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Aprill, Ellen

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IS OPENAI FOUNDATION A PRIVATE FOUNDATION? SHOULD IT BE?

BY

ELLEN P. APRILL

JOHN E. ANDERSON PROFESSOR OF TAX LAW EMERITA
LMU LOYOLA LAW SCHOOL

SENIOR SCHOLAR IN RESIDENCE
LOWELL MILKEN CENTER FOR PHILANTHROPY AND NONPROFITS
UCLA SCHOOL OF LAW

Is OpenAI Foundation a Private Foundation? Should It Be?

Ellen P. Aprill*

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* Senior Scholar in Residence, Lowell Milken Center for Philanthropy and Nonprofits, UCLA School of Law; John E. Anderson Professor of Tax Law Emerita, LMU Loyola Law School. She thanks her colleague Jill Horwitz for suggesting the title.

I. Introduction

OpenAI began its existence as a Delaware nonprofit corporation on December 8, 2015.¹ The IRS, acting on OpenAI's application,² recognized it as exempt under section 501(c)(3) of the Internal Revenue Code some eleven months later, on November 3, 2016.³ As is well known, section 501(c)(3) of the Internal Revenue Code sets forth the requirements for exemption from the income tax for entities "organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes."⁴

In addition, however, section 509 distinguishes two kinds of section 501(c)(3) organizations, public charities and private foundations. "Public charity," although not a term found in the Internal Revenue Code,⁵ is used widely to distinguish such entities from those section 501(c)(3) organizations named in the Internal Revenue Code as private foundations. Public charities, for the most part, engage directly in charitable activities. Private foundations, for the most part, make grants to section 501(c)(3) organization that engage in charitable activities. Funding by a limited number of donors, often an individual, family, or

¹ See Certificate of Incorporation of a Non-Stock Corporation OpenAI, Inc. (filed Dec. 8, 2015), *reprinted in* Temporary Sealing Motion RE: OpenAI Defendants' Motion for Summary Judgment Exhibit 1 at 3, Musk v. Altman, No. 4:24-cv-04722-YGR (C.D. Cal. Oct. 17, 2025), Dkt. No. 328, <https://www.courtlistener.com/docket/69013420/328/5/musk-v-altman/>.

² OpenAI Inc. Application for Exemption (on file with author). Section 508(a) requires organizations seeking exemption under section 501(c)(3) to file an application and receive a favorable determination from the IRS.

³ OpenAI Inc. IRS Determination Letter (Nov. 3, 2016), https://273ventures.com/pdf/FinalLetter_81-0861541_OPENAIINC_09012016_01.pdf.

⁴ Section 501(c)(3) also exempts organizations organized and operated "to foster national or international sports competition . . . or for the prevention of cruelty to children or animals."

⁵ The IRS determination letter does identify the organization as a public charity, however. *See supra* note 3. Schedule A to Form 990, Public Charity Status and Public Support also uses the term "public charity." *See* IRS, 2025 Schedule A (Form 990), <https://www.irs.gov/pub/irs-pdf/f990sa.pdf>. Section 509 operates by setting forth what kinds of section 501(c)(3) entities are not private foundations. Calling these organizations "public charities" is far less awkward than calling them "not private foundations."

corporation, also characterizes private foundations. As discussed in more detail below, private foundations are subject to a variety of provisions that treat them less generously than public charities.

Section 501(c)(3) organizations can avoid private foundation status in a variety of ways. The IRS’s determination letter categorized nonprofit OpenAI as a public charity under a provision, also discussed in more detail below, that requires an organization to receive more than one-third of its total support each taxable year from gifts, grants, contributions, and membership fees (“509(a)(1) public support test”).⁶ When OpenAI determined in 2019 that donations alone could not fund its research and development efforts and formed a for-profit subsidiary under its control,⁷ its tax- exempt categorization did not change.⁸

As part of OpenAI’s long-awaited recapitalization completed in October of 2025, the OpenAI nonprofit was renamed OpenAI Foundation (“OpenAI Foundation”).⁹ Its for-profit subsidiary became a Delaware public benefit corporation, OpenAI Group PBC (“OpenAI PBC”).¹⁰ As a public benefit corporation, it is a for-profit entity that in addition to its

⁶ See OpenAI Inc. 2016 Form 990, Schedule A, retrieved from ProPublica Nonprofit Explorer. Although the details of the section 509(a)(1) public support test are found through a cross-reference to section 170(b)(1)(A)(v8), I will use “section 509(a)(1) support test” as a simpler phrase to identify the category.

⁷ *Our Structure*, OPENAI, <https://openai.com/our-structure/>; see, e.g., OpenAI Inc. 2019, 2020, and 2021 Forms 990, Schedule A, retrieved from ProPublica Nonprofit Explorer. Microsoft became a major investor in one of its for-profit subsidiaries. See *Microsoft Invests in and Partners with OpenAI to Support Us Building Beneficial AGI*, OPENAI (July 22, 2019), <https://openai.com/index/microsoft-invests-in-and-partners-with-openai/>. For description of how OpenAI established control of its subsidiary, see Ellen P. Aprill, Rose Chan Loui & Jill R. Horwitz, *Board Control of a Charity’s Subsidiaries: The Saga of OpenAI*, 182 TAX NOTES FED. 289 (2024).

⁸ See, e.g., OpenAI Inc. 2019, 2020, and 2021 Forms 990, Schedules A, retrieved from ProPublica Nonprofit Explorer.

⁹ See *Our Structure*, OPENAI, <https://openai.com/our-structure/>.

¹⁰ See OpenAI Group PBC, Certificate of Incorporation, <https://www.documentcloud.org/documents/26205026-openai-pbc-articles-of-incorporation/>.

stockholders' pecuniary interest undertakes in its governing document to consider certain listed public benefits.¹¹

In the 2025 recapitalization, OpenAI Foundation received stock in exchange for its interest in the OpenAI for-profit. OpenAI Foundation now holds 26% of OpenAI PBC's equity, valued at approximately \$130 billion at the time of the recapitalization.¹² OpenAI Foundation retains control over OpenAI PBC by virtue of its holding a special class of stock, Class N, that carries the right to appoint all the members of the OpenAI PBC board.¹³

The adoption of "foundation" as part of the nonprofit's name, its announced intention to focus its charitable activities in making grants,¹⁴ and the receipt of valuable OpenAI PBC equity led some commentators to assume that, or at least query whether, OpenAI Foundation had become a private foundation under the Internal Revenue Code.¹⁵ Under current law, such concerns and assertions are misplaced. However misleading inclusion of "foundation" in the name may seem, many public charities do so.¹⁶ As explained in this study, OpenAI Foundation remains a public charity and continuing characterization as such is vital to it.

¹¹ See DEL. CODE ANN. tit. 8, § 362. For further discussion of Delaware public benefit corporations, see *infra* notes 21-23 and accompanying text.

¹² See Brett Taylore, *Built to Benefit Everyone*, OPENAI (Oct. 28, 2025), <https://openai.com/index/built-to-benefit-everyone/>.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ See Mike Scutari, *OpenAI Now Has a Foundation. We Have Some Questions*, INSIDE PHILANTHROPY (Nov. 19, 2025), <https://www.insidephilanthropy.com/home/openai-now-has-a-foundation-we-have-some-questions>; E-mail from Benjamin Soskis to author (Nov. 14, 2025), regarding treatment in an earlier post of OpenAI Foundation's status (on file with author).

¹⁶ One important set of examples consists of community foundations - Silicon Valley Foundation, California Community, Cleveland Foundation, among many others. See JAMES J. FISHMAN, STEPHEN SCHWARZ & LLOYD HITOSHI MAYER, *NONPROFIT ORGANIZATIONS: CASES AND MATERIALS* 720-22 (6th ed. 2021) [hereinafter *Nonprofit Organizations 2021 Textbook*]. A recent example much in the news is the Obama Foundation. See Obama Foundation, 2024 Form 990, Schedule A, https://assets.ctfassets.net/17h59hfnlxjx/5RHRYAsSWERYpf9Wj2et5U/ecaf59d201b5660275da35643871b7b9/B200_The_Barack_Obama_Foundation_Form_990_TR_PD_Copy_TY24.pdf.

Nonetheless, this paper argues that the example of OpenAI Foundation demonstrates the need to reconsider some of the rules distinguishing private foundations from public charities. Details as to how Elon Musk structured his donations to OpenAI that emerged in his ultimately unsuccessful suit against it raise additional questions about the use of donor-advised funds (“DAFs”) to enable section 501(c)(3) organizations to achieve public charity status and to satisfy the minimum distribution requirement for private foundations.

To give background, Part II describes briefly the private foundation regime as well as relevant history of OpenAI. Part III explains in detail how OpenAI Foundation qualifies as a public charity. Part IV examines the potential impact of developments since the adoption of the 509(a)(1) public support test that bear on its usefulness today. To make clear the impact of characterization as a private foundation, Part V lays out the consequences for OpenAI Foundation of the various private foundation excise taxes if it is treated as a private foundation. Part VI concludes by offering recommendations regarding the requirements for both private foundations and public charities based on this examination.

As appropriate, this analysis will also consider applicable state nonprofit laws that interact with the tax rules. The conclusion of this study underscores the need to address loopholes that many others have identified regarding donations from DAFs. It also recommends further study of possible changes to the definition of private foundation and the requirements for public charities as to the extent of their charitable activities.

II. Background

a. OpenAI History

When OpenAI began its existence in 2015 as a Delaware nonprofit corporation, its Certificate of Incorporation stated, “[t]he specific purpose of this corporation is to provide funding for research, development and distribution of technology related to artificial intelligence. The resulting technology will benefit the public and the corporation will seek to open source technology for the public benefit when applicable.”¹⁷

After creating its for-profit subsidiary in 2019,¹⁸ OpenAI Foundation amended its Certificate of Incorporation in 2020 to revise its purpose. There it obligates itself to undertake to “research and/or otherwise support efforts to safely develop and distribute such technology and its associated benefits, including analyzing the societal impacts of the technology and supporting related educational, economic, and safety policy research and initiatives.”¹⁹ “Open source technology for the public benefit” no longer appears.

As part of its October 2025 recapitalization, OpenAI changed the name of its nonprofit to OpenAI Foundation. Its for-profit subsidiary became a Delaware public benefit corporation, OpenAI PBC,²⁰ a for-profit corporation that also undertakes specified public benefits. Delaware defines such public benefits broadly: “a positive effect (or reduction of negative effects) on 1 or more categories of persons, entities, communities or interests (other

¹⁷ OpenAI 2015 Certificate of Incorporation, *supra* note 1.

¹⁸ See *supra* note 7 and accompanying text.

¹⁹ Amended and Restated Certificate of Incorporation of OpenAI, Inc. A Nonprofit Non-Stock Corporation (filed Apr. 23, 2020), *reprinted in* Temporary Sealing Motion RE: OpenAI Defendants’ Motion for Summary Judgment Exhibit 1 at 5, Musk v. Altman, No. 4:24-cv-04722-YGR (C.D. Cal. Oct. 17, 2025), Dkt. No. 328, <https://www.courtlistener.com/docket/69013420/328/5/musk-v-altman/>.

²⁰ See *supra* note 10 and accompanying text.

than stockholders in their capacities as stockholders) including, but not limited to, effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific or technological nature.”²¹

According to its Certificate of Incorporation,²² OpenAI PBC undertakes to promote the following public benefit:

[E]nsure that artificial general intelligence benefits all of humanity, including by conducting and/or funding artificial intelligence research (the "Mission"). The Corporation may also research and/or otherwise support efforts to safely develop and distribute such technology and its associated benefits, including analyzing the societal impacts of the technology and supporting related educational, economic, and safety policy research and initiatives. The resulting technology will benefit the public and the Corporation will seek to distribute it for the public benefit when applicable.

The OpenAI PBC Certificate of Incorporation also requires its Board of Directors to “solely consider the Mission (and may not consider the pecuniary interests of stockholders or any other interest) in respect of safety and security issues related to the OpenAI enterprise.”²³

Prior to adoption of the October 2025 recapitalization plan, OpenAI had floated the possibility of recapitalization in which the nonprofit would cede control over its for-profit

²¹ See DEL. CODE ANN., tit. 8, § 362(b).

²² OpenAI PBC, Certificate of Incorporation, *supra* note 10, art. III Public Benefit. These categories resemble those in section 501(c)(3), but they differ in important ways. They look to impact, not purpose. They lack the full panoply of requirements found in section 501(c)(3), such as the prohibition of campaign intervention. Most importantly, as for-profit entities, public benefit corporations are designed to benefit their stockholders, which section 501(c)(3) forbids.

