their mission is to serve the public. In words from the webpage of the oldest community foundation, the Cleveland Foundation, community foundations "work toward the greater good of the citizens in the community."⁴⁶ Thus, it seems possible that the private letter rulings involving software reach their conclusion too quickly by requiring that organizations benefit only traditional charitable classes.⁴⁷

Undoubtedly, not every activity that benefits the public as a whole is charitable. If that were the case, a business activity that employed many people while observing the non-distribution constraint could well qualify under section 501(c)(3). Given the lack of consensus on a theory of nonprofit status and tax exemption,⁴⁸ it will of course be hard to specify which activities that benefit the public as a whole should be considered charitable. The old standbys of market failure and government are likely to play an important role.⁴⁹ However, benefiting the public as a whole rather than a traditional charitable class should not be the sole basis for denying section 501(c)(3) status.

When and how to recognize new charitable purposes and classes pose an unending challenge to the IRS. New meanings of charity evolve in different ways. The IRS recognized several new charitable purposes in the 1970s, as reviewed below. Study by the IRS of how to go about recognizing new charitable purposes, a step that inevitably requires a consideration of charitable class, would be an important, albeit difficult, task. The section below makes some preliminary recommendations.

E. New Charitable Purposes and Classes

Professor John Simon has observed, "The truth of the matter is that it is impossible to frame a perfect definition of charitable purposes," and concluded that there is probably not a law of charity.⁵⁰ As the ALI Draft Restatement reminds us, the charitable

⁴⁶Cleveland Foundation, available at <https://www.clevelandfoundation.org/about/about-overview/>.

⁴⁷Other private letter rulings have also denied exemption in connection with open-source software, albeit not always or exclusively on grounds of lacking a charitable class. See, e.g., LTR 201405022 (trade or business for profit; not furthering an exempt purpose); LTR 201505041 (private inurement); LTR 201303018 (private benefit; not scientific research). The question of charitable class is only one aspect of determining whether an organization qualifies for exemption, but serving the public should not automatically mean disqualification.

⁴⁸James Fishman, Stephen Schwarz, and Lloyd Hitoshi Mayer, *Nonprofit Organizations: Cases and Materials* 25-33 (5th ed. 2015).

⁴⁹*Id.*

⁵⁰Simon, "Is There a Law of Charity?" at 5, 24 (2002) (paper presented at NYU National Center on Philanthropy and the Law conference).

⁴³*Scott on Trusts*, *supra* note 12, at section 75.2: A "trust to promote the happiness or well-being of members of the community" is charitable only if it is "for the benefit of the members of the community generally and not merely for the benefit of a class or persons."

⁴⁴Draft ALI Restatement, *supra* note 14, at section 1.01, cmt. g.

⁴⁵Hill and Mancino, *supra* note 6, at para. 4.02[1][c].

purposes that it and the Third Restatement endorse “do not include many important sectors of the charitable world in the early 21st century, notably arts and cultural institutions, public-interest law firms, sports groups, and environmental protection and advocacy groups.”⁵¹ Charitable purpose evolves. Over time, and particularly in the 1970s, the IRS has recognized new purposes and activities as tax exempt.

In recognizing new purposes and activities, the agency inevitably also recognizes a new charitable class. That is, the two concepts are inextricably linked, as the Third Restatement has recognized by discussing charitable class in a comment to the section on charitable purpose. Charities must provide public benefit, and they do so by having a group of beneficiaries — a charitable class. New charitable purposes and activities create new charitable classes, and newly recognized charitable classes give rise to new charitable purposes.

When the IRS recognizes a new charitable category, it often ties the new category to categories under existing law, including traditional trust law. Rev. Rul. 76-204,⁵² for example, found a conservation organization eligible for section 501(c)(3) status, stating, “It is generally recognized that efforts to preserve and protect the natural environment for the benefit of the public serve a charitable purpose.” As support, it cited the Second Restatement and several state cases from as far back as the mid-1800s. Rev. Rul. 74-587⁵³ concluded that a community development organization that provided funds and working capital to businesses in economically depressed areas was “charitable” because, as the term is defined in reg. section 1.501(c)(3)-1(d)(2), it promoted social welfare by relieving the poor and distressed or underprivileged, easing neighborhood tension, and combating community deterioration. Although neither ruling so states explicitly, they take for granted that the activities at issue benefit the public as a whole.

These two revenue rulings suggest one model for the IRS to follow in accepting new charitable purposes or classes: an accretion model.⁵⁴ Community development organizations and environmental organizations were first determined to be exempt under long-standing categories: providing relief to the poor or easing neighborhood tension and dete-

rioration in the first case, and contributing to science and education in the second case. Activity in these two areas then became sufficiently widespread that the organizations conducting them came to qualify for exemption as themselves serving a charitable purpose and benefiting a charitable class.

Revenue rulings recognizing new charitable classes or purposes often cite federal legislation. The treatment of the aged is particularly instructive. For many years, the IRS recognized organizations that provided relief to the aged as serving a charitable class only when they relieved distress, in particular relief of poverty.⁵⁵ Rev. Rul. 57-467,⁵⁶ for example, concluded that a home for the elderly that accepted only paying guests and discharged those unable to pay was not charitable. This revenue ruling permitted a home for the aged to qualify as a charitable activity, but only if: (1) the organization was dedicated to providing, and in fact provided, care and housing to aged individuals who would otherwise be unable to provide for themselves without hardship; (2) those services were rendered to all or a reasonable proportion of the home’s residents at substantially below cost to the extent of the organization’s financial ability; and (3) the services were of the type that minister to the needs and relief of hardship or distress of aged individuals.⁵⁷

Fifteen years later, Rev. Rul. 72-124⁵⁸ reversed that position. It concluded that the aged, without consideration of financial hardship, are a class highly susceptible to “unique forms of distress” because of their need for housing, healthcare, and financial security.⁵⁹ Following this ruling recognizing the aged as a charitable class, several activities for the benefit of the elderly have been recognized as exempt.⁶⁰ That is, the IRS over time came to

⁵⁵See generally Joint Committee on Taxation, “Historical Development and Present Law of the Federal Tax Exemption for Charities and Other Tax-Exempt Organizations,” JCX-29-05, at 132-134 (pts. I, II) (Apr. 19, 2005); Elizabeth C. Kastenbergh and Joseph Chasin, “Elderly Housing,” EO CPE Text for Fiscal 2004 (Jan. 21, 2004); and Hopkins, *supra* note 22, at 181.

⁵⁶1957-2 C.B. 313.

⁵⁷A later ruling clarified that any required entrance fees for obtaining residence and direct personal services had to be included in determining whether the home’s services are rendered to all or to a reasonable proportion of residents below cost. Rev. Rul. 64-231, 1964-2 C.B. 139.

⁵⁸1972-1 C.B. 145.

⁵⁹Colombo has criticized this ruling in particular and the IRS in general for not insisting that services to the aged be provided at “the lowest feasible cost.” See Colombo, “The Next Property Tax Battle: Senior Living Complexes,” Nonprofit Law Prof Blog, Nov. 11, 2013.

⁶⁰As listed in JCX-29-05, *supra* note 55, at 134, they include Rev. Rul. 75-198, 1975-1 C.B. 157 (senior citizen center); Rev. Rul. 75-38, 1975-2 C.B. 205 (rural rest home); Rev. Rul. 76-244, 1976-1

(Footnote continued on next page.)

⁵¹Draft ALI Restatement, *supra* note 14, at section 101, cmt. d.

⁵²1976-1 C.B. 152.

⁵³1974-2 C.B. 162.

⁵⁴The United Kingdom has recognized this kind of charitable accretion in legislation. The U.K. Charities Act of 2011 includes a catchall: “purposes, which can be recognized as charitable by analogy to, or within the spirit of, purposes falling within” 12 listed categories. Charities Act of 2011, ch. 1, section 2.

recognize the aged as a charitable class and organizations that serve that charitable class as tax exempt.

Rev. Rul. 72-124 asserted, "It is now generally recognized that the aged, apart from considerations of financial distress alone, are also, as a class, highly susceptible to other forms of distress in [the] sense that they have special needs because of their advanced years." To support this statement, the revenue ruling cited the Older Americans Act of 1965⁶¹ and the National Housing Act.⁶²

Similarly, Rev. Rul. 78-384,⁶³ which involved environmental organizations, similarly relied on federal legislation. It looked particularly to the National Environmental Policy Act of 1969⁶⁴ to support its conclusion that the activities of the organization seeking exemption serve a broad public interest and thus merit charitable status.

These revenue rulings thus provide a second model for recognizing a new charitable class, one based on public policy.⁶⁵ That approach operates as a mirror image of the public policy doctrine announced in *Bob Jones*.⁶⁶ The Supreme Court in *Bob Jones* identified a fundamental public policy against racial discrimination in schools, as demonstrated by judicial, legislative, and executive action. The Court therefore denied tax exemption to a racially discriminatory school. In this second model for establishing new charitable classes and purposes, evidence that an organization's activities reflect

federal legislation supports a conclusion that the activities accomplish charitable purposes and benefit a charitable class.

These two potential bases for defining new charitable classes discussed above — accretion and fulfilling public policy — do not, of course, exhaust all possibilities. There is an important third category. As Justice Lewis F. Powell Jr. wrote in his *Bob Jones* concurrence, tax exemption plays an important role by "encouraging diverse, indeed often sharply conflicting, activities and viewpoints" and serves as "one indispensable means of limiting the influence of government orthodoxy on important areas of community life."⁶⁷ Limiting exemption under section 501(c)(3) to organizations that reflect public policy or resemble closely established charitable purposes would not serve the important functions of this third category: section 501(c)(3) organizations that challenge traditional categories or public policy. As then-IRS Commissioner Randolph Thrower testified during the controversy regarding exemption for public interest law firms detailed below, "The Internal Revenue Service frequently finds itself at the leading edge of the movement of charity into new and unexplored fields."⁶⁸

Rev. Rul. 75-74,⁶⁹ which recognized a public interest law firm as exempt under section 501(c)(3), exemplifies the third category. A leading history of how this exemption developed unapologetically states, "Public interest litigation extends the benefits of tax exemption to persons not within the classes of traditional objects of charity."⁷⁰ Another study describes the difficulties the IRS faced:

It saw itself on new and unmapped ground. The traditional practice in the field had been conducted by established charities, the NAACP and ACLU, or legal aid societies with purposes and beneficiaries long recognized as charitable — unpopular or disenfranchised minorities. As the Service saw it, these groups were not exempt by virtue of the fact they litigated, but rather by the nature of their

C.B. 155 (meal delivery organizations); Rev. Rul. 77-2, 1977-1 C.B. 120 (broadcasting organizations); Rev. Rul. 77-246, 1977-2 C.B. 190 (transportation providers); and Rev. Rul. 81-61, 1981-1 C.B. 355 (beauty shop).

⁶¹P.L. 89-73.

⁶²P.L. 90-448.

⁶³1978-2 C.B. 174.

⁶⁴42 U.S.C. section 4321 (1969). It also cited the Wilderness Act, the Estuarine Areas Act, the Wild and Scenic Rivers Act, and the Water Bank Act.

