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GET OUT OF 1993, AND INTO 2023: MOVING THE SUBSTANTIATION REQUIREMENTS FOR CHARITABLE CONTRIBUTIONS OUT OF THE PAST AND INTO THE PRESENT

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[1] The comments contained in this paper are the individual views of the author and do not represent the position of the California Lawyers Association.

[2] Although the participants on the project might have clients affected by the rules applicable to the subject matter of this paper, and have advised such clients on applicable law, no such participant has been engaged by a client to participate on this project.

EXECUTIVE SUMMARY

This paper concerns the tax treatment of charitable contributions, specifically current issues with the requirements for substantiation of gifts. The paper discusses the history of the charitable contribution deduction, the rise of substantiation requirements, and the problems which arise when the immovable object (the Tax Code) meets the unstoppable force (the Internet). The paper addresses the changes that are needed to the Code in order to accommodate the changes in giving methods that have occurred and continue to occur as the result of the continuing development of new ways to solicit donations and new methods to contribute.

Under Section 170(f)(8) of the Internal Revenue Code, charitable contributions over $250 must be acknowledged by a contemporaneous, written acknowledgment from the donee organization which clearly states:

1. The amount of cash and a description (but not value) of any property other than cash contributed.;
2. Whether the donee organization provided any goods or services in consideration, in whole or in part, for any property described in clause (1)
3. A description and good faith estimate of the value of any goods or services referred to in clause (2) or, if such goods or services consist solely of intangible religious benefits, a statement to that effect.

26 U.S.C. §170(f)(8)(B) (2023)

For purposes of this section, 'contemporaneous' means "before the due date of the return, plus extensions" (or, if sooner, the date on which the return is filed). IRC Section 170(f)(8)(C)). In theory, then, a taxpayer could make a donation in August of the tax year, and as long as the letter from the charity was received by the due date of the return (including extensions, if any), the 'contemporaneous' requirement is deemed to have been satisfied.

In addition, noncash donations carry additional requirements. For donations under $500, no additional documentation is required. For donations above $500 and below $5,000, an additional form (8283) must be filed, which shows a) the name and address of the donee organization, b) a description of the items donated, c) the date the item was donated d) the date the item was originally acquired, e) how the item was acquired, f) the original value (i.e., the cost basis), d) the current ('fair market') value of the donated item, and g) how the current value was determined. 26 C.F.R. §1.170A-16(c). For donations with a declared value above $5,000, an additional requirement applies: the taxpayer must also provide a 'contemporaneous' appraisal. See Treas. Reg. § 1.170A-16(d) (requiring qualified appraisal); Treas. Reg. § 1.170A-17 (defining qualified appraisal).

On paper, these requirements seem to be straightforward and simple. In practice, they are anything but. When Section 170 was enacted in 1956, making a cash charitable contribution meant writing a check payable to a charity and dropping the check in the mail (usually accompanied by a voucher provided by the charity). Charities reached out to potential donors primarily in one of three ways: written pleas for donations (letters to previous donors); door-to-door solicitations and in-person requests at fundraising activities. In addition, the only substantiation for a donation was in the form of a canceled check; the $250 written acknowledgement requirement wouldn't enter the code until 1995.

Ironically, the change in substantiation rules arrived just in time for a new method of commerce: the Internet. The impact of the Internet wasn't immediate; mail delivery increased year-over-year until 2006. But contributions have changed dramatically. Today, while charities still mail donation requests and hold fundraisers, door-to-door solicitation has been replaced by websites such as Go Fund Me, apps such as iDonate and even the charity's own website as primary drivers of contributions. Checks, in turn, have been replaced by credit cards, often authorized through third parties, and set up for repetitive donations.