²³ *Id.*

subsidiary.²⁴ It abandoned this plan “after hearing from civic leaders and engaging in constructive dialogue with the offices of the Attorney General of Delaware and the Attorney General of California.”²⁵

The Attorney General of California and the Attorney General of Delaware engaged in this constructive dialogue to fulfill their duty to protect charitable assets.²⁶ As the American Law Institute, Restatement of the Law of Charitable Nonprofit Organizations states, the state attorney general “has the authority to protect charitable assets and interests within the jurisdiction of the state and to see judicial relief to protect the public’s interest in those assets and interests.”²⁷ Further, as the California Attorney General’s Guide for Charities explains, assets of nonprofit charitable organizations are “irrevocably dedicated to charitable purposes.”²⁸ Note well that these assets are devoted to the charitable purposes, not the charitable entity. In this regard, nonprofit entities differ from for-profit ones, where duties run to the corporation and its shareholders.²⁹ To preserve the availability of dedicated charitable assets, “[a] charity must receive fair market value for a sale, conversion of status, or other

²⁴ See Krystal Hu, Arsheeya Bajwa, Aditya Soni & Anna Tong, *OpenAI Dials Back Conversion Plan, Nonprofit to Retain Control*, REUTERS (May 6, 2025), <https://www.reuters.com/business/openai-remain-under-non-profit-control-change-restructuring-plans-2025-05-05/>.

²⁵ OpenAI, *Evolving OpenAI’s Structure* (May 5, 2025), <https://openai.com/index/evolving-our-structure/>.

²⁶ See Del. Att’y Gen., *Consumer Protection Unit*, <https://attorneygeneral.delaware.gov/fraud/cpu/>; CAL.GOV’T CODE §§ 12580, 1258a, 12588, and 12598(a).

²⁷ RESTATEMENT OF CHARITABLE NONPROFIT ORGS. § 5.01(a) (A.L.I. 2021), (The Role of the State Attorney General).

²⁸ CAL. DEP’T OF JUST., ATTORNEY GENERAL’S GUIDE FOR CHARITIES 17 (2024), <https://www.oag.ca.gov/system/files/media/Guide%20for%20Charities.pdf>.

²⁹ See *Duty of Loyalty*, LEGAL INFO. INST., CORN. L. SCH., https://www.law.cornell.edu/wex/duty_of_loyalty. Cf. RESTATEMENT OF CHARITABLE NONPROFIT ORGS. § 202(a) (fiduciary duty runs to “the best interests of the charity in light of its purposes”).

transfer of all or substantially all its assets to an entity that is not a charity. . . .”³⁰ In the case of OpenAI, those assets included control of the for-profit subsidiary.

Both Attorneys General accepted OpenAI’s October 2025 recapitalization plan.³¹ Their approvals emphasized that the Class N gave the OpenAI Foundation continued control of OpenAI PBC through the right to appoint the Board of OpenAI PBC so long as OpenAI Foundation owns any shares of the Class N stock.³² Both Attorneys General also required that the Safety and Security Committee of the nonprofit, not the for-profit, be given by contract “an effective approval right . . . over PBC actions relating to safety and security.”³³

The value of OpenAI PBC has increased since its recapitalization in October of 2025. Investments from SoftBank, Microsoft, and Nvidia in early 2026 now support a value of as much as \$852 billion.³⁴ Its planned IPO is likely to send its value even higher. Any increase in the value of OpenAI’s PBC will, of course, increase the value of OpenAI Foundation’s holdings.³⁵

³⁰ RESTATEMENT OF CHARITABLE NONPROFIT ORGS. § 2.02(a) (Duty of Loyalty).

³¹ See Rob Bonta, California Attorney General, Memorandum of Understanding re Notice of Conditions of Non-Objection Conditions of Non-Objection (Oct. 27, 2025) (“California MOU”), <https://oag.ca.gov/system/files/attachments/press-docs/Final%20Executed%20MOU%20Between%20OpenAI%20and%20California%20AG%20re%20Notice%20of%20Conditions%20of%20Non-Objection%20%2810.27.2025%29%20%28Signed%20by%20OpenAI%29%20%28Signed%20by%20CA%20DOJ%29.pdf>; Delaware Attorney General Statement of No Objections to OpenAI Inc.’s Corporate Restructuring (Oct. 28, 2025) (“Delaware No Objection Statement”), <https://news.delaware.gov/files/2025/10/2025-10-28-OpenAI-DEAG-Statement-of-Nonobjection.pdf>.

³² *Id.*

³³ *Id.* Whether OpenAI Foundation guided OpenAI PBC in connection with its decision to accept the safety conditions required in its agreement with the Department of Defense, however, is unknown. See OpenAI, *Our Agreement with the Department of War* (Mar. 2, 2026), <https://openai.com/index/our-agreement-with-the-department-of-war/>.

³⁴ Sofia Lindstrom, *OpenAI Files for IPO: \$850B Tag; \$25B Revenue (2026)*, TECH INSIDER (June 11, 2026), <https://tech-insider.org/openai-ipo-850-billion-valuation-2026/>.

³⁵ *Id.*

b. The Private Foundation Regime

Private foundations are treated less favorably than public charities in a number of ways. Income tax deductions to them are more limited than deductions to public charities. The income tax deduction for gifts of cash to private foundations is limited to 30% of adjusted gross income,³⁶ as compared to 60% for public charities.³⁷ Gifts of long-term capital gain property to private foundations face an adjusted gross income limit of 20%,³⁸ compared to a 30% of adjusted gross income for such gifts to public charities.³⁹ Moreover, only gifts of publicly traded stock to private foundations receive a full fair market value deduction for income tax purposes; the income tax deduction to private foundations for gifts of privately traded stocks is limited to basis.⁴⁰ No such deduction limit for privately-traded stock applies for donations to public charities.

Moreover, private foundations are subject to a series of two-tier excise taxes so onerous that they operate as regulatory requirements and prohibitions. Of particular relevance here, these excise taxes include an annual distribution requirement equal to 5% of the average fair market value of their investment assets and a limit on investments in for-profit businesses.⁴¹

The Tax Reform Act of 1969 (“1969 Tax Reform Act”) established the regime by defining the term “private foundation” and regulating private foundations through a series of

³⁶ I.R.C. § 170(b)(1)(B).

³⁷ § 170(b)(1)(A), § 170(b)(1)(G).

³⁸ § 170(b)(1)(B).

³⁹ § 170(b)(1)(C),

⁴⁰ § 170(e)(5)(B).

⁴¹ See *infra* Part IV for discussion of these and the other private foundation excise taxes.

two-tiered excise taxes. The legislation represented the culmination of a series of hearings beginning in 1962 sharply critical of private foundations led by Congressman Wright Patman of Texas.⁴² As a leading nonprofit textbook (“Nonprofit Organizations 2021 Textbook”) explains, “although supported more by anecdotal evidence than thoughtful empirical analysis,” the legislation adopted reflected Congress’s belief “that private foundations were more susceptible to abuse than public charities;”⁴³ as a result, “the anti-foundation forces prevailed.”⁴⁴

The 1969 Tax Reform Act defined the term “private foundation” for the first time.⁴⁵ It did so by specifying what kind of section 501(c)(3) organizations are not deemed private foundations. It does so in several ways.⁴⁶ The one applicable to OpenAI Foundation, as noted earlier, is the section 509(a)(1) public support test. Section 509(a)(1) from its inception to today excluded from characterization as a private foundation a section 501(c)(3) “described in section 170(b)(1)(A) (other than in clauses (vii) and (viii)).”

⁴² See Joint Committee on Taxation, Historical Development and Present Law of the Federal Tax-Exemption for Charities and Other Tax-Exempt Organizations 10 (2005), <https://www.jct.gov/getattachment/91d1c71d-866b-4423-84a7-0f1ec352edf8/x-29-05-1586.pdf>.

⁴³ Nonprofit Organizations 2021 Textbook, *supra* note 16, at 707.

⁴⁴ *Id.* at 719.

⁴⁵ Joint Committee on Internal Revenue Taxation, General Explanation of the Tax Reform Act of 1969 57 (1970) (“a term not found in prior law”), <https://www.jct.gov/publications/1970/jcs-16-70/>.

⁴⁶ These tests, in addition to the section 501(a)(1) public support test discussed in detail *infra*, are as follows: Traditional charities (churches and conventions or associations of churches, certain educational organizations, hospitals and medical research organizations, support organizations for state colleges and universities, and governmental units are *per se* public charities. I.R.C. § 509(a)(1), cross-referencing to § 170(b)(1)(A)(i)-(v). Organizations that demonstrate public support when gross receipts from exempt functions and membership fees are considered also qualify. § 509(a)(2). Organizations that demonstrate public support through their relationship with other kinds of public charities (known as supporting organizations) also are public charities. § 509(a)(3). Importantly, section 501(c)(3) organizations that cannot meet the one-third test of the 509(a)(1) public support test can look to a facts and circumstances test that, in addition to at least 10% public support, takes into account such factors as the amount and sources of support, presence of a representative governing body, and availability of public facilities or services or public participation. See Treas. Reg. § 1.170A-9(f)(3). I question whether 10% of public support satisfies the section 170(b)(1)(A)(vi) requirement of “substantial” public support.

Section 170(b)(1)(A)(vi), which also dates back to the Tax Reform Act of 1969, is the provision under which the OpenAI Foundation, like many section 501(c)(3) organizations, qualifies as a public charity.⁴⁷ It reads, in part, to an organization that “normally receives a substantial part of its support,” other than income received in performance of its exempt function, “from a government unit . . . or from direct or indirect contributions from the general public.”⁴⁸

Neither section 170 nor section 509(a)(1) defines “substantial part” for purposes of the 509(a)(1) public support test. Section 509 does include other definitions applicable in general to the provisions distinguishing private foundations from public charities. Section 509(d) defines “support” broadly, including “gifts, grants, contributions, or membership fees” and “gross investment income.”⁴⁹ Section 509(e) defines “gross investment” to mean “the gross amount of income from interest dividends, payments with respect to securities loans . . . , rents and royalties.” Importantly, flush language at the end of section 509(d) states that the term “support” excludes “any gain from the sale or other disposition of property which would be considered as gain from the sale or exchange of a capital asset.”

⁴⁷ Nonprofit Organizations 2021 Textbook, *supra* note 16, at 750, observes, “Most organizations that avoid private foundation status come within the exception provide by § 509(a)(1) for traditional and publicly supported charities described in § 170(b)(1)(A)(i) through (vi).” Again, I use the term “509(a)(1) public support test” to identify this method of avoiding private foundation status because it is simpler than “the 170(b)(1)(A)(vi) test.”

⁴⁸ I.R.C. § 170(b)(1)(A)(vi).

⁴⁹ Section 509(d) states that it defines support “for purposes of this part and Chapter 42.” The latter is the chapter of the IRC regarding excise taxes on private foundations and other tax-exempt organizations. I.R.C. § 509(d)(1). The full list of items of support specified in section 509(d) also includes (1) gross receipts from admissions, sales of merchandise, performance of services or furnishing of facilities for an activity that is not an unrelated business, (2) net income from unrelated business activities, (3) tax revenues levied for the benefit of the organization, and (4) the value of services or facilities furnished by a governmental until without charge. *Id.*

Regulations detail how organizations calculate the 509(a)(1) public support test. The next section turns to them.

III. Details of the 509(a)(1) Public Support Test

Both Treasury regulation section 1.170A-9(f) and section 1.509(a)-3 expand and elaborate on the 509(a)(1) public support test.⁵⁰ From the adoption of these regulations in 1973 to today, satisfaction of this test requires, over a specified testing period, that public support be at least one third of total support. That is, the 501(a)(1) public support test requires calculation of a fraction that, as explained further below, has public support as the numerator and total support as the denominator.⁵¹

These regulations chose one-third as the required percentage of public support, without explicit statutory guidance. The statute requires only an undefined “substantial part of its support.”⁵² Regulations promulgated in the 1970’s, such as this one,⁵³ do not disclose the kind of detailed explanations we see today in notices of proposed regulations or preambles of final regulations for the decisions made.⁵⁴

⁵⁰ These two sets of regulations are largely the same, with some differences as to the rules for unusual grants. *See infra* note 59 for a description of unusual grants. It is more common to cite the regulations under section 170. *See. e.g.*, Nonprofit Organization 2021 Textbook, *supra* note 17, at 750 and ff. I will do so here.