⁶⁵In 2006 the United Kingdom legislatively recognized several new charitable purposes. Some of the categories representing recent developments include the advancement of citizenship or community development; the advancement of human rights, conflict resolution, or reconciliation, or the promotion of racial harmony or equality and diversity; the advancement of environmental protection or improvement; the relief of those in need because of youth, age, ill health, disability, financial hardship, or other disadvantage; and the promotion of the efficiency of the armed forces of the Crown, or of the efficiency of the police, fire, and rescue services or ambulance services. See U.K. Charities Act of 2011, ch. 1, section 2. As Marion Fremont-Smith has observed, although the recognition of new listed purposes took legislation in the United Kingdom, those purposes had long been recognized in the United States. Fremont-Smith, *Governing Nonprofit Organizations* 48 (2004). Relying on legislation to establish new charitable purposes and classes seems to be an unnecessary and inefficient approach.

⁶⁶461 U.S. 574.

⁶⁷*Id.* at 609 (Powell, J., concurring).

⁶⁸Tax Exemptions for Charitable Organizations Affecting Poverty Programs: Hearings Before the Subcommittee on Employment, Manpower, and Poverty of the Senate Committee on Labor and Public Welfare, 91st Cong., 2d Sess., at 61 (statement of Thrower), quoted in Oliver A. Houck, "With Charity Toward All: The Qualification of Business-Sponsored Law Firms as Charities Under the Internal Revenue Code," 93 *Yale L.J.* 1415, 1438 (1984).

⁶⁹1975-1 C.B. 80.

⁷⁰A.M. Wiggins Jr. and Bert W. Hunt, "Tax Policy Relating to Environment Activities and Public Interest Litigation," in *IV Research Papers Sponsored by the [Filer] Commission on Private Philanthropy and Public Needs* 2069 (1977).

charitable interest themselves. The newer organizations were being established in order to litigate, and for clients not restricted to recognized minorities. In fact, they often intended to deal with the interests of "diffuse majorities," the popular movements for environmental and consumer protection most prominent among them.⁷¹

Rev. Rul. 75-74 did not grant the public interest law firm exemption on the basis that it served a traditional charitable class. Instead, it recognized that those organizations "provide a service which is of benefit to the community as a whole. They provide legal representation on issues of significant public interest where such representation is not ordinarily provided by traditional law firms."⁷²

However, the recognition of public interest law firms as exempt came only after considerable controversy and "a firestorm of protest" from the public interest bar.⁷³ According to work by A.M. Wiggins Jr. and Bert W. Hunt and by Oliver A. Houck, the IRS in the late 1960s recognized as exempt several organizations engaging in public interest litigation.⁷⁴ In early 1970, however, the IRS announced that it would be studying the subject, and it suspended the issuance of determination letters until completion of the study. Angry congressional press releases, news coverage, and letters to the editors of major newspapers followed.⁷⁵ In October 1970 the IRS issued two news releases explaining that the study was continuing. Shortly thereafter, the Senate Subcommittee on Employment, Manpower, and Poverty announced that it would hold a hearing on the issue in mid-November, and the Senate Committee on Interior and Insular Affairs published a report, "Selected Materials on Tax Exempt Status and Public Interest Litigation." In a press release issued November 12, 1970, the IRS announced that it had developed new guidelines,⁷⁶ and the Senate subcommittee held the

promised hearings on November 16 and 17, 1970. The commissioner testified, as did 36 witnesses opposed to the IRS's position, "ranging from the national Council of Churches of Christ and the Union of American Hebrew Organizations to the United Automobile Workers and a panel of former presidents of the American Bar Association."⁷⁷ One study of this history concluded that although there was general satisfaction with the guidelines as ultimately announced, "there was lingering dissatisfaction with the manner in which the subject had been handled."⁷⁸

Organizations seeking exemption for activities that are more than gradually evolutionary and instead contest the status quo, such as public interest law firms in the 1970s or perhaps open-source software currently, present a particular challenge to an established administrative agency. Organizations that claim benefit to the community as a whole raise especially difficult issues. When the IRS receives many applications for recognition of exemption for nontraditional purposes, special procedures seem appropriate. Those procedures should include public comment and participation. Those who wish to establish new kinds of section 501(c)(3) organizations would be required to articulate why those organizations should be recognized as exempt.

F. Recommendations

The IRS has tied the concept of charitable class closely to private benefit by focusing on organizations that lack a sufficiently broad charitable class rather than articulating criteria for public benefit. It has looked for traditional charitable classes, even though the notion of charitable class is not itself an end but rather a means of ensuring benefit to the community at large. At the same time, the IRS has long recognized as exempt community foundations

⁷¹Houck, *supra* note 68, at 1446-1447 (footnotes omitted).

⁷²Those public interest firms must also abide by a revenue procedure (now Rev. Proc. 92-59, 1992-29 IRB 11) that regulates fees and compensation.

⁷³Fishman, Schwarz, and Mayer, *supra* note 48, at 320.

⁷⁴Wiggins and Hunt, *supra* note 70, at 2070. The history discussed throughout this paragraph relies on their work, and on Houck, *supra* note 68.

⁷⁵Houck, *supra* note 68, at 1445.

⁷⁶IR-1078 (Nov. 12, 1970). The IRS outlined its position in the hearings, but formal guidelines were issued as revenue procedures. See Rev. Proc. 71-39, 1971-2 C.B. 575; and Rev. Proc. 75-13, 1975-1 C.B. 662. Rev. Proc. 71-39 stated:

The engagement of the organization in litigation can reasonably be said to be in representation of a broad public interest rather than a private interest. The litigation is designed to present a position on behalf of the public at

(Footnote continued in next column.)

large on matters of public interest. Typical of such litigation may be class actions in the public interest, suits for injunction against action by government or private interest broadly affecting the public, similar representation before administrative boards and agencies, test suits where the private interest is small, and the like.

The above revenue procedures banned the receipt of fees for services. In Rev. Proc. 92-59, 1992-2 C.B. 411, the IRS changed its position to permit fees for services up to 50 percent of the organization's cost of operations. See Paul Streckfus, "New Ruling to Public Interest Law Firms Recalls Wild History," *Exempt Org. Tax Rev.*, August 1992, p. 403.

⁷⁷Houck, *supra* note 68, at 1446.

⁷⁸Wiggins and Hunt, *supra* note 70, at 2071. The authors also write, "While the IRS indicated at the time of the promulgation of the Guidelines that there would be a study and revision of the section 501(c)(3) regulations to incorporate standards relating to litigation, with the usual procedure of public notice and hearing," there was no amendment of the regulations either at the time of the study or later. *Id.*

that act to benefit the community at large. An IRS study of charitable class would aid it in its challenging duty of regulating an always-changing landscape and determining when to recognize new categories of charitable organizations. This report recommends that the agency begin that task. Several professional organizations, including the ABA Section of Taxation; the ABA Section of Real Property, Trust, and Estate Law; the American College of Trust and Estate Counsel; and the New York State Bar Association would likely aid in any such effort.

III. Disaster Relief

Victims of disasters are appropriate beneficiaries of charity; that is, they can constitute a charitable class. Indeed, regulations on special deduction provisions for contributions of inventory define the need to include “a person who is the victim of a natural disaster (such as fire or flood), a person who is the victim of a civil disaster (such as a civil disturbance), [or] a person who is temporarily not self-sufficient as a result of a sudden and severe personal or family crisis (such as a person who is the victim of a crime of violence).”⁷⁹ The regulations further define care of the needy as “alleviation or satisfaction of an existing need” and specify that “care of the needy must relate to the particular need which causes the person to be needy.”⁸⁰

For disaster relief, who is needy changes as time passes. As professor Robert A. Katz summarizes in vivid language for those of us of a certain age (or with a fondness for TV reruns):

A [disaster relief organization] can . . . rescue both Gilligan and Thurston Howell, III, for example, from a sinking S.S. Minnow without inquiring into their ability to pay. Once on land, the [disaster relief organization] can continue to provide certain in-kind services to both regardless of their financial resources. The most common example of this is counseling in its many varieties. . . . Back on shore, both Thurston Howell and Gilligan can receive free mental health counseling to help them cope with their ordeal. As the calamity recedes, [a disaster relief organization] must increasingly differentiate among disaster victims based on their financial condition — especially with respect to financial assistance. Once victims have the opportunity to purchase the needed supplies, those in decent financial shape can satisfy their basic needs on

their own. Once Thurston Howell can access his assets, he ceases to be an appropriate recipient of a charity's financial assistance.⁸¹

Given the varied scope of disasters and changes over time as to which victims of disasters are needy, disaster relief raises particularly difficult issues regarding charitable class.

For example, a 1992 IRS EO continuing professional education (CPE) text explains that unless a disaster such as a hurricane has imposed harm of mass proportion, organizations created to aid those killed and injured in a single disaster, such as a single firefighting effort, may have difficulty establishing that the organization "is formed for an open-ended class, such as victims of future fires, rather than for the benefit of a particular selected group."⁸² That is, organizations created to help victims of a single fire or other incident generally would not benefit a broad enough class to qualify for exemption under section 501(c)(3).

However, charities have found that stricture difficult to follow. The reaction of the IRS and Congress to the bombing of the federal building in Oklahoma City and other 1995 developments provides important background to the legislative and regulatory changes to issues of disaster relief and charitable class that arose after the 9/11 terrorist attacks.

A. Oklahoma City Bombing

After the April 19, 1995, bombing of the federal building in Oklahoma City caused the deaths of 168 people and injured almost 700 others, Richard L. Hanson, an IRS agent in the office of the district director in Oklahoma City, wrote a letter dated August 28, 1995, to charity officials in that city. The 18-page letter gave guidance on what its author considered long-standing applicable law in providing relief for the disaster, including a discussion of charitable class.⁸³

⁸¹Katz, "A Pig in a Python: How the Charitable Response to September 11 Overwhelmed the Law of Disaster Relief," 36 *Ind. L. Rev.* 251, 268 (2003) (footnotes omitted).

⁸²Carmen Pomares and Jay Rotz, "Emergency Funds and Disaster Relief Organizations (Definite Class Problem)," *EO CPE Technical Program Instruction Textbook for Fiscal 1992* (Oct. 1, 1991).

⁸³Letter from Hanson to Jon H. Trudgeon (Aug. 25, 1995) (Oklahoma City letter). The letter appears as Appendix 2 in BKD LLC, “Oklahoma City Disaster Relief Fund Inc. Forensic Investigation Report” (Mar. 20, 2013) (BKD report). *See also* Korman, *supra* note 40; and Catherine E. Livingston, “Disaster Relief Activities of Charitable Organizations,” *Exempt Org. Tax Rev.* February 2002, p. 153.

⁷⁹Reg. section 1.170A-4A(b)(2)(ii)(D) and (E). Although these provisions fall under the special rules for contributions of inventory, they are used more generally.

