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## FOURTH QUARTER CHOKE: HOW THE IRS BLEW THE CORPORATE SPONSORSHIP GAME

### I. INTRODUCTION

At the end of the college football season, many tax-exempt organizations host college football bowl games. These organizations seek corporate sponsorship to defray the cost of the bowl games and have been extremely successful at soliciting revenue from corporate sponsors.<sup>1</sup> For example, in 1991 Mobil Oil Corporation gave the Cotton Bowl Athletic Association (CBAA) a \$1.5 million corporate sponsorship payment.<sup>2</sup> As specified in the contract, the CBAA provided Mobil many promotional benefits during the nationally televised game.<sup>3</sup>

Traditionally, income received by a tax-exempt organization from a corporate sponsorship payment would not be taxed by the Internal Revenue Service (IRS or Service). However, in 1991 the IRS decided that the CBAA's claimed acknowledgment of its corporate sponsor's generosity constituted advertising services given in exchange for payment. Therefore, in a technical advice memorandum popularly known as the "Mobil Cotton Bowl Letter,"<sup>4</sup> the IRS decided to tax the payment as unrelated business income.<sup>5</sup>

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1. See Dennis Zimmerman, *Corporate Title Sponsorship Payments to Nonprofit College Football Bowl Games: Should They Be Taxed?*, 5 EXEMPT ORGANIZATION TAX REV. 438, 440 (1992) (estimating that college bowl games received \$64 million in corporate sponsorship payments in 1992).

2. Amy Forsythe, *Implications of the Cotton Bowl Ruling on the Exempt Status of Intercollegiate Athletic Organizations*, 6 EXEMPT ORGANIZATION TAX REV. 933, 933 (1992); see Lee A. Sheppard, *The Goldberg Variations, Or: Giving Away the Store*, 58 TAX NOTES 530, 532 (1993) (discussing Tech. Adv. Mem. 91-47-007 (Aug. 16, 1991)).

3. Sheppard, *supra* note 2, at 532; see Paul Streckfus, *Maybe a Glimpse of Mobil-Cotton Bowl Contract Provisions*, 5 EXEMPT ORGANIZATION TAX REV. 788, 788 (1992) (Mobil denied terms of contract as contained in article).

4. See Sheppard, *supra* note 2, at 532.

5. Tech. Adv. Mem. 91-47-007 (Aug. 16, 1991). Certain identifying material, such as the name of the taxpayer, is deleted from technical advice memoranda. Rev. Proc. 92-2, 1992-1 C.B. 550. However, the parties were named in *Tax Notes. Services Provided by Organization Produced UBTI*, 53 TAX NOTES 1021, 1021 (1990) ("Tax Analysts has learned the section 501(c)(3) organization that was the subject of this technical advice is the Cotton Bowl Athletic Association, which stages a New Year's Day bowl game sponsored by Mobil Oil Corporation."). Two days later a similar ruling was reported to have also been issued to the John Hancock Sun Bowl. Gilbert Fuchsberg & Mark Robichaux, *IRS to Tax Sponsor's Fees to Bowl Game Organizers*, WALL ST. J., Dec. 4, 1990, at B1.

Technical advice memoranda are "furnished as a way of helping Service personnel close cases and establish and maintain consistent holdings throughout the Internal Revenue Service." Rev. Proc. 92-2, 1992-1 C.B. 548. "Technical Advice should be requested when there is

The IRS based its decision to tax the CBAA's receipt of Mobil's corporate sponsorship payments, in part, on the lavish recognition the CBAA gave its corporate sponsor.<sup>6</sup> Television viewers of the nationally broadcast game not only heard Mobil's name, but also saw Mobil's logo emblazoned across the field, the players' uniforms, and the stadium.<sup>7</sup> Because the overwhelming sponsor recognition appeared to be advertising, the IRS decided to tax the CBAA on the income it received from Mobil Oil, even though the CBAA was a nonprofit, educational institution.<sup>8</sup>

Understandably, the IRS's decision to tax such payments upset both the nonprofit organizations that sponsor bowl games and many other tax-exempt organizations that rely on corporate sponsorship income.<sup>9</sup> In an attempt to provide guidance for these tax-exempt organizations, the IRS released tentative audit guidelines regarding treatment of corporate sponsorship income.<sup>10</sup> These guidelines, like the Mobil Cotton Bowl Letter, would have aggressively taxed corporate sponsorship income and were, like the Letter, poorly received by the exempt organization community.<sup>11</sup> The exempt organization community responded by lobbying Congress and writing letters to the IRS.<sup>12</sup> Those efforts were extraordinarily successful and, in the summer of 1993, the IRS issued proposed

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a lack of uniformity regarding the disposition of an issue or when an issue is unusual or complex enough to warrant consideration by the National Office [of the IRS]." *Id.* at 549. Although a taxpayer may request that an issue be referred to the National Office for technical advice, the District Director or Chief determines whether to request technical advice on any issue considered. *Id.* Finally, no other taxpayer may *officially* rely on the technical advice given to another taxpayer. *Id.* at 557. "Nonetheless, [technical advice memoranda] can be valuable in understanding IRS thinking on a point of law and, in practice (the statutory prohibition notwithstanding), these documents are cited as IRS positions on issues, such as in court opinions, articles, and books." BRUCE R. HOPKINS, *THE LAW OF TAX-EXEMPT ORGANIZATIONS* app. A, at 1046 (6th ed. 1992); *see also id.* at 1043-50 (discussing general sources of tax law regarding charitable organizations); Francene M. Augustyn, *Research in Federal Income Taxation*, 38 U. FLA. L. REV. 767 (1986) (describing general tax sources and setting forth framework to research tax problems).

6. Tech. Adv. Mem. 91-47-007.

7. *See Sheppard, supra* note 2, at 532.

8. Tech. Adv. Mem. 91-47-007.

9. *See Paul Streckfus, Proposed Corporate Sponsorship Regulations*, 7 EXEMPT ORGANIZATION TAX REV. 379, 379 (1993).

10. Announcement 92-15, 1992-5 I.R.B. 51 [hereinafter Guidelines]. This document was originally issued as a news release. I.R.S. News Release IR-92-4 (Jan. 17, 1992); *see* Giola Ligos & Russlyn Guritz, *Corporate Sponsorship Income*, in 1993 IRS EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM TEXTBOOK 244, 248-49 (17th ed. 1993).

11. *See infra* part IV.

12. *Luncheon Speech—Cotton Bowl Comments*, 5 EXEMPT ORGANIZATION TAX REV. 615, 616 (1992) [hereinafter *Cotton Bowl Comments*] (printing comments of two professionals representing CBAA, Edward Knight, and Bruce Bernstien); *see infra* part IV.

treasury regulations that gave exempt organizations tremendous leeway and discretion in recognizing their corporate sponsors.<sup>13</sup>

This Comment addresses several issues raised by the "Mobil Cotton Bowl Letter,"<sup>14</sup> the tentative audit guidelines,<sup>15</sup> and the proposed treasury regulations.<sup>16</sup> First, it describes the basic law surrounding tax-exempt organizations and the unrelated business income tax (UBIT).<sup>17</sup> Next, it analyzes the IRS's historical policy regarding the taxation of college bowl games and the tax law before the Cotton Bowl Letter.<sup>18</sup> This Comment then reviews the 1991 Mobil Cotton Bowl Letter<sup>19</sup> and notes the changes in tax policy adopted by the IRS in the Cotton Bowl Letter and the subsequent audit guidelines.<sup>20</sup>

This Comment shows that the IRS has rejected, at one time or another, every legal, tax, and policy argument that tax-exempt organizations have advanced to avoid taxation of corporate sponsorship payments.<sup>21</sup> Nevertheless, in response to the threat of congressional action, which might have created overly broad and unmanageable exemptions, the IRS proposed treasury regulations that encompass all exempt organizations, not merely bowl games.<sup>22</sup> This Comment shows how tax-exempt organizations were successful in changing the IRS's position, and describes the present state of the law surrounding acknowledgement of corporate sponsors.<sup>23</sup>

This Comment concludes that the IRS's accommodation of the bowl interests has compromised the IRS's organizational integrity.<sup>24</sup> The IRS should withdraw the proposed treasury regulations and use the Mobil

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13. Taxation of Tax-Exempt Organizations' Income from Corporate Sponsorship, 58 Fed. Reg. 5687 (1993) (proposed Jan. 22, 1993) [hereinafter Proposed Regulations] (Proposed Treasury Regulations §§ 1.512(a)-1(e), 1.513-4). For minor, typographical corrections, see Prop. Treas. Reg. § 1.513-4, 58 Fed. Reg. 9597 (1993) (proposed Feb. 22, 1993); Prop. Treas. Reg. §§ 1.512(a)-1, 1.513-4, 58 Fed. Reg. 6923 (1993) (proposed Feb. 2, 1993).

14. Tech. Adv. Mem. 91-47-007; see Sheppard, *supra* note 2, at 532.

15. See Guidelines, *supra* note 10.

16. See Proposed Regulations, *supra* note 13.

17. See *infra* part II.A.

18. See *infra* part II.B.

19. See *infra* part III.A.

20. See *infra* part IV.B.

21. See *infra* parts III, IV.A-B.

22. See Milton Cerny, *Sponsorship Regs Deserve Cheers, Not Boos*, 8 EXEMPT ORGANIZATION TAX REV. 747, 747 (1993).

23. See *infra* part V.

24. See Paul Streckfus, *Corporate Sponsorship Sellout Puts Integrity of IRS at Risk*, 8 EXEMPT ORGANIZATION TAX REV. 746, 746 (1993) (arguing that IRS should write new regulations to restore its integrity); see also Sheppard, *supra* note 2 at 532-33. Sheppard argued that the IRS's capitulation amounted to "giving away the store." *Id.* at 530; see *infra* part VI.

Cotton Bowl Letter as a guide for taxation of corporate sponsorship income.<sup>25</sup>

## II. THE PREGAME SHOW: LAWS GOVERNING THE TAXATION OF TAX-EXEMPT ORGANIZATIONS AND THE UNRELATED BUSINESS INCOME TAX

### A. *The Laws Governing the Taxation of Tax-Exempt Organizations*

The Sixteenth Amendment, which authorized Congress to impose a federal income tax, became part of the United States Constitution in 1913.<sup>26</sup> Congress quickly passed the Tariff Act of 1913, which imposed taxes on the incomes of individuals and corporations.<sup>27</sup>

Today, § 61 of the Internal Revenue Code (IRC) defines gross income as "all income from whatever source derived."<sup>28</sup> This catch-all provision sweeps broadly to encompass income received from any source.<sup>29</sup> Typically, a taxpayer's gross income is subjected to a complicated series of deductions, exemptions, and equations to yield final income tax liability.<sup>30</sup> The tax system in the United States is designed to collect revenue, but it also promotes the goals of equity, efficiency, and simplicity, while stimulating specific activities.<sup>31</sup>

Historically, certain organizations have been granted exemption from taxation because they conduct activities that the federal government has decided to encourage.<sup>32</sup> The Tariff Act of 1913<sup>33</sup> enacted tax-exemption principles to accompany income taxation.<sup>34</sup> Indeed, some commentators conclude that the exemption for charitable organizations is based on the idea that they perform functions that the government would otherwise have to perform.<sup>35</sup>

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25. See *infra* part VI.

26. See also THOMAS A. BAILEY & DAVID M. KENNEDY, *THE AMERICAN PAGEANT* 630 (7th ed. 1983) (discussing political climate surrounding passage of income tax amendment).

27. Tariff Act of 1913, ch. 16, § II(A), 38 Stat. 114, 166.

28. I.R.C. § 61 (1988).

29. MARVIN A. CHIRELSTEIN, *FEDERAL INCOME TAXATION* 10 (6th ed. 1991).

30. SANFORD M. GUERIN & PHILIP F. POSTLEWAITE, *PROBLEMS AND MATERIALS IN FEDERAL INCOME TAXATION* 46-48 (3d ed. 1993).

31. *Id.* at 9-14.

32. HOPKINS, *supra* note 5, at 8-16.

33. 38 Stat. 114, 172.

34. HOPKINS, *supra* note 5, at 7; see also James J. McGovern, *The Exemption Provisions of Subchapter F*, 29 *TAX LAW* 523, 525-27 (1975) (discussing historical development of exemptions for charitable, religious, and scientific organizations).

35. See HOPKINS, *supra* note 5, at 8-9; see also PETER F. DRUCKER, *THE NEW REALITIES* 59-68 (1989) (explaining that government has tried and failed to usurp many activities traditionally carried on by nonprofit organizations).