Unfortunately, the Code is still stuck in 1993 and requires a written acknowledgement from the donee organization, which presents several problems today: first, the donor may not be donating directly to a charity, but through a third party acting as a conduit[3]; and second, the code does not address donations through third party conduits. Consequently, the third party may not collect the information necessary to allow the donee organization to acknowledge the donation. Even where that happens, many charitable organizations have not adopted proper acknowledgement letters in accordance with Section 170(f)(8). Finally, the requirement of a "contemporaneous" acknowledgement can be problematic where the item is unique, the item is difficult to value, or the taxpayer, receives a letter which does not comply with the Code.

In short, the Tax Code needs to get out of 1993 and into 2023. To do so, this paper offers the following suggestions:

1. Allow for reasonable cause as a defense for online donations;
2. Allow for a broader scope for substantial compliance; and
3. Provide guidance to new nonprofits.

DISCUSSION

I. INTRODUCTION

The deduction for charitable contributions has been part of the Internal Revenue Code (IRC) since the IRC's first revision in 1917. Prior to 1917, the highest individual tax rate was 7% which applied to income over $3,000. Only a relatively small number of Americans had a sufficient level income to be impacted by the tax, until the cost of U.S. involvement in World War I brought the need to raise additional funds. Consequently, the War Income Tax Revenue Act of 1917 (P.L. 65-50) raised tax rates substantially – the

[3] This would include third parties raising funds on behalf a charity (for example, a radio station or other organization) and merchant service providers who actually collect funds from donors and remit them to the charity.

highest tax rate was now 67% - and broadened the reach to subject more Americans to an income tax. [4]

This dramatic increase in tax rates triggered a concern that one of the 'victims' would be charities.

According to the Joint Committee on Taxation, some

> [l]egislators feared that the [tax] increase would reduce individuals' income "surplus" from which they supported charity. It was thought that a decrease in private support would create an increased need for public support and even higher rates, so the [charitable] deduction was offered as a compromise.[5]

At the time, the prevailing viewpoint was that wealthy individuals' contributions to charity reduced the need for government action. In fact, many wealthy industrialists, including John D. Rockefeller, and Andrew Carnegie along with wealthy retailers, including A. Montgomery Ward and Marshall Field IV, had given substantial sums to support a variety of philanthropic causes, and many in Congress wanted to encourage them and others to do so.

While the deduction itself is over 100 years old, the substantiation rules are only just now entering their 30s. Prior to 1993, all that was needed to support a charitable contribution deduction was a canceled check; the charity was not required to provide any proof that a deduction was made, nor the amount of the donation. As a result, it was possible to game the system and gain a benefit that was not actually earned by making a *quid pro quo* donation – in other words, receiving a benefit for making a (larger) donation, which in turn was not reported as income by the donor.

In 1993, the President's Budget Proposal made a number of revenue-losing changes in the law governing exempt organizations. To compensate, the President proposed that charitable organizations be required to file with the Internal Revenue Service annual information returns reporting charitable contributions in excess of $500 from any one donor during the preceding calendar year.[6] This proposal generated a fair amount of negative feedback from charitable organizations who expressed concern about donor privacy, and was eventually replaced by the requirement of the donor to obtain a letter from the donee organization if the contribution exceeded $250.[7] The new substantiation requirements were made effective for contributions made on or after January 1, 1994.

The Treasury Department first issued proposed regulations addressing the new substantiation requirements in August 1995. However, those proposed regulations made

[4] Joint Committee on Taxation, Present Law and Background Relating to the Federal Tax Treatment of Charitable Contributions, October 14, 2011, JCX-55-11, p. 4. (cited in: U.S. Congressional Research Service. *The Charitable Deduction for Individuals: A Brief Legislative History* (R46178; June 26, 2020 (Version 3)), by Margo L. Crandall-Hollick. Text in: EveryCRSReport.com; Accessed March 19, 2023.)

[5] Id.

[6] *15 West 17th Street LLC v. Commissioner*, 147 T.C. No. 19, 12-13 (2016), quoting Office of Mgmt. & Budget, Exec. Office of the President, Budget of the United States Government, Fiscal Year 1993 Part Two 7 (1992).