⁸⁰*Id.*

It advised that an organization can avoid the problem of “limited class” if its beneficiaries “constitute a traditional charitable class” and are indefinite either “by virtue of their large numbers or by defining the class of beneficiaries in an ‘open-ended manner.’”⁸⁴ The letter also informed its recipients that “a business is not an appropriate charitable beneficiary.”⁸⁵

The Oklahoma City letter further stated that to satisfy the charitable class requirement, there had to be a finding of inadequate resources because “maintaining a person’s standard of living at a level satisfactory to that person rather than at a level to satisfy basic needs would overly serve private interests.”⁸⁶ Although persons who are not poor may be appropriate objects of relief, “an outright transfer of funds based solely on an individual’s involvement in a disaster without regard to meeting that individual’s involvement in a disaster or without regard to meeting that individual’s particular distress or financial needs would result in excessive private benefit,” Hanson wrote.⁸⁷ Moreover, the Oklahoma City letter rejected lump sum benefits: “Lump sum benefits or other similar arrangements not specifically geared toward alleviating the specific distress would not be appropriate.”⁸⁸

Those strictures may have hamstrung the Oklahoma City Disaster Relief Fund Inc. (DRF).⁸⁹ Although the Oklahoma bombing took place more than 20 years ago, as of June 2012, the DRF was estimated to still hold \$10 million of \$14.6 million in contributions “for future needs of the victims.”⁹⁰ A report commissioned in 2013 by the Board of Trustees of the Oklahoma City Community Foundation and undertaken by the accounting firm BKD LLP stated, “Despite this outpouring of generosity and financial support, the public discourse regarding these donations has recently deteriorated in an often very ugly public debate concerning who should now receive the benefit of the funds contributed by others many years ago.”⁹¹ The BKD report concluded that the DRF followed practices and procedures consistent with IRS guidance for disaster relief:

“The DRF framed its practices and procedures that exist today based on the guidance provided by the IRS in August 1995.”⁹² BKD reported that the DRF had been asked to disburse funds in the same manner that funds were disbursed after September 11, 2001,⁹³ an indication that Oklahoma City victims did not realize that the 9/11 rules were special and limited. The BKD report recommended that the DRF seek a private letter ruling to address when future disbursements of funds are permissible. It also recommended establishing and communicating a written policy for committee review of survivor appeals, formalizing a policy for the use and distribution of funds, determining whether some funds could be redirected to the DRF consistently with IRS requirements, and reviewing the educational and mental health needs of remaining children of the victims.⁹⁴

The IRS positions taken in the Oklahoma City letter and their consequences are important because they give context to the similar, initial IRS response to the 9/11 attacks. For Oklahoma City, unlike 9/11, Congress did not intervene to override the IRS and change long-standing positions for a limited class of victims. The reaction by Oklahoma City bombing victims also demonstrates the confusion engendered by Congress’s passing special tax rules for the 9/11 victims.

B. Employer-Sponsored Foundations

Also in 1995, the IRS issued two private letter rulings, LTR 9516047 and LTR 9544023, that allowed employer-sponsored foundations to provide financial relief to employees affected by natural disasters. LTR 9544023 found that a program that helps those who are unable to care for themselves financially as a result of natural disaster aids proper objects of charity by offering relief of the poor and distressed. Because the program at issue was open-ended in that the benefits would be provided to former, current, and future employees, it served a charitable class. Benefits to the employer were deemed incidental. The IRS came to a similar conclusion in LTR 9516047 on the basis of the program’s “established criteria for advertising, application process, requirements of applicants, evidence [of] the fact that [its] purpose is to relieve distress of financially needy individuals in emergency situations.”

The IRS revoked both those rulings in 1999, however.⁹⁵ LTR 199914040 revoked LTR 9516047. It

⁸⁴Oklahoma City letter, *supra* note 83, at 4. As noted earlier, limiting charitable class to those who are “traditional” unnecessarily limits the meaning of charitable.

⁸⁵*Id.* at 12-13.

⁸⁶*Id.*

⁸⁷*Id.*

⁸⁸*Id.*

⁸⁹The Oklahoma City Community Foundation established the DRF to efficiently provide needed aid. BKD report, *supra* note 83.

⁹⁰Susan L. Abbott and Lisa A.H. McChesney, “Creating a Disaster Relief Charity: The One Fund Boston Model,” 25 *Tax’n Exempts* 29 (May/June 2014).

⁹¹BKD report, *supra* note 83, at 1.

⁹²*Id.* at 3.

⁹³*Id.* at 1.

⁹⁴*Id.* at 40.

⁹⁵The position in these 1999 private letter rulings is the same as that taken in Ruth Rivera Huetter and Marvin Friedlander, (Footnote continued on next page.)

cited *Wendy L. Parker*, and concluded that the disaster relief program subsidized the employer and thus served a private interest to an impermissible degree because it provided funds and goods available only because of employment. The ruling explained, "While there is some public benefit in ensuring that individuals are provided for in times of disaster or financial crisis, there is no assurance that selection of beneficiaries solely among employees of a particular employer serves the best interests of the public." LTR 199917077, revoking LTR 9544023, concluded that the disaster relief program provides a job benefit similar to other employee benefit programs' such as sick, life, death, and accident benefits that serve the private interests of the employer rather than satisfy charitable purposes. The repudiation of the 1995 private letter rulings left employer-sponsored private foundations uncertain about whether and how they could aid their employees who were harmed by a disaster.⁹⁶

The events of 9/11 changed the landscape regarding disaster relief for both public charities and private foundations. Those events, including new code provisions, forced the IRS to consider the contours of the charitable class doctrine, at least for disaster relief. As Hill and Mancino write, "With the September 11 organizations, the Service has been forced to grapple with the issue of who are permissible beneficiaries, what is a charitable class, and what is public benefit."⁹⁷

C. Initial IRS Reaction to 9/11

On September 17, 2001, the IRS released an advance text of a publication on disaster relief. The text adopted the legal positions advanced at the time of the Oklahoma City bombing: "Funds cannot be distributed to persons merely because they are victims of a disaster" but "must be based on an objective evaluation of the victims' needs at the time of the grant."⁹⁸ Those positions gained national attention when, at a November 2002 congressional Oversight Subcommittee hearing, Steven Miller, then-director of the IRS Tax-Exempt and Government Entities Division, testified: "A person must be distressed or needy to be an appropriate beneficiary of a charity's assistance. An affected individual is not entitled to charitable funds without a showing of need. The charity's funds cannot be distributed among the victims simply on a

pro-rata basis because that method is not based on meeting individual victims' needs."⁹⁹

This position reiterated that taken in the Oklahoma City letter, but in light of public dismay,¹⁰⁰ the IRS quickly backtracked. On November 16 then-Commissioner Charles O. Rossotti made a brief announcement that "we don't want people who were affected by the terrorist attack distracted by tax issues."¹⁰¹ That statement was released in conjunction with an IRS notice, issued in anticipation of legislation, stating that payments made by a charity to individuals or their families because of the 9/11 attacks would be treated "as related to the charity's exempt purpose provided that the payments are made in good faith using objective standards."¹⁰² Rossotti said that the notice sent a "clear signal" to charities that organizations acting "in a reasonable, good-faith manner to get help to victims will not endanger their tax-exempt status."¹⁰³ Those statements set the stage for congressional action as well as changes in IRS policy toward employer-provided disaster relief.

D. Victims of Terrorism Tax Relief Act

Congress passed the VTTRA on December 20, 2001,¹⁰⁴ and President George W. Bush signed the bill in January 2002.¹⁰⁵ Consistent with the IRS notice, section 104 of the VTTRA provides that effective for payments made on or after September 11, 2001:

1. payments made by an organization described in section 501(c)(3) . . . by reason of the death, injury, wounding, or illness of an individual incurred as a result of the terrorist attacks against the United States on September 11, 2001, or an attack involving anthrax occurring on or after September 11, 2001, and before January 1, 2002, shall be treated as related to the purpose or function constituting the basis for such organization's exemption under section 501 . . . if such payments are made in good

⁹⁹Hearing on Charitable Organizations Providing September 11th Disaster Relief Before Subcommittee on Oversight of the Ways and Means Committee of the United States House of Representatives (Nov. 8, 2001).

¹⁰⁰Fremont-Smith, *supra* note 65, at 93; Lee A. Sheppard, "Was the IRS Reversal on Charity Necessary?" *Tax Notes*, Nov. 26, 2001, p. 1138.

¹⁰¹IRS, "Statement of IRS Commissioner Charles O. Rossotti" (Nov. 16, 2001).

¹⁰²Notice 2001-78, 2001-2 C.B. 576.

¹⁰³*Supra* note 101.

¹⁰⁴For more on the VTTRA, see Ellen P. Aprill and Richard Schmalbeck, "Post-Disaster Legislation: A Series of Unfortunate Events," 56 *Duke L. J.* 51, 67-76 (2006).

¹⁰⁵White House, "President Bush Signs Legislation to Help Victims of Terrorism" (Jan. 23, 2002).

"Disaster Relief and Emergency Hardship Programs," EO CPE Technical Instruction Program for Fiscal 1999, ch. K (Aug. 1998).

⁹⁶See Livingston, *supra* note 83, at 156.

⁹⁷Hill and Mancino, *supra* note 6, at para. 3.02[7].

⁹⁸IRS, "Advanced Text of a Special IRS Publication" (Sept. 17, 2001).

faith using a reasonable and objective formula which is consistently applied; and

2. in the case of “a private foundation . . . any payment described in paragraph (1) shall not be treated as made to a disqualified person for purposes of section 4941.”¹⁰⁶

That is, this legislation applied to victims of the 9/11 terrorist attacks and anthrax attacks, which took place between September 11, 2001, and January 1, 2002 — but only those victims. As the Joint Committee on Taxation explained, the VTTRA relieved charities from the requirement “to make a specific assessment of [need]”¹⁰⁷ before disbursing funds. That legislative history indicated the JCT’s approval of equal division of funds among decedents or division based on surviving dependents.¹⁰⁸

However, the VTTRA did not change the assessment requirement for other disasters. In light of the national tragedy of 9/11, Congress created a special set of tax rules to benefit victims of a single, specific, and extraordinary disaster. The extent to which that standard departed from established charitable law bears emphasis. As Lorie Slutsky, president of the New York Community Trust, the country’s largest community foundation, wrote, victim compensation differs from the goals of charity: “Victim compensation is about monetizing the value of a lost breadwinner and making sure that a family is provided for, while charity seeks to find ways to provide emergency relief and services that help people to move beyond a very painful or traumatic event in their lives to a point where they can start to rebuild their lives.”¹⁰⁹

The VTTRA also added section 139 to the code. That provision excludes from gross income pay-

ments to individuals for personal and family expenses incurred as a result of a qualified disaster. Qualified disasters include those resulting from a terroristic or military action, disasters declared by the president, or those declared by the Treasury secretary.¹¹⁰ Relief payments for qualified disasters eligible for exclusion are amounts “paid by a Federal, State, or local government, or agency or instrumentality thereof,” so long as the expense “is not otherwise compensated for by insurance or otherwise.”¹¹¹

The JCT’s technical explanation of section 139 bears importantly on the contours of the charitable class doctrine. Section 139, a provision excluding amounts from income, is not directly related to qualification for exemption. The JCT, however, treats the statutory language of section 139 as a springboard for a discussion of exemption concerning disaster relief generally.¹¹²

In retrospect, it seems that both the placement of that discussion of general charitable rules and the language chosen have produced confusion. In aiding victims of 9/11 in accordance with section 104 of the VTTRA, charities, as noted above, need not make a specific assessment of need. They must, however, use “a reasonable and objective formula which is consistently applied.”¹¹³ The JCT’s discussion of rules for charities providing disaster relief outside these special 9/11 rules states that the organization must have a class of beneficiaries “sufficiently large or indefinite” and also demonstrate “that it is applying consistent, objective criteria for assessing need.”¹¹⁴ By using language such

tortfeasor. She can obtain compensation regardless of the magnitude of the loss and whether it has left her distressed.