There are twenty-five different categories of exempt organizations listed in I.R.C. § 501(c).<sup>36</sup> To be exempt, § 501(c)(3) corporations must be operated exclusively for religious, charitable, scientific, or other educational purposes; must not have earnings that benefit any private individual; and must not act to influence legislation.<sup>37</sup> When § 501(c)(3) organizations restrict themselves to their exempt purposes, they enjoy the benefits of tax exemption.<sup>38</sup>

Before 1950 it did not matter how tax-exempt organizations generated their income so long as it was used for charitable purposes.<sup>39</sup> Any organization that used its income for charitable purposes did not have to pay taxes on that income. For example, in the 1940s New York University, a tax-exempt organization, acquired a macaroni factory.<sup>40</sup> Because all the company's profits were paid to New York University and then used for educational purposes, the Third Circuit held the macaroni company was organized and operated for an exempt purpose.<sup>41</sup> The standard was called the "destination-of-funds test," because it examined where the income will be spent, not the source of the income.<sup>42</sup>

### B. *The Law Governing the Unrelated Business Income Tax*

Because of the tax relief provided by the destination-of-funds test, exempt organizations operating businesses competing in the private sector enjoyed a competitive advantage over commercial enterprises.<sup>43</sup> Tax exemption meant that exempt organizations could lower their profit mar-

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36. I.R.C. § 501(c)(1)-(25) (1988). Section 501(c) contains different types of organizations that are exempt such as labor organizations, *id.* § 501(c)(5), chambers of commerce, *id.* § 501(c)(6), or fraternal orders, *id.* § 501(c)(8). Exempt organizations do not have their income taxed. *Id.* § 501(a). Section 501(c)(3) organizations are

[c]orporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals . . . .

*Id.* § 501(c)(3).

37. *Id.* § 501(c)(3).

38. *Id.* §§ 511-514. The CBAA is a § 501(c)(3) organization. Tech. Adv. Mem. 91-47-007 (Aug. 16, 1991).

39. Forsythe, *supra* note 2, at 934.

40. *C.F. Mueller Co. v. Commissioner*, 190 F.2d 120, 121 (3d Cir. 1951), *superseded by* I.R.C. §§ 511-513 (1988), *as construed in* *Rennselaer Polytechnic Inst. v. Commissioner*, 732 F.2d 1058, 1061 (2d Cir. 1984).

41. Forsythe, *supra* note 2, at 934 n.7 (citing *C.F. Mueller Co.*, 190 F.2d at 120-22).

42. *Id.* at 934; *see* *Trinidad v. Sagrada Orden de Predicadores*, 263 U.S. 578, 581 (1924) ("[The exemption clause of the tax act] says nothing about the source of the income, but makes the destination the ultimate test of exemption.").

43. Forsythe, *supra* note 2, at 934.

gins and increase their market shares at the expense of tax-paying businesses.<sup>44</sup>

In 1950, responding to private sector complaints about unfair competition from nonprofit organizations, Congress enacted the unrelated business income tax.<sup>45</sup> Also known as UBIT,<sup>46</sup> this provision taxes income generated by § 501(c)(3) organizations that engage in business activities unrelated to their tax-exempt purpose.<sup>47</sup> For example, if a § 501(c)(3) organization, after being formed for an educational purpose, provided advertising services to a paying customer, that organization would be engaged in an unrelated trade or business.<sup>48</sup> The modern test to determine if a tax-exempt organization has taxable income is to examine the *source* of the income.<sup>49</sup> If the source of the income is unrelated to the tax-exempt purpose, the organization has taxable income.<sup>50</sup>

Prior to 1950 and the enactment of the unrelated business income tax, organizations were either completely exempt from tax or fully taxable: "[t]here was no middle ground."<sup>51</sup> Today, depending on the source of the income, nonprofits may have part of their income taxed and part not taxed. Under the modern source-of-income test, only income generated from related activities of a tax-exempt organization will avoid taxation. For example, income derived from student use of an educational institution's ski resort does not create unrelated business taxable in-

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44. *See id.* Tax-exempt organizations and for-profit businesses are treated differently for tax purposes. However, some commentators focus on their respective similarities because both are representative social institutions, with social goals and social purposes. *See* PETER F. DRUCKER, *MANAGING THE NONPROFIT ORGANIZATION* at xiii, xiv (1990); PETER F. DRUCKER, *CONCEPT OF THE CORPORATION* (1946). *But see* Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, § 6 (magazine), at 32.

45. Forsythe, *supra* note 2, at 934 n.10 (citing S. REP. NO. 2375, 81st Cong., 2d Sess. 27 (1950), reprinted in 1950-2 C.B. 483, 504).

46. Kevin S. Barrett & Timothy B. Forsyth, *Corporate Sponsorship and the UBIT*, 5 EXEMPT ORGANIZATION TAX REV. 979, 979 (1992).

47. *See* Duncan A. Peete, *Corporate Sponsorship Payments: Charitable Gifts Versus Income from an Unrelated Trade or Business*, 6 EXEMPT ORGANIZATION TAX REV. 1281, 1282-83 (1992).

48. *See* *United States v. American College of Physicians*, 475 U.S. 834, 840 (1986).

49. *Id.* at 837-38 ("Prior law had required only that the profits garnered by exempt organizations be used in furtherance of tax-exempt purposes, without regard to the source of the income."); Richard L. Kaplan, *Intercollegiate Athletics and the Unrelated Business Income Tax*, 80 COLUM. L. REV. 1430, 1434 (1980) ("By this enactment, Congress clearly rejected the destination-of-income rule for determining taxability and adopted a test looking to the *source* of the income, irrespective of its use.").

50. *American College of Physicians*, 475 U.S. at 835 ("A tax-exempt organization must pay tax on income that it earns by carrying on a business not 'substantially related' to the purposes for which the organization has received its exemption from federal taxation.").

51. Forsythe, *supra* note 2, at 933.

come.<sup>52</sup> However, revenue generated from the public's use of the same ski resort would be taxed as unrelated business taxable income.<sup>53</sup>

Nonprofit organizations not only want to avoid taxation on unrelated business income, but also fear a complete loss of tax-exempt status. Either could force a nonprofit organization to close its doors.<sup>54</sup> The two issues are intertwined because the benefits of exempt status can be significantly eroded by subjecting tax-exempt organizations to the unrelated business income tax.<sup>55</sup>

An activity carried out by a tax-exempt organization will be taxed if the activity satisfies three tests.<sup>56</sup> First, the activity must constitute a "trade or business."<sup>57</sup> Second, the activity must be "regularly carried on."<sup>58</sup> Finally, the activity must *not* be "substantially related" to the stated tax-exempt purpose or goal of the organization.<sup>59</sup>

Thurgood Marshall, associate justice of the Supreme Court, discussed these laws and regulations in *United States v. American Bar Endowment*.<sup>60</sup> In that case an exempt organization, American Bar Endowment, funded its activities by providing an insurance program to its members.<sup>61</sup> The Court found American Bar Endowment's avowed charitable purpose to be unrelated to the insurance program and therefore taxed American Bar Endowment's income from the insurance program.<sup>62</sup> Significantly, the Court emphasized as "undisputed" the public

52. Rev. Rul. 78-98, 1978-1 C.B. 167.

53. *Id.*

54. *Cotton Bowl Comments*, *supra* note 12, at 621-22 (discussing how bowl organizations could never pay 75% of their gross receipts to NCAA and 34% (old tax rate) to IRS).

55. Forsythe, *supra* note 2, at 936.

56. BRUCE R. HOPKINS, *THE TAX LAW OF CHARITABLE GIVING* 156 (1993); *see infra* part III.

57. I.R.C. § 512(a)(1) provides the general rule for unrelated business taxable income, and the specific definition of an unrelated trade or business can be found in *id.* §§ 512(a)(1), 513.

58. *Id.* § 512(a)(1).

59. *Id.* § 513(a). "Substantially related" does not refer to the need of such organization for income or funds to carry out its tax-exempt mission. The Code states that:

The term "unrelated trade or business" means, in the case of any organization subject to the tax imposed by section 511, any trade or business the conduct of which is not substantially related (aside from the need of such organization for income or funds or the use it makes of the profits derived) to the exercise or performance by such organization of its charitable, educational or other purpose or function . . . .

*Id.*

Separately, of course, there can be no specific exemption from taxation. Treas. Reg. § 1.513-1(a) (1988); HOPKINS, *supra* note 56, at 156.

60. 477 U.S. 105 (1986).

61. *Id.* at 107.

62. *Id.* at 119.



policy of preventing unfair competition between private for-profit entities and tax-exempt organizations.<sup>63</sup>

There are other public policies supporting the enforcement of the unrelated business income tax besides the prevention of unfair competition.<sup>64</sup> Traditionally, tax-exempt status is granted to organizations that serve the social welfare, such as colleges and universities.<sup>65</sup> Moreover, colleges and universities have been successful in persuading Congress and the IRS that collegiate sports programs are "intertwined" with educational and academic functions, and therefore serve the social welfare.<sup>66</sup>

Historically, college athletics have received special treatment since the unrelated business income tax was enacted in 1950.<sup>67</sup> Furthermore, the legislative history behind the Revenue Act of 1950<sup>68</sup> and the Reform Act of 1969<sup>69</sup> confirms that Congress did not intend to tax collegiate athletic events.<sup>70</sup> Moreover, collegiate athletics have been valuable training grounds for exemplary citizens. "A football player named Eisenhower became a five-star general and President of the United States. A football player named White became Supreme Court Justice. A football player named Ford became President."<sup>71</sup>

Although the IRS has admittedly given blanket special treatment to college athletics in the past, in 1977 the IRS, presumably as a result of increased commercialism in college athletics, indicated that it might alter

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63. *Id.* at 114-15. "The undisputed purpose of the unrelated business income tax was to prevent tax-exempt organizations from competing unfairly with businesses whose earnings were taxed." *Id.* at 114; Tech. Adv. Mem. 91-47-007 (Aug. 16, 1991) ("The notion of unfair competition is the underlying reason for the enactment of the tax on unrelated business income . . .").

64. See HOPKINS, *supra* note 56, at 10-19 (discussing public policies behind I.R.C.'s exemption of charitable organizations); see also DRUCKER, *supra* note 35, at 15-17 (arguing that government is no longer looked upon to produce better society); HOPKINS, *supra* note 5, at 13 (explaining that nonprofits often relieve the government of responsibilities it might otherwise have to perform).

65. *American College of Physicians*, 475 U.S. at 838 (discussing how to encourage "benevolent enterprise"); Barrett & Forsyth, *supra* note 46, at 979; see, e.g., I.R.C. § 501(c)(1)-(25) (listing of tax-exempt organizations helps indicate charitable impulse behind deduction).

66. *Cotton Bowl Comments*, *supra* note 12, at 618.

67. I.R.C. § 511(a)(1); see Kaplan, *supra* note 49 (describing preferential tax treatment of college athletics); cf. Christopher L. Chin, Comment, *Illegal Procedures: The NCAA's Unlawful Restraint of the Student Athlete*, 26 LOY. L.A. L. REV. 1213 (1993) (discussing certain immunities National Collegiate Athletic Association (NCAA) receives from antitrust laws).

68. Revenue Act of 1950, ch. 994, 64 Stat. 906 (1950).

69. Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 487 (1969).

70. S. REP. NO. 552, 91st Cong., 1st Sess. 67-68 (1969); H.R. REP. NO. 2319, 81st Cong., 2d Sess. 37, 109 (1950), *reprinted in* 1950-2 C.B. 380, 458; S. REP. NO. 2375, 81st Cong., 2d Sess. 29, 107 (1950), *reprinted in* 1950-2 C.B. 483, 505.

71. Jim Murray, *Football Once Was a Sport*, L.A. TIMES, Mar. 13, 1994, at C1, C11.

its stance and tax the radio and broadcast income from bowl games.<sup>72</sup> This controversial position met with strong opposition,<sup>73</sup> and in 1978 the IRS issued a technical advice memorandum to none other than the CBAA, the same party to whom—over a decade later—it would issue the Mobil Cotton Bowl Letter.<sup>74</sup> In the 1978 technical advice memorandum, the IRS decided not to tax the income from the sale of broadcast rights during the CBAA's football game<sup>75</sup> because it found that the CBAA's activity of selling broadcast rights was substantially related to the Association's purpose.<sup>76</sup>

The IRS broadly concluded that the “[a]thletic activities of schools are substantially related to their educational functions.”<sup>77</sup> Since athletic activities were substantially related to the purpose of exempt educational organizations, such activities were not subject to the unrelated business income tax.<sup>78</sup> This ruling meant that the sale of services associated with the athletic event would also be considered related to the purpose of exempt educational organizations, and therefore also not subject to the unrelated business income tax.