⁵¹ I note again that the regulations also include a “facts and circumstances” test for organizations that fail to meet the one-third requirement but evidence other indicia of public support – a percentage at least 10%, activities that will attract public support, and presence of a representative governing body. Treas. Reg. § 1.170A-9(f)(3).

⁵² I.R.C. § 170(b)(1)(A)(vi).

⁵³ T.D. 7242, 38 F.R. 12 (Jan. 3, 1973).

⁵⁴ *See* Ellen P. Aprill, *Administrative Law Meets Section 501(c)(3) Charitable Purpose*, 72 TAX LAW. 213 (2023).

Statutory language for a slightly different test, section 509(a)(2), may well be the basis for the one-third requirement. Section 509(a)(2) was designed for section 501(c)(3) organizations that receive considerable support not only from gifts, grants and contributions, but also income from exempt function income, such as membership dues and fees from the services or goods that advance exempt purpose.⁵⁵ Such organizations include “symphony societies, garden clubs, alumni associations, Boy Scouts, Parent-Teacher Associations and many other membership organizations.”⁵⁶

To qualify as a public charity under section 509(a)(2), such public support must be more than one-third of total support, with exempt function income included in both the numerator and the denominator.⁵⁷ In promulgating Treasury regulation section 1.170A-9(f) for the 509(a)(1) public support test, the Department of the Treasury (“Treasury”) and the Internal Revenue Service (“IRS”) may well have followed this statutory lead of setting one-third as the meaning of substantial for purposes of the 509(a)(1) public support test.⁵⁸

⁵⁵ See § 509(a)(2)(A).

⁵⁶ S. Rep. No. 552, 91st Cong., 1st Sess. 461 (1969).

⁵⁷ I.R.C. § 509(a)(2)(A). The statute imposes limits on the amount of public support included the numerator to the greater of \$5,000 or 1% of the organization’s support for the year. The test also excludes for purposes of public support in the numerator amounts from certain insiders of the organization. § 509(a)(2)(A) (flush language). Insiders under the private foundation regime are called “disqualified persons” (“DQPs”). As defined in section 4946, they include substantial contributors. The creator of a charitable trust is always a substantial contributor, as are those who have given or bequeathed an aggregate amount of more than \$5K, if that is more than 2% of total contribution from inception to the end of the tax year in which the gift or bequest is received. The term also includes a foundation manager. Foundation managers include officers, directors, trustees, or other individuals having similar powers or responsibilities. Also included are owners of substantial contributors and persons owning more than 20% of entities that are substantial contributors; family members (spouses, ancestors, children, grandchildren, great grandchildren and spouses of children, grandchildren, and great grandchildren) and entities if more 35% of its control is owned by substantial contributors, more than 20% owners of substantial contributions, foundation managers, and family members of the foregoing. Further, the section 509(a)(2) test also imposes certain requirements as to investment income. See § 509(a)(2)(B).

⁵⁸ I think that is the path I would have followed during my years in the late 1980s serving in the Office of Tax Policy at Treasury helping to draft regulations.

For purposes of the total support denominator of the 509(a)(1) public support test, the regulations take out of the calculation an item section 509(d) lists in the definition of support, one important to the section 509(a)(2) test – all income from performance of its exempt function.⁵⁹ Again, we do not have any statement as to why, but it seems likely to me that this move was taken because the test of section 509(a)(2) was enacted specifically to take account of exempt function income.

For the 509(a)(1) public support test, the numerator of the public support fraction consists of “support from a governmental unit or from direct or indirect contributions from the general public.”⁶⁰ These items of public support are subject to an important limitation, designed to ensure substantial public support by ensuring that more than just a few persons donate to the entity. “Contributions by an individual, trust, or corporation” are taken into account as good support only to the extent such contributions do not “exceed two percent of the organization’s total support” during the testing period.⁶¹ All contributions from certain members of a donor’s family are aggregated for purposes of this two percent test.⁶²

Contributions from governmental entities and organizations that qualify as public charities

⁵⁹ Treas. Reg. § 170A-9(f)(7). The regulations for the 509(a)(1) public support test also exclude from the calculation – both for the numerator and denominator – unusual grants. Treas. Reg. § 1.170A-9(f)(6)(ii). Unusual grants are, in general, unexpected gifts that could suddenly throw a section 501(c)(3) into private foundation status. *Id.* Although not an issue here, this safety valve can be crucial in the kinds of situations the category anticipates. MacKenzie Scott’s as well as Travis Kelce’s and Taylor Swift’s gifts at the time of their wedding appear to be such unusual grants. See Tom Huddleston Jr., *MacKenzie Scott Announced Another \$7.1 Billion in 2025 Charitable Donations—She’s Now Given Away 26.3 Billion Since 2019*, CNBC: MAKE IT (Dec. 13, 2025), <https://www.cnbc.com/2025/12/13/mackenzie-scott-revealed-her-total-charitable-donations-for-2025.html>; Chris Willman, *Taylor Swift and Travis Kelce Donated \$26 Million to Charities Ahead of Wedding*, VARIETY (July 2, 2026), <https://variety.com/2026/music/news/taylor-swift-travis-kelce-donate-26-million-charity-wedding-1236800905/>.

⁶⁰ Treas. Reg. § 1.170A-9(f)(1).

⁶¹ Treas. Reg. § 1.170A-9(f)(6)(i). I note that the statutory provisions do not direct any such limit.

⁶² *Id.* Gifts limited to 2% in the numerator are included in full in the denominator. Thus, the 2% limits makes it harder for an organization to satisfy the one-third requirement.

under the section 509(a)(1) public support test are not subject to the two percent limitation.⁶³
(Both categories of contributions are included in full in the denominator.)

These rules were established in the 1969 Tax Reform Act and regulations promulgated in the early 1970's. They are over 50 years old.⁶⁴ Since then, the nonprofit landscape has changed in significant ways that bear upon these rules, as discussed in the next section.

IV. Developments Since the 1969 Tax Reform Act

Developments since the Tax Reform Act of 1969 call for reconsideration of both the numerator and the denominator of the 509(a)(1) public support test. The older of these developments, modern portfolio theory, affects the denominator of the 509(a)(1) public support test while the recent expansion of DAFs goes to the numerator. These developments suggest reconsideration of this test in ways that could affect qualification of OpenAI Foundation and other section 501(c)(3) entities as public charities.

a. Impact on the Denominator of the 509(a)(1) Public Support Test

Understanding the denominator of the 509(a)(1) support test requires consideration of section 509, section 170(b)(1)(A)(vi), and the section 170 regulations. As noted above, section 509(a)(1) cross references to section 170(b)(1)(A)(vi). The latter sets forth

⁶³ Treas. Reg. § 1.170(a)(9)(f)(6)(v). Note only this category of public charities escapes the 2% limit. Not even section 509(a)(1) traditional charities are free of the 2% limit. I speculate that this distinction looks to the fact that traditional charities, such as a school, may have a single funder or small group of funders. Permitting unlimited donations from them would undermine the purpose of ensuring that public charities are broadly supported. As noted above, *see infra* notes 100-101 and accompanying text, a similar issue arises with gifts from DAF Sponsors.

⁶⁴ *See Symposium Issue: The 1969 Tax Reform Act and Charities: 50 Years Later* (2020), <https://taxreview.law.pitt.edu/ojs/taxreview/article/view/116>.

requirements regarding “support” received by “an organization referred to in subsection 170(c)(2).” The language of section 170(c)(2) repeats the language of section 501(c)(3) with one exception. It does not include among organizations eligible for the charitable deduction “testing for public safety.” Treas. Reg. section 1.170A-9(f)(7)(i) specifies that support is to be as defined in section 509(d)(2), except for exempt function income. As noted above, “support” under 509(a)(2) includes “gross investment income,” except for capital gains. Section 509(e) further explains that gross investment income includes interest and dividends, among other items.

At the time of the enactment of these statutory provisions and regulations, interest and dividends undoubtedly were a key source of revenue for many section 501(c)(3) organizations. Other kinds of investment and returns, including long-term appreciation, were suspect. As Bevis Longstreth wrote in his classic work on the issue, under the-then standard “prudent man” standard found in the Restatement (Second) of Trusts, investment managers had to “measure their investment decisions against constrained interpretations of a legal standard that have lagged far behind changes in investment theory and in the marketplace.”⁶⁵ Further, he asserts “Pervasive changes in the financial marketplace . . . and the advances in financial theory and practice . . . have rendered the Restatement’s quarter-century old prescriptions for prudent conduct self-contradictory and sometimes self-defeating.”⁶⁶

Professor Susan Gary has summarized the situation at the beginning of the 1970’s,⁶⁷ explaining that

⁶⁵ BEVIS LONGSTRETH, *MODERN INVESTMENT MANAGEMENT AND THE PRUDENT MAN RULE* 3 (1986).

⁶⁶ *Id.* at 14.

⁶⁷ Susan N. Gary, *UPMIFA: Coming Soon to a Legislature Near You*, 21 *PROB. & PROP.* 32 (2007). Professor Gary was the Reporter for UPMIFA. As discussed *infra*, the National Conference of Commissioners

a great deal of uncertainty existed about the standards that governed directors of charities operating as nonprofit corporations. Trust law provided guidance, but trust law at that time restricted investment decision making in a number of ways. Trustees analyzed risk on an asset-by-asset basis, rather than across the portfolio. Trust law did not permit delegation of investment authority, so involving investment advisors caused concern. Trust accounting rules defined income and principal in a way that affected both spending and investing. If a charity could spend only "income" under trust law rules, the trust law definition of income limited investment options.

At that time, charitable organizations, whether organized as trusts or nonprofit corporations, found needed guidance in the “prudent man” rule of section 227 of the Restatement (Second) of Trusts.

Section 227 directed trustees “to make such investments and only such investment as a prudent man would make of his own property having in view the preservation of the estate and the amount of and regularity of income to be derived.”⁶⁸ This rule had some unfortunate consequences. In the words of Professor Edward C. Halbach, Jr., the Reporter for the Restatement (Third) of Trusts (2012), application of this standard “often crystalized into doctrine prescribing the permissible types and characteristics of trust investments. . . .

on Uniform State Laws approved the Uniform Prudent Management of Institution Funds Act (“UPMIFA”) to replace UMIFA on July 13, 2006. *Id.* All of the states except Pennsylvania have adopted UPMIFA. *See* Unif. L. Comm’n, *Uniform Prudent Management of Institutional Funds Act*, Enactment Tracker, <https://www.uniformlaws.org/committees/community-home?CommunityKey=043b9067-bc2c-46b7-8436-07c9054064a3#LegBillTrackingAnchor>. UPMIFA changes UMIFA in a number of ways. It applies to both charitable corporations and charitable trusts. Other changes include permitting spending below the historical dollar value of endowments, suggesting criteria for prudent levels of spending, and specifically calling for diversification of investments. *See* Gary *supra*.

⁶⁸ RESTATEMENT (SECOND) OF TRUSTS § 277 (A.L.I. 1959).

Judging and classifying investment in isolation generally resulted in broad categories of assets or courses of action being labeled ‘speculative’ or per se imprudent, usually regardless of the care, skill, and caution exercised by the trustee.”⁶⁹

The National Conference of Commissioners on Uniform State Laws, aware of these issues, appointed a committee to draft what became the Uniform Management of Institutional Funds Act (“UMIFA”). It was approved by the Commissioners adopted in 1972.⁷⁰ The first page of its preface observed that managers of institutional funds and their counsel “have wrestled with questions as to permissible investments, delegation of investment authority, and use of the total return concept in investing endowment funds.”⁷¹ On page 2, it quoted Cary and Bright:⁷²

[T]oo often the desperate need of some institutions for funds to meet current operating expenses has led their managers, contrary to their best long-term judgment, to forego investments with favorable growth prospects if they have a low current yield.

[I]t would be far wiser to take capital gains as well as dividends and interest into account in investing for the highest overall return consistent with the safety and

⁶⁹ Edward C. Halbach Jr., *Trust Investment Law in the Third Restatement*, 77 IOWA L. REV. 1151, 1152 (1992).

⁷⁰ See Gary, *supra* note 67.

⁷¹ UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT 1 (“UMIFA”) (UNIF. L. COMM’N 1972), <https://www.uniformlaws.org/committees/community-home/librarydocuments?LibraryKey=032e391c-cd07-42f1-ad73-44b013f54c18&5a583082-7c67-452b-9777-e4bdf7e1c729=eyJsaWJyYXJ5ZW50cnkiOiJmMjY5YTQ4NS02ZTkxLTRiYmUtODRlZi1hYWZhkNTliODI5MWQifQ%3D%3D>.