Katz, *supra* note 81, at 271. Korman criticized the VTTRA on this ground, asserting that it created “enormous confusion about the difference between a tort fund and charity.” Korman, *supra* note 40, at 19.

¹¹⁰Section 139(c). When the cross-references in section 139(c) are consulted, qualified disasters include terrorist or military action, or a threat of military action, directed against the United States or its allies; military action involving the Armed Forces of the United States resulting from violence against the United States or its allies; a disaster declared by the president that triggers assistance from the Federal Emergency Management Agency; or a disaster determined by the Treasury secretary. Disasters declared by the secretary have been natural disasters, such as the Ebola outbreak (Notice 2014-65, 2014-47 IRB 842), the Japanese earthquake and tsunami (Notice 2011-32, 2011-18 IRB 737), and the Chilean earthquake (Notice 2010-26, 2010-14 IRB 527).

¹¹¹Section 139(b)(4).

¹¹²I believe a better choice would have been to contrast the special rules applicable for charities in connection with 9/11 with the rules charities otherwise must follow.

¹¹³See JCX-93-01, *supra* note 107, at 11.

¹¹⁴See *id.* at 17.

¹⁰⁶Victoria B. Bjorklund observed, “This relaxed standard for September 11 charitable aid was apparently sought because certain prominent funds had distributed money without investigating the need of those who received the assistance.” Bjorklund, “Reflections on September 11 Legal Developments,” in the Foundation Center, *September 11: Perspectives From the Field of Philanthropy* (2002).

¹⁰⁷JCT, “Technical Explanation of the ‘Victims of Terrorism Tax Relief Act of 2001’ as Passed by the House and the Senate on Dec. 20, 2001 (Comm. Print 2001),” JCX-93-01, at 11 (Dec. 21, 2001).

¹⁰⁸*Id.*

¹⁰⁹Slutsky, “Maximizing America’s Generosity,” in the Foundation Center, *September 11: Perspectives From the Field of Philanthropy* 113-114 (2002). Others have also noted the pressure on organizations in the face of a disaster to move from dispensing charitable relief to acting as a tort fund. As Katz explains:

Compensatory damages in tort law aim to fully indemnify the victim of a legal wrong. The damage award should approximate the difference between victim’s well-being in the pre- and post-tort world, insofar as this loss can be: (1) measured in money (e.g., lost earnings, bodily injury, pain and suffering); and (2) attributed to the

(Footnote continued in next column.)

as “objective” and “consistent” — words similar those used to describe the special 9/11 rules — the JCT obscures the crucial principle that only 9/11 disaster relief charities have an exception from the requirement of individually assessing need. Disaster relief agencies and victims became confused, as criticism of the Oklahoma City DRF demonstrates.¹¹⁵

The JCT discussion under section 139 also addresses disaster relief that is provided to employees by private foundations controlled by their employers. It rejects the 1999 private letter rulings involving employer-sponsored foundations. Instead, it concludes that “an employer-controlled private foundation is not providing an inappropriate benefit and is not disqualified from exemption under section 501(c)(3)” by making payments to company employees who are victims of a qualified disaster as defined under newly enacted section 139.¹¹⁶ The IRS was instructed to reconsider its existing ruling position to ensure that private foundations established and controlled by employers would have guidance permitting them to provide disaster relief to employees.¹¹⁷

E. IRS Response to the VTTRA

The IRS quickly complied. Its 2002 publication, *Disaster Relief: Providing Assistance Through Charitable Organizations* (Publication 3833),¹¹⁸ sets forth standards for disaster relief by public charities and private foundations consistent with the instructions in the JCT’s technical explanation of the VTTRA. Publication 3833 also purports to define charitable class. The significance of this guidance warrants quoting it at length. In its current version, it states:

The group of individuals that may properly receive assistance from a tax-exempt charitable organization is called a “charitable class.”

A charitable class must be large enough or sufficiently indefinite that the community as a whole, rather than a pre-selected group of people, benefits when a charity provides assistance. For example, a charitable class could consist of all the individuals in a city, county or state. This charitable class is large enough that the potential beneficiaries cannot be individually identified and providing benefits to this group would benefit the entire community.

If the group of eligible beneficiaries is limited to a smaller group, such as the employees of a particular employer, the group of persons eligible for assistance must be indefinite. To be considered to benefit an indefinite class, the proposed relief program must be open-ended and include employees affected by a future disaster. Accordingly, if a charity follows a policy of assisting employees who are victims of all disasters, present or future, it would be providing assistance to an indefinite charitable class. If the facts and circumstances [indicate] that a newly established disaster relief program is intended to benefit only victims of a current disaster without any intention to provide for victims of future disasters, the organization would not be considered to be benefiting a charitable class.¹¹⁹

Publication 3833 is also careful to state, “Charities must also maintain appropriate records to show that they have made distributions to individuals after making appropriate needs assessment based on the recipients’ financial resources and their physical, mental, and emotional well-being.”¹²⁰

Even with this guidance, several issues remain. An IRS publication is not a precedential authority. Moreover, Publication 3833 does not make clear the extent to which its discussion of charitable class applies generally and applies only for disaster relief. The possible implications of the statements in the publication reach broadly. Rochelle Korman is concerned that “if ‘public interest’ becomes a metaphor for some hypothesized benefit to an undefinable ‘public,’ then every activity of every organization can satisfy the public interest requirement. Certainly, then, the automakers should be exempt but perhaps the universities should not.”¹²¹

¹¹⁹Publication 3833, *supra* note 2, at 9. The publication also states that disaster assistance may be provided to business to achieve charitable ends. *Id.* at 8. In response to requests from the ABA tax section after 9/11, the IRS deputy associate chief counsel (income tax and accounting) wrote a letter to the then-chair of the ABA tax section saying that some charitable grants to business are excludable from income as gifts (Apr. 15, 2002). For the requests for that guidance, see ABA letter (Oct. 15, 2001) and follow-up letter (Nov. 19, 2001). For further discussion of charitable donations to businesses, see Bjorklund, *supra* note 106, at 23-24.

¹²⁰Publication 3833, *supra* note 2, at 13.

¹²¹Korman, *supra* note 40, at 19-20. Focusing on employer-sponsored private foundations, she continues:

It is true that the employee body of any business is open-ended and indefinite — employees come and go, they retire, get fired, quit, die. However, if Merrill Lynch, Enron, GE, and Halliburton are communities in the charitable class sense, then so is every apartment building (cooperative, condominium or rental), every block association, and every local coffee house (as it wouldn’t be fair

(Footnote continued on next page.)

¹¹⁵See BKD report, *supra* note 83.

¹¹⁶See JCX-93-01, *supra* note 107, at 11.

¹¹⁷*Id.* at 18.

¹¹⁸IRS Publication 3833, *Disaster Relief: Providing Assistance Through Charitable Organizations* (Mar. 13, 2002). For the most recent version of this publication, see *supra* note 2. For the changes introduced to the publication as a result of the VTTRA, see Gitterman and Friedlander, *supra* note 31.

Hill and Mancino express regret that the law of tax exemption “has not effectively addressed the nature and role of beneficiaries or a charitable class for decades.” Moreover, they say, despite the attention paid to these questions in the context of disaster relief, “broader questions relating to a charitable class of beneficiaries have not been addressed.”¹²² This report argues that now is a good time for the IRS to address them.

F. Post-VTTRA Developments

The VTTRA’s special tax rules had consequences, of course. The large amounts of funds expended by 9/11 charities were likely expected, but some of the post-9/11 consequences probably were not. As Katz reminds us, section 104 of the VTTRA “essentially waived” the prohibition against private benefit for organizations engaged in 9/11 relief. “It freed such entities to make payments without regard to actual need,” he said.¹²³ Katz has tracked the results of those special rules. The Twin Towers Fund, he reports, raised at least \$440,640 for each of the 438 uniformed and other official personnel killed at the World Trade Center, and the New York Firefighters 9-11 Disaster Relief Fund raised at least \$418,000 for each of the 347 fire department personnel killed at the World Trade Center.¹²⁴ Katz finds these sums “legally excessive” under common law.¹²⁵ He notes, “Section 104 did not abrogate the state common law prohibition against private benefit; at most, it authorized one class of nonprofit organizations to enrich private interests without forfeiting their federal tax advantages.”¹²⁶ Its impact, as discussed below, has not proved so limited.

In light of the VTTRA and its special rules, the IRS’s *Disaster Relief* publication reminds its readers that “because of the requirement that exempt organizations must serve a charitable class, a tax-exempt disaster organization cannot target and limit its assistance to specific individuals, such as a few persons injured in a particular fire.”¹²⁷ At the same time, the publication states in an example that victims of a single hurricane can constitute a charitable class when more than 100,000 homes are damaged because “the disaster is large enough that providing aid to this group benefits the public as a

whole.”¹²⁸ The publication gives no guidance on when groups larger than a few and less than 100,000 constitute a charitable class.

This unanswered — and perhaps not fully answerable — question continues to plague those who seek to help victims of natural and man-made disasters. Consider the Boston Marathon bombing. On April 15, 2013, bombs set off at the site of the Boston Marathon by Dzhokhar and Tamerlan Tsarnaev killed three civilians and injured more than 250 others.¹²⁹ Within hours, Massachusetts Gov. Deval Patrick and Boston Mayor Thomas Menino created the One Fund Boston. As announced on its webpage, the fund’s stated purpose was “to raise money to help those families most affected by the tragic events” that unfolded during the 2013 Boston Marathon.¹³⁰ To ensure it served a charitable class, however, the One Fund Boston’s articles of organization carefully specified that “the principal activities of the Corporation shall be to assist those affected by the Boston Marathon tragedy of April 15, 2013, or other attacks which may occur in the United States in the future.”¹³¹ That is, at the time of its formation, the organization’s legal purpose was not limited to aiding victims of that one particular disaster, but its solicitations represented otherwise.

Still, the One Fund Boston distributed all of the more than \$80 million it received in donations to the approximately 200 survivors and the families of those most affected. It announced its planned dissolution as a nonprofit in 2015.¹³² It stopped accepting donations and shut down after 22 months of operation.¹³³ To operate quickly, it distributed the first \$60 million to victims “for whatever they most needed, be it prosthetics, accessible housing, job training, time away with families.”¹³⁴ The survivors and families of victims decided how to use the money: “There was no spending criteria.”¹³⁵ For the

¹²⁸*Id.* Katz notes that the publication treats such a group as a charitable class “even if one could name every intended beneficiary at the outset” and, more generally, that the IRS is “vague as to how many persons a disaster must devastate before the victims comprise a charitable class for federal tax purposes.” Katz, *supra* note 81, at 263.

¹²⁹Sarah Schweitzer, “Two Years After Bombings, Marathon Survivors Ready to Run,” *The Boston Globe*, Apr. 15, 2015.

¹³⁰The One Fund Boston, 2013, available at http://b3cdn.net/oneboston/f30adc69fb8ee3302c_j3m6baczi.pdf.

¹³¹The One Fund Boston Articles of Incorporation, Art. II (on file with author) (emphasis added).

¹³²Chelsea Rice, “One Fund Boston Distributed Final Funds to Bombing Survivors,” *Boston.com*, Sept. 2, 2014; Mary Moore, “One Fund Boston Is Winding Down Operations,” *Boston Business Journal*, June 16, 2015.