Although the IRS treated collegiate athletics gently in this first technical advice memorandum, by 1991, when the Cotton Bowl Letter was published, commercialism had tarnished the amateur status of collegiate athletics.<sup>79</sup> In many ways the collegiate game had become similar to pro-

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72. HOPKINS, *supra* note 5, at 887-88.

73. *See id.* at 888.

74. Tech. Adv. Mem. 78-51-004 (Aug. 21, 1978). A representative of the Cotton Bowl Athletic Association alluded that the Cotton Bowl had been the subject of that technical advice memorandum. *See Cotton Bowl Comments, supra* note 12, at 615.

75. Tech. Adv. Mem. 78-51-004.

76. *Id.*

77. *Id.* (citing S. REP. NO. 2375, 81st Cong., 2d Sess. 29, 107 (1950), *reprinted in* 1950-2 C.B. 483, 505); *see* Rev. Rul. 67-291, 1967-2 C.B. 184 (holding athletic program to be “integral part of [university’s] overall educational activities”); Tech. Adv. Mem. 79-30-043 (Apr. 3, 1979) (“Athletic events are substantially related to the [university’s] exempt educational program.”); *cf.* Chin, *supra* note 67, at 1213 (“Under this traditional view, amateur athletics have been an incidental undertaking, subordinate to the universities’ essential task of providing an education.”).

78. Tech. Adv. Mem. 78-51-004.

79. Forsythe, *supra* note 2, at 936. Forsythe argues that the taint of commercialism should remove the bowl games’ privilege of tax exemption. She supports her charge of commercialism with the conclusions of sports writers:

“Quite simply, big-time college sport has almost nothing to do with college and everything to do with moneygrubbing.” Rick Telander, *A Question of Fairness*, SPORTS ILLUSTRATED, May 1, 1989, at 114. “It’s appalling that some college sports administrators refuse to consider the educational well-being of their athletes.” Robert Sullivan, *A Study in Frustration*, SPORTS ILLUSTRATED, June 19, 1989, at 94. “[B]ig time, big bucks college football has become more of a commercial than an educational enterprise.” Jerry Kirshenbaum, *Judge Burciaga Gets Down to Business with College Football*, SPORTS ILLUSTRATED, Sept. 27, 1982, at 10. “But colleges

fessional sports. For example, in 1992 college football bowl games netted \$64 million.<sup>80</sup> Furthermore, because the participating universities received 75% of the revenues from bowl games, the activity of operating a college football team seemed more commercial.<sup>81</sup> In fact, at the seventy universities with the largest football programs, the average annual profit is around \$2.3 million per school.<sup>82</sup>

John Hancock Company's sports marketing consultant, Jack Mahoney, spoke about the modern commercial nature of college football. Explaining why that company became the corporate sponsor of the John Hancock Bowl, he said, " 'Philanthropy and patron of the sports days are gone. We wanted the recognition.' "<sup>83</sup> Because of collegiate sports' transformation from amateur to commercial status, by 1991, when the IRS wrote the Mobil Cotton Bowl Letter, the CBAA could no longer rely on romantic, antiquated notions of amateur athletics as extensions of an educational organization's purpose.

### III. THE FIRST HALF: AN ANALYSIS OF THE TAX AND POLICY ARGUMENTS NOT TO TAX CORPORATE SPONSORSHIP INCOME AND THE IRS'S REJECTION OF THOSE ARGUMENTS

In the Cotton Bowl Letter, the CBAA made four arguments to avoid taxation.<sup>84</sup> The CBAA argued that: (1) Mobil's payment was merely a donation, and there was no quid pro quo or prearranged bene-

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should do two more things as well: Admit that they are engaging in pro sports, and share the gravy with the players." Dave Kindred, *Pass the Gravy, Please*, SPORTS ILLUSTRATED, May 15, 1989, at 96. "The only difference between Georgia Tech's conference, the ACC [Atlantic Coast Conference] and the NFL [National Football League] is that the ACC has a better deal. It doesn't have to pay its players." *Id.*

Forsythe, *supra* note 2, at 937 n.50.

80. Chin, *supra* note 67, at 1217 n.32 (citing Dick Rosenthal, *Crowning a National Champion More Complicated Than It Sounds*, USA TODAY, Jan. 21, 1993, at 2C).

81. *Cotton Bowl Comments*, *supra* note 12, at 621. Regarding the spoils of postseason football, Bobbie Bowden, coach of the 1994 national champion Florida State Seminoles football team, argued that: "You've got to pay the players some money. Everybody makes money off the playoffs and everybody makes money off the bowls, except the players." Shav Glick, *Morning Briefing*, L.A. TIMES, Jan. 7, 1994, at C2.

82. Bob Oates, *Football Is Necessary for Gender Equity to Be Attained*, L.A. TIMES, Dec. 12, 1993, at C3.

83. Paul Streckfus, *Service's EO Office Cracks Down on 'Big Business' Aspects of Nonprofits*, 5 EXEMPT ORGANIZATION TAX REV. 787, 787 (1992) (quoting Jack Mahoney, John Hancock Company's sports marketing consultant); *see also* Hennessey v. National Collegiate Athletic Ass'n, 564 F.2d 1136, 1149 n.14 (5th Cir. 1977) ("[A]mateur athletics [is] a business venture of far greater magnitude than the vast majority of 'profit making' enterprises.").

84. *See* Tech. Adv. Mem. 91-47-007 (Aug. 16, 1991).

fit;<sup>85</sup> (2) since the CBAA's game does not compete with nontax-exempt entities, the CBAA should not be taxed;<sup>86</sup> (3) advertising is not an activity that should be subjected to the unrelated business income tax because the recognition given to sponsors is not a "trade or business," is not "regularly carried on," and is substantially related to the CBAA's tax-exempt purpose;<sup>87</sup> and (4) the use of the Cotton Bowl logo constitutes a royalty and income from the use of a royalty is not taxable.<sup>88</sup>

In the Mobil Cotton Bowl Letter, the IRS rejected all of these arguments and taxed Mobil's corporate sponsorship payment to the CBAA as unrelated business income.<sup>89</sup> This section first discusses the facts of the Letter, and then analyzes the arguments discussed in the Letter.

#### A. *The Facts Surrounding the Mobil Cotton Bowl Letter*

Every January 1, the CBAA, a § 501(c)(3) organization, hosts a football bowl game named The Mobil Cotton Bowl Classic.<sup>90</sup> The game is televised throughout the nation and features the SouthWest Conference (SWC) Champion against a nationally ranked opponent.<sup>91</sup>

The CBAA's founders created it for an educational purpose, namely to contribute funds generated by the annual bowl game to the participating universities.<sup>92</sup> It is a § 501(c)(3) tax-exempt organization and, as such, does not pay taxes on proceeds that it receives from activities related to its exempt purpose.<sup>93</sup>

Like other national bowl games, the CBAA sought a corporate sponsor to help defray the costs associated with the Cotton Bowl.<sup>94</sup> Costs the CBAA might incur in hosting the bowl game include payments to event participants, overhead costs allocated to the bowl game, and expenses directly connected with the bowl game.<sup>95</sup> Moreover, by NCAA

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85. See *infra* part III.B.

86. See *infra* part III.C.

87. See *infra* part III.D.

88. See *infra* part III.E.

89. See *infra* part III.E.

90. *Cotton Bowl Comments*, *supra* note 12, at 616.

91. *The Mobil Cotton Bowl Classic* (NBC television broadcast, Jan. 1, 1994).

92. *Cotton Bowl Comments*, *supra* note 12, at 616-17.

93. Tech. Adv. Mem. 91-47-007 (Aug. 16, 1991); see *infra* part II.B.

94. Even the first recorded intercollegiate sporting event in the United States had a corporate sponsor. In 1852 a crew race between Harvard and Yale received sponsorship from the Boston, Concord, and Montreal Railroad Company. The corporate sponsor paid both teams' expenses and bought the winning team "an expensive set of matched black walnut oars." Chin, *supra* note 67, at 1235 (citing RICK TELANDER, *THE HUNDRED YARD LIE* 52 (1989)).

95. Proposed Regulations, *supra* note 13, at 5690-91 (Proposed Treasury Regulations § 1.513-4(g), Example 4).

regulation, 75% of all gross proceeds generated at the bowl game must be distributed to the participating schools.<sup>96</sup> The revenues that the CBAA might receive include television and radio rights, admission paid by attending fans, and corporate sponsorship.<sup>97</sup> In 1991 the CBAA received a \$1.5 million corporate sponsorship payment from the Mobil Oil Corporation.<sup>98</sup>

Understandably, Mobil Oil expected to receive some form of acknowledgment for this large payment;<sup>99</sup> in fact, the forms of acknowledgement were specified in the contract between the CBAA and Mobil Oil.<sup>100</sup> The contract required that Mobil's logo be placed on the uniforms of every player participating in the game, that Mobil's logo be written in chalk on the center of the field, that Mobil's logo be displayed prominently throughout the stadium, that the name of the game be changed from "Cotton Bowl Classic" to "Mobil Cotton Bowl Classic," and that the television broadcasters of the game focus their cameras on Mobil's logo several times during the game.<sup>101</sup>

This contract between Mobil and the CBAA raised the following issue: When does an acknowledgment of a corporate sponsor's generosity become advertising services given in exchange for payment, and therefore unrelated business taxable income?<sup>102</sup> In this case, the local IRS office challenged Mobil's corporate sponsorship payments and ultimately sought advice from the national office.<sup>103</sup> The IRS later published that technical advice in the form of Technical Advice Memorandum 91-47-007,<sup>104</sup> which is also known as the Mobil Cotton Bowl Letter.<sup>105</sup>

### *B. Corporate Sponsorship Payments Are Donations and There Is No "Quid Pro Quo" or Prearranged Benefit*

The CBAA's first argument discussed in the Mobil Cotton Bowl Letter is comprised of three parts. First, the CBAA argued that the pay-

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96. *Cotton Bowl Comments*, *supra* note 12, at 616.

97. Proposed Regulations, *supra* note 13, at 5690-91 (Proposed Treasury Regulations § 1.513-4(g), Example 4).

98. Forsythe, *supra* note 2, at 933.

99. Walter B. Slocombe & Milton Cerny, *Corporate Sponsorship Guidelines—Did the IRS Fumble the Ball?*, 6 EXEMPT ORGANIZATION TAX REV. 75, 76 (1992) (arguing that donors expect their contributions to be recognized).

100. Tech. Adv. Mem. 91-47-007.

101. Sheppard, *supra* note 2, at 532. One critic stated, "It's a whale of an acknowledgment!" Streckfus, *supra* note 24, at 746.

102. Tech. Adv. Mem. 91-47-007.

103. *Cotton Bowl Comments*, *supra* note 12, at 616.

104. Tech. Adv. Mem. 91-47-007.

105. Sheppard, *supra* note 2, at 532.

ment from Mobil Oil was a donation as defined by § 170 of the Internal Revenue Code.<sup>106</sup> Second, mere recognition of such a donation through displays of Mobil's logo throughout the Cotton Bowl telecast did not constitute advertising services.<sup>107</sup> Finally, the CBAA argued that it was unfair for the IRS to test for donations by determining whether substantial benefits flow to the sponsor from the relationship.<sup>108</sup> The IRS rejected all these arguments by asserting that the donation was in fact part of a quid pro quo in which advertising services were exchanged for cash.<sup>109</sup>

The donation argument is based on the traditionally favorable treatment of contributions to tax-exempt organizations.<sup>110</sup> Since 1924 the United States Supreme Court has upheld the exemption of organizations engaged in charitable activities.<sup>111</sup> The favorable treatment extends beyond granting tax-exempt status and in essence, subsidizes charities by allowing individuals and businesses to deduct gifts to these organizations.<sup>112</sup> Critically, the IRS treats charitable deductions more favorably than deductions for business expenses,<sup>113</sup> depreciation,<sup>114</sup> or loss.<sup>115</sup> The government not only allows the donating corporations and individuals to take a deduction, but also does not tax the donation as part of the tax-exempt organization's income. In part, the charitable-contribution deduction is based on the belief that many challenges facing society cannot be attacked through government intervention, but must be solved by decentralized, independently financed, nongovernmental organizations.<sup>116</sup>

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106. Tech. Adv. Mem. 92-47-007 (applying I.R.C. § 170 (1988)). "There shall be allowed as a deduction any charitable contribution (as defined in subsection (c)) payment of which is made within the taxable year." I.R.C. § 170(a)(1) (1988).

107. Tech. Adv. Mem. 91-47-007.

108. *Cotton Bowl Comments*, *supra* note 12, at 616.