[7] Id. Pp. 13-17.

no provision for donee reporting by charitable organizations.[8] Although the IRS requested public comments and scheduled a hearing for November 1995, only one comment out of several hundred pages of comments received by the IRS addressed donee reporting. No one at the November hearing mentioned donee reporting. The final regulations, issued in December 1996, did not implement donee reporting requirements.[9] No further effort was made to address donee reporting until 2015, when the IRS issued a Notice of Proposed Rule Making (NPRM) which proposed a donee reporting system "to implement the exception to the 'contemporaneous written acknowledgment' requirement for substantiating charitable contribution deductions of $250 or more."[10] After over 38,000 comments were received regarding the NPRM, the Secretary withdrew the NPRM.[11] There has been no further attempt to address donee reporting since the withdrawal of the NPRM.

II. GET OUT OF 1993…THE CURRENT STATE OF DONATIONS

A. THE REQUIREMENTS OF SECTION 170(F)(8)

In 1993, when Section 170(f)(8) was enacted, the Internet was in its infancy. AOL was only beginning what would become its ubiquitous campaign of sending installation CDs to every household in America; Amazon (1994), Netscape (also 1994), EBay (1995), Yahoo! (also 1995), PayPal (1998), Google (also 1998) and Wikipedia (2001) did not yet exist, and for those few individuals who had access to the Internet, there were only four services to choose from: the aforementioned AOL, Prodigy, CompuServe and GEnie. Today, a website is an essential part of having a business; in 1993, the word 'website' was barely invented (with the first recorded use of 'website' dating back to either a white paper posted on a Usenet newsgroup in January 1993, or an article in the March 1993 issue of *Computer Shopper*).[12]

It was in this landscape, then, that Section 170(f)(8) landed. Donors making cash donations generally made those donations by check, mailed directly to a charity, in response to a written petition for donations from the charity. In the alternative, they donated money at a charitable fundraiser or at the charity itself. In any event, it was easy enough to get a written record from the organization confirming the contribution.

In the ensuing thirty years, websites have become essential parts of businesses and a common way for charities to solicit donations. Those donations are often made directly on the website via a third party (commonly known as a merchant service provider). The third party collects the funds and distributes them to the charity after deducting a fee and sends a receipt to the donor acknowledging the donation.

This arrangement works well for all parties. The Internet gives the charity a simple and seamless way to raise funds; the donor a cost-effective way to find and

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[8] Id, p. 18.
[9] Id. p 20.
[10] Id., p 20 (quoting 80 Fed. Reg. 55802 (Sept. 17, 2015)).
[11] Id. p. 23.
[12] See, https://english.stackexchange.com/questions/379047/when-was-the-term-web-site-or-website-first-used, last accessed March 19, 2023.

contribute to causes they believe in and wish to support, and the merchant service provider generates revenue for its shareholders/owners. The problem is that Section 170(f)(8) is often lost in the shuffle. After the donor receives the initial receipt – which generally just shows the amount donated and the date of donation – there is often no further communication between the parties, even though Section 170(f)(8)(B)(ii) requires that any acknowledgement includes "[w]hether the donee organization provided any goods or services in consideration, in whole or in part, for any property described in clause (i)." Consequently, the receipt sent by the merchant service provider does *not* satisfy the substantiation requirements of Section 170(f)(8)[13], and the taxpayer has a potential problem that won't raise its head until an audit occurs.