¹³³Mitchell Weiss, “Lessons From Boston’s Experiment With the One Fund,” *Harvard Business Review*, Jan. 22, 2016.

¹³⁴*Id.*

¹³⁵*Id.*

to permit Starbucks to qualify as a community for charitable purposes but not the local independent café).

Id.

¹²²Hill and Mancino, *supra* note 6, at para. 4.02[1][a].

¹²³Katz, *supra* note 81, at 331.

¹²⁴*Id.* at 244-254.

¹²⁵*Id.* at 254.

¹²⁶*Id.* at 332.

¹²⁷Publication 3833, *supra* note 2, at 10.

remaining \$20 million donated later, the organization used “a more nuanced protocol” to give money “to the survivors and to a small number of organizations that could provide some continuity of care.”¹³⁶

The One Fund Boston worked to avoid running afoul of the charitable class strictures. A recent article in the *Harvard Business Review* by Mitchell Weiss, a former chief of staff to the Boston mayor,¹³⁷ characterizes the response of the fund and the city as “hacking the bureaucracy”:

Four weeks into the One Fund Boston, we hit a snag. Our intentions, to distribute the money to survivors and families on a need-blind basis, ran counter to IRS policies. The agency required an indefinite list of beneficiaries and financial needs-testing distributions. We were at loggerheads. Until we weren't. It turned out that if Mayor Menino would sign an executive order saying that One Fund Boston was performing an essential government function, we could satisfy IRS policy and meet our goals. One Fund was, and he did. It was a little-known workaround (at least to the lawyers and regulators initially involved), but it met everyone's legal requirements.¹³⁸

The One Fund Boston distributed almost \$61 million in 75 days, with the most severely injured victims receiving more than \$2 million each.¹³⁹

As to be expected, the lawyers who advised the One Fund Boston give a more lawyerly explanation. They report that based on Publication 3833, the IRS “had questions about the One Fund's plans to make distributions without financial needs testing.”¹⁴⁰ The lawyers then turned instead to “lessening the burdens of government” as the basis for exemption.¹⁴¹ Their explanation continues:

The One Fund team worked closely with the IRS to overcome these issues and to show that the One Fund instead met the criteria for a 501(c)(3) tax-exempt charitable organization that lessens the burdens of government, focus-

ing on the organization's relationship with the City of Boston and the City's role in approving distributions. “Lessening the burdens of government” is an alternative method of qualifying as a 501(c)(3) organization. As far as we know, this method has not been used before in the disaster relief context. This approach to the formation of a relief organization allowed the One Fund Boston to accomplish its immediate and ongoing goals for distributions.¹⁴²

The articles of the One Fund Boston were amended to specify that its activities would include “lessening the burdens of government of the City of Boston, regarding the Boston Marathon tragedy of April 15, 2013, and related events, and other attacks which may occur in the future.”¹⁴³ These creative and resourceful lawyers do not claim that the One Fund Boston model will work in all circumstances. They suggest that it offers “an alternative to more charitable models when there is significant government involvement.”¹⁴⁴ If that is the case, the IRS, both in Publication 3833 and in some form of precedential guidance, needs to so state in order to help other organizations seeking to avoid individual financial means testing.

Clarification of the lessening the burdens of government standard is especially important because its boundaries are murky at best. The IRS EO CPE text on the standard opens with this language: “The determination of whether an organization's activities lessen the burdens of government is based upon a facts and circumstances test. Open wide and say, ‘Ahh!’”¹⁴⁵ Examples underscore the uncertainty. In connection with the 2016 presidential campaign, the IRS granted exemption under section 501(c)(3) for the Republican convention in Cleveland but not for the Democratic convention in Philadelphia.¹⁴⁶ The IRS has ruled that a tax-exempt foundation could own a Double-A baseball team because the foundation, by taking over construction and operation of the team's stadium, lessened the burden of government.¹⁴⁷

¹³⁶*Id.*

¹³⁷Biography of Mitchell Weiss, senior lecturer of business administration, Harvard Business School, available at <http://www.hbs.edu/faculty/Pages/profile.aspx?facId=183463>.

¹³⁸Weiss, *supra* note 133.

¹³⁹*Id.* In contrast, distributions took years in Columbine, Colorado; 259 days in Aurora, Colorado; and 122 days in Sandy Hook, Connecticut.

¹⁴⁰Abbott and McChesney, “Disaster Relief: The One Fund Boston Model,” 58 *Bos. B.J.* (Spring 2014). See also Joshua Corie Yesnowitz, “The One Fund Boston: Lessons for Leaders,” Boston University Initiative on Cities (Aug. 2014).

¹⁴¹Reg. section 1.501(c)(3)-1(d)(2) includes lessening of the burdens of government as one of the meanings of charitable.

¹⁴²Abbott and McChesney, *supra* note 140.

¹⁴³The One Fund Boston Articles of Amendment (on file with author).

¹⁴⁴*Id.*

¹⁴⁵Robert Louthian and Amy Henchey, “Lessening the Burdens of Government,” EO CPE Text for Fiscal 1993 (Oct. 1, 1992).

¹⁴⁶Claudia Vargas, “Turned Down by the IRS, Philly's DNC Host Committee Goes for Plan B,” *philly.com*, July 17, 2016. The reasons for the different treatment could be many — the amount of money contributed by the city, the use to which contributed funds will be put, and the nature of the fundraising.

¹⁴⁷See Lloyd Hitoshi Mayer and Craig A. Sharon, “New Direction for Team Ownership? The Memphis Redbirds Baseball Foundation,” 16 *ABA Forum on the Entertainment and Sports Industries* (Spring 1998).

The charitable class requirement ensures that a section 501(c)(3) organization benefits the public, at least indirectly, and not just the immediate beneficiaries of its activities. In determining whether an organization lessens the burden of government, however, the IRS does not ask about the extent of public benefit. For the IRS, an activity lessens the burdens of government if it meets two tests. First, there must be a determination of whether a governmental unit considers the activities to be its burden. Second, the activity must in fact lessen the burden.¹⁴⁸ Further, there must be an “objective manifestation by the government that it considers such activity to be part of its burden.”¹⁴⁹ Often a statute provides that objective manifestation. If there is no statute, “the organization must demonstrate that a governmental unit considers the organization to be acting on the government’s behalf, thereby freeing up government assets — human, material, and fiscal — that would otherwise have to be devoted to the particular activity.”¹⁵⁰ According to the IRS, factors that support the objective manifestation include the governmental unit’s inviting the organization to take part in the activity, evidence that the organization acts jointly with the governmental unit, or an illustration that the activity is an integral part of a government unit. Moreover, “any one or more of these objective manifestations illustrates to the IRS that the governmental unit considers the organization to be acting on its behalf to free up resources that would otherwise have been devoted to the activity.”¹⁵¹

The governor of Massachusetts and the mayor of Boston established the One Fund Boston. The mayor appointed two-thirds of its board. The One Fund Boston, by virtue of the mayor’s executive order, had the responsibility to collect and distribute all the funds contributed from the public to aid the victims. The city government approved disbursements.¹⁵² According to the organization’s 2014 Form 990, its final filing, the One Fund Boston’s mission included¹⁵³:

- “providing a single vehicle to receive overwhelming numbers of contribution . . . and thereby avoiding the misdirection of donations to fraudulent organizations or individuals”;
- “providing the infrastructure to coordinate the collection, administration, and distribution of [donated] funds in a manner consistent with

the City of Boston’s interest in assisting the victims of the attacks, financially or otherwise”; and

- acting as a central resource to allow those affected by the attacks to find appropriate, reputable services.

Such close government involvement does not always characterize disaster relief efforts. Yet in many instances, adopting that structure would seem possible.¹⁵⁴

The 2003 EO CPE text offers further guidance on the relevant factors in determining whether an organization’s activities lessen governmental burdens: (1) the interrelationship with a governmental unit, such as the government appointment of its directors; (2) activities previously conducted by the governmental unit; (3) payment by the organization of general or specific expenses of a local government; (4) governmental funding; and (5) whether the activity is one that could be performed directly by the governmental unit without violating applicable law.¹⁵⁵

Importantly, even if an organization that lessens the burden of government is not required to make individualized determinations of need, it does not avoid testing for impermissible private benefit. “An organization which claims to lessen the burdens of government must demonstrate that any private benefit received by individuals or businesses is both qualitatively and quantitatively incidental,”¹⁵⁶ according to the CPE text. Thus, the possibility remains of “legally excessive” awards from organizations exempt on the basis of lessening governmental burdens. How the excessive private benefit differs from individualized need is not immediately clear. Could an organization exempt under section 501(c)(3) act as a tort fund if its basis of exemption is lessening the burdens of government? If so, guidance from the IRS is needed.

Existing guidance regarding section 102 could also complicate exemption on the basis of lessening the burdens of government. One factor in determining whether a charitable activity lessens the burden of government is whether it is an activity the government could undertake directly.¹⁵⁷ That is, if a charity undertakes an activity forbidden to the governmental unit, it is not lessening the burdens of

¹⁴⁸Rev. Rul. 85-2, 1985-1 C.B. 178.

¹⁴⁹*Id.* and Rev. Rul. 85-1, 1985-1 C.B. 177.

¹⁵⁰Louthian and Henchey, *supra* note 145.

¹⁵¹Abbott and McChesney, *supra* note 140.

¹⁵²Telephone call with Abbott and McChesney (Aug. 2, 2016).

¹⁵³One Fund Boston Inc., Schedule O, 2014 Form 990.

¹⁵⁴However, the CPE text on lessening the burdens of government recommends that reviewers “be skeptical of letters from government officials that praise an organization’s activities” and of “arguments that if the organization did not participate, the government would have to perform the activity itself.” Louthian and Henchey, *supra* note 145.

¹⁵⁵*Id.*

¹⁵⁶*Id.*

¹⁵⁷*Id.*

government. Except for payments covered by section 139, however, “governmental grants in response to a disaster (whether to a business or an individual) generally do not qualify as gifts because the government’s intent in making the payments proceeds from a government’s duty to relieve the hardship caused by the disaster. In addition, a government can expect an economic benefit from programs that relieve business or individual hardships.”¹⁵⁸ By making transfers to disaster victims that are gifts under section 102 for purposes of the tax law,¹⁵⁹ charities may be engaged in an activity forbidden to governments.

However, comparison with permissible governmental activities is only one factor among many in determining whether an organization lessens the burdens of government. Still, the question of the legitimacy of a gift from the government raises issues for disaster relief organizations seeking this basis for exemption and underscores the need for guidance.

To date, charitable fundraising for disasters has not generally relied on lessening the burdens of government. Much of the fundraising has undoubtedly been conducted by charities that have followed all the long-standing applicable rules for charitable class and individualized determination of need. That is, many charities providing disaster relief have used open-ended categories, such as all victims in a geographic area or all victims of a particular type of disaster, into the future. They did not and could not identify all specific beneficiaries. They distributed funds based on assessments of need and made clear to donors that funds could be used for more than one disaster. In those cases, no possible charitable class or other legal problems would arise.