109. Tech. Adv. Mem. 91-47-007.

110. I.R.C. §§ 170, 501(c)(3), 511-514 (1988). For a thorough history of the national tradition of exempting charitable organizations from taxation, see HOPKINS, *supra* note 56, at 10-19.

111. *Trinidad v. Sagrada Orden de Predicadores*, 263 U.S. 578, 581 (1924) (holding that "destination of income" test precluded taxation where income went to charitable causes).

112. HOPKINS, *supra* note 56, at 38.

113. I.R.C. § 162 (1988).

114. *Id.* §§ 167-168.

115. *Id.* § 165.

116. HOPKINS, *supra* note 56, at 11.

Clearly then, the exemption for charitable organizations is a derivative of the concept that they perform functions which, in the organizations' absence, government would have to perform; therefore, government is willing to forego the tax revenues it would otherwise receive in return for the public services rendered by charitable organizations.

*Id.*; see Nathan Wirtschafter, Peter Drucker: A Conservative Approach to the Associative State (Apr. 6, 1990) (unpublished manuscript, on file with The Johns Hopkins University Li-

To express appreciation for such donations, charitable organizations have been allowed to recognize their contributors and still maintain their tax-exempt status.<sup>117</sup> Moreover, donors—quite reasonably—expect to have their gifts acknowledged.<sup>118</sup> For example, the IRS has approved recognition that informs the public of the sponsor of the event without penalty to the recipient of the gift.<sup>119</sup> The IRS has also allowed the name of a contributor to be placed on the outside of a building,<sup>120</sup> and has even allowed a contributor to demand that a public charity change its name to the name of the contributor for the next 100 years.<sup>121</sup> In sum, charitable organizations can provide, and indeed are expected to provide, certain benefits to a contributor in return for contributions. The CBAA pointed to these precedents and argued that the benefits provided to a sponsor of a bowl game are neither substantial benefits nor made in expectation of a return benefit.<sup>122</sup>

The IRS disagreed. The IRS first decided to test whether a quid pro quo existed between the CBAA and Mobil.<sup>123</sup> The test for a quid pro quo was to “look at all the facts and circumstances to see if the payment was made with an expectation of receiving . . . a substantial return benefit.”<sup>124</sup> The IRS found that Mobil expected a return benefit—advertising services—when it negotiated and signed a contract for \$1.5 million with the CBAA.<sup>125</sup> Moreover, Mobil in fact received a substantial return benefit from the national television exposure given to the event.<sup>126</sup>

The IRS compared the benefits with those provided in *Hernandez v. Commissioner*.<sup>127</sup> In *Hernandez*, fixed donations made to the Church of Scientology in exchange for training sessions were held to be taxable income.<sup>128</sup> The Supreme Court, affirming the Ninth Circuit, found that a “quid pro quo” existed between the Church members and the tax-

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brary) (describing conservative-intellectual influence on development of nonprofit, knowledge-based organizations including Kaiser Permanente).

117. See, e.g., Rev. Rul. 67-342, 1967-2 C.B. 187 (discussing “brought to you by” acknowledgements); Rev. Rul. 77-367, 1977-2 C.B. 192 (discussing “name on the building” acknowledgements).

118. Slocombe & Cerny, *supra* note 99, at 76.

119. Rev. Rul. 67-342, 1967-2 C.B. 187.

120. Rev. Rul. 77-367, 1977-2 C.B. 192.

121. Rev. Rul. 73-407, 1973-2 C.B. 383.

122. Tech. Adv. Mem. 91-47-007.

123. *Id.*

124. *Id.*

125. *Id.*; Forsythe, *supra* note 2, at 933.

126. Tech. Adv. Mem. 91-47-007.

127. *Id.* (citing *Hernandez v. Commissioner*, 490 U.S. 680 (1989)).

128. *Hernandez v. Commissioner*, 490 U.S. 680, 685-86 (1989).

payer.<sup>129</sup> Citing previous case law, the Court defined a "gift" as "'a voluntary transfer of property by the owner to another without consideration therefor.'"<sup>130</sup> The payments to the Church were not a gift, but were payments made in exchange for training classes.<sup>131</sup>

Applying *Hernandez's* rule to the CBAA, the IRS concluded that the advertising services provided by the CBAA were a substantial return benefit,<sup>132</sup> and that these services were a "very valuable package of benefits."<sup>133</sup> Unfortunately, the IRS did not directly compare the benefits provided by the CBAA with the benefits exchanged in *Hernandez*.<sup>134</sup> Nevertheless, the IRS concluded that it believed the benefits were enough to trigger taxation.<sup>135</sup>

### C. *Since the CBAA Does Not Compete with For-Profit Businesses, It Should Not Be Taxed*

An important public policy behind the unrelated business income tax is to prevent tax-exempt businesses from unfairly competing with for-profit businesses.<sup>136</sup> Significantly, the Supreme Court has held that this tax is aimed primarily at unfair competition.<sup>137</sup> The CBAA, and other bowl games organizers, however, tried to introduce a corollary to the

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129. *Id.* at 688, 690.

130. *Id.* at 687 (quoting *DeJong v. Commissioner*, 36 T.C. 896, 899 (1961), *aff'd*, 309 F.2d 373 (9th Cir. 1962)).

131. *Id.* at 694. Despite winning at the Court of Appeals, the IRS has now unilaterally designated the Church of Scientology as a tax-exempt organization. This decision, coupled with the IRS's strategic reversal on corporate sponsorship, has prompted calls for a House Ways and Means Oversight Subcommittee investigation of the IRS's decision-making process. Paul Streckfus, *Viewpoint: Surrender to Scientologists Raises More Questions About IRS's Administration of Exempt Orgs.*, 8 EXEMPT ORGANIZATION TAX REV. 914, 914 (1993).

132. Tech. Adv. Mem. 91-47-007.

133. *Id.*; see *Panel Six: Unrelated Business Income Tax Issues*, 6 EXEMPT ORGANIZATION TAX REV. 388, 391 (1992) [hereinafter *Panel Six*] (statement of Suzy McDowell) (describing marketing benefits provided to corporate sponsors); cf. *Cotton Bowl Comments*, *supra* note 12, at 616 ("It's come down to a benefits test, that the focus is from their being recognized by having their name attached to part of the event, [to] that of some benefit to them will cause taxation.") (comments of Bruce Bernstien); see also *Hernandez*, 490 U.S. at 691-92 (describing Church's exchange of auditing lessons to congregants for money); Slocombe & Cerny, *supra* note 99, at 77 (arguing that many corporate statutes require some business benefit, whether direct or indirect, be present in order for gift to not be ultra vires).

134. Tech. Adv. Mem. 91-47-007.

135. *Id.* ("We believe that the benefits provided [to Mobil] in this case are significantly different from the types of donor recognition previously recognized by the Service as insignificant."); see *Hernandez*, 480 U.S. at 691-92; cf. Rev. Rul. 67-342, 1967-2 C.B. 187 (allowing limited benefit of naming program's corporate sponsor on public broadcasting stations).

136. See S. REP. NO. 2375, 81st Cong., 2d Sess. 27 (1950), *reprinted in* 1950-2 C.B. 483, 504; *supra* part II.A.

137. *United States v. American Bar Endowment*, 477 U.S. 105, 114-15 (1986).



public policy of not allowing unfair competition: If the activity does not compete with a for-profit entity, it should not be taxed.<sup>138</sup>

The IRS disagreed with this argument, concluding that for tax to be levied “there is no necessity to determine that the organization actually competes with other advertisers.”<sup>139</sup> Citing treasury regulations,<sup>140</sup> the IRS stated that “[a]lthough the notion of unfair competition is the underlying reason for the enactment of the tax on unrelated business income, there is no requirement that unfair competition be present in order to tax the proceeds from an activity.”<sup>141</sup> In other words, the IRS believed both that the IRS did not have to test for unfair competition, and that even in the absence of unfair competition, the IRS could still find an exempt organization engaged in an activity that could be taxed.<sup>142</sup>

After setting forth this rule, the IRS nevertheless examined whether the CBAA’s activity constituted unfair competition with any for-profit entities.<sup>143</sup> The IRS noted that in *Carolinas Farm & Power Equipment Dealers Ass’n v. United States*,<sup>144</sup> the court “indicate[d] that where an organization (1) conducts an activity with a profit motive and (2) the activity is not substantially related to that organization’s exempt purpose, then the organization’s activity presents a sufficient likelihood of competition to be within the policy of the statute.”<sup>145</sup> Applying the profit motive test from *Carolinas* to the CBAA, the IRS found the CBAA’s activity to be profit-motivated since the unrelated activity—advertising—generated profits.<sup>146</sup>

Arguably, the bowl games could be perceived as engaging in unfair competition, because they provide advertising services at cheaper rates than other media outlets.<sup>147</sup> For example, John Hancock Financial Services had a bowl game agreement very similar to Mobil’s agreement.<sup>148</sup> John Hancock estimated that it received \$5.1 million worth of advertis-

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138. Tech. Adv. Mem. 91-47-007 (Aug. 16, 1991); see also *Carolinas Farm & Power Equip. Dealers Ass’n v. Commissioner*, 699 F.2d 167, 170 (4th Cir. 1983) (holding that taxpayer engaged in “trade or business” when acting for profit motive).

139. Tech. Adv. Mem. 91-47-007.

140. *Id.* (citing Treas. Reg. § 1.513-1(b) (1991)).

141. *Id.*

142. *Id.*

143. *Id.*

144. 699 F.2d 167 (4th Cir. 1983).

145. Tech. Adv. Mem. 91-47-007; see *Carolinas*, 699 F.2d at 170.

146. Tech. Adv. Mem. 91-47-007.

147. See Zimmerman, *supra* note 1, at 442.

148. *Id.*

ing in exchange for a \$1.6 million corporate sponsorship payment.<sup>149</sup> A corporate officer said, "The bowl is an extraordinarily efficient media buy. It would cost us a great deal more money to help influence sales by normal advertising."<sup>150</sup> This statement indicates that corporate sponsors are aware that placing their logo across a stadium during a televised football game is cheaper than buying air time from other media outlets.<sup>151</sup> Therefore, had the IRS been required to make a determination, the IRS probably would have found the CBAA to have been engaged in unfair competition.

*D. The Recognition Given to Sponsors Is Not a "Trade Or Business," Is Not "Regularly Carried On," and Is Substantially Related to the CBAA's Tax-Exempt Purpose*

An activity conducted by a tax-exempt organization, such as the sale of advertising, can only be taxed if it meets a three-step test. The activity can be taxed if the activity is (1) a "trade or business," (2) "regularly carried on," and (3) not substantially related to the exempt organization's purpose.<sup>152</sup> Long before the Cotton Bowl Letter, the Supreme Court had held that the sale of advertising is an unrelated business, and therefore advertising revenue is unrelated business taxable income to a tax-exempt organization unless the advertisements significantly contribute to an organization's tax-exempt purpose.<sup>153</sup> However, the bowl

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149. *Id.*; Michael J. McCarthy, *Keeping Careful Score on Sports Tie-Ins*, WALL ST. J., Apr. 24, 1991, at B1.

150. Zimmerman, *supra* note 1, at 442 (quoting Jack Mahoney). John Hancock discovered that the "awareness of the company" rose from 90% to 96%. *Panel Six*, *supra* note 133, at 392. Beth Purcell of the IRS's Exempt Organization Division reported that according to the study, surveyed consumers who said, "Yes, I would consider buying products from your company," rose from 41% to 54%. *Id.* Despite the difficulty of quantifying the cause and effect of advertising, the company was convinced that the exposure was working, and the IRS was convinced that advertising benefits, not generosity, caused John Hancock to sponsor a bowl game. *Id.*

151. See Zimmerman, *supra* note 1, at 442.

152. Treas. Reg. § 1.513-1(a) (1991); see *infra* part III.D.1-3. In addition there must be no specific exemption for the activity. Treas. Reg. § 1.513-1(a); HOPKINS, *supra* note 56, at 156. In 1991, when the IRS issued Technical Advice Memorandum 91-47-007, no specific exemptions were available. The analysis, therefore, focuses on the first three steps of the test for unrelated business taxable income. In the end the IRS essentially created a specific exemption for bowl games. See Proposed Regulations, *supra* note 13, at 5690-91 (Proposed Treasury Regulation § 1.513-4(g), Example 4).