⁷² *Id.* at 2 (quoting WILLIAM CARY & CRAIG BRIGHT, THE LAW AND THE LORE OF ENDOWMENT FUNDS 5-6 (1969)).

preservation of the funds invested. If the current return is insufficient for the institution's needs, the difference between that return and what it would have been under a more restrictive policy can be made up by the use of a prudent portion of capital gains.

The prudent man standard adopted in UMIFA followed the lead of Cary and Bright:⁷³

In the administration of the powers to appropriate appreciation, to make and retain investments, and to delegate investment management of institutional funds, members of a governing board shall exercise ordinary business care and prudence under the facts and circumstances prevailing at the time of the action or decision. In so doing they shall consider long and short-term needs of the institution in carrying out its educational, religious, charitable, or other eleemosynary purposes, its present and anticipated financial requirements, expected total return on its investments, price level trends, and general economic conditions.

As Professor Gary reflected, “UMIFA created a new set of rules that made total-return investing possible for charities organized as nonprofit corporations.”⁷⁴

The 509(a)(1) public support test does not take these new rules or the considerations that led them into account. UMIFA was adopted by the Uniform Commission in 1972. It thus became official only after adoption of the 1969 Act and the same year as the applicable final section 170 regulations. Moreover, states adopted UMIFA slowly. Rhode Island was the first, enacting it the same year as its publication, 1972.⁷⁵ California, Delaware, Illinois, Maryland,

⁷³ *Id.* § 6, Standard of Care.

⁷⁴ Gary, *supra* note 67.

⁷⁵ Uniform Laws Annotated, UMIFA, Table of Jurisdiction Where Act Has Been Adopted.

Minnesota, Montana, New Hampshire, and Tennessee, Vermont, Virginia, and Washington did so in 1973.⁷⁶ However, Alabama, Arkansas, Hawaii, Idaho, Iowa, Kentucky, Maine, Mississippi, Nebraska, Nevada, New Mexico, Oklahoma, South Carolina, Utah and Wyoming did not do so until the 1990s, and South Dakota waited until 2000.⁷⁷ Further, UMIFA applied only to nonprofit corporations, not trusts.

Today modern portfolio theory and investment for total return is well-established. As the Nonprofit Organizations 2021 Textbook explains, “The adoption of UMIFA and its successor, UPMIFA, and the influence of modern portfolio theory encouraged spending rules and investment decisions” based “on the concept of total return, which includes both traditional income as well as the market appreciation of the endowment portfolio.”⁷⁸ Endowment investments no longer rely on assets that produce current income in the form of interest and dividends.⁷⁹

Currently, of course, OpenAI Foundation does not have capital gain from sale of its stock in the OpenAI PBC. But in order to fund its announced charitable activities, an undertaking to make \$1 billion in grants,⁸⁰ it may well need to so do. Sale of even a small

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Nonprofit Organizations 2021 Textbook, *supra* note 16, at 213-14. As Professor Jeffrey N. Gordan explains in *The Puzzling Survival of the Constrained Prudent Man Rule*, Appendix B to LONGSTRETH, *supra* note 65, at 209, “A division of a firm’s return between ‘income’ and ‘capital gain’ is highly artificial from the viewpoint of financial economics.” The NACUBO (National Association of College and University Business Officers) Endowment Study: A 50-Year Retrospective 7 (2023), <https://www.nacubo.org/Publications/The-Solutions-Exchange/The-NACUBO-Endowment-Study-A-50-Year-Retrospective>, states, “The shift to total return gained momentum in the early 1970s and looking back it seems as though it must have been inevitable. . . . [S]pending from the corpus and the endowment had become the accepted practice and endowments were better able to fulfill their potential as reliable sources for institutional funding.”

⁷⁹ See National Association of College and University Business Officers, *supra* note 78.

⁸⁰ Bret Taylor, *Update on the OpenAI Foundation*, OPENAI (Mar. 24, 2026), <https://openai.com/index/update-on-the-openai-foundation/>. The period over which OpenAI Foundation plans to make this \$1 billion of grants is not clear from the announcement.

portion of its equity would likely produce a large amount of capital gains. But the availability of such funds from stock sales would have no impact on its qualification as a public charity under the 509(a) public support test. The denominator does not include capital gains.

Other provisions of tax law applicable to section 501(c)(3) organization reach more broadly. The 1.39 percent excise tax on investment income under section 4940 includes capital gain net income in its base.⁸¹ Section 4942, the excise tax on failure to meet the minimum 5% income distribution requirements, includes in its base the fair market value of assets, that is, unrealized gain.⁸² Form 990, the annual return for public charities, includes capital gains in revenue for purposes of reporting.⁸³ Congress in 1969, however, made a different decision for purposes of distinguishing private foundations from public charities. I suggest reconsideration of whether this decision remains appropriate given the change in investment norms, guidance, authorities, and practices.

b. Impact on the Numerator of the 509(a)(1) Public Support Test

The recent explosion of DAFs calls into question the exception to the 2% limitation in the numerator for certain kinds of gifts under the 509(a)(1) public support test. Organizations that serve as sponsors of DAFs (“DAF Sponsors”) permit an individual or a family who sign an agreement with the DAF Sponsor to contribute cash or other assets, such as securities, to an account held by the DAF Sponsor. These accounts are not separate legal entities. The DAF

⁸¹ I.R.C. § 4940(c)(1). Form 990PF requires reporting of capital gains for this purpose. 2025 Instructions to Form 990PF at 22, <https://www.irs.gov/pub/irs-pdf/i990pf.pdf>.

⁸² I.R.C. § 4942(e)(1)(A). Assets used or held directly in carrying out the foundation’s exempt purpose are excluded for purposes of this calculation. *Id.*

⁸³ See Internal Revenue Service, 2025 Instructions to Form 990 at 40-41, <https://openai.com/index/update-on-the-openai-foundation/>.

Sponsor is the legal owner of all the accounts. It retains control of the accounts and makes the ultimate decisions as to their investment and their distribution.

Donors, however, can make recommendations as to distributions and investment. “Although not legally binding, virtually all these grant recommendations are accepted if the grantee is a qualified U.S. public charity.”⁸⁴ Grants to charities come from the DAF Sponsor, not the DAF donor; the DAF donor who recommended the grant remains anonymous. There is no required distribution from a DAF account. Funds can sit in these accounts indefinitely unless and until the DAF donor makes a recommendation and the DAF Sponsor acts. Nonetheless, DAF donors are entitled to a charitable contribution deduction at the time of the donation to the DAF Sponsor. Moreover, because a DAF Sponsor aggregates large numbers of donors, DAF Sponsors qualify as public charities under the 501(a)(1) public support test.⁸⁵

DAF Sponsors have existed for many years, particularly at community foundations.⁸⁶ Some credit the Cleveland Foundation as establishing the model for DAFs in 1914.⁸⁷ Others look to the New York Community Trust in 1931.⁸⁸ The establishment of DAF Sponsors by commercial investment firms late in the 20th Century transformed the world of DAFs. The Fidelity Gift Fund was founded and received section 501(c)(3) public charity status in

⁸⁴ Nonprofit Organizations Textbook, *supra* note 16, at 730. Recently the three largest DAF Sponsors – Fidelity Charitable, Vanguard Charitable, and DAFgiving360 (formerly Schwab Charitable), announced they would suspend grants to the Southern Poverty Law Center after a federal jury indicted it on charges that many of have questioned. See Harvey J. Dale, Daniel J. Hemel & Jill S. Manny, *DAF Sponsors Should Stand Up for Nonprofit Sector Independence*, 191 TAX NOTES FED. 1305 (2026).

⁸⁵ See, e.g., Fidelity Gift Fund 2024 Form 990, Schedule A, retrieved from ProPublica Nonprofit Explorer.

⁸⁶ See *supra* note 16.

⁸⁷ Lila Corwin Berman, Donor Advised Funds in Historical Perspective (Oct. 23, 2015), Boston College Forum on Philanthropy and the Public Good, at 5, 12.

⁸⁸ Benjamin M. Leff, *Getting Donor-Advised Funds Regulation Right: Closing the Public Support Test Loophole*, 28 NYU J. LEG. & PUB. POL. 125, 137 n.43 (2025).

1991.⁸⁹ It distributed \$18.3 billion to other public charities in 2025.⁹⁰ In 2024, it was the largest U.S. charity by donations.⁹¹ According to the Institute for Policy Studies, in 2024, donations from commercial and independent DAF Sponsors accounted for 11 of the top 20 charities, “including every spot in the top five.”⁹² According to this study, the top five were Fidelity Charitable Gift Fund, National Philanthropic Trust, Schwab Charitable Fund (nowDAFGiving360), Goldman Sachs Philanthropy Fund, and Vanguard Charitable Endowment Fund.⁹³

As part of the Pension Protection Act,⁹⁴ Congress enacted statutory provisions addressing DAFs and DAF Sponsors in 2006, in good measure because of perceived abuses by commercial DAF Sponsors.⁹⁵ These provisions defined DAFs and DAF Sponsors, established a category of taxable distributions, imposed a tax on prohibited benefits as well as specifying other sanctions.⁹⁶

The DAF legislation included a number of special rules for DAF Sponsors that other section 509(a)(1) public support entities do not face. Under Section 4966, “taxable

⁸⁹ *About Us*, FIDELITY CHARITABLE, <https://www.fidelitycharitable.org/about-us.html>

⁹⁰ *Id.*

⁹¹ *The Largest Non-Profit Organizations in the US*, CIVIDATA, <https://cividata.org/en/us/#donations>.

⁹² Helen Flannery, *The Top Charities in America Aren't What You Think*, INEQUALITY (May 27, 2026), <https://inequality.org/article/top-charities-donor-advised-funds/>. This study estimated donor-advised fund sponsor and university contributions from Form 990s and estimated other contribution from Forbes' list of American's Top Charities.

⁹³ *Id.*

⁹⁴ Pub. L. No. 109-280, Tit. XII., Subtitle B, Part 2 (Aug. 17, 2006).

⁹⁵ See I.R.C. §§ 4966 and 4977, *id.* at 120 Stat. 105 and 120 Stat. 1097. These provisions address such abuses as fund sponsors having been found “to received personal benefits in return for their grants without reducing their charitable deduction,” such as using DAF funds to pay their children's college tuition. Nonprofit Organizations 2021 Textbook, *supra* note 16, at 733-34.

⁹⁶ See § 4966(c), § 4967(a)(2).

distributions” are subject to a 20% excise tax. Taxable distributions include grants to an individual, grants to other than section 509(a)(1) public charities and governmental entities if not for a charitable purpose, to other DAF Sponsors and to certain organizations, such as private foundations and foreign charities unless the DAF Sponsor engages in a kind of rigorous oversight detailed in the one of the private foundation excise tax provisions.⁹⁷ Section 4967 imposes an excise tax on grants that indirectly or indirectly benefit a donor (or donor advisor). Section 4858, which imposes an excise tax on transactions providing an excess benefit to certain insiders of a public charity, was amended to apply to DAF donors and donor advisors, who would not otherwise have been insiders to which the provision applies.⁹⁸ Section 4943, a provision limiting ownership of business by private foundations, was amended to apply as well to DAF Sponsors.⁹⁹

The legislation, however, did not include a provision forbidding use of DAFs to avoid the two percent limit in the numerator of the section 509(a) public support test.

Circumvention is easy. A direct grant from an individual or private foundation to a section 501(a)(1) public support charity would be subject to the two percent limit. Grants from other section 501(a)(1) public support charities are not subject to the two percent limit, and DAF Sponsors so qualify. If an individual or a private foundation makes a donation to a DAF Sponsor, and then, at the recommendation of the donor, the DAF Sponsor makes a grant to that charity, the two percent limit would not apply. This set of moves would permit an

⁹⁷ See § 4966(c)(1)(B).

⁹⁸ See I.R.C. § 4958(7) and (8).

⁹⁹ See I.R.C. § 4943(e).

individual donor or private foundation to recommend and thus indirectly make unlimited grants to a 501(a)(1) public support charity without endangering its public charity status.

The IRS and the Treasury Department, however, recognized this possible circumvention. It published Notice 2017-73 on December 4, 2017, to describe the approaches it was considering in developing DAF regulations.¹⁰⁰ According to the Notice, the IRS and the Treasury Department anticipated that, for purposes of the Section 509(a)(1) public support test, a donee organization would be required to treat any distribution from a DAF account “as coming from the donor (or donors) that funded the DAF rather than from the sponsoring organization Sponsor.”¹⁰¹ Moreover, “all anonymous contributions received (including a DAF distribution for which the sponsoring organization fails to identify the donor that funded the DAF)” would be treated as being made by one person.”¹⁰²

The IRS and Treasury released a set of proposed DAF regulations in November of 2023,¹⁰³ but the proposed regulations did not address the DAF loophole in the numerator of the section 509(a)(1) public support test. These proposed regulations have not been finalized. Doing so is among the items on the initial 2025-2036 Priority Guidance Plan from Treasury and the IRS, released on September 30, 2025.¹⁰⁴

¹⁰⁰ IRS Notice 2017-73, <https://www.irs.gov/pub/irs-drop/n-17-73.pdf>.