B. THE UNBEARABLE VAGUENESS OF SECTION 170(F)(11)(C)

Where the donor gives property instead of cash, and the claimed value of such property exceeds $5,000 Section 170(f)(11) requires the donor to obtain (and attach to the return) a 'qualified appraisal' performed by a 'qualified appraiser.' Section 170(f)(11)(E)(ii) generally defines 'qualified appraiser' as "an individual who—

(I) has earned an appraisal designation from a recognized professional appraiser organization or has otherwise met minimum education and experience requirements set forth in regulations prescribed by the Secretary,

(II) regularly performs appraisals for which the individual receives compensation, and

(III) meets such other requirements as may be prescribed by the Secretary in regulations or other guidance." 26 U.S.C. Section 170(f)(11)(E)(ii). Section 170(f)(11)(E)(iii) goes on to add "An individual shall not be treated as a qualified appraiser with respect to any specific appraisal unless—

(I) the individual demonstrates verifiable education and experience in valuing the type of property subject to the appraisal,

The Regulations get slightly more specific, defining a 'qualified appraiser' as "an individual with verifiable education and experience in valuing the type of property for which the appraisal is performed, as described in paragraphs (b)(2) through (4) of this section." Treas. Reg. §1.170A-17(b)(1) (2023).

i. THE PROBLEM.

Paragraph (2) is critical here, as it requires the appraiser to have completed "professional or college-level coursework" (§1.170A-17(b)(2)(i)(A)) "from an educational organization, generally recognized professional trade or appraiser organization, or employer educational program." (§1.170A-17(b)(2)(ii)). This works fine where such programs exist but fails when they do not. For example, cryptocurrency has long been considered 'property' by the IRS, but there are no "educational organization(s),

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[13] See, e.g., *Addis v. Commissioner*. There, the Ninth Circuit upheld the Tax Court's denial of a charitable contribution deduction where the charity's written acknowledgment failed to include all of the language of §170(f)(8), stating "[t]he deterrence value of section 170(f)(8)'s total denial of a deduction comports with the effective administration of a self-assessment and self-reporting system" Addis v. C.I.R, 374 F.3d 881, 887 (9th Cir. 2004)

generally recognized professional trade or appraiser organization(s), or employer educational program(s) which offer "professional or college-level coursework" on the valuation of cryptocurrency. Consequently, it is difficult, if not impossible, to obtain a 'qualified appraisal' of cryptocurrency since there is no real way for a person to become a 'qualified appraiser.'

ii. THE IRS' POSITION.

In general, the IRS requires strict compliance with the appraisal requirements of Section 170 and will opt to deny a deduction where there is a question. This is because "the IRS's deficiency determinations in [a Statutory Notice of Deficiency] are presumed correct, and the taxpayers bear the burden to prove otherwise and to show their entitlement to any claimed deduction. Proving entitlement to a claimed deduction generally includes proving that the taxpayers satisfied the specific requirements for any deduction claimed." *Emanouil v. Comm'r*, T.C. Memo. 2020-120, 30 (U.S.T.C. Aug. 17, 2020) (internal citations omitted).

The IRS has recently addressed the question of whether an appraisal of cryptocurrency is required when it is donated. IRS Memo 202302012 focused on the issue of cryptocurrency donations and concluded that where a taxpayer transfers cryptocurrency to a qualified charitable organization and claims a deduction of $5,000 or more, the taxpayer must obtain a qualified appraisal.

The Memo noted that "[a] qualified appraisal is not required for donations of certain readily valued property specifically set forth in the Code and regulations, namely: cash, stock in trade, inventory, property primarily held for sale to customers in the ordinary course of business, publicly traded securities, intellectual property, and certain vehicles."[14] The Memo further noted that "the term 'publicly traded securities' for purposes of section 170 to mean securities as defined by section 165(g)(2)" and determined that "[c]ryptocurrency … is none of the items listed in section 165(g)(2), and therefore does not satisfy the definition of a security in section 165(g)(2)." Therefore, "a qualified appraisal is required."

iii. THE REASONABLE CAUSE DEFENSE.

In situations where an individual has not gotten the requisite appraisal, or where the appraisal fails to meet IRS standards for some reason, there are two common defenses taxpayers can use to save their deduction. The first is the 'reasonable cause' defense under IRC Section 170(f)(11)(A)(ii)(II). Under the reasonable cause defense, the taxpayer asserts that they have a valid reason for failing to meet the requirements, and that they should still be entitled to the deduction.