153. See *United States v. American College of Physicians*, 475 U.S. 834, 839 (1986) ("Congress has declared unambiguously that the publication of paid advertising is a trade or business activity distinct from the publication of accompanying educational articles and editorial comment."); Tech. Adv. Mem. 91-47-007; Slocombe & Cerny, *supra* note 99, at 75.

games still made the argument, and the IRS again chose to refute those arguments.<sup>154</sup>

### 1. Trade or business

The Supreme Court defined a "trade or business" as the selling of goods and services with a profit motive.<sup>155</sup> In 1985 the Court held the sale of advertising to be a trade or business in *United States v. American College of Physicians*.<sup>156</sup> In that case the taxpayer sold advertising in its tax-exempt journal, and the Court held the taxpayer to be engaged in the trade or business of advertising.<sup>157</sup> Similarly, in two other cases, the Tax Court used a profit-motive test to help determine if the sale of advertising was a trade or business.<sup>158</sup>

The activities of the CBAA were similar to the activities of the taxpayers in the profit-motive cases.<sup>159</sup> The profit-motive test states that a profit motive exists if profit is generated by an activity.<sup>160</sup> The CBAA generated excess profits in its activities; therefore, a profit motive is presumed. Thus, the CBAA was engaged in profit-motivated activity, advertising, which is a trade or business.<sup>161</sup>

Additionally, in *National Water Well Ass'n v. Commissioner*,<sup>162</sup> the Tax Court pointed out that the test for a trade or business examined the presence of a profit motive,<sup>163</sup> circumstantial evidence,<sup>164</sup> and the competitive, commercial nature of the activity.<sup>165</sup> If these tests were applied to the CBAA, the CBAA would be found to be engaged in a trade or business. First, the CBAA's activity is designed to produce a profit.<sup>166</sup> Second, circumstantial evidence of a profit motive exists because the CBAA seemingly endorses Mobil's products by juxtaposing its name

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154. Tech. Adv. Mem. 91-47-007 (Aug. 16, 1991).

155. *United States v. American Bar Endowment*, 477 U.S. 105, 112-14 (1986).

156. 475 U.S. 834, 839-40 (1986); see Elizabeth Magin, *Advertising, the Unrelated Business Income Tax, and National Collegiate Athletic Association v. Commissioner*, 7 EXEMPT ORGANIZATION TAX REV. 209, 212 (1993).

157. *American College of Physicians*, 475 U.S. at 840.

158. *West Virginia State Medical Ass'n v. Commissioner*, 91 T.C. 651, 659-60 (1988), *aff'd*, 882 F.2d 123 (4th Cir. 1989); *Fraternal Order of Police v. Commissioner*, 87 T.C. 747 (1986), *aff'd*, 833 F.2d 717 (7th Cir. 1987).

159. Tech. Adv. Mem. 91-47-007.

160. *Carolinas Farm & Power Equip. Dealers Ass'n v. Commissioner*, 699 F.2d 167, 169 (4th Cir. 1983).

161. Tech. Adv. Mem. 91-47-007.

162. 92 T.C. 75, 84-86 (1989).

163. *Id.* at 89.

164. *Id.* at 88.

165. *Id.* at 85-86, 90-91; see Magin, *supra* note 156, at 212.

166. Tech. Adv. Mem. 91-47-007.

with Mobil's.<sup>167</sup> Finally, the activity is conducted in a commercial manner that is similar to others providing professional advertising services.<sup>168</sup>

In accord with these arguments, the IRS found a profit motive in the activities of the CBAA.<sup>169</sup> The IRS concluded that the CBAA engaged in a trade or business by providing advertising services in exchange for a large payment. The IRS then proceeded to the next step of the analysis: whether the activity was regularly carried on.<sup>170</sup>

## 2. Regularly carried on

The legislative history of the Tax Reform Act of 1969 states that " 'tax does not apply unless the business is 'regularly' carried on and therefore does not apply, for example, in cases where income is derived from an annual athletic exhibition.' " <sup>171</sup> Similarly, the Tenth Circuit recently held that the sale of advertising in a commemorative program for an annual three-week-long basketball tournament was not regularly carried on.<sup>172</sup>

The IRS strongly disagreed with the *NCAA* decision. Beth Purcell, Office of Chief Counsel, criticized the Tenth Circuit:

The Tenth Circuit first of all starts off its opinion by saying, "Yes, the section 513 regulations are valid. Yes, they are controlling." And then they purport to apply them. The problem is that in applying them they misread the Code, the regulations, and *American College of Physicians*. . . . So, what the Tenth Circuit has done is commit mayhem on the definition of the trade or business of advertising in the 513 regulations . . . .

. . . .

. . . [W]e at the Service were not terribly impressed with the court's reasoning. We are not going to follow the opinion. We issued an AOD [action on decision] on this, and *we are*

167. See *Mobil Cotton Bowl Classic* (NBC television broadcast, Jan. 1, 1994).

168. See Tech. Adv. Mem. 91-47-007 ("[T]he [CBAA's] services are provided in a manner consistent with competitive and promotional efforts typical of commercial endeavors.").

169. *Id.*

170. See *id.*

171. Letter from John T. Bell, Executive Director, Gator Bowl Association, Inc., to Internal Revenue Service Assistant Commissioner, Employee Plans and Exempt Organization (May 18, 1992) [hereinafter *Gator Bowl Letter*], reprinted in 6 EXEMPT ORGANIZATION TAX REV. 358, 363 (1992) (quoting S. REP. NO. 552, 91st Cong., 1st Sess. 67-68 (1969)).

172. *National Collegiate Athletic Ass'n v. Commissioner*, 92 T.C. 456, 468-70 (1989), *rev'd on other grounds*, 914 F.2d 1417, 1423 (10th Cir. 1990), *action on decision*, 1991-015 (July 3, 1991).

*actively looking for another case to litigate this issue in a different circuit.*<sup>173</sup>

As an alternative to the Tenth Circuit's analysis, the IRS wanted to examine the frequency, continuity, and manner of the organization's activity,<sup>174</sup> and then compare that tax-exempt activity with a for-profit organization's comparable commercial activity.<sup>175</sup>

Using this approach the IRS compared the activity of the CBAA to that of a tax-paying organization.<sup>176</sup> The IRS found that services provided to Mobil were "systematic," "consistent," and took place over a long period of time.<sup>177</sup> The IRS concluded that "the [o]rganization's services are provided in a manner consistent with competitive and promotional efforts typical of commercial endeavors."<sup>178</sup> As a result the IRS held that the activity was regularly carried on.

### 3. Substantial relation

The third test that an organization must satisfy in order to avoid the unrelated business income tax is whether the activity is substantially related to the avowed purposes and goals of the organization.<sup>179</sup> The legislative history of the statutes creating the unrelated business income tax directly addresses this issue.

The IRS examined the legislative history in 1978 when it issued a technical advice memorandum to the CBAA regarding broadcast rights.<sup>180</sup> The IRS admitted that "[t]he committee reports for the Revenue Act of 1950 indicate that income of an educational organization from charges for admissions to football games would not be deemed to be income from an unrelated business, since its athletic activities are *substantially related* to its educational program."<sup>181</sup> Next, the IRS described college athletic organizations as "generally . . . held to be

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173. *Panel Six, supra* note 133, at 393-94 (emphasis added) (quoting Beth Purcell).

174. Tech. Adv. Mem. 91-47-007; *Panel Six, supra* note 133, at 393.

175. Tech. Adv. Mem. 91-47-007.

176. *Id.*

177. *Id.*

178. *Id.*; see also Treas. Reg. § 1.513-1(c)(2)(ii) (as amended in 1992); Rev. Rul. 75-201, 1975-1 C.B. 164 (stating that volunteer solicitation for annual yearbook sales was not regularly carried on). *But see* Rev. Rul. 73-424, 1973-2 C.B. 190 (stating that annual yearbook advertising solicitation was regularly carried on because of competitive and commercial methods used to solicit advertisements).

179. Tech. Adv. Mem. 91-47-007.

180. Tech. Adv. Mem. 78-51-004 (Aug. 21, 1978).

181. *Id.* (citing H.R. REP. NO. 2319, 81st Cong., 2d Sess. 37, 109 (1950), *reprinted in* 1950-2 C.B. 380, 458) (emphasis added).

educational”<sup>182</sup> and athletic programs to be “an integral part of the educational process of a university.”<sup>183</sup> Citing Revenue Ruling 67-291, the IRS continued that “any activity providing necessary services to student athletes and coaches furthers the educational program of such schools.”<sup>184</sup>

The “substantial relation” test has changed, however, since the 1978 ruling. Treasury regulations specify that there must be a substantial *causal* relationship between the activity and the goal of the organization for there to be a substantial relation.<sup>185</sup> The “performance of the services from which the gross income is derived must *contribute importantly* to the accomplishment of those purposes.”<sup>186</sup> Applying this test to the CBAA’s situation, the IRS ruled that taking payments from a corporate sponsor and displaying the sponsor’s logo did not form a substantial causal relationship with the Association’s avowed educational purpose.<sup>187</sup> The IRS said that the display of Mobil’s logo did not “contrib-

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182. *Id.*

183. *Id.*

184. *Id.*; see Rev. Rul. 67-291, 1967-2 C.B. 184 (holding that nonprofit organization was engaged in related educational activity and not subject to unrelated business income tax when it collected dues and contributions to maintain training table for university athletes).

185. HOPKINS, *supra* note 5, at 874 (citing Treas. Reg. § 1.513-1(d)(2) (as amended in 1991)).

186. Treas. Reg. § 1.513(d)(2) (as amended in 1991) (emphasis added).

187. Tech. Adv. Mem. 91-47-007; The IRS acknowledged a Harvard Business School Case Study while writing the technical advice memorandum. *Panel Six, supra* note 133, at 391-92. The study showed that through sponsoring a college football game, an insurance company successfully revamped its image. *Id.* The study showed that during a four-hour football game, the broadcast displayed the sponsor’s logo for a total of about one hour. *Id.* at 392. The study indicated that the sponsor received \$5.1 million worth of advertising in exchange for its \$1.6 million payment. Streckfus, *supra* note 83, at 787. The IRS felt the report justified its conclusion that the checks to bowl games were not being written by generous donors, but by corporations bent on recognition. *Panel Six, supra* note 133, at 392.

Other commentators have argued that by hosting a bowl game, the CBAA does not execute an educational purpose of any kind. Forsythe, *supra* note 2, at 935-36. One skeptic said, “It is difficult to see how the preparation for, and conduct of, an annual bowl game furthers educational purposes. It is even more difficult to comprehend how the promotion of a sponsor could relate to educational purposes.” *Id.* at 936.

In response, the CBAA has argued that NCAA regulations require bowl games to return at least 75% of their gross proceeds to the participating universities. *Cotton Bowl Comments, supra* note 12, at 621. Indeed the CBAA argues that it is a support organization, organized to support the participating colleges’ and universities’ educational programs. *Id.* at 615. Revenues from bowl games support other athletic activities at universities, virtually all women’s athletics, and scholarships for the 300 to 400 students on scholarship at a major university. *Id.* at 621. The revenue also supports other universities. See Chin, *supra* note 67, at 1223 n.82 (“Most conferences split revenues from college football bowl games among the conference members.”).

ute importantly" to the CBAA's educational purpose.<sup>188</sup> In conclusion, the IRS's concern that college sports were being conducted as a for-profit activity, led to the ruling that the CBAA's sponsorship payments should be taxed.

*E. The Use of the Cotton Bowl Logo Constitutes a Royalty and Income from Its Use of a Royalty Is Not Taxable*

Finally, the CBAA argued that corporate sponsorship payments are merely "royalties."<sup>189</sup> Under this line of reasoning, because the payments are payments for the use of a trademark or logo, the payments are royalties, which are not taxable.<sup>190</sup> The CBAA tried to characterize Mobil's payment as a payment for the use of the CBAA's logo, even though the CBAA placed Mobil's logo on the stadium.

The IRS rejected this argument, concluding that the payments in this case were not for royalties, but were instead for services.<sup>191</sup> In a previous case, the IRS had recognized that certain payments in exchange for the use of an exempt labor organization's logo were royalties.<sup>192</sup> However, in this case Mobil's payments required the personal services of members of the CBAA.<sup>193</sup> The IRS decided that the contractual requirements of "personal services of the organization's members" caused the payments to be compensation for services, and not royalties for the use of the CBAA's logo.<sup>194</sup>

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188. Tech. Adv. Mem. 91-47-007. In *American College of Physicians*, the Supreme Court refused to create a rule that all advertising income generated by tax-exempt journals was *per se* taxable as UBTI. 475 U.S. at 841-47. The Court required a specific analysis of the circumstances. *Id.* at 847. Nevertheless, in *American College of Physicians* the Court held the sale of advertising in a medical periodical to be unrelated to an educational organization's exempt purpose. *Id.* at 847-50.