In other cases, money may have been raised directly for the families of those harmed as gifts from members of the public, but not as charitable contributions. The pleas used to be frequent on local television and radio. Now they are often found on crowdfunding sites. Crowdfunding options were unavailable at the time of the 9/11 terrorist attacks. The widespread and often extremely successful option of crowdfunding has changed enormously

the dynamics for fundraising, particularly for individuals or groups that evoke sympathy but do not constitute a charitable class. Those wishing to help those victims directly now have an easily available option that permits gifts to be made without limit, often totaling millions of dollars. Donors to funds that do not purport to qualify as a tax-exempt charity need not involve worry about charitable class or assessment of need.

Under the law, these donations, of course, also do not benefit from the charitable contribution deduction. For many donors, eligibility for the charitable contribution deduction does not matter. Only approximately one-third of American taxpayers itemize.¹⁶⁰ Yet in many cases, donors unaware of the applicable law may well be taking the deduction for contributions to funds that are ineligible for the charitable contribution deduction. Moreover, when the charity itself is doing the fundraising on crowdfunding sites, donations from donors who take the standard deduction rather than itemize can nonetheless create problems for the charity’s exempt status if the total amount raised exceeds the needs of victims. In other cases, individuals raising funds on crowdfunding sites may represent themselves as doing so on behalf of a charity, without the charity’s knowledge or approval.¹⁶¹

In yet other cases, when charities sponsor crowdfunding efforts for a group of specific victims, it may be far from clear whether the sponsoring groups are at risk of violating the charitable class rules. Consider the recent horrendous shooting in Orlando, Florida. On June 12 Omar Mateen killed 49 people and injured 53 others at the Pulse nightclub.¹⁶² Equality Florida Action Inc., a section 501(c)(4) organization, along with its sister section 501(c)(3) organization, has established a GoFundMe site for the Pulse victims. These groups are dedicated to securing equality and justice for Florida’s LGBT community.¹⁶³

More than \$7.5 million had been raised as of November 1, with a goal of \$10 million, for the victims of the Pulse shooting. Victims for this purpose include victims’ families, survivors, and “those in the club who may not have suffered

¹⁵⁸Rev. Rul. 2005-46, 2005-2 C.B. 120. The ruling cites *Kroon v. United States*, No. A-90-71 (D. Alaska 1974); and Rev. Rul. 2003-12, 2003-1 C.B. 283.

¹⁵⁹As Rev. Rul. 2006-27, 2006-1 C.B. 915, explains:

Section 102 provides that the value of property acquired by gift is excluded from gross income. . . . A payment made to an individual that responds to the individual’s needs, that is made without economic or other consideration being received by the donor, and that does not proceed from any moral or legal duty is motivated by detached and disinterested generosity, and may be excluded from gross income as a gift under section 102.

¹⁶⁰See Benjamin H. Harris and Daniel Baneman, “Who Itemizes Deductions?” *Tax Notes*, Jan. 17, 2011, p. 345.

¹⁶¹See, e.g., Diaa Hadid, “A World Vision Donor Sponsored a Boy. The Outcome Was a Mystery to Both,” *The New York Times*, Aug. 2, 2016. I thank Gene Tagaki for bringing that example to my attention.

¹⁶²Richard Perez-Pena and Sheryl Stolberg, “Orlando Shooting Survivors Cope With the Trauma of Good Fortune,” *The New York Times*, June 14, 2016.

¹⁶³About Equality Florida, available at <http://www.eqfl.org/about>.

physical injury but are in need of trauma support.”¹⁶⁴ In their Orlando Victims Fund transparency statement, the groups involved state that “distribution of funds to the victims and families of mass casualty crimes, including shooting and terrorist attacks, requires the highest level of transparency, complete accountability, and closely managed stages of distribution.”¹⁶⁵ The statement announces that Equality Florida, the LGBT Community Center of Central Florida, the National Compassion Fund, and the OneOrlando Fund have formed a partnership to ensure attainment of those goals.¹⁶⁶

The transparency statement for the Pulse shooting GoFundMe explains that all donations to the site will take place through Equality Florida Institute Inc., a section 501(c)(3) organization.¹⁶⁷ Equality Florida Institute identifies itself as an educational organization, not an organization dedicated to lessening the burdens of government. In fact, the organization’s webpage states, “Equality Florida Action has always existed in a hostile political environment.”¹⁶⁸

The crowdfunding transparency statement represents that 100 percent of monies raised will go to the families and survivors of the Pulse shooting and that “all contributions are deductible to the full extent of the law.”¹⁶⁹ Nowhere is there any consideration of whether these victims constitute a charitable class, whether the goal of \$10 million might produce a surplus greater than charitable need, or how any surplus would be handled.

The transparency statement for the Pulse shooting site pays particular attention to the National Compassion Fund.¹⁷⁰ That fund is a project of the National Center for Victims of Crime, a section 501(c)(3) organization. With the help of expert panels, it compensates victims according to the injuries they have suffered.¹⁷¹ It was proposed by “victims and families from past mass casualty crimes across the country, including 9/11, Columbine, Virginia Tech, NIU, Aurora, Oak Creek, and New Town” after “they experienced stressful and prolonged

negotiations attempting to collect money donated in their names.”¹⁷² The National Compassion Fund is collecting funds in separate accounts for victims of different mass crimes.¹⁷³ Its webpage does not discuss how those separate funds meet the charitable class requirement or how any excess funds would be directed.

Another of the partners, the OneOrlando Fund, has announced a change from its original plans. OneOrlando is a project of Strengthen Orlando Inc., a section 501(c)(3) organization that the city of Orlando had already set up for the “purpose of supporting and starting a project to strengthen the Orlando community.”¹⁷⁴ The OneOrlando Fund originally had planned to work with and through other charities and nonprofits. However, after criticism from the National Center for Victims of Crime, the OneOrlando Fund announced that the \$7 million it had collected primarily from corporations (that is, not from the GoFundMe campaign) would be given directly to survivors and family members of victims of the Pulse shooting, rather than through other organizations.¹⁷⁵ According to one news report, a group of 100 people who had suffered from other U.S. mass shootings decried the original plans of the OneOrlando Fund to work through other organizations and encouraged donors to give to the GoFundMe campaign established by Equality Florida or the fund set up by the National Compassion Fund.¹⁷⁶ The OneOrlando Fund’s webpage now states that “payments from the OneOrlando Fund are to be apportioned to the victims in accordance with the severity of the injuries.”¹⁷⁷ As of August 17 the OneOrlando Fund had raised an estimated \$23 million and begun accepting claims from the victims and families.¹⁷⁸

Although OneOrlando may well be a project eligible for exemption on the basis of lessening the burdens of government, that does not clearly seem to be the case for its partners. The public statements

¹⁷²*Id.*

¹⁷³*Id.*

¹⁷⁴OneOrlando Fund, FAQs, available at <https://www.oneorlando.org/faq/>. The 2013 Form 990 of Strengthen Orlando gives its specific purpose as supporting the “municipal purpose of the city of Orlando, Florida.” This Form 990 reports net assets of \$633,745.

¹⁷⁵Frances Robles and Timothy Williams, “\$7 Million in Donations to Go Directly to Orlando Kin and Survivors,” *The New York Times*, June 17, 2016.

¹⁷⁶Eleanor Goldberg, “Orlando Fund Giving \$7 Million Directly to Victims After Public Outcry,” *The Huffington Post*, June 22, 2016.

¹⁷⁷OneOrlando Fund, “Process and Transparency, Distribution Protocol,” available at <https://www.oneorlando.org/process-transparency/>.

¹⁷⁸Andy Segedin, “OneOrlando Fund to Disburse \$23M,” *The Nonprofit Times*, Aug. 17, 2016.

¹⁶⁴See <https://www.gofundme.com/pulsevictimsfund>. GoFundMe and other crowdfunding sites, including CrowdRise and Kickstarter, engage in charitable as well as individual campaigns. See Salvador Briggman, “Top Ten Crowdfunding Sites for Charities,” CrowdCrux.

¹⁶⁵Equality Florida Action, Orlando Victims Fund Transparency Statement.

¹⁶⁶*Id.*

¹⁶⁷About Equality Florida, available at <http://www.eqfl.org/about>.

¹⁶⁸*Id.*

¹⁶⁹See <https://www.gofundme.com/pulsevictimsfund>.

¹⁷⁰*Id.*

¹⁷¹National Compassion Fund, FAQs, available at <http://nationalcompassionfund.org/faq/>.

for those funds' activities and the large dollar amounts involved raise difficult questions about how the organizations will comply with the charitable class doctrine, stay true to their fundraising solicitations so as not to violate state law regarding solicitations, and avoid impermissible private benefit under both federal tax law and state nonprofit law.

That is, these internet solicitations do not adopt language and procedures to protect against excess private benefit or the use of funds inconsistent with the language of the solicitations. The Red Cross, after the withering criticism it received in connection with its 9/11 Liberty Fund, revised its written solicitation documents "to underscore its discretion to use Disaster Relief Fund monies to respond to any domestic disaster, rather than just the particular one that may have prompted or preceded the donor's decision to give."¹⁷⁹ Another 9/11 charity, the Families of Freedom Scholarship Fund, which raised \$105 million, provided in its governing instrument for the possibility of broader use of funds raised beyond families of 9/11 victims.¹⁸⁰ Charitable crowdfunding sites need to take similar precautions. IRS guidance would help them to do so.

The efforts to help the victims of the Pulse shooting underscore the need for greater clarity regarding charitable class, lessening the burden of government, and how to communicate charitable efforts on crowdfunding sites. That is, the ability to raise funds through websites has increased the importance of addressing further issues of charitable class for mass shootings and other disasters. Charities aiding the victims of our too-many human-made disasters may be adopting the rules of the VTTRA without realizing that they were special, targeted rules, not new general rules.¹⁸¹ Charities may assume that they are lessening the burdens of government without establishing a close relationship with governmental agencies and officials. Individuals and groups may be claiming to raise funds on behalf of the charity without following its procedures or coordinating with it. The IRS should develop and announce guidance on the relationship

between lessening the burdens of government and disaster relief. Possible misconceptions need correcting.

G. Recommendations

The concept of charitable class is complicated. The nature of charitable purposes and of charitable class changes over time. The appropriate size to qualify as a charitable class is uncertain. Questions regularly arise about when the set of beneficiaries remains so small that the organization is providing impermissible private benefit. Crowdfunding complicates that issue further. Questions about when an organization serves an indefinite set of beneficiaries have been heightened because of congressional directions after 9/11.

More than 15 years have passed since the 9/11 attacks. Ideally, the IRS, given its experience over these years, would undertake a project to clarify in precedential authority what role charitable class plays in tax exemption. A requirement stated in the IRM but not reflected in official guidance fails the test of transparency. Clarity regarding criteria for exemption is especially important after the 2013 crisis involving the IRS's use of inappropriate criteria in reviewing applications for tax exemption by conservative organizations.¹⁸² Moreover, the IRM guidance is incomplete. It considers what constitutes too small a set of beneficiaries, but it does not explain when the set of beneficiaries is large enough to be indefinite or how to address new charitable classes. A thoughtful study of charitable class and of how the IRS uses the concept could protect the agency from accusations of callousness such as those it encountered after 9/11. A broad reexamination and clarification of charitable class, including its complicated relationship to both charitable purpose and private benefit, would represent a large and difficult undertaking. The suggestions above regarding how to identify new charitable purposes attempt to provide a possible starting point.