"Reasonable cause requires that the taxpayer have exercised ordinary business care and prudence as to the challenged item. See *United States v. Boyle*, 469 U.S. 241 (1985)" *Crimi v. Comm'r*, Docket No. 13262-09, 99 (U.S.T.C. Feb. 14, 2013). A taxpayer's reliance on the advice of a professional, such as a certified public accountant, would constitute reasonable cause and good faith if the taxpayer could prove by a preponderance of the evidence that: (1) the taxpayer reasonably believed the professional

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[14] IRS Memo 202302011 (January 13, 2023), p. 3 (citing §170(f)(11)(A)(ii)(I); Treas. Reg. §1.170A-16(d)(2)(i).)

was a competent tax adviser with sufficient expertise to justify reliance; (2) the taxpayer provided necessary and accurate information to the advising professional; (3) the taxpayer actually relied in good faith on the professional's advice. See *Rovakat, LLC v. Commissioner*, 102 T.C.M. (CCH) at 279 (citing, *Neonatology Assocs., P.A. v. Commissioner*, 115 T.C. 43, 98-99 (2000), aff'd, 299 F.3d 221 (3d Cir. 2002)); see also sec. 1.6664-4(c)(1), Income Tax Regs. *Crimi v. Comm'r*, Docket No. 13262-09, 99 (U.S.T.C. Feb. 14, 2013). Reasonable cause is most effective when the taxpayer has omitted information, such as cost basis (Treas. Reg. 1.170A-13(b)(3)(ii)) or the manner of acquisition (Treas. Reg. 1.170A-13(c)(4)(iv)(C)(1)), because these situations have been specifically identified in the regulations as situations where "[t]he taxpayer's deduction will not be disallowed simply because of the inability (for reasonable cause) to provide these items of information." Like substantial compliance, discussed below, reasonable cause fails where strict compliance is required (i.e., where donations are subject to the requirements of Section 170(f)(8)).

iv. THE SUBSTANTIAL COMPLIANCE DEFENSE.

The second defense available to the taxpayer is one of substantial compliance. A taxpayer has 'substantially complied' when the "appraisals described the contributed property well enough to permit the Commissioner to understand the appraiser's valuation methodology." *Cave Buttes, L.L.C. v. Comm'r*, 147 T.C. No. 10, 22 (U.S.T.C. Sep. 20, 2016) (quoting *Estate of Evenchik v. Comm'r*, T.C. Memo 2013-34, 12-14 (Feb. 4, 2013)).

Taxpayers often rely upon the substantial compliance defense when the IRS challenges the sufficiency of the documentation provided by the taxpayer. For example, where the IRS challenged the sufficiency of two appraisals which failed to note that they were prepared for income tax purposes,[15] the Tax Court found that "each appraisal valued the correct asset (a fee simple interest in real property) according to the correct standard (fair market value); each was prepared within 30 days of the date of contribution; and each used a commonly accepted approach (the income approach) to estimate fair market value for the contribution…"[16] and therefore the appraisals substantially complied with the substantiation requirements of Section 170(f)(11)(D).

But not every taxpayer is so lucky – in fact, the substantial compliance defense fails far more often than it succeeds, and absolutely fails where – as is so often the case – the court determines that the substantiation requirement is statutory, and therefore requires strict compliance (as is the case where cash donations subject to Section 170(f)(8) requirements are concerned; see, *Averyt et.al. v. Comm'r*, TC Memo 2012-198 – "The doctrine of substantial compliance does not apply to excuse compliance with the substantiation requirements of Section 170(f)(8)(B)"). "[It] has been applied most often in cases involving procedural regulatory requirements". Id., quoting *Durden v. Commissioner*, T.C. Memo, 2012-140.