189. Tech. Adv. Mem. 91-47-007 (Aug. 16, 1991).

190. See I.R.C. § 512(b)(2) (1988) ("There shall be excluded all royalties (including overriding royalties) whether measured by production or by gross or taxable income from the property, and all deductions directly connected with such income.").

191. Tech. Adv. Mem. 91-47-007.

192. See Rev. Rul. 81-178, 1981-2 C.B. 135 (situation one).

193. See *id.* (situation two).

194. Tech. Adv. Mem. 91-47-007. The technical advice memorandum suggests that other decisions consistently hold that sponsorship payments will be considered as payments for royalties and not as payments for services if the exempt organization is actively involved in the production of the income. See *id.*; cf. *Fraternal Order of Police v. Commissioner*, 833 F.2d 717, 723-24 (7th Cir. 1987) (holding that involvement in publication of periodical listing constituted unrelated trade or business); *National Collegiate Athletic Ass'n v. Commissioner*, 92 T.C. 456, 468-70 (1989), *rev'd on other grounds*, 914 F.2d 1417 (10th Cir. 1990), *action on decision*, 1991-015 (July 3, 1991) (finding exempt organization was actively involved in creation of income); *National Water Well Ass'n v. Commissioner* 92 T.C. 75, 99-101 (1989) (find-

### F. Conclusion

In summary, the IRS rejected the CBAA's four arguments and taxed the CBAA for the corporate sponsorship payment it received from Mobil as unrelated business income.<sup>195</sup> The technical advice memorandum shows that the IRS was not persuaded by a single tax, legal, or policy argument advanced on behalf of the bowl associations.<sup>196</sup> Consistent with its new policy to aggressively tax unrelated business income of bowl games, on January 17, 1992 the IRS issued tentative audit guidelines to help clarify how it would tax corporate sponsorship income.<sup>197</sup>

## IV. THE THIRD QUARTER: OBJECTIONS TO THE AUDIT GUIDELINES

On January 17, 1992 the IRS issued tentative audit guidelines regarding the treatment of corporate sponsorship income.<sup>198</sup> These guidelines met with strong objection on both procedural and substantive grounds. In the normal procedure the Treasury Department issues regulations and the IRS follows with guidelines.<sup>199</sup> In this case the IRS took an unusual step by issuing the guidelines first.<sup>200</sup> There were also substantive objections to the guidelines, led loudly by the bowl associations.<sup>201</sup> The exempt organization community responded in angry unison with the bowl organizations to the substance of the tentative guidelines.

It is of particular interest to note the techniques used to change the proposed guidelines. The bowl games had been unable to persuade the IRS not to exempt corporate sponsorship income using legal or policy

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ing exempt organization was actively involved in creation of income); see Treas. Reg. § 1.513(c) (as amended in 1992).

195. See Tech. Adv. Mem. 91-47-007 (Aug. 16, 1991).

196. See *id.*

197. Guidelines, *supra* note 10, at 51-53. One commentator said that he believed the release of the guidelines to have been "an IRS attempt to counteract an uproar, fanned by the national media, that followed the release of the now-infamous Mobil Cotton Bowl technical advice memorandum." Paul Streckfus, *Corporate Sponsorship Update: Response to Proposed Guidelines*, 5 EXEMPT ORGANIZATION TAX REV. 967, 967 (1992).

198. It would be a mistake to consider the Cotton Bowl Letter and the tentative audit guidelines to be one document even though they were released within months of each other. The guidelines have a much wider scope, encompassing all exempt organizations, while the technical advice memorandum arguably only reveals the IRS's attitude about a narrow group of cases. See *infra* part IV.B.

199. Julianne MacKinnon & Paul Streckfus, *Non-Profit Tax Conference Updates Charities on Latest Developments*, 5 EXEMPT ORGANIZATION TAX REV. 411, 411 (1992) (describing Marcus S. Owens's Address at 28th Annual Washington Nonprofit Tax Conference (Mar. 6, 1992)).

200. *Id.*

201. *Id.* at 412.



arguments,<sup>202</sup> yet the bowl games and exempt organizations succeeded with political tools and persuasion. The bowl games convinced politicians in the House and Senate not only to lobby on their behalf, but also to write legislation aimed at providing special exemptions for corporate sponsorship income.<sup>203</sup> In addition, the bowl games initiated a powerful letter-writing campaign to the IRS.<sup>204</sup> Indeed, the persistent advocacy of the exempt community played a decisive role in changing the stringent rules offered in the tentative guidelines to the lenient rules in the July 1993 proposed regulations.

#### A. *Procedural Objections to the Audit Guidelines*

The Director of the IRS's Exempt Organizations Technical Division, Marcus S. Owens, described the proposed guidelines as "a new mechanism for providing nonprecedential guidance."<sup>205</sup> His speech, given less than three months after the issuance of the proposed guidelines, revealed that the IRS wanted to establish a new procedure for creating regulations. First, the IRS would publish "an announcement with its tentative views,"<sup>206</sup> then request comments and conduct a hearing, and finally, create new regulations.<sup>207</sup> Most importantly, Mr. Owens hinted that the tentative announcements "might be construed as 'baby regs,' with perhaps some precedential value in the eyes of the courts."<sup>208</sup>

The exempt organization community responded negatively to the prospect of "baby regs."<sup>209</sup> Generally, "guidelines" are a utility for revenue agents.<sup>210</sup> The IRS would have been taking the unprecedented step of adding substantial weight to internal guidelines that were not rules of

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202. See *supra* part III.

203. See, e.g., H.R. 538, 102d Cong., 1st Sess. (1991); H.R. 2464, 102d Cong., 1st Sess. (1991); S. 866, 102d Cong., 1st Sess. (1991).

204. *Panel Three: Significant Issues in the Office of the Associate Chief Counsel for Employee Benefits and Exempt Organizations*, 7 EXEMPT ORGANIZATION TAX REV. 551, 553 (1993) [hereinafter *Panel Three*]; *Citizens Groups to IRS: Tax the Bowl Games and Olympics!*, 6 EXEMPT ORGANIZATION TAX REV. 657, 657 (1992) [hereinafter *Citizens Groups*] ("The Internal Revenue Service is under intense pressure to allow businesses to use non-profit organizations as advertising vehicles. Of 339 comments on an IRS proposal to tax the income [of] the John Hancock Bowl, Mobil Cotton Bowl, and other non-profits received from corporate sponsors, 338 opposed the IRS.").

205. MacKinnon & Streckfus, *supra* note 199, at 411.

206. *Id.*

207. *Id.*

208. *Id.*

209. See, e.g., Gator Bowl Letter, *supra* note 171, at 358.

210. *Panel Four: IRS Coordinated Examination Program for Colleges and Universities*, 6 EXEMPT ORGANIZATION TAX REV. 43, 44 (1992) [hereinafter *Panel Four*] ("The official view is that guidelines are simply suggestions from the National Office of the Internal Revenue Service to the agents in the field, suggestions on how to do a quality audit, how to develop

law.<sup>211</sup> The Gator Bowl Association called the form “improper”<sup>212</sup> and criticized the proposed guidelines for lacking “legislative guidance.”<sup>213</sup> The Gator Bowl Association also lambasted the Service, not only for circumventing the protections guaranteed to taxpayers, but also for sidestepping policy considerations by bypassing input from the Treasury.<sup>214</sup> Similarly, the CBAA attacked the IRS for “making policy,” “writing law,” and “not interpreting regulations.”<sup>215</sup>

However, at least some members of the exempt community took heart at the IRS's new procedure. *The Exempt Organization Tax Review* grudgingly admitted that the guidelines showed the IRS had “public relations savvy.”<sup>216</sup> Walter B. Slocombe and Milton Cerny, who work with “Independent Sector,” a nonprofit coalition of some eight-hundred organizations, wrote encouragingly that the public comment period “has permitted public dialogue and education.”<sup>217</sup>

Ultimately, the IRS rejected the procedural objections of the bowl games and other exempt organizations to early issuance of audit guidelines. In fact, despite protests to the contrary, the IRS has used the new procedure to create baby regs in another area: coordinated examination programs for colleges and universities.<sup>218</sup>

### B. Substantive Objections to the Proposed Guidelines

The public comment period created an opportunity for exempt organizations to examine the audit guidelines and offer substantive comments in response to the them. The guidelines outlined factors to be used by an IRS examiner in evaluating a return prepared by a tax-exempt organization.<sup>219</sup> They also created a framework for analyzing corporate sponsorship income and for allowing the examiner to make “a determination as

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issues.” (statement of Marcus S. Owens, Director of IRS Exempt Organization Technical Division)).

211. Gator Bowl Letter, *supra* note 171, at 358.

212. *Id.*

213. *Id.*

214. *Id.*

215. *Cotton Bowl Comments*, *supra* note 12, at 615.

216. Streckfus, *supra* note 197, at 967.

217. Slocombe & Cerny, *supra* note 99, at 85.

218. *Panel Four*, *supra* note 210, at 43. “Regulations are very difficult to change once they are published in final form as we all know. And certainly in the exempt organizations area they may as well be carved in stone in a lot of cases. I like the flexibility of audit guidelines.” *Id.* at 45 (statement of Marcus S. Owens).

219. Guidelines, *supra* note 10, at 51; *see* Peete, *supra* note 47, at 1284.

to whether an organization is engaged in an unrelated trade or business activity."<sup>220</sup>

In general, the guidelines instructed examiners to look for situations where exempt organizations received substantial payments in exchange for valuable marketing or other services.<sup>221</sup> The guidelines specifically stated that mere recognition of a corporate contributor would be incidental to the contribution.<sup>222</sup> The IRS ordered its examiners to examine all the facts and circumstances of the relationship.<sup>223</sup> Examiners were instructed to look at the value of the service provided for payment, the terms of the contract, the amount of sponsor control, and the level of exposure.<sup>224</sup> Furthermore, the IRS said that it would not apply these guidelines to organizations that were purely local in nature, generated small amounts of gross revenue from corporate sponsors, and operated with large amounts of volunteer labor.<sup>225</sup> Finally, IRS examiners were instructed to analyze corporate sponsored events by reviewing the contracts, correspondence between the parties, videotapes of the events, and other arrangements between the parties in order to determine if the organization was performing substantial services in return for the payments received.<sup>226</sup>

More specifically, IRS examiners were instructed to look for contractual arrangements providing that the corporate logo be placed in the official event title, in the stadium, on printed materials, on uniforms, or in advertisements.<sup>227</sup> They were also instructed to examine contracts for requirements that participants be available for personal appearances, that media coverage be required, or that payment be contingent on the exempt organization securing television, radio, or other marketing contracts. Another factor was whether the arrangement could be terminated for failure to reach a certain level of public exposure.<sup>228</sup> Additionally, the examiners were directed to look through the agreements to determine whether additional services such as plane tickets, travel, lodging, limousines, hospitality suites, and lavish receptions were included as part of the services or benefits promised to the corporate sponsor.<sup>229</sup>

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220. Guidelines, *supra* note 10, at 51.

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.* at 52.

227. *Id.*

228. *Id.*

229. *Id.* at 52-53.

The bowl games and the exempt organization community reacted angrily when the guidelines were announced,<sup>230</sup> and they mailed in over three hundred protest letters to the IRS.<sup>231</sup> This is an understandable reaction in light of the financial interests of the parties.<sup>232</sup> Payments for sponsored events grew from \$400 million in 1984 to a staggering \$3 billion in 1991.<sup>233</sup> The proposed guidelines threatened to tax not only the income from football bowl games, but also the income from marathons, symphonies, and a host of other nonprofit organizations.

For example, under the tentative guidelines, the Mobil Cotton Bowl would clearly generate unrelated business income for the CBAA. The CBAA provided millions of dollars of advertising in exchange for payment.<sup>234</sup> The terms of the contract specified the amount of exposure, that the sponsor (Mobil Oil) had a large amount of control, and that the exposure amounted to a significant promotion.<sup>235</sup> Had an examiner following the guidelines looked at the contract, the negotiations between the parties, and a videotape of the event, the examiner would have found that Mobil's logo was placed in the title of the event, on the stadium, on printed event materials, on the players' uniforms, and on advertisements promoting the event.<sup>236</sup> In addition, the CBAA provided special seating arrangements for Mobil, tickets, hospitality suites, and numerous receptions for Mobil executives and guests. The IRS guidelines would have found that the above activities triggered taxation of the CBAA. In essence, had the guidelines been adopted, they would have removed a significant portion of the tax-exempt status of the bowl games.

Several criticisms of the substance of the guidelines deserve additional attention. First, the guidelines were criticized for unfavorably defining the distinctions between recognition (identification and acknowledgment of corporate sponsors) and return benefits (providing advertising services).<sup>237</sup> However, the IRS had previously rejected this

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230. See Streckfus, *supra* note 197, at 967.