¹⁰¹ *Id.* § 5.

¹⁰² *Id.* The Notice also anticipated that the regulations would specify that distributions from a DAF Sponsor would be treated as public support without limitation “only if the sponsoring organization specifies that the distribution is not from a DAF or states that no donor or donor advisor advised the distribution.” *Id.*

¹⁰³ NPRM, Taxes on Distributions from Donor Advised Funds under Section 4966, 88 Fed. Reg. 77922 (Nov. 14, 2023), <https://www.federalregister.gov/documents/2023/11/14/2023-24982/taxes-on-taxable-distributions-from-donor-advised-funds-under-section-4966>.

¹⁰⁴ TREASURY & IRS, 2025-2026 PRIORITY GUIDANCE PLAN 6, item 35 (2025), <https://www.irs.gov/pub/irs-counsel/2025-2026-initial-pgp.pdf> (under “Deregulation and Burden Reduction”).

To date, Treasury and the IRS have not proposed any proposed regulations regarding the DAF loophole in the numerator of the section 509(a)(1) public support test. Nonetheless, this issue has continued to attract attention since Notice 2017-73. The Accelerated Charitable Efforts (“ACE”) Act would tighten a number of DAF provisions regarding distribution of funds from DAF Sponsors, primarily to speed distribution. It includes a provision regarding the 509(a) public support test like that in Notice 2014-73.¹⁰⁵ It was introduced in the Senate in 2021 and House of Representative in 2022, but no action has been taken on it.¹⁰⁶ Recently, Professor Benjamin Leff has called this use of DAF donations to satisfy the 509(a)(1) public support test an “obviously abusive strategy.”¹⁰⁷ After considering the alternative approaches to address this abuse, he endorses the one contained both in Notice 2017-73 and the ACE Act – requiring recipient charities “to treat distributions from a DAF as if they were made directly from the donor-advisor rather than from the DAF sponsor.”¹⁰⁸

Elon Musk’s suit against OpenAI for breach of charitable trust,¹⁰⁹ although ultimately dismissed on statute of limitations grounds,¹¹⁰ exposed use of the DAF loophole in practice. The District Court’s January 15 Order Denying Defendant OpenAI’s Motion for Summary Judgement and Granting in Part and Denying in Part Microsoft’s Motion for Summary

¹⁰⁵ See S. 1981, 117th Cong. § 6, <https://www.congress.gov/bill/117th-congress/senate-bill/1981/text>, and H.R. 6595, 117th Cong., <https://www.congress.gov/bill/117th-congress/house-bill/6595/text>.

¹⁰⁶ *Id.*

¹⁰⁷ Leff, *supra* note 88, at 177.

¹⁰⁸ Leff, *supra* note 88, at 190. The alternatives he rejects are forbidding gifts from DAF Sponsors if they are necessary to satisfy the 501(a)(1) public support test or adopting a general anti-abuse rule. *Id.* He finds these options difficult to administer, ineffective, and burdensome.

¹⁰⁹ See Complaint, Musk v. Altman, No. 3:24-cv-04722 (N.D. Cal. Aug. 5, 2024), <https://www.courtlistener.com/docket/69013420/1/musk-v-altman/>.

¹¹⁰ See Geoff Bennett & Ryan Connelly Holmes, *Jury Throws Out Musk’s Lawsuit Against Sam Altman and OpenAI*, PBS NEWS HOUR (May 18, 2026), <https://www.pbs.org/newshour/show/jury-throws-out-musks-lawsuit-against-openai-and-sam-altman..>

Judgment stated,¹¹¹ “From the start, Musk was one of OpenAI’s largest donors, donating approximately \$38 million.¹¹² The Order continues, “Musk initially contributed through YC.org—OpenAI’s fiscal sponsor while it secured 501(c)(3) status – per OpenAI’s instruction Once OpenAI acquired 501(c)(3) status, Musk contributed funds through Donor Advised Funds (“DAFs”) that Vanguard and Fidelity administered.”¹¹³

The timing and amounts of DAF donations or other donations from Musk are not clear. The exhibits supporting the court’s statements quoted above are under seal. At one point, Musk claimed publicly that he had donated \$50- \$100 million to the nonprofit OpenAI.¹¹⁴ After examining investigative reports and tax filings, TechCrunch found that the Musk Foundation donated \$12.4 million and \$6.3 million in 2018 to the commercial DAF Sponsor, Fidelity Charitable Gift Fund. Fidelity subsequently donated \$7.8 million to OpenAI between 2018. The timing suggests that these are the donations recommended by Musk, but because anonymity of the ultimate donor is a key feature of DAFs, there is no certainty that these donations came from Musk’s DAF accounts.

If we treat all the donations listed by the Court’s Order – including any made through the fiscal sponsor YC.org – as coming directly from Musk or his private foundation, they would be subject to the 2% limitation in the numerator. Even so, based on the revenue

¹¹¹ January 15 Order Denying Defendant OpenAI’s Motion for Summary Judgement and Granting in Part and Denying in Part Microsoft’s Motion for Summary Judgment, <https://caselaw.findlaw.com/court/us-dis-crt-n-d-cal/118202562.html>.

¹¹² *Id.* at 2

¹¹³ *Id.* at 3. Musk’s donation from YC.org as OpenAI’s fiscal sponsor intermediary raises the same issue as donations from DAF sponsors as to the 509(a)(1) public support test but any rules addressed to DAF Sponsors would not apply to this form of intermediary.

¹¹⁴ Mark Harris, *Elon Musk Used to Say He Put \$100M in OpenAI, but Now It’s \$50M: Here Are the Receipts*, TECHCRUNCH (May 17, 2023), <https://techcrunch.com/2023/05/17/elon-musk-used-to-say-he-put-100m-in-openai-but-now-its-50m-here-are-the-receipts/>.

reported on OpenAI's Schedules A to its Forms 990, the schedule that provides the numbers for satisfying the 509(a)(1) public support test,¹¹⁵ limiting these donations to 2% in the numerator would not throw the nonprofit into private foundation status.¹¹⁶

This DAF loophole as to the numerator of the 509(a)(1) public support test will continue to have traction. The founders of both OpenAI and Anthropic have announced their intention to donate a large percentage of their wealth after their respective IPOs.¹¹⁷ They could well do so by establishing private foundations and then donating the stock after the IPO establishes the stock's value.¹¹⁸ In this way, they can take a full fair market charitable donation deduction for income tax purposes to the extent they have income.¹¹⁹ More importantly, such a donation would not trigger capital gains. Although the rule that donations to a 501(c)(3) or a 501(c)(4) organization do not trigger capital gains is longstanding,¹²⁰ members of Congress have expressed concern about this aspect of tax-exempt giving in the

¹¹⁵ Available 990s for the OpenAI nonprofit precede the recapitalization and the change of the nonprofit's name.

¹¹⁶ My fine research assistant, Andrew Goldblatt, did these calculations.

¹¹⁷ See Leo Almazora, *Wealthy Donors Stay the Course on Giving as Anthropic Funnels AI Fortunes into Philanthropy*, INV. NEWS (Feb. 26, 2026), <https://www.investmentnews.com/retirement-planning/wealthy-donors-stay-the-course-on-giving-as-anthropic-funnels-ai-fortunes-into-philanthropy/265452>; Chris Cioffi, *Anthropic, OpenAI Tax-Exempt IPO Move Stoke Congress Ire*, BLOOMBERG TAX (June 29, 2026), <https://news.bloombergtax.com/daily-tax-report/anthropic-openai-tax-exempt-ipo-move-to-stoke-congress-ire>.

¹¹⁸ The super, super rich often care little about the income tax deduction because their wealth so exceeds their income. They do care about the gift tax deduction and taking the value of the stock out of their estate. See David S. Miller, *Advice for Jeff Bezos: Social Welfare Organizations as Grantmakers*, 21 NYU J. LEG. & PUB. POL 413 (2018). They do want to avoid capital gains tax. Contributions to section 501(c)(4) organizations also achieve that goal, as donations to section 501(c)(4) organizations by Yves Chouinard and Barre Seid demonstrated. See Laura Saunders, *Get a Tax Break Like a Billionaire on Your Political Donation*, WALL ST. J. (Sep. 16, 2022), <https://www.wsj.com/articles/political-candidate-donation-tax-deduction-11663284238>.

¹¹⁹ See Cioffi, *supra* note 117. As the article explains, members of Congress have expressed concern about the loss of tax revenue on the built-in capital gains when highly appreciated stock is donated, even though that tax treatment is longstanding.

¹²⁰ See Wendy Gerzog, *From the Greedy to the Needy*, 87 OR. L. REV. 1133 (2008); Nonprofit Organizations 2021 Textbook, *supra* note 16, at 890.

context of both OpenAI's and Anthropic's founders.¹²¹ Should these potential donors establish private foundations, as seems likely, they would have available to them the same loophole employed by Musk – giving funds to a DAF Sponsor and then recommending a grant to a section 501(c)(3) public charity so that there will be no 2% limit in the numerator,¹²² and less chance of the entity falling into private foundation status.

Receipt by OpenAI Foundation of OpenAI PBC stock did not affect the numerator of the 501(a)(1) public support test. Speculation that OpenAI Foundation became a private foundation after the name change and recapitalization, noted above, may represent a misunderstanding as to the nature of the OpenAI Foundation's receipt of the stock. The OpenAI PBC stock received by the OpenAI Foundation was not a grant or gift, much less a gift subject to the 2% limit in the support test numerator. It was a continuation of its investment in what had been its for-profit subsidiary received in a different, tax-free form. Any built-in gain consists of unrealized appreciation. Gain would be recognized and realized when individuals or for-profit entities sell the stock, but tax-exempt entities are not taxed on capital gain, and, as discussed above, capital gains do not currently figure in the denominator of the 509(a)(1) public support test.

In short, OpenAI Foundation's status as a public charity remains secure under the current rules regarding both the numerator and the denominator for the section 509(a)(1) public support test. The issues discussed here – exclusion of capital gains in the denominator

¹²¹ Cioffi, *supra* note 119. I note that these OpenAI founders could, like Musk, donate their stock to a DAF Sponsor and then recommend donations to OpenAI Foundation.

¹²² As discussed below, such a gift from a DAF Sponsor would also help satisfy the private foundation annual charitable distribution requirement. *See infra* notes 147-153.

and the DAF donation loophole in the numerator, however, raise questions about the current rules, as explained further in Part VI.

V. OpenAI Foundation as a Private Foundation

To highlight the importance of the distinction between public charities and private foundations, this section details the consequences to OpenAI Foundation if it were to be classified as a private foundation. The private foundation excise taxes are technical and complicated. This section attempts to explain them as simply as possible, focusing on the aspects of each that would apply to OpenAI Foundation as a private foundation rather than covering in full all the details of each excise tax. It first discusses the two provisions that would have the greatest impact on the current structure and announced plans of OpenAI Foundation and then other excise tax provisions that would or might affect it but not in such immediately significant ways.

a. Section 4942 Income Distribution Requirement

Section 4942 imposes an excise tax on failure to distribute annually at least the “minimum investment return” (MIR) for charitable purposes.¹²³ MIR is 5% of the fair market value of all assets of the foundation (other than assets used directly in carrying out its exempt purposes) over any acquisition indebtedness to which those assets are subject.¹²⁴ Different

¹²³ See I.R.C. § 4942(g)(1). Grants to section 501(c)(3) public charities easily satisfy this requirement. Grants to entities that are not section 501(c)(3) public charities, such as section 501(c)(4) organization or foreign charities, also can satisfy this requirement because the statute requires a charitable purpose, not section 501(c)(3) status. For a private foundation to make grants to organizations other than those exempt under section 501(c)(3), they must satisfy oversight requirements known as “expenditure responsibility.” See § 4945(h). Certain set-asides for future expenditures for a charitable activity also are taken into account in satisfying the distribution requirement. See § 4942(g)(2).

¹²⁴ See § 4942(e).

assets are subject to different rules. Readily marketable securities, such as OpenAI stock after its IPO, are valued on a monthly basis and then averaged for the year.¹²⁵ I note again that unrealized gain is included in this calculation.