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[15] See, Treas. Reg. §1.170A013(c)(3)(ii) – "A qualified appraisal shall include the following information: (G) A statement that the appraisal was prepared for income tax purposes;"
[16] *Emanouil v. Comm'r*, T.C. Memo. 2020-120, 43-44 (U.S.T.C. Aug. 17, 2020)

III. GET INTO 2023 – DONATIONS IN THE MODERN WORLD

A. SECTION 170(F)(8) DOESN'T PLAY WELL WITH ONLINE DONATIONS

As mentioned above, Section 170(f)(8) came into existence in a time when donations were primarily made primarily directly to the charity making the request.

Today, taxpayers have a multitude of options when it comes to making donations, and checks are near the bottom of the list. Online giving has become a substantial part of any nonprofit's fundraising efforts; according to Blackbaud, a nonprofit software and services provider that tracks online giving, in 2012 only 7% of all donations were made online[17]; in 2021, that number had increased to 12%.[18] And while the 2021 figure represented a drop from 2020's 13%, the trend is expected to continue upward, as younger generations are likely to make more donations via online giving. In fact, mobile donations – which were statistically irrelevant in 2012, represented 28% of donations in 2021.

Taxpayers who donate online often do not get a personalized receipt which meets the requirements of Section 170(f)(8). Frequently, they get an e-mail thanking them for their gift, and omitting whether the donor received any benefit in exchange for the donation, which automatically rules the e-mail out as substantiation. Even worse, where the charity does provide the letter, the letter often fails as well – many simply say "your donation is deductible to the full extent of the law," a meaningless blob of phrasing which says essentially nothing and meets no standards. While the taxpayer can follow up directly with the charity and request a complying letter, that assumes a) that the taxpayer or their tax preparer will notice the error in time to receive the complying letter prior to the due date of the return, and b) that the charity will agree to send a letter with complying language. Currently, there is no penalty on the charity for refusing to send a revised letter – the penalty is solely borne by the taxpayer. As a result, attempts to reach out to charities often fall on deaf ears.[19] See Exhibit A for examples of non-compliant letters.

B. SECTION 170(F)(11)(C) DOESN'T PLAY WELL WITH NEW INNOVATIONS

When the noncash substantiation requirements were initially drafted, the types of items likely to be donated had long-established markets; real estate, autos, stocks, and other items were either specifically exempted because a ready market existed for them or had formal appraisal programs where an individual could be certified by the types of programs envisioned. And where the potential donation was difficult to appraise – such as in the case of intellectual property – the Code and the Regulations exempted the item

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[17] Samantha Sharf, "Charitable giving grew 4.9% in 2013 as online donations picked up," February 5, 2014, https://www.forbes.com/sites/samanthasharf/2014/02/05/charitable-giving-grew-in-2013-as-online-giving-picked-up/?sh=1d335f30b962. Last accessed March 25, 2023.

[18] Blackbaud Institute, "Online Giving Trends" https://institute.blackbaud.com/charitable-giving-report/online-giving-trends/. Last Accessed March 25, 2023.

[19] This is not surprising, since by sending a 'corrected' letter, a charity that uses a form letter is essentially admitting that *all* of the letters it has sent are invalid. Rather than issuing potentially hundreds of corrected letters, the charity can simply ignore the request.

from appraisal. In the intervening years, a number of new items have been developed, with no consideration as to how the requirements of Section 170(f)(11)(C) might be satisfied.

i. WHO IS A 'QUALIFIED APPRAISER' WHEN THE ITEM BEING APPRAISED DIDN'T EXIST PREVIOUSLY?

Cryptocurrencies and Nonfungible Tokens (or "NFTs") are two prime examples for which Section 170(f)(11)(C) needs updating. When no one has ever seen an item before, how can one obtain "verifiable education and experience in valuing the type of property subject to the appraisal?" This is a question that becomes more relevant as new technology – and new products – are developed, but which is not even contemplated in the current IRC or the Regulations.

ii. WHO PROVIDES THE EDUCATION?