231. *Panel Three*, *supra* note 204, at 553 ("The Service received 339 written comments on the proposed audit guidelines.").

232. See Zimmerman, *supra* note 1, at 440 (estimating that potential tax liability for corporate sponsorship income—before deductions—would be \$281 million); cf. *Citizens Groups*, *supra* note 204, at 658 (alleging that potential liability was \$374 million).

233. Streckfus, *supra* note 83, at 787.

234. See *supra* part III.A.

235. See *supra* part III.A.

236. See *supra* part III.A.

237. Slocombe & Cerny, *supra* note 99, at 77-78; see also Peter L. Faber, *ABA Members Submit Comments on Corporate Sponsorship Guidelines*, 6 EXEMPT ORGANIZATION TAX REV. 229, 234-35 (1992).

objection.<sup>238</sup> Second, many public comments, especially from public broadcasting stations, recommended that the IRS mimic the Federal Communications Commission's (FCC) treatment of acknowledgment of corporate sponsorship.<sup>239</sup> Finally, the examination guidelines state,

As a matter of audit tolerance, the Service will not apply these guidelines to organizations that are of a purely local nature, that receive relatively insignificant gross revenue from corporate sponsors and generally operate with significant amounts of volunteer labor. Generally, included among these are youth athletic organizations such as little league baseball and soccer teams, and local theatres and youth orchestras.<sup>240</sup>

Many commentators asserted that this section was vague. They thought that "local" and "relatively insignificant" needed more accurate definitions.<sup>241</sup>

Although many commentators discussed the audit guidelines on a substantive or procedural level, many organizations relied on traditional, historical, and moral arguments in favor of tax exemption. They argued that they were "good organizations," engaged in noncommercial behavior, and that the IRS should leave them alone.<sup>242</sup> Despite their pleas, this "howling mob of charity junkies" could not alone bully the IRS into changing stringent audit guidelines into lax proposed treasury regulations.<sup>243</sup> Ultimately, it took threatened action by Congress to intimidate the IRS into an administrative retreat.

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238. See *supra* part III. The CBAA made the argument that an agreement that directly tied compensation to a television rating should not be subject to the unrelated business income tax, because more exposure indicates that an exempt organization is better fulfilling its mission. *Cotton Bowl Comments, supra* note 12, at 620. But see *Slocombe & Cerny, supra* note 99, at 81 ("Making a payment depend on the degree to which third party activity, such as television coverage, circulates publicity about the donor so closely resembles the terms of normal advertising arrangements as to justify treating such arrangements as tending to indicate advertising.").

239. *Slocombe & Cerny, supra* note 99, at 79 ("Since the FCC has primary regulatory authority over public broadcasting, the IRS should defer to the FCC's standards in this area, and declare expressly that it will not regard as advertising for tax purposes any activity that is not regarded as advertising under FCC standards for public broadcasting.").

240. Guidelines, *supra* note 10, at 52.

241. *Streckfus, supra* note 197, at 967; see, e.g., *Gator Bowl Letter, supra* note 171, at 361. But cf. *Faber, supra* note 237, at 235 ("We believe that this type of administrative exception [not taxing small exempt organizations] represents an admirable exercise of administrative discretion on the part of the IRS.").

242. *Streckfus, supra* note 197, at 967 ("Qualitatively, most of the comments simply say, 'We're good organizations, leave us alone.'").

243. *Streckfus, supra* note 24, at 746.

C. *Proposed Congressional Responses to the Taxation of Corporate Sponsorship Income*

Congress began to explore the taxation of corporate sponsorship even before the publication of the Mobil Cotton Bowl Letter.<sup>244</sup> Previously, Congress had tried to craft a narrow exception for athletic events. However, in response to the Mobil Cotton Bowl Letter and audit guidelines, Congress expanded its reach to attempt to protect all exempt organizations receiving corporate sponsorship income.<sup>245</sup> Ultimately, the IRS's proposed treasury regulations were created, at least in part, to counteract issues left unresolved by threatened congressional action.<sup>246</sup>

Before the release of the Cotton Bowl Letter, some members of Congress had introduced legislation to provide limited protection for annual athletic events. For example, corporate sponsorship income from athletic events would have been exempted from taxation in several bills.<sup>247</sup> Congress's limited approach made fiscal sense because its proposed tax exemption would have resulted in a smaller loss of revenue. If only college football bowl games were granted exemption from taxation, the total amount of foregone revenue would have been about \$5 million.<sup>248</sup> Such a policy, however, would give preferential treatment to one type of non-profit organization—namely those who organize amateur athletics—over others.<sup>249</sup> In an effort to extend the protection to all nonprofits benefiting from corporate sponsorship income, House Ways and Means Committee Member Rod Chandler introduced legislation to protect the income of cultural organizations, agricultural fairs, and community celebrations.<sup>250</sup>

Representative Chandler's legislation was not the only proposed legislation introduced in 1992 that addressed the issue of corporate sponsor-

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244. Tech. Adv. Mem. 91-47-007 (Aug. 16, 1991).

245. Steven D. Simpson, *When Will Corporate Sponsorship Create UBIT Liability?*, J. TAX'N OF EXEMPT ORGANIZATIONS, Nov.-Dec. 1992, at 3, 7.

246. Ligos & Guritz, *supra* note 10, at 251. ("While this [H.R. 11, 102d Cong., 2d Sess. (1992)] would have taken care of the annual bowl game, it would have left a number of unresolved issues for local exempt organizations.")

247. See H.R. 2464, 102d Cong., 1st Sess. (1991); S. 866, 102d Cong., 1st Sess. (1991); H.R. 538, 102d Cong., 1st Sess. (1991). *But see* H.R. 969, 102d Cong., 1st Sess. (1991) (Representative Paul Henry's unenacted bill that would have effectively overturned Tech. Adv. Mem. 78-51-004 (Aug. 21, 1978) and taxed broadcasting revenue as unrelated business income).

248. Zimmerman, *supra* note 1, at 440.

249. *Id.* at 439.

250. H.R. 5308, 102d Cong., 2d Sess. (1992) (bill sponsored by Republican Rod Chandler of Washington); see Streckfus, *supra* note 197, at 968.

ship.<sup>251</sup> Indeed, one attorney reportedly boasted that with three Texans on the House Ways and Means Committee, the CBAA could never be taxed.<sup>252</sup> That attorney proved to be correct<sup>253</sup>—when the Revenue Act of 1992<sup>254</sup> was sent to the President to be signed, it had provisions that eliminated most taxation of corporate sponsorship income.<sup>255</sup>

President Bush pocket vetoed the bill for reasons that had nothing to do with corporate sponsorship.<sup>256</sup> However, commentators speculated that many of its provisions—including the ones protecting tax-exempt organizations—would appear in future tax bills.<sup>257</sup> Those commentators incorrectly assumed that it would take legislative action to limit taxation of corporate sponsorship income.<sup>258</sup> Surprisingly, in an effort to preempt probable congressional action, the IRS wrote administrative regulations that defined advertising activity as mere acknowledgement.<sup>259</sup>

#### V. THE FOURTH QUARTER: WHAT DO THE PROPOSED REGULATIONS DO?

Near the end of a close football game, just before the fourth quarter, it is customary for some football players to raise their helmets high as an assertion that their team—even after three quarters of battle—is ready and capable of continuing the fight to the finish.<sup>260</sup> During the fourth quarter of the battle over corporate sponsorship, the IRS bowed its head, lowered its helmet, and discarded its self-confidence. It resembled a football team bullied into submission by three quarters of combat on the gridiron.

Paul Streckfus, Editor of *The Exempt Organization Tax Review*, alluded to this loss of confidence when he wrote,

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251. See H.R. 5645, 102d Cong., 2d Sess. (1992) (providing relief from IRS's proposed audit guidelines).

252. Paul Streckfus, *IRS' Pre-Inaugural Gift for Charities*, 7 EXEMPT ORGANIZATION TAX REV. 179, 179 (1993).

253. See *infra* part V.

254. H.R. 11, 102d Cong., 2d Sess. (1992).

255. See Ligos & Guritz, *supra* note 10, at 251.

256. *Id.* at 253.

257. *Id.*

258. John Spirtos & Paul Streckfus, *Tax Exempt Provisions of H.R. 11 (With EOTR Commentary)*, 6 EXEMPT ORGANIZATION TAX REV. 1110, 1110 (1992) (“[M]any of its provisions will no doubt show up in future tax bills.”).

259. Streckfus, *supra* note 24, at 746.

260. For example, in the Federal Express Orange Bowl, the trailing Nebraska Cornhuskers raised their helmets just before beginning a drive with seconds to go in the fourth quarter. Nebraska lost to eventual national champion Florida State 18-16. *The Federal Express Orange Bowl* (NBC television broadcast, Jan. 1, 1994).

One of my constant fears is that the tax lobbying process is so one-sided that tax officials get brainwashed into believing patently ridiculous arguments if they are repeated often enough by lobbyists who will make any argument, no matter how false, depending on who is paying them. To me this is what has occurred since the issuance of the Mobil Cotton Bowl technical advice memorandum in regard to the issue of whether a three-hour barrage of the word "Mobil" constitutes advertising for purposes of the tax law.<sup>261</sup>

Ironically, as soon as the IRS adeptly backpedaled to avoid the controversy generated by the bowl games, it received harsh criticism from many tax commentators for creating such a generous corporate sponsorship rule.<sup>262</sup> These analysts feel it is their mission to keep the tax system "fair," and they decried the initiative taken by an administrative agency.<sup>263</sup> One tax analyst lambasted the IRS's definition of acknowledgement<sup>264</sup> as defying common sense;<sup>265</sup> another compared the proposed regulations to *Alice in Wonderland*.<sup>266</sup>

Moreover, while the IRS bragged that it had created a general rule in one-tenth of the time that it would have normally taken Congress,<sup>267</sup> one tax analyst decried the guidelines as "the most egregious example of IRS abuse of the administrative process."<sup>268</sup> After reminding the IRS that it was an administrative agency and not a legislature,<sup>269</sup> he charged that "[t]here can be no justification for the legislating that the IRS has done in the proposed corporate sponsorship regulations."<sup>270</sup> Finally, he concluded that "[i]f [IRS Commissioner Margaret] Richardson and [Treasury Assistant Secretary for Tax Policy Leslie] Samuels don't step in now, their reputations for fair dealing and equal treatment of taxpay-

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261. Streckfus, *supra* note 9, at 379.

262. *Id.*

263. *Id.*

264. *See infra* part V.A (defining acknowledgement).

265. Sheppard, *supra* note 2, at 532.

266. Streckfus, *supra* note 24, at 746.

267. Marlis L. Carson, *Corporate Sponsorship Regs Provide "Clear Line" for IRS, Charities, Says Owens*, 7 EXEMPT ORGANIZATION TAX REV. 917, 917 (1993) (quoting Marcus S. Owens). Moreover, in the early days of the Clinton Administration, it seemed possible that the President's call for "shared sacrifice" might have meant fewer tax breaks for special interests. Streckfus, *supra* note 9, at 379 (quoting President Clinton).

268. Streckfus, *supra* note 24, at 746.

269. *Id.*

270. *Id.*



ers will be put in serious jeopardy as the proposed regulations become final."<sup>271</sup>

This section discusses the proposed regulations and explains how they drastically changed the rules originally offered in the audit guidelines.<sup>272</sup> It examines the new definitions of advertising and acknowledgement, explains how the "tainting rule" will affect corporate sponsorship income, and reviews the examples included in the proposed regulations.<sup>273</sup> Finally, in light of the recent developments in the field of corporate sponsorship regulation, this section analyzes the 1994 Mobil Cotton Bowl.<sup>274</sup>

#### A. *Differences Between the Proposed Regulations and the Audit Guidelines*

The proposed treasury regulations<sup>275</sup> differ from the tentative audit guidelines<sup>276</sup> in several ways. First, the proposed regulations focus on the nature of the services provided to the corporate sponsor and not on the possible benefits—for example, advertising value—provided to the sponsor.<sup>277</sup> Second, the regulations create definitions for advertising and acknowledgement.<sup>278</sup> Third, the regulations create certain limitations on the types of acknowledgement that tax-exempt organizations may provide to their corporate sponsors.<sup>279</sup> Fourth, the regulations add examples of cases restricting the ability of tax-exempt organizations to take deductions for unrelated business activities.<sup>280</sup> Finally, and most controversially, the IRS has proposed an extension of the tainting rule to corporate sponsorship.<sup>281</sup>

The proposed regulations differ from the guidelines in that they focus on the nature of the services provided by the nonprofit instead of the benefits provided to the sponsor.<sup>282</sup> The guidelines had essentially cre-

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271. *Id.*

272. *See infra* part V.A.