Any undistributed income for a year if it is still undistributed as of the beginning of the second year (or any succeeding) taxable year following the current taxable year triggers excise taxes. The undistributed amount is subject to a tax of 30%; continuing failure leads to a 100% tax.¹²⁶

Distributions to other grantmaking private foundations and certain supporting organizations do not count for purposes of this distribution requirement. Because DAF Sponsors qualify as public charities, however, distributions to them from a private foundation would count toward this requirement. Indeed, Musk's private foundation often makes grants to DAF Sponsors, not just those detailed in his suit against OpenAI.¹²⁷ Even then, his private foundation has often failed to satisfy the minimum distribution requirement.¹²⁸

Donations to and grants from DAF Sponsors employed to satisfy the minimum distribution requirement raise issues parallel to the use of such grants to ensure qualifying under the 501(a)(1) public support test. Some commentators condemn this practice.¹²⁹ As the Nonprofit Organizations 2021 Textbook summarizes, this end run violates "the spirit of the

¹²⁵ See § 4942(e)(2)(A).

¹²⁶ See § 4942(a), (b).

¹²⁷ See Alan Cantor, *The "Charity" of Musk*, ALAN CANTOR CONSULTING, <https://www.alancantorconsulting.com/2024/03/the-charity-of-elon-musk/>.

¹²⁸ Theodore Schleifer & David A. Fahrenthold, *Musk's Foundation Grows to \$14 Billion, but Gives Little to Outsiders*, N.Y. TIMES (Dec. 2, 2025), <https://www.nytimes.com/2025/12/02/us/politics/elon-musk-foundation.html>.

¹²⁹ See Leff, *supra* note 88, at 150, ACE Act, *supra* note 105, at section 4.

private foundation regulatory regime,” first “by delaying grants to operating charities” and second by shielding the identity of donors.¹³⁰ Others think a provision forbidding such grants would cut too broadly. They point to the benefits of private foundation grants to DAF Sponsor, flexibility in timing grants, reducing costs, and support for complex charitable giving.¹³¹ To date, no statute administrative guidance has limited this method of satisfying the MIR.

If OpenAI Foundation were a private foundation, the section 4942 distribution requirement would require a major adjustment to its operations as compared to its announced plans. After its March 2026 funding round, OpenAI PBC was now valued at \$852 billion.¹³² Its value could increase further after its planned IPO some time in 2027.¹³³ Using the March 2026 value, OpenAI Foundation’s 26% share would amount to more than \$221 billion. Assuming for simplicity that the OpenAI PBC stock represents OpenAI Foundation’s only asset, 5% of OpenAI Foundation’s assets would come to \$11 billion.

OpenAI Foundation has announced a commitment for 2026 of \$50 million and an updated total of \$1 billion over some unspecified period of time.¹³⁴ While a large and

¹³⁰ Nonprofit Organizations 2021 Textbook, *supra* note 16, at 798-99. Donors to public foundations must be listed on the publicly available Form 990PF.

¹³¹ See Jack Salmon, *When Private Foundations Give Through DAFs: Exploring the How and Why of this Practice*, PHILANTHROPY ROUNDTABLE (Mar. 6, 2024), <https://www.philanthropyroundtable.org/resource/when-private-foundations-give-through-dafs-exploring-the-how-and-why-of-this-practice/>; *Why Private Foundations Are Opening Donor-Advised Funds*, VANGUARD CHARITABLE (May 3, 2024), <https://www.vanguardcharitable.org/blog/why-private-foundations-are-opening-donor-advised-funds>.

¹³² *Who Owns OpenAI? Complete Ownership Breakdown 2026*, AI FUNDING TRACKER (June 16, 2026), <https://aifundingtracker.com/who-owns-openai/>.

¹³³ Chris Neiger, *OpenAI Is Now Considering a 2027 IPO with a \$1 Trillion Valuation. Should Investors Expect the Same Volatility as the SpaceX IPO?*, MOTLEY FOOL (July 2, 2026), <https://www.fool.com/investing/2026/07/02/openai-is-considering-a-2027-ipo-1-trillion-cap/>.

¹³⁴ See *Update on OpenAI Foundation*, *supra* note 80; *Committing to Communities: The 2026 People-First AI Fund*, OPENAI FOUND. (June 15, 2026), <https://openaifoundation.org/news/2026-people-first-ai-fund>.

impressive absolute number, this amount is far below the amount of distribution that would be required if OpenAI Foundation were a private foundation. That is, as a private foundation, under section 4942 OpenAI Foundation would have to undertake charitable activities itself or make grants many multiples of those it has announced to avoid this excise tax. If, as Sam Altman, the CEO of OpenAI, has asserted,¹³⁵ OpenAI's will have a market valuation of \$1 trillion after the IPO. If a private foundation, OpenAI Foundation's 26% share of that value would require annual distributions of \$1.3 billion to satisfy section 4942.

MIR is a floor, not a ceiling. At times since the 1960's, the IRS has applied a different and less certain test to section 501(c)(3) organizations, a test that requires section 501(c)(3) organizations to engage in "a charitable program commensurate in scope with its financial resources."¹³⁶ Revenue Ruling 64-182 announced the doctrine. Revenue Ruling 67-5 followed not long after. Both involved what we now identify as private foundations.¹³⁷ Both, moreover, preceded the adoption of the private foundation regime in 1969.

Revenue Ruling 64-182 is a mere two paragraphs long. It concludes that a corporation deriving its income principally from the rental of space in a commercial office building can qualify for section 501(c)(3) status if "it is shown to be carrying on through [its] contributions and grants a charitable program commensurate in scope with its financial

¹³⁵ Ryan Vanzo, *Sam Altman Called Any OpenAI IPO Valuation Below \$1 Trillion a "Nonstarter."* *Should Investors Prefer OpenAI or SpaceX?*, MOTLEY FOOL (July 5, 2026), <https://www.fool.com/investing/2026/07/05/sam-altman-called-any-openai-ipo-valuation-below-1/>.

¹³⁶ Rev. Rul. 64-182, 1964 C.B. 186. *See generally* N.Y. STATE BAR ASS'N TAX SECTION, REPORT TO TREASURY REGARDING THE USE OF THE "COMMENSURATE IN SCOPE" TEST (2008), <https://nysba.org/wp-content/uploads/2020/03/1169-Report.pdf>. It describes invocation of the doctrine by members of Congress and other policymakers as well as its use by the IRS.

¹³⁷ Rev. Rul. 64-182, *supra* note 136. Rev. Rul. 67-5, 1967-1 C.B. 123.

resources.¹³⁸ The ruling concluded that the corporation there met this test. Because of an error in redacting, GCM 34,682 issued on November 17, 1971 identified Revenue Ruling 64-182 as “the Field” ruling,¹³⁹ and it is thus widely known that the ruling involved the building owned by the Field Foundation.

In contrast, Revenue Ruling 67-5 explicitly identifies the entity described in the ruling as a “foundation controlled by the creator’s family.”¹⁴⁰ It concludes that this foundation does not satisfy the commensurate-in-scope test because “the foundation owns non-income producing assets and is prevented from carrying on a charitable program commensurate in scope with its financial resources.”¹⁴¹ This revenue ruling demonstrates that at least some within the IRS resisted modern portfolio theory and its endorsement of investment for total return at the very time that the private foundation regime was being formulated.¹⁴²

The New York State Bar Association report recounts that “starting in the 1990s, the IRS began to apply the test to non-grant making entities,”¹⁴³ that is, to public charities. The IRS may have moved from private foundations to public charities because the 5%

¹³⁸ Rev. Rul. 64-182, *supra* note 136.

¹³⁹ Compare Gen. Coun. Mem. 32,689 (Oct. 9, 1963) with Gen. Coun. Mem. 34,682 (Nov. 1971). As Evelyn Brody has noted, “it has become common knowledge that the subject of this ruling is the Field Foundation, and the ruling is referred to as ‘the Field Foundation Ruling,’ noting that the 1971 GCM “at one point slips and makes such a reference.” Evelyn Brody, *Of Sovereignty and Subsidy: Conceptualizing the Charity Tax Exemption*, 23 J. CORP. L. 585, 623 n.187 (1998). Both these General Counsel Memoranda tie the commensurate-in-scope test to the primary purpose requirement of Treas. Reg. § 1.501(c)(3)-1(e)(1) for organizations carrying on a trade or business as a substantial part of its activities.

¹⁴⁰ Rev. Rul. 67-5, *supra* note 137.

¹⁴¹ *Id.*

¹⁴² See Thomas A. Troyer, *The 1969 Private Foundation Law: Historical Perspective on Its Origins and Underpinnings*, 27 EXEMPT ORG. TAX. REV. 52 (2000).

¹⁴³ N.Y. STATE BAR ASS’N TAX SECTION, *supra* note 136, at 7.

distribution requirement of section 4942 came to be seen as an adequate standard. This move to public charities, however, took place in private letter rulings, not through additional revenue rulings or other official guidance clarifying the doctrine and the basis for this expansion. Importantly for this study, The New York State Bar’s study notes, “Although most operating organization that were the subject of CIS [commensurate in scope] analysis were engaged in unrelated trade or business activities, several private letter rulings discussed excessive investment activities by those organizations.”¹⁴⁴ The Nonprofit Organizations 2021 Textbook comments, “after many years of near dormancy the IRS resurrected the commensurate-in-scope doctrine for the purposes of denying exemption to organizations without any meaningful charitable program.”¹⁴⁵

The IRS has applied the commensurate-in-scope doctrine as recently as 2025. In Private Letter Ruling 202535014, it denied exemption under section 501(c)(3) to an organization that relied on a raffle business for funds in part on the grounds that services it provided to the less fortunate were not commensurate in scope with its financial resources.¹⁴⁶

If OpenAI Foundation found itself to be a private foundation, its grantmaking obligations under the required income distribution would far exceed the grant programs in has announced to date. As a public charity, it is possible, although unlikely, that it would face instead IRS challenge under the commensurate in scope doctrine, given the doctrine’s

¹⁴⁴ N.Y. STATE BAR ASS’N TAX SECTION, *supra* note 136, at 7, n.17. [*Id.*]

¹⁴⁵ Nonprofit Organizations 2021 Textbook, *supra* note 16, at 595, citing Priv. Ltr. Rul. 2008-28-023 (May 2, 2008) (failed commensurate in scope test when less than half of one percent of funds received devoted to charitable activities).

¹⁴⁶ See also Priv. Ltr. Rul. 2025-35-014 (June 3, 2025). See also Priv. Ltr. Rul. 2024-43-024 (May 31, 2024), Priv. Ltr. Rul. 2022-39-017 (June 23, 2021), and Priv. Ltr. Rul. 2018-29-022 (Feb. 6, 2018). Although the commensurate in scope test is not the focus of any of these private letter rulings, they all cite the doctrine and Rev. Rul. 64-182 as one basis for the IRS decision to deny or revoke exemption.

uncertain scope.

b. Section 4943 Excess Business Holdings

Another significant impact on OpenAI Foundation if it became a private foundation would be the section 4943 excise tax limiting private foundation ownership of for-profit businesses. Application of this rule would likely require OpenAI Foundation to dispose of much, if not all, of its OpenAI PBC stock. Such would be the case even though such ownership was carefully structured to ensure the OpenAI Foundation received the fair market value of its for-profit holdings, as applicable nonprofit law requires.¹⁴⁷

Section 4943 imposes a two-tier tax on excess business holdings. In general, this provision provides that a foundation along with DQPs,¹⁴⁸ cannot own together more than 20% of the voting stock of a business.¹⁴⁹ Ownership of more than the permitted amount is subject to an initial tax of 10% and a 200% second-tier tax for failure to dispose of the excess holdings during a statutorily prescribed correction period.¹⁵⁰

Even without applying the complicated rules as to who are insiders, OpenAI Foundation's current ownership of 26% of OpenAI PBC would violate this rule.¹⁵¹ Possibly of more consequence would be the impact of section 4943 on OpenAI Foundation's

¹⁴⁷ See RESTATEMENT OF CHARITABLE NONPROFIT ORGS. § 3.04(c) (A.L.I. 2021) ("A charity must receive fair market value for a sale, conversion of status, or other transfer of all or substantially all its assets to an entity that is not a charity.").

¹⁴⁸ See *supra* note 57.

¹⁴⁹ I.R.C. § 4943(c)(1) and (2).

¹⁵⁰ § 4943(a) and (b).