Even a narrower reconsideration of charitable class may be an effort that the IRS is unprepared to take at this time in light of its limited resources. At the very least, however, the guidance on charitable class for disaster relief that now appears only in the IRS publication should be issued in a form on which taxpayers and their advisers can rely, such as a revenue ruling. That revenue ruling should make clear which of the pronouncements in the publication apply only to disaster relief and which apply more generally. Also, given the experience of the One Fund Boston, the IRS should state how and

¹⁷⁹Katz, *supra* note 81, at 316.

¹⁸⁰Its governing instrument states, "The Board of Directors . . . may redirect any excess assets of the Fund to support other postsecondary education scholarship programs, on the good faith determination of at least two-thirds of the directors that the needs of the [9/11] victims' dependents have been met, or can with reasonable certainty be met with less than all of the assets of the Fund. In any event, any assets remaining in the Fund as of December 31, 2030, may be used to support other postsecondary education scholarship programs." See *id.* at 297.

¹⁸¹See discussion of the Oklahoma City bombing, *supra* Section II.A, and of the California firefighters, *infra* Section IV.A.

¹⁸²See Lily Kahng, "Tea Party Controversy and Administrative Discretion," 99 *Cornell L. Rev.* 41 (2013).

when disaster relief funds can qualify as “lessening the burdens of government” and what that categorization means regarding the determination of need and impermissible private benefit.

IV. First Responders

As discussed earlier, issues involving charitable trusts generally divide into two categories — whether the class of beneficiaries is too small and whether the class is broad enough. Publication 3833 emphasizes the second category: when and whether beneficiaries constitute an indefinite class. The charitable class requirement also means that donors cannot earmark contributions to a charitable organization for a particular individual or family.¹⁸³

Congress has twice in recent years enacted special legislation permitting a small number of individuals to be treated as a charitable class. It first did so for five firefighters who died in a California fire in 2006. It did so a second time for two policemen killed while sitting in their squad car in Brooklyn on December 20, 2014. Whether Congress is asked to take similar action in connection with the recent shootings of Dallas and Baton Rouge police remains to be seen.

Tragic deaths involving first responders take place every year. Of an estimated 900,000 sworn police officers,¹⁸⁴ approximately 123 line-of-duty deaths occurred in 2015.¹⁸⁵ The U.S. Fire Administration estimates that the total number of firefighters in 2014 was 1.13 million and that on-duty firefighter deaths totaled 91 in that year.¹⁸⁶ According to *The New York Times*, 66 enforcement officers had died as of the end of August 2016, with shooting deaths exceeding traffic deaths for the first time. “The number of shooting deaths so far this year is nearly twice as high as over the same period last year,”¹⁸⁷ according to the *Times*. To date, how-

ever, only the two incidents noted above, both of which took place in states with large congressional delegations, have garnered congressional attention.

First responders killed in the line of duty rightly evoke enormous and particular sympathy. They risk their lives in the service of the rest of us. As professor Lloyd Hitoshi Mayer has put it, they “intentionally put themselves in harm’s way in order to serve the larger community.”¹⁸⁸ This year, on the 15th anniversary of 9/11, Americans were reminded of the enormous number of brave first responders killed in those terrorist attacks — almost 400 of the more than 2,700 who lost their lives.¹⁸⁹ If we as a nation believe special treatment of first responders is appropriate, equity and sympathy demand relief for all those victims, not just a few who receive media coverage when the events take place in states with large congressional delegations.

A. Fallen Firefighters Assistance

On October 26, 2007, five firefighters were overrun by the so-called Esperanza fire burning in Riverside County, California.¹⁹⁰ The fire received extensive national coverage.¹⁹¹ At the request of the Riverside board of supervisors, the United Way of Central California established a fund for the firefighters’ survivors.¹⁹² The fund eventually received more than \$1 million in donations.¹⁹³

According to the *Los Angeles Times*, when the fund’s donations reached half a million dollars, a United Way official placed a “cautionary call” to the IRS.¹⁹⁴ The official “was stunned to learn that tax-exempt organizations cannot raise money for a group as small and specific as the families of the firefighters.”¹⁹⁵ The official claimed that “much of his confusion stemmed from the fact that Congress

¹⁸³Publication 3833, *supra* note 2, at 10.

¹⁸⁴National Law Enforcement Officers Memorial Fund, “Law Enforcement Facts.”

¹⁸⁵See also Bill Chappell, “Number of Police Officers Killed by Gunfire Fell 14 Percent in 2015, Study Says,” NPR, Dec. 29, 2015. The Officer Down Memorial Page gives the number for 2015 as 128. The tragic events in Dallas and Baton Rouge are expected to make the 2016 numbers higher than usual.

¹⁸⁶U.S. Fire Administration, “U.S. Fire Statistics.” The National Fire Protection Association, in contrast, gives the number of line-of-duty firefighter fatalities in 2014 as 64. National Fire Protection Association, “Firefighter Fatalities in the United States.”

¹⁸⁷Niraj Chokshi, “Deaths in the Line of Duty: Police Officers Killed This Year, by the Numbers,” *The New York Times*, July 27, 2016 (using figures from the National Law Enforcement Officers Memorial Fund and the Officer Down Memorial Page). See also Jason Hanna and Steven Visser, “Fallen Officers: 37 Shot Dead in the Line of Duty in 2016,” CNN, Aug. 15, 2016 (“shooting deaths of police officers in the United States are on the rise this year”).

¹⁸⁸Email from Mayer (Aug. 3, 2016) (on file with author). Members of the military put themselves in harm’s way on behalf of the public, as well. We as a nation have several special tax provisions already in place for those who lose their lives in combat. Indeed, important parts of the VTTRA were modeled on the provisions applicable to soldiers killed in duty. See Aprill and Schmalbeck, *supra* note 104, at 68-74.

¹⁸⁹“9/11 by the Numbers,” *New York Magazine*, Sept. 2014.

¹⁹⁰U.S. Forest Service and the California Department of Forestry and Fire Protection, “Esperanza Fire, Accident Investigation Factual Report” (Oct. 26, 2006).

¹⁹¹See, e.g., Randal C. Archibold, “Burst of Wind-Driven Flames Engulfed Firefighters,” *The New York Times*, Oct. 28, 2006.

¹⁹²Maeve Reston, “Donations to Firefighters’ Survivors Put at Risk,” *Los Angeles Times*, Dec. 7, 2006.

¹⁹³Jack Siegel, “A Worthy Cause Does Not Justify Stupid Legislation,” *Charity Governance*, Jan. 2, 2007.

¹⁹⁴Reston, *supra* note 192.

¹⁹⁵*Id.* The United Way official acknowledged ignorance about the law. One of the Riverside County supervisors reacted with outrage: “This was a spontaneous effort — there wasn’t time to go to a bunch of tax attorneys and CPAs.” That is, a lawmaker expressed indifference to following the law.

had passed a special law exempting the families of the Sept. 11 terrorist attacks from most of the IRS regulations.”¹⁹⁶ As with the victims of the Oklahoma City bombings, the special 9/11 legislation confused rather than clarified the law regarding disaster relief, despite the clear limitations in the legislation itself and the explanation in the IRS *Disaster Relief* publication.

Unwilling to cure the problem by expanding the class of beneficiaries or returning money to donors, the Riverside board of supervisors turned to the California congressional delegation for special legislation.¹⁹⁷ The delegation succeeded. On December 21, 2006, Congress passed H.R. 6429, the Fallen Firefighters Assistance Tax Clarification Act of 2006.¹⁹⁸ In language echoing the VTTRA, the legislation provided that payments to families of the firefighters who died in the Esperanza fire “shall be treated as related to the purpose or function constituting the basis of [an] organization’s exemption,” as long as “such payments are made in good faith using a reasonable and objective formula which is consistently applied.” This special provision applied “only to payments made on or after October 26, 2006 and before June 1, 2007.”¹⁹⁹

As Jack Siegel wrote on his Charity Governance blog when the law passed, “Congress could have acted far more responsibly by taking a detailed look at the definition of charitable class and its relation to fallen public servants. . . . Rather than dealing with this problem on an ad hoc basis, Congress would serve the tax system by coming up with a comprehensive solution to the issues raised by the United Way of Central California.”²⁰⁰ He also noted, “The United Way of Central California is not the first organization to make a mistake with respect to charitable class and it surely won’t be the last.”²⁰¹ Indeed, Congress enacted a similar targeted fix for a similar mistake in 2015.

B. Slain Officer Family Support

On the afternoon of December 20, 2014, New York City police officers Wenjian Liu and Rafael Ramos were ambushed and killed at point-blank range while sitting in their patrol car in Brooklyn.²⁰²

These shootings followed protests in reaction to a grand jury decision not to bring criminal charges in the case of Eric Garner, who had died after being held in a police chokehold. Based on social media postings, the suspect in the shootings of Liu and Ramos was angered by the Garner and Michael Brown cases.²⁰³

The shooting also came at a time of enormous tension between the New York City police and Mayor Bill de Blasio (D). Dozens of officers turned their backs on the mayor when he entered a news conference after the shootings. The head of the Patrolmen’s Benevolent Association blamed the mayor for the shooting.²⁰⁴ Officers turned their backs on the mayor at Ramos’s funeral²⁰⁵ and again at Liu’s funeral.²⁰⁶

The shooting of the two officers prompted an outpouring of both sympathy and donations from the public. The Daily News Charities, a section 501(c)(3) public charity,²⁰⁷ set up a fund for the two officers, promising that all money raised would go to the officers’ families, and de Blasio urged New Yorkers to donate to the fund.²⁰⁸ As of January 12, 2015, donations to the fund had reached almost half a million dollars.²⁰⁹

A fund to benefit two families suffering as a result of a single incident would not, however, benefit a charitable class. To solve this problem, the New York congressional delegation apparently exercised its clout. Congress passed, and on April 1, 2015, the president signed, the Slain Officer Family Support Act of 2015.²¹⁰ Like the VTTRA and the Fallen Firefighters Assistance Tax Clarification Act, the legislation provided that payments to families of the two officers would “be treated as related to the purpose or function constituting the basis of [an] organization’s exemption,” as long as “such payments are made in good faith using a reasonable

²⁰³Pervaiz Shallwani, “NYPD Shooting Suspect Referenced Garner, Brown Cases,” *The Wall Street Journal*, Dec. 21, 2014.

²⁰⁴Andy Newman, “Updates on Fatal Shooting of Two NYPD Officers,” *The New York Times*, Dec. 20, 2014.

²⁰⁵Matt Flegenheimer, “For de Blasio, Attack Comes Amid Tension Over Police,” *The New York Times*, Dec. 20, 2014.

²⁰⁶Newman, *supra* note 204.

²⁰⁷Daily News Charities information, available at <http://www.guidestar.org/FinDocuments/2014/136/169/2014-136169151-0c04c376-9.pdf>. The Daily News Charities was established in 1938, available at <http://www.guidestar.org/profile/13-6169151>.

²⁰⁸Bill Hutchinson, “Daily News Launches Appeal Fund to Raise Money for Families of NYPD Officers Rafael Ramos and Wenjian Liu,” *New York Daily News*, Dec. 22, 2014.

²⁰⁹Stephen Rex Brown, “Daily News Readers Donate \$384,349 to Families of Slain NYPD Officers Wenjian Liu, Rafael Ramos,” *New York Daily News*, Jan. 5, 2015.

²¹⁰H.R. 1527, *supra* note 4.

¹⁹⁶Reston, *supra* note 192.