The IRC requires a qualified appraiser to have received "education" from a "qualified appraiser organization" or met a minimum education experience. Unfortunately, neither a "qualified appraiser organization" nor the "minimum education experience" has ever been clearly defined. It seems clear that the last part of that clause – "met minimum education and experience requirements set forth in regulations prescribed by the Secretary" – was intended to allow for the situation in which taxpayers increasingly find themselves: appraising the value of a new, previously nonexistent, product. Yet neither the Secretary of the Treasury nor the IRS has ever undertaken an effort to outline what 'education' options might satisfy the requirements of this section. As a result, taxpayers who wish to donate new products or tech are left groping in the dark for answers, hoping to find a sufficient toehold that will satisfy the IRS and the courts. Given the courts' reluctance to look outside of the specific language of the IRC and Regulations, that is not likely to happen.

C. FIXING THE PROBLEMS

i. ALLOW FOR REASONABLE CAUSE AS A DEFENSE FOR ONLINE DONATIONS

For online donations, taxpayers should be allowed a reasonable cause defense where the taxpayer has complied with the intent of the law, but not the letter of the law. For example, in the situation where the taxpayer makes a donation online, and their only receipts are a) an e-mail acknowledging the donation and b) a charge on their bank or credit card statement, the donation should be allowed. While this would not meet the requirement of Section 170(f)(8) that the donee disclose "Whether the donee organization provided any goods or services in consideration," it would reflect reality – most taxpayers are not that conversant in the tax code to know that the donation acknowledgement requires specific language and that what they received as part of their online transaction was not sufficient. By the time this is discovered – often not until they are audited – the taxpayer has lost their opportunity to cure the defect. In the alternative, the Regulations could permit the taxpayer the opportunity to cure the defect by obtaining an acknowledgement from the charity, provided a) the acknowledgement correctly states the date and amount of the contribution, b) the nonprofit further acknowledges that no letter other than a standard e-mail or receipt was provided at the time of the transaction and c) the taxpayer obtains such acknowledgement within a reasonable time period – say 90 days – after the IRS requests it.

ii. ALLOW FOR A BROADER SCOPE OF SUBSTANTIAL COMPLIANCE

For noncash donations, taxpayers should be allowed the deduction where they can establish that they substantially complied with Section 170(f)(11)(C), but circumstances prevent actual, to-the-letter compliance.

The primary purpose of Section 170(f)(11(C) is to prevent overvaluations. Congress was very concerned that individuals might try to overvalue an item to gain an extra benefit, and there are certainly plenty of examples where this concern has been justified.

However, there are also plenty of examples where this concern on Congress' part has operated to hamper donations as well, particularly where the item being donated does not have an active appraisal market or is – as in the case of cryptocurrencies and NFTs – a completely new area.

The Secretary and the IRS have the power to set education and experience standards, but have thus far been reluctant to do so, based upon their inaction in this regard. Until either of them acts, there needs to be a mechanism that allows for donations of new products or tech that gives taxpayers confidence that their contribution won't be undone by a technicality over which they have no power.

As of this writing, taxpayers are not permitted to rely upon the current market price of cryptocurrency, even though a ready market exists. Moreover, the IRS considers cryptocurrency to be property[20]and not a security, but the SEC has recently indicated that it considers cryptocurrency to be a security.[21] The IRS should – at least for cryptocurrencies, but also for NFTs or whenever a ready market for a new product has developed – allow the use of the current market price in place of an appraisal. The IRS could certainly indicate that such treatment is temporary until such time as a) sufficient recognized appraisal organizations exist which offer training programs or b) the Secretary promulgates education standards, or c) both options occur.