¹⁵¹ A special rule, known as Newman's Own Rule because of the private foundation for which it was enacted, see Nonprofit Organization 2021 Test, *supra* note 15, at 807-808, permits a private foundation to own 100% of a for-profit business but only if it meets a number of conditions, such as the business distributing its entire operating income to the private foundation annually. See § 4943(g).

ownership of OpenAI PBC Class N stock. Ownership of any shares of this class of stock gives OpenAI Foundation control of the OpenAI PBC Board. Such control was crucial to both the California and Delaware Attorney Generals; they did not approve a recapitalization plan in which the nonprofit would not control the for-profit entity.¹⁵² In the language of the MOU with the California Attorney General,¹⁵³

So long as the NFP [not for profit] holds Class N Common Stock, the NFP will retain control and oversight over the newly formed PBC, including the sole power and authority of the Board of Directors of the NFP (the “NFP Board”) to appoint members of the Board of Directors of the PBC (the “PBC Board”) and the power and authority of the NFP Board to remove PBC Board members.

Currently, OpenAI Foundation owns 100% of Class N stock. It would seem to come squarely within the application of section 4943(a)(2)(B)’s application to “the private foundation’s holdings in a business enterprise.”

Class N stock is not technically voting stock. Yet, it holds the most important attribute of voting stock – the ability to determine the governing board of a for-profit corporation. Applicable regulations state that voting stock “is normally determined by reference to the power of the stock to vote for the election of directors.”¹⁵⁴ Thus, it seems at least possible, even likely, that Class N stock would be treated as voting stock.

¹⁵² See *supra* notes 24-25 and accompanying text.

¹⁵³ See California MOU, *supra* note 31 and accompanying text. In addition, other provisions of the MOU give OpenAI Foundation a number of other powers, including requiring its prior written approval to any change in OpenAI PBC’s Corporate Governance Guidelines or the mission of the OpenAI PBC. *Id.* Delaware’s statement of no objections includes parallel provisions. Delaware Letter of No Objections, *supra* note 31 and accompanying text.

¹⁵⁴ Treas. Reg. § 53.4943-3(a)(2)(ii).

If need be, OpenAI Foundation as a private foundation could give up its Class N stock. Its agreements with the California and Delaware Attorneys General specify that the decision “whether to relinquish the Class N Common Stock, if ever, is in the control of the NFP Board.”¹⁵⁵ But should OpenAI Foundation become a private foundation, the impact of the section 4943 excess business holdings would require careful consideration, particularly as to its ownership of the Class N stock carrying the right to appoint the board members of the OpenAI PBC.

c. Section 4944 Jeopardy Investments

Section 4944 imposes a two-tier tax on “jeopardy investments.” That two-tier tax can apply to both the foundation and its managers. A private foundation making a jeopardy investment faces an initial tax of 10% of the amount invested for each taxable year or part thereof.¹⁵⁶ Failure to correct results in a 25% on the foundation and a 5% tax on unwilling management.¹⁵⁷

Regulations define a jeopardy investment as one for which foundation managers “have failed to exercise ordinary business care and prudence . . . in providing for the long- and-short-term financial needs of the foundation to carry out its exempt purposes.”¹⁵⁸ The test is one of “facts and circumstances,” including the need for diversification. Margin trading, commodity futures, options and straddles, and short sales are among the investments

¹⁵⁵ See California MOU, Item 3, *supra* note 31; Delaware No Objection Statement, Item 1, *supra* note 31.

¹⁵⁶ I.R.C. § 4944(a).

¹⁵⁷ § 4944(b).

¹⁵⁸ Treas. Reg. § 53.4944-1(a)(2)(i).

inviting close scrutiny.¹⁵⁹ The regulations explicitly acknowledge that “foundations managers may take into account expected return (including both income and appreciation of capital.)¹⁶⁰ Although a determination that an investment is a jeopardy investment is made “on an investment by investment basis,” such a determination shall take “into account the foundation’s portfolio as a whole.”¹⁶¹

These regulations were adopted in 1972.¹⁶² They sound remarkably like the prudent man standard adopted in UMIFA, also in 1972.¹⁶³ UMIFA, however, did not include a diversification requirement. Both section 4944 and UPMIFA do so. UPMIFA’s provision states, “An institution shall diversify the investments of an institutional fund unless the institution reasonably determines that, because of special circumstances, the purposes of the fund are better served without diversification.”¹⁶⁴ Unlike section 4944, this requirement of

¹⁵⁹ Program-related investments (PRIs) are deemed not to be a jeopardy investment. § 4944(c). PRIs are investments designed to accomplish exempt purposes. Investment in an urban renewal project is an example of a PRI. *See* Treas. Reg. § 53.4944-3(b).

¹⁶⁰ Treas. Reg. § 53.4944-1(a)(2)(i).

¹⁶¹ *Id.*

¹⁶² T.D. 7422.

¹⁶³ *See supra* note 73 and accompanying text. According to Longstreth, “UMIFA’s standard of care is drawn in part from the Internal Revenue Code’s private foundation regulations under Section 4944 and the ‘ordinary business care add guidance’ formula found in those regulations.” LONGSTRETH, *supra* note 64, at 27. He continues, “Although no formal public record of the Treasury Department’s deliberative process exists, it appears that the final regulations reflect the success of the affected constituency in persuading their regulator, first, that Congress’ primary goal in Section 4944 was to foster effective portfolio management and, second, that goal would be best served by a departure from trust law doctrine in favor of modern notions of investment prudence.” *Id.* at 31.

¹⁶⁴ UPMIFA § 3(e)(4), <https://www.uniformlaws.org/viewdocument/final-act-109?CommunityKey=043b9067-bc2c-46b7-8436-07c9054064a3&tab=librarydocuments>. I speculate that Pennsylvania did not adopt UPMIFA because of its decision, in light of the controversy over the Hershey Foundation, not to require diversification. *See* Jonathan Klick & Robert H. Sitkoff, *Agency Costs, Charitable Trusts, and Corporate Control: Evidence from Hershey’s Kiss-Off*, 108 COLUM. L. REV. 749 (2008); Evelyn Brody, *Whose Public? Parochialism and Paternalism in State Charity Law Enforcement*, 79 IND. L.J. 937, 985-99 (2004). I have not found any evidence of enforcement of the diversification requirement by the IRS under section 4944 or state regulators under UPMIFA. A recent post from Carnegie Investment Counsel on its Nonprofit Investment Management Blog describes UPMIFA, including its diversification requirement, and observes, “Several nonprofit leaders and stakeholders have already used UPMIFA to better align their

nonprofit law applies to both public charities and private foundations. UPMIFA does not distinguish between these two kinds of section 501(c)(3) entities.

If OpenAI Foundation were a private foundation, the extent to which its investments were diversified would be public because of the publicly available Form 990PF, which requires disclosure of investments.¹⁶⁵ Because OpenAI is a public charity, however, we do not know the composition of its investment holdings. We may suspect, but do not know, whether its holdings consist largely, if not exclusively, of stock of OpenAI PBC.

Under section 4944 if OpenAI Foundation were a private foundation and under UPMIFA, as either a public charity or private foundation, OpenAI Foundation could well argue that any failure to diversify reflects the special circumstance of its duty to oversee OpenAI PBC. Its holding of Class N stock giving it the right and duty to appoint the members of the governing board of OpenAI PBC.¹⁶⁶ Other provisions in the approvals from the California and Delaware Attorneys General underscore OpenAI Foundation's right of approval over OpenAI PBC safety and security considerations. These considerations as to the relationship between OpenAI Foundation and OpenAI PBC may or may not succeed in countering any assertion under section 4944 or UPMIFA of failure to diversify.¹⁶⁷ If, however, if state or federal regulations found the extent of OpenAI Foundation's holdings of

investment funds with their organizations' values." Megan Lencowski, *What Every Nonprofit Should Know About UPMIFA (Uniform Management of Institutional Funds Act)*, CARNEGIE INV. COUNS.: NONPROFIT INV. MGMT. BLOG (Dec. 16, 2025), <https://blog.carnegieinvest.com/nonprofit-investment-services-blog/what-every-nonprofit-should-know-about-the-uniform-prudent-management-of-institutional-funds-act>.

¹⁶⁵ See generally 2025 Instructions to Form 990PF, <https://www.irs.gov/pub/irs-pdf/i990pf.pdf>.

¹⁶⁶ If OpenAI Foundation were a private foundation, its ability to continue to hold Class N stock is questionable under § 4943 business holding rules. This discussion of section 4944 assumes a determination that section 4943 does not apply to the kind of control exercised by Class N stock since it is not a traditional class of voting stock. See *supra* notes 154-155 and accompanying text.

¹⁶⁷ Enforcement of the duty to diversify, however, is rare. See *supra* note 164.

any OpenAI PBC's violated any diversification requirement, it would be free to sell the stock and invest elsewhere.

d. Section 4940 Investment Income Tax

All private foundations must pay a 1.39% on its net investment income for its taxable year, including its "net gross investment income."¹⁶⁸ Gross investment income includes "income from interest, dividends, rent, payments with respect the securities loans. . . and royalties."¹⁶⁹ That list is much the same as that used for the denominator of 509(a)(1) public support test. In contrast to the items of income included for that denominator, however, it also includes capital gain.¹⁷⁰ This tax was originally intended to fund audits of private foundations, but it has never been so used.¹⁷¹ The amount of the tax has changed over the years; in 2019 Congress set the amount at 1.39% to simplify a complicated provision under which the tax could vary from year to year.¹⁷²

A tax of 1.39%, of course, is low as a percentage. Even as a private foundation, OpenAI Foundation would not face a large tax bill in absolute terms under this provision on its OpenAI PBC stock until and unless it sells some of the stock. Sales of such stock, however, could well result in a tax that is high as an absolute number. Public charities, with the exception of certain private universities and colleges,¹⁷³ face no tax on their investment

¹⁶⁸ I.R.C. § 4940(c)(1). Net income is calculated after subtracting ordinary and necessary paid or incurred in connection with such items of income. § 4940(a)(3).

¹⁶⁹ § 4940(c)(2).

¹⁷⁰ *Id.*

¹⁷¹ Nonprofit Organizations 2021 Textbook, *supra* note 16, at 775.

¹⁷² § 4940(a).

¹⁷³ *See* I.R.C. § 4968.

income.

e. Section 4941 Self-Dealing

Private foundations face strict self-dealing rules. Of particular relevance here, sales and exchanges between the foundation and a disqualified person are one category of self-dealing subject to an excise tax.¹⁷⁴ An initial tax is imposed on any disqualified person other than a foundation manager acting as such in any self-dealing transaction.¹⁷⁵ Unlike other private foundation excise taxes, this tax falls on individuals, not the entity. The initial tax is 10% of the amount involved for each year or part of the year in the taxable period; failure to correct triggers the second level tax of 200% of the amount involved.¹⁷⁶ Knowing foundation managers who participate in any act of self-dealing can also be subject to tax. The first-tier tax on managers is 5% up to a maximum of \$20K per act; the second-tier tax on a manager who refuses to agree to all or part of a correction is 50%.¹⁷⁷ All of these taxes are imposed on the full amount of the transaction, even if at or below fair market value or at a bargain price.¹⁷⁸

All of the members of OpenAI Foundation, including Sam Altman, are foundation managers under this definition.¹⁷⁹ The section 4941 definition of self-dealing would mean that no contract could be entered between OpenAI Foundation, if it were a private

¹⁷⁴ I.R.C. § 4941(d)(1)(A). Other categories of self-dealing are: leases; loans; furnishing of goods, services or facilities; payment of compensation other than compensation for personal services that is not excessive; use or transfer of assets or income, and payments to government officials. § 4941(d)(1)(B)-(E). Note the exception for reasonable compensation for personal services.

¹⁷⁵ See § 4941(e)(2).

¹⁷⁶ See § 4941(a); 4941(b)(1).

¹⁷⁷ See § 4941(a)(2); § 4941(b)(2).

¹⁷⁸ See § 4941(e)(2).

¹⁷⁹ See OpenAI, Our Structure, <https://openai.com/our-structure/>.

foundation, and any of the board members or entities controlled by them.¹⁸⁰ We know of no such contracts currently. We know that OpenAI PBC has contracts with several entities in which Sam Altman holds equity,¹⁸¹ but not any with OpenAI Foundation.