¹⁹⁷*Id.*

¹⁹⁸H.R. 6429, *supra* note 3.

¹⁹⁹*Id.* The IRS later issued a legal memorandum (ILM 200722026) concluding that this legislation intended and permitted that donations to the firefighters’ families be deductible, even though the legislation did not directly address deductibility.

²⁰⁰Siegel, *supra* note 193.

²⁰¹*Id.*

²⁰²Benjamin Miller and Al Baker, “Two Officers Fatally Shot in Brooklyn,” *The New York Times*, Dec. 20, 2014.

and objective formula which is consistently applied." This special provision applied "only to payments made on or after December 20, 2014, and on or before October 15, 2015."²¹¹ The legislation also addressed deductibility. It specified that any cash contribution for the benefit of the two officers' families "shall not fail to be treated as a charitable contribution for purposes of section 170 . . . merely because such contribution is for the exclusive benefit of such families."²¹²

Rep. Hakeem S. Jeffries, D-N.Y., authored the bill; Rep. Peter T. King, R-N.Y., cosponsored the bill in the House; and Sen. Charles E. Schumer, D-N.Y., led the effort in the Senate.²¹³ Jeffries said, "The assassination of Detective Ramos and Detective Liu was a national tragedy, and it required a national response."²¹⁴ According to King, "The government has a moral duty to reward those who step forward in times of tragedy."²¹⁵ Schumer announced, "Because NYPD Detectives Wenjian Liu and Rafael Ramos gave their lives in the protection of their fellow citizens, we have a sacred duty to honor their sacrifice and support their suffering families."²¹⁶

Undoubtedly, we as a nation owe much to first responders. As President Obama reminded the country July 17, after the shooting of the Dallas and Baton Rouge officers, "For the second time in two weeks, police officers who put their lives on the line for ours every day were doing their job when they were killed in a cowardly and reprehensible assault. These are attacks on public servants, the rule of law, and on civilized society."²¹⁷ Still, we must ask whether contributions for the two New York detectives and five California firefighters but not other first responders merit special tax treatment. Requirements for disaster relief, such as those forbidding private benefit and requiring an individual assessment of need, are intended to ensure equity among charitable beneficiaries generally. As citizens and taxpayers, we must ask whether we wish to waive those requirements for first responders to ensure that all first responders are treated the same way.

²¹¹*Id.*

²¹²*Id.* at section d. The legislation, like legislation for victims of the Chilean earthquake (Mar. 10, 2010), the 2004 Indian Ocean tsunami (Jan. 6, 2005), and the 2010 Haitian earthquake (Jan. 25, 2010), also allows contribution deductions to be accelerated. In this case, contributions made between January 1 and April 15, 2015, could be treated as if made on December 31, 2014.

²¹³Jeffries press release (Apr. 1, 2015).

²¹⁴*Id.*

²¹⁵*Id.*

²¹⁶*Id.*

²¹⁷White House, Office of the Press Secretary, statement by the president (July 17, 2016).

C. Recommendations

As Siegel wrote a decade ago, Congress should enact a comprehensive solution for gifts to first responders that do not meet the charitable class requirement.²¹⁸ After passage of the Slain Officer Family Support Act, other EO lawyers criticized "the piecemeal approach" and "wondered whether it might be time for Congress to clarify the situation."²¹⁹ Congress has before it the model used in section 104 of the VTTRA, the Fallen Firefighters Assistance Tax Clarification Act, and the Slain Officer Family Support Act. Other thoughtful suggestions require further consideration as well. Alexander Reid has proposed expanding section 139 "to allow public charities to designate some 'all-too-common' fact patterns as qualified disasters as well, such as death in the line of duty, mass shootings, and other events that cause community trauma," and Victoria Bjorklund has suggested enacting legislation to permit deductible contributions to a government agency to help survivors.²²⁰

Each death of a first responder is tragic. However, allowing ongoing private benefit for this one class of beneficiaries in the charitable context runs the risk of undermining a bedrock principle of charitable organizations. It could start us down the famous and feared slippery slope, particularly if we expand the beneficiaries for any such special rules to victims other than first responders, such as victims of mass shootings.

If Congress is unwilling to authorize awards to some victims and their families above individual need, possibilities exist for preventing excess private benefit if resources exceed need.²²¹ One legislative approach to contain this danger would be to limit the dollar amount a particular family or family

²¹⁸Siegel, *supra* note 193.

²¹⁹Fred Stokeld, "Earmarking of Charitable Giving Questioned," *Tax Notes*, Sept. 8, 2015, p. 1215 (quoting Alexander Reid and Bjorklund). I recommend that any legislation include Congress among the groups that can trigger any special tax provisions for first responders. That way, congressional delegations can be involved when first-responder constituents lose their lives.

²²⁰*Id.*

²²¹As Katz explains, under common law, any surplus reverts to a donor through a resulting trust. If, however, the donor's intent can be interpreted as not for a resulting trust to arise, options include (1) redirecting any surplus "to a different but closely related charitable purpose" of the same donee charity; (2) use by the same donee charity for a different and not necessarily related purpose; or (3) enriching intended beneficiaries "in a benevolent but legally non-charitable manner." Katz, *supra* note 81, at 272-273 (citing the Restatement (Second) Trusts). The discussion in the text relies on the options listed by Katz. They assume the organization involved otherwise qualifies as a charity.

member could receive and to require in the legislation that donations above that amount be used for other charitable purposes of the organization.²²² That approach itself carries risks. It would override, or at least attempt to override, many state solicitation laws that require organizations to use funds in accordance with the representations made in their fundraising.²²³

Another complicated possibility would be to give the organization the ability to set up private trusts for these victims, without fear of the loss of exemption. Donors would have the option of making a deductible contribution limited to need and authorizing the charity to transfer excess amounts to a fund that would distribute excess monies to victims as an act of nondeductible benevolence.²²⁴ The organization would need to notify donors of a reduced amount eligible for tax deductions. The charity could also offer to return excess funds to donors.²²⁵ Current technology makes those options more feasible than they were in the recent past.

The administrative burdens of these approaches are considerable. Both options regarding excess funds are complicated and likely to draw strong objections from would-be donors. As the Riverside County supervisor responded to the suggestion that the United Way expand the class of its fund beyond the families of the five firefighters killed in the Esperanza fire, "This money was raised on the premise that these firefighter families would get the money."²²⁶

Also, any comprehensive approach would need to define first responders. Would the charity have a duty to verify the victims' status? If so, what organizations would be able to supply the verification? To what extent would the provisions of section

139 serve as a model for identifying the victims?²²⁷ Would injuries short of death be included?

In short, any congressional attempt to draft special legislation for first responders faces many challenges. However, those difficulties should not prevent Congress from addressing the issue. For example, hearings on the subject, with representatives from many stakeholders — including the IRS, state regulators, police and firefighter organizations, and disaster relief groups, as well as many of those who worked so hard to save lives after 9/11 — would be a helpful first step in developing a legislative solution. Perhaps the recent tragic events in Dallas and Baton Rouge will give Congress an impetus to undertake a thorough consideration of this issue.

V. Conclusion

Establishing charitable purpose and identifying charitable class get to the heart of what tax exemption seeks to achieve. Tax-exempt entities must provide public benefit. Excessive private benefit undermines that requirement, but concern about private benefit can obscure issues of public benefit. As Hill and Mancino caution, the issue of charitable class has not received the attention it needs because "tax law has focused on private benefit, not the presence of public benefit, to a charitable class."²²⁸

This report calls for a reexamination of charitable class in the 21st century. It makes suggestions at two levels. Ideally, the IRS would undertake a thorough and far-ranging study of charitable trusts, including organizations that benefit only a few members of a charitable class, organizations that benefit the public at large, and criteria — perhaps along the lines suggested here — for identifying new charitable classes. Conclusions of that study would form the basis for official guidance. More modestly, the IRS could clarify the reach of the language regarding charitable class in Publication 3833 and release that guidance in a revenue ruling. Guidance is also needed on when disaster relief qualifies for exemption by lessening the burdens of government. That guidance should include a discussion of how the

²²²The Families of Freedom Scholarship Fund for families of 9/11 victims included a provision to that effect in its founding instrument. See *supra* note 180.

²²³As Publication 3833 cautions, "Many state and local authorities that regulate charitable solicitation rules have imposed regulations that provide that, if a charity represents that funds will be used for the relief of the victims of a particular disaster, the funds may not be for other programs of the organization." Publication 3833, *supra* note 2, at 3. As noted earlier, after 9/11, the Red Cross suffered from this misstep. See Katz, *supra* note 81, at 302-319.

²²⁴Korman also makes a suggestion along these lines — that organizations set up section 501(c)(4) organizations for this purpose. Korman, *supra* note 40, at 27-28.

²²⁵How to distribute non-charitable funds raises its own difficult issues. See Justice Department, "Final Report of the Special Master for the September 11th Victim Compensation Fund of 2001," at 52, 97 (2004).

²²⁶Reston, *supra* note 192.

²²⁷Section 139 excludes from income any qualified disaster payment. Qualified disasters are defined in section 139(c) to include "(1) a disaster which results from a terroristic or military action (as defined in section 692(c)(2)), (2) federally declared disaster (as defined by section 165(h)(3)(C)(i)), (3) a disaster which results from an accident involving a common carrier, or from any other event, which is determined by the Secretary to be of a catastrophic nature." See *supra* note 110 for a description that includes an explanation of the cross-references in section 139.

²²⁸Hill and Mancino, *supra* note 6, at para. 3.02[7].

private benefit doctrine, which is so closely related to charitable class, applies to disaster relief.

Ideally, Congress would enact a comprehensive set of statutory provisions, perhaps along the lines suggested here, applicable to first responders before the next highly publicized incident. More modestly, my hope is that Congress holds hearings on the question as soon as possible, especially in light of the recent loss of first responders in Dallas and Baton Rouge.

The world of tax exemption is changing in the 21st century. Crowdfunding sites, for example, make it possible to raise millions of dollars from thousands of people practically overnight. In his comprehensive work on the response to 9/11, Katz argued against any changes to the bedrock principles of charitable law. He urged that the unique circumstances of 9/11 not permanently distort charitable nonprofit law.²²⁹ However, experience with post-9/11 disasters and the availability of new technology, such as crowdfunding, suggest that some adjustments to the bedrock may well be needed. At the very least, the role of charitable class in tax law should be updated. ■

²²⁹"Dissatisfaction with the performance of disaster relief organizations may prompt some to seek deep changes in bedrock charity law principles. To avoid that possibility, perhaps the better course was to let this pig pass through the python, so to speak, such that the legal framework would readily resume its prior shape, and avoid being permanently distorted. In that way, a hard case will not have made bad law." Katz, *supra* note 81, at 332-333.

IN THE WORKS

A look ahead to planned commentary and analysis.

Handling stock rights in reorganizations and other acquisitions (*Tax Notes*)

Jasper L. "Jack" Cummings, Jr., reviews the treatment of stock rights in corporate reorganizations, emphasizing that those rights are, in fact, not stock.

The GAAP in LIFO (*Tax Notes*)

Martin Scheckner discusses whether the United States will adopt the international financial reporting standards, focusing on companies that use the last-in, first-out method of accounting, which is not permitted under IFRS.

Barbarians at the gates: Private state tax enforcement (*State Tax Notes*)

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