iii. PROVIDE GUIDANCE TO NEW NONPROFITS

In 1993, when Congress was considering how to strengthen substantiation to prevent taxpayer overvaluations and other problems, one option that was considered was having nonprofits file reports showing the names, taxpayer identification numbers and amounts of donations which exceeded a certain threshold. Among the concerns expressed around this idea was the possibility of harm to taxpayers should their sensitive data be compromised (a prescient thought well ahead of its time). As a result, the burden of reporting was placed on taxpayers, and nonprofits were largely 'off the hook,' their only obligation being to provide the taxpayer with acknowledgement letter. No formal

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[20] See e.g., Zbylut, Gregor& McCullum, Paul, "Bitcoin: Property or Currency?" 148 Tax Notes 867 (2015)

[21] See Reuters, "U.S. SEC threatens to sue Coinbase over some crypto products," March 22, 2023, https://www.reuters.com/legal/coinbase-issued-wells-notice-by-sec-2023-03-22/, last accessed March 26, 2023.

example of the letter was ever provided; instead Section 170(f)(8) was designed to provide guidance to nonprofits about the kind of information that would need to be included.[22] However, the prevalence of nonconforming letters suggests that nonprofits don't look to the IRC when drafting their letters. To remedy this – and to assist taxpayers in meeting their obligation – the IRS should require nonprofits to submit a sample of their acknowledgement letters as part of the nonprofit application process. Doing so will increase the likelihood of conforming letters and force nonprofits to take their obligation to provide accurate, conforming documentation more seriously.

IV. CONCLUSION

The current law and regulations are relics of methods of giving that no longer predominate the giving environment. The IRC needs to become more flexible in how it addresses new and developing technology and products. This paper offers some suggestions as to how the IRC can get out of the past and into the present, with an eye toward the future.

[22] For a complete discussion of the legislative history of the 1993 modifications to §170 and the addition of (f)(8), see *15 West 17th Street LLC v. Comm'r*, 147 T.C. No 19, 12-22 (2016)

EXHIBIT A

Receipt
September 02, 2022

Friends of Lanai Booster
Love Fund 2022-23

To
[redacted]

Item	Deductible Amt*	Subtotal
Donation $975.00	$975.00	$975.00
Fees	$0.00	$0.00
Subtotal	$975.00	$975.00

Payments

9/02/2022 Check	$975.00

Summary

Subtotal	$975.00
Tax	$0.00
Total	**$975.00**
Payment	$975.00
Balance	**$0.00**

Federal Income Tax Deduction Summary **Deductible Amount $975.00**

*For federal income tax purposes you may be able to deduct the portion of your purchase price that exceeds the item's fair market value (FMV), if you paid the excess with the intent to make a charitable contribution. For more information, please consult with your tax advisor.

tax ID 02-0592638

Friends of Lanai Booster
PO Box 260585 Encino CA 91426

From: Darrell Smith info@chapter3.org
Subject: 2021 Donation Summary - Chapter 3
Date: Jan 11, 2022 at 3:11:23 PM
To: [redacted]@gmail.com

Dear [redacted]:

Please find the summary of your 2021 financial donations to Chapter 3, Pioneer Group, and Pilates for Parkinson's attached to this e-mail.

Chapter 3 (C3) is a registered non-profit corporation with the State of Texas and is a recognized 501c3 non-profit organization with the Internal Revenue Service of the United States of America.

Thank you for trusting C3 to be good stewards of your offering. Your support of C3, Pioneer Group, and Pilates for Parkinson's over the past year has been crucial in the fulfillment of our mission. Should you need any further information, please do not hesitate to contact us. You can always find information online at:

chapter3.org

Thanks again for your support!

peace,

Darrell Smith

Chapter 3

5150 Broadway, #247 | San Antonio, Texas 78209 | chapter3.org

pdf

[redacted]

286 KB

Donor Name	Date	Donation Description (if applicable)	Amount	Ministry
[redacted]				
	06/25/2021	Special Donation	1,000.00	Pioneer Group
Total for [redacted]			$ 1,000.00	