As a public charity, OpenAI Foundation faces a different limit on transactions with DQPs under section 4958.¹⁸² Such transactions can trigger excise taxes, but only if they result in excess benefit to the DQP. That is the DQP must not pay less than fair market value for assets or services received from the public charity and cannot receive more than fair market value for assets or services that go to the public charity. If an excess benefit transaction takes place, the first tier tax on the DQP is 25% and 10% on a knowing manager, with second tier tax of 200% on the insider involved in the transaction.¹⁸³ The tax, however, is levied only to the extent the amount that does not reflect fair market value, not the entire amount transferred.¹⁸⁴ That is, unlike section 4942, which operates as a prohibition in the case of private foundations, transactions that do not produce excess benefit are permitted between a public charity and its disqualified persons.

¹⁸⁰ There is an exception for reimbursements and compensation for personal services rendered by an insider so long as the amounts are reasonable and necessary in light of the private foundation's exempt purpose. § 4941(d)(1)(D) and (d)(2)(E).

¹⁸¹ See Berber Jin & Kate Clark, *Sam Altman's Side Hustles Blur the Line Between OpenAI's Interests and his Own*, WALL ST. J. (Apr. 16, 2026), <https://www.wsj.com/tech/ai/chatgpt-openai-ipo-altman-029ae6d5>.

¹⁸² See I.R.C. § 4958. The definition of DQPs under section 4958 differs in some details than the definition applicable to private foundations. See Treas. Reg. § 53.4958-3.

¹⁸³ § 4958(a) and (b).

¹⁸⁴ § 4958(c)(1).

f. Section 4945 Lobbying Prohibition

Section 4945 imposes excise tax on a variety of items deemed “taxable expenditures.” One of those items is legislative lobbying.¹⁸⁵ If a private foundation lobbies a legislative body or engages in any other taxable expenditure, it faces an initial of 20% on the amount of the lobbying expenditure, with a 5% tax on any knowing managers.¹⁸⁶ Second tier taxes if any taxable expenditure is not corrected are 100% and 50%, respectively.¹⁸⁷

OpenAI Foundation’s 2020 amended Certificate of Incorporation undertakes to “research and/or otherwise support efforts to safely develop and distribute such technology and its associated benefits, including analyzing the societal impacts of the technology and supporting related educational, economic, and safety policy research and initiatives.”¹⁸⁸ How AI should be regulated and whether by the federal or state government are matters of concern and debate.¹⁸⁹ These stated purposes allow and perhaps even encourage OpenAI Foundation’s involvement in shaping regulation.

The difference between legislative lobbying as a public charity and as a private foundation seems considerable at first glance. A public charity is permitted under the language of section 501(c)(3) to engage in lobbying so long as it is not substantial part of its

¹⁸⁵ I.R.C. § 4945(d)(2). Other taxable expenditures include influencing elections and certain voter registration drives, grants to individuals unless made according to procedures submitted to the IRS, and grants for other than charitable purposes as defined in the Internal Revenue Code. *See* § 4945(d).

¹⁸⁶ § 4945(a)(1) and (a)(2).

¹⁸⁷ § 4945(b), (c).

¹⁸⁸ *See supra* note 19, and accompanying text.

¹⁸⁹ *See e.g.*, John Fogarty, *Eight Considerations to Shape the Future of AI Governance*, BIPARTISAN POL’Y CTR. (Dec. 3, 2025), <https://bipartisanpolicy.org/article/eight-considerations-to-shape-the-future-of-ai-governance/>; Joshua P. Meltzer, *The US Government Should Regulate AI if it Wants to Lead on International AI Governance*, BROOKINGS (May 22, 2023), <https://www.brookings.edu/articles/the-us-government-should-regulate-ai/>.

activities.¹⁹⁰ For a private foundation, any amount of such lobbying is a taxable expenditure. But the applicable regulations for both public charities and private foundations contain generous exceptions. Both the rules for public charities and private foundations exempt from the definition of lobbying “nonpartisan analysis, study or research.”¹⁹¹ Providing technical assistance to a government body in response to a written request is yet another exception.¹⁹² These exceptions would allow OpenAI Foundation an active role in any consideration of legislation regulating AI whether it was a public charity or private foundation.

Moreover, even if OpenAI Foundation found itself limited in lobbying efforts as either a private foundation or public charity, OpenAI PBC could shoulder that responsibility.¹⁹³ Its Certificate of Incorporation states as to OpenAI PBC’s public benefit that it “may also research and/or otherwise support efforts to safely develop and distribute such [AI] technology” including safety policy research and initiatives.”¹⁹⁴ Further, its Certificate of Incorporation provides that the pecuniary interest of stockholders are not to be taken into account “in respect of safety and security issues.”¹⁹⁵ These provisions support involvement of OpenAI PBC in lobbying as to regulation of AI.

¹⁹⁰ “Nobody (including the Services) knows for sure when lobbying becomes ‘substantial’.” Nonprofit Organizations 2021 Textbook, *supra* note 16, at 486. Section 501(h) permits section 501(c)(3) public charities to make an election under which permitted lobbying turns on dollars spent. Because the maximum lobbying expenditure under this provision is \$1 million, large public charities do not choose to make the election.

¹⁹¹ For private foundations, *see* Treas. Reg. § 53.4945-2(d)(1); for public charities, *see* Rev. Rul. 70-79, 1970-1 C.B. 127.

¹⁹² For private foundations, *see* Treas. Reg. § 53.4925-2(d)(2); for public charities. *See* Rev. Rul. 70-449, 1970-2 C.B. 111.

¹⁹³ OpenAI PBC, however, would not be able to take a business deduction for any lobbying expenditures. *See* section 162(e).

¹⁹⁴ *See supra* notes 22-23 and accompanying text.

¹⁹⁵ *Id.*

In short, the difference between legislative lobbying for public charities and private foundations is unlikely to hamper OpenAI Foundation, whatever its status, from engaging in legislative lobbying.

g. Summary of Consequences of OpenAI Foundation as a Private Foundation

If OpenAI were a private foundation, some of the private foundation excise taxes would have a profound effect on its organization and operation, others less so. The charitable distribution requirement of section 4942 and the excess business rules of section 4943 would require it to revamp its structure and operations. The jeopardy investment rules of section 4944 could also have an impact, although the IRS has seldom asserted violation of its diversification requirement.¹⁹⁶ The self-dealing rules of section 4941 could limit possible future investments in entities run by any of its disqualified persons. The investment income tax of section 4940 and the lobbying prohibition of section 4945 would, I believe, have less of an impact. Overall, however, this analysis shows how important categorization as a public charity is to OpenAI.

VI. Recommendations and Conclusion

This study leads me to two sets of recommendations. The first recommends immediate action by Treasury and the IRS to issue guidance closing the currently available DAF loopholes that bear upon the private foundation regime. The second set recommends further study of both the extent to which public charities rely on capital gains and the feasibility of guidance as to the level of charitable activity required of public charities.

¹⁹⁶ The same is true of the UPMIFA diversification requirement, which applies to OpenAI Foundation as either a private foundation or public charity. The saga of the Hershey Foundation, however, indicates that in certain circumstances, a diversification requirement can have an enormous impact. *See supra* note 164.

The DAF loopholes have received a great deal of attention. Many, including Treasury and the IRS, have taken the position that permitting donations through DAF Sponsors to ensure satisfaction of the 509(a) public support test represents an abuse.¹⁹⁷ My hope is that we will see the next set of DAF regulations come sooner rather than later and that they will close down this method of donating.¹⁹⁸ I find the need for guidance particularly compelling because of the announced plans by OpenAI founders to donate a large percentage of their OpenAI PBC stock to charities.¹⁹⁹

I urge the Treasury and the IRS to issue similar guidance to shut down use of donations from private foundations to DAF Sponsors in order to satisfy the section 4942 income distribution requirement. The current state of affairs would permit AI founders who form private foundations to satisfy section 4943 by grants to DAF Sponsors and delay use of the funds for charitable activities indefinitely.

The justifications offered for permitting donations from private foundations to DAF Sponsors to satisfy the minimum distribution requirements ring hollow.²⁰⁰ Flexibility in timing grants undermines, indeed contradicts, the section 4942 distribution requirement. If a private foundation lacks the resources to structure complex charitable giving or needs to reduce costs, the appropriate response would be to dissolve the private foundation and

¹⁹⁷ See *supra* notes 100-102 and notes 107-108 and accompanying text.

¹⁹⁸ I note, however, that the current Treasury and IRS Priority Guidance Plan does not include new DAF guidance, only finalizing the current proposed DAF regulations. See Treasury and IRS Priority Guidance Plan, *supra* note 104, at 6, item 35.

¹⁹⁹ See Cioffi, *supra* note 117.

²⁰⁰ See *supra* note 131 and accompanying text.

distribute its assets to a DAF Sponsor, as James Fishman has recommended for private foundations with assets worth less than \$1 million.²⁰¹

Other aspects of this examination call for further study and development. As discussed in Section IV, I sense that reliance on capital gains is currently a key source of revenue for section 501(c)(3) organizations, at least those with endowments. If so, excluding of capital gains from the denominator of the section 509(a)(1) public support test fails to reflect accurately current sources of operating revenue on which section 501(c)(3) organizations rely. This intuition needs to be tested empirically by calculating the extent to which gains from sales of assets reported on Part VIII, Line 7 of Form 990 would figure in the total support of the denominator of the 509(a) public support test if it included capital gains. I hope to enlist someone with skills for that kind of analysis to help me do so.

The most difficult issue, I think, follows from the contrast between OpenAI Foundation's announced charitable grants and the size of its obligation if it were a private foundation. Public charities have no required distribution under the Internal Revenue Code. The 2008 Report on the commensurate-in-scope test from the New York State Bar Association Tax Section, although it found the commensurate test to have been "poorly defined and unevenly applied" and the scope of the test itself "unclear,"²⁰² it nonetheless endorsed IRS guidance providing a "safe-harbor spending floor" for applying the doctrine to public charities such that "a percentage of net asset value" that "must be spent on charitable

²⁰¹ See James Fishman, *The Private Foundation Rules at Fifty: How Did We Get Them and Do They Meet Current Needs*, 17 PITT. TAX. REV. 274, 287-93 (2020).

²⁰² N.Y. STATE BAR ASS'N TAX SECTION, *supra* note 136, at 5-6.

programs each year, similar to that in the private foundation . . . area.”²⁰³ The 2014 Report of the Advisory Committee on Tax Exempt and Government Entities also called for additional guidance on the commensurate in scope test.²⁰⁴ At least tentatively, I endorse the call for some such guidance to reduce uncertainty about application of the doctrine.²⁰⁵

As detailed as some of its analysis has been, this study has not attempted to explain or examine all the many technical requirements of the private foundation tax regime, even for the provisions it does discuss. Nonetheless, exploring the distinction between public charities and private foundations by using OpenAI Foundation as an example has allowed the pursuit of several different objectives. One has been to clarify the path toward and the reasons for the structure OpenAI adopted in its 2025 recapitalization. Another has been to show the impact of categorization as a private foundation excise taxes in a way that simply describing the rules in isolation would not. That examination also demonstrates the enormous impact on OpenAI Foundation if it became a private foundation. Finally, this examination identified the

²⁰³ *Id.* at 35. The Report continues, “no inference should result from an organization’s failure to meet the safe harbor.” *Id.*

²⁰⁴ Advisory Committee on Tax Exempt and Government Entities, 2014 Report and Recommendations 157 (2014), <https://www.irs.gov/pub/irs-prior/p4344--2014.pdf>.

²⁰⁵ As with the 5% requirement of section 4943, there is a risk that a minimum or safe harbor will become the norm. Such guidance, however, could also serve as an aid to Attorneys General. As the National Association of Attorneys General has explained “nonprofit corporations need to use revenue and assets to further the organization’s charitable purposes, and attorneys general are the primary protectors and regulators of nonprofits in their states.” National Association of Attorneys General, Charities Regulation 101, After OpenAI’s recapitalization on October 28, 2025, for example, California Attorney General Rob Bonta issued a statement that concluded. “We will be keeping a close eye on OpenAI to ensure ongoing adherence to its charitable mission and the protection of the safety of all Californians. Press Release, Attorney General Rob Bonta Issues Statement on OpenAI’s Recapitalization Plan (Oct. 28, 2025), <https://oag.ca.gov/news/press-releases/attorney-general-bonta-issues-statement-openai%E2%80%99s-recapitalization-plan>. The California Attorney General will face an enormous challenge in determining whether OpenAI Foundation is demonstrating sufficient “adherence to its charitable mission” in its actions, whether in programs it undertakes directly or through grantmaking, given the value of its holdings in OpenAI PBC, especially after any IPO. A federal tax safe harbor could offer at least some helpful guidance.

need for changes to current rules and areas for further study. As its author, my hope is that readers have come away with a greater understanding of this area of law and how OpenAI Foundation fits within it.