273. *See infra* part V.A.

274. *See infra* part V.B.

275. Proposed Regulations, *supra* note 13.

276. Guidelines, *supra* note 10.

277. Ligos & Guritz, *supra* note 10, at 254.

278. *Id.*

279. *Id.* at 254-56.

280. Proposed Regulations, *supra* note 13, at 5689-90 (Proposed Treasury Regulations § 1.512(a)-1(e), Examples 2-4).

281. Juliann Avakian-Martin, *Tainting Rule Discussed at Hearing on Corporate Sponsorship Regs.*, TAX NOTES TODAY 144-3, July 9, 1993, available in LEXIS, Fedtax Library, TNT File; *see infra* part VI.

282. Ligos & Guritz, *supra* note 10, at 254.

ated a benefits test<sup>283</sup> that turned on whether substantial benefits were provided to the corporate sponsor.<sup>284</sup> For example, the IRS would examine the corporate sponsorship agreement to determine whether the corporate sponsor's logo would be placed on the official title of the event, on the stadium, on printed materials related the event, and on participant uniforms.<sup>285</sup> Under the regulations these requirements have disappeared entirely.

The proposed regulations instead define these activities as acknowledgements.<sup>286</sup> Activities designated as "quid pro quo" advertising in the Cotton Bowl Letter,<sup>287</sup> and classified as advertising services in the guidelines, are now classified as acknowledgements. This is a critical change,

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283. See *Cotton Bowl Comments*, *supra* note 12, at 616. "It's come down to a benefits test, that the focus is from their being recognized by having their name attached to part of the event, [to] that of some benefit to them that will cause taxation." *Id.* Compare the previous comments with the IRS's analysis: "The appropriate way to answer this question [Was there a quid pro quo?] is to look at all the facts and circumstances to see if the payment [from Mobil] was made with an expectation of receiving from the Organization [CBAA] a substantial return benefit." Tech. Adv. Mem. 91-47-007 (Aug. 16, 1991).

284. See Guidelines, *supra* note 10, at 51.

285. *Id.* at 52.

286. Significantly, the regulations define the difference between advertising and acknowledgement, something not done in the audit guidelines.

(b) Advertising. With respect to sponsorship of the activities of exempt organizations, advertising means any message or other programming material which is broadcast or otherwise transmitted, published, displayed or distributed in exchange for any remuneration, and which promotes or markets any company, service, facility or product. Advertising includes any activity which promotes or markets any company, service, facility, or product. Advertising does not include acknowledgements described in paragraph (c) of this section.

(c) Acknowledgements — (1) Description. Acknowledgements are mere recognition of sponsorship payments. Acknowledgements may include the following, provided that the effect is identification of the sponsor rather than the promotion of the sponsor's products, services or facilities: sponsor logos and slogans that do not contain comparative or qualitative descriptions of the sponsor's products, services, facilities or company; sponsor locations and telephone numbers; value-neutral descriptions, including displays or visual depictions, of a sponsor's product-line or services; and sponsor brand or trade names and product or service listings. Logos or slogans that are an established part of a sponsor's identity are not considered to contain comparative or qualitative descriptions.

Proposed Regulations, *supra* note 13, at 5690. "To the extent possible, the proposed regulations are designed to parallel the statutory and regulatory framework of the Federal Communications Commission (FCC) currently in effect." *Id.* at 5688; see Commission Policy Concerning the Noncommercial Nature of Educ. Broadcasting Stations, FCC Public Notice 86-161, Apr. 11, 1986; see also Commission Policy Concerning the Noncommercial Nature of Educ. Broadcasting Stations, 97 F.C.C.2d 255, 263 (1984) ("To summarize, donor acknowledgements utilized by public broadcasters may include: (1) logograms or slogans which identify and do not promote, (2) location, (3) value neutral descriptions of a product line or service, (4) brand and trade names and product or service listings.").

287. Tech. Adv. Mem. 91-47-007.

because income-generating activities that once would have been taxed are no longer taxed.

A case in point is Example 4 in the proposed regulations, which describes a situation nearly identical to the Mobil Cotton Bowl.<sup>288</sup> In Example 4 the tax-exempt organization, *P*, conducts a football game with an exclusive corporate sponsor.<sup>289</sup> The corporate sponsor's logo appears on the stadium, the players' uniforms, the players' helmets, the scoreboard, the cups used to serve drinks at the game, and all printed materials.<sup>290</sup> Finally, the commercial broadcaster agrees to focus its television cameras on the corporate sponsor's logo.<sup>291</sup> According to the regulations, "*P*'s activities are acknowledgements of the payment and not advertising."<sup>292</sup>

The proposed regulations create a series of limitations as to what constitutes an acknowledgement.<sup>293</sup> These limitations define the types of acknowledgements that constitute advertising.<sup>294</sup> Messages that are advertising include "qualitative or comparative language; price information or other indications of savings or value associated with a product or service; a call to action; an endorsement; or an inducement to buy, sell, rent, or lease the sponsor's product or service."<sup>295</sup> Tax analysts thought these limitations were too narrow and remarked that it would be difficult to construct an acknowledgement that would constitute advertising.<sup>296</sup> However, Example 7 of the regulations describes a situation in which an acknowledgement would constitute advertising.<sup>297</sup>

In Example 7 a hypothetical nonprofit radio station airs a program sponsored by a local record shop, and in recognition of that sponsorship airs the following message: "This program has been underwritten by the Record Shop, where you can find all of your great hit music. The Record Shop is located at 123 Main Street. Give them a call today at 555-1234. This station is proud to have the Record Shop as a spon-

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288. See Proposed Regulations, *supra* note 13, at 5690-91 (Proposed Treasury Regulations § 1.513-4(g), Example 4).

289. *Id.* at 5690.

290. *Id.*

291. *Id.*

292. *Id.* at 5691.

293. *Id.* at 5690 (Proposed Treasury Regulations § 1.513(c)(2)).

294. *Id.*

295. *Id.*

296. Streckfus, *supra* note 252, at 180 ("Under the proposed regulations it is difficult to conceive of a situation involving a corporate sponsorship arrangement that would constitute advertising as opposed to acknowledgement.").

297. See Proposed Regulations, *supra* note 13, at 5691 (Proposed Treasury Regulations § 1.513-4(g), Example 7).

sor.’<sup>298</sup> This example concludes with the warning that this acknowledgement goes beyond the limitations expressed in the regulations, and that the corporate sponsorship payments would be taxed as unrelated business income to the exempt organization.<sup>299</sup>

However, by dividing the message into its components, it is difficult to see how the message can be classified as advertising under the proposed regulations. The first part of the message, “This program has been underwritten by the Record Shop, where you can find all your great hit music,’<sup>300</sup> does contain an endorsement of the Record Shop. However, assume the Record Shop is a national company, whose national slogan or logo is “‘where you can find all your great music.’<sup>301</sup> Such a logo would then be deemed to be “an established part of [the] sponsor’s identity,”<sup>302</sup> and the endorsement would be allowed as an acknowledgement.

Moreover, Example 7 seems to imply, but does not explicitly state, that the Record Shop is a local business. Perhaps its products are not as well known as those of national companies, such as Mobil. By sustaining the rule prohibiting endorsements against the Record Shop, small, local companies will be precluded from taking equal advantage of the corporate sponsorship regulations. If “[t]he principle of administrative simplicity governs the rules defining advertising and acknowledgements in the proposed regulations,”<sup>303</sup> why the ambiguity? How will the IRS determine which logos are an established part of a sponsor’s identity? Will the determination be local or national? Assuming the IRS defers to the corporate sponsor—as it has often done in the field of corporate sponsorship regulations<sup>304</sup>—then there is a strong argument that the endorsement will not be considered advertising.

In the second part of the message, the station broadcasts the Record Shop’s address and phone number.<sup>305</sup> This part of the message falls within the definitions of acknowledgement that allow broadcast of “sponsor locations and telephone numbers.”<sup>306</sup> Included in the message announcing the phone number is the exhortation to: “‘Give them a call

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298. *Id.*

299. *Id.*

300. *Id.*

301. *See id.*

302. *Id.* at 5690 (Proposed Treasury Regulations § 1.513-4(c)(1)).

303. Proposed Regulations, *supra* note 13, at 5688.

304. *See infra* part VI.

305. Proposed Regulations, *supra* note 13, at 5691 (Proposed Treasury Regulations § 1.513-4(g), Example 7).

306. *Id.* at 5690 (Proposed Treasury Regulations § 1.513-4(c)(1)).

today.’”<sup>307</sup> This exhortation appears to be a call to action<sup>308</sup> and might also fall under the category of advertising, but it is a relatively small component of the message. Again, large companies have a benefit over small ones. For example, suppose a message contained a call to action such as, “Stop and smell the pizza!”<sup>309</sup> The message is a call to action, yet because it is a national slogan, the call to action is excluded under the regulations.<sup>310</sup> Small companies suffer because they simply do not have national slogans; similarly the small exempt organizations that seek their sponsorship also suffer. Finally, the last part of the message, “This station is proud to have the Record Shop as a sponsor,”<sup>311</sup> appears to be a simple acknowledgement.

In short, there is a compelling argument that the lone example of advertising in the proposed regulations is not really advertising as defined by the regulations. If so, it gives additional credence to the assertion that it is difficult to create an acknowledgement that constitutes advertising under the proposed regulations.<sup>312</sup>

Moreover, although the Cotton Bowl Letter arguably applied only to bowl games,<sup>313</sup> the broad definitions for advertising and acknowledgements contained in the proposed regulations cover many more types of corporate sponsorship activities.<sup>314</sup> Notwithstanding the scope of the regulations, inequities would have resulted in the “blatant disregard for the charitable community in favor of the large bowl game sponsors.”<sup>315</sup> The scope of examples in the proposed regulations allows corporate sponsorship for a variety of situations. These examples include a marathon sponsored by a national corporation,<sup>316</sup> an art museum that receives money to help publish a catalog,<sup>317</sup> an organization that sponsors sports tournaments across the country and displays the corporate sponsor’s

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307. *Id.* at 5691 (Proposed Treasury Regulations § 1.513-4(g), Example 7).

308. *Id.* at 5690 (Proposed Treasury Regulations § 1.513-4(c)(2)).

309. This is Pizza Hut’s current slogan. Pizza Hut was an advertiser—but not the corporate sponsor—during the Cotton Bowl. *The Mobil Cotton Bowl Classic* (NBC television broadcast, Jan. 1, 1994).

310. Proposed Regulations, *supra* note 13, at 5690 (Proposed Treasury Regulations § 1.513-4(c)(1)).

311. *Id.* at 5691 (Proposed Treasury Regulations § 1.513-4(g), Example 7).

312. Sheppard, *supra* note 2, at 532.

313. Ligos & Guritz, *supra* note 10, at 246-47.

314. *Id.* at 253.

315. Cerny, *supra* note 22, at 747.

316. Proposed Regulations, *supra* note 13, at 5690 (Proposed Treasury Regulations § 1.513-4(g), Example 1).

317. *Id.* at 5690 (Proposed Treasury Regulations § 1.513-4(g), Example 2).

product (a car) at its events,<sup>318</sup> college football bowl games,<sup>319</sup> a local baseball team sponsored by a national pizza chain,<sup>320</sup> annual art festivals that acknowledge sponsors in festival brochures,<sup>321</sup> and symphony programs.<sup>322</sup>

The scope of activities covered by these proposed regulations means that purely local organizations, which operate with significant amounts of volunteer labor, and receive insignificant amounts of corporate sponsorship income, will still be held accountable to the regulations.<sup>323</sup> Generally, under the audit guidelines these small organizations would not have been required to deal with corporate sponsorship issues.<sup>324</sup> In fact, because organizations that receive less than \$1000 in unrelated business income do not need to file a special form to report such income there already exists a de minimis threshold.<sup>325</sup> However, under the regulations, small organizations no longer have the protection that they might have enjoyed under the audit guidelines.

Small organizations may suffer in another way. The proposed regulations<sup>326</sup> state that they will follow the rule in Revenue Ruling 67-246.<sup>327</sup> This 1967 Revenue Ruling applied to the situation in which fundraising activities such as selling tickets to a benefit concert were designed to solicit payments that were part gift and part purchase price of admission.<sup>328</sup> The Revenue Ruling held that only the amounts above the fair market value of the purchase price were charitable deductions to the taxpayer under § 170.<sup>329</sup> Amounts below fair market value—if unrelated—were unrelated business taxable income.<sup>330</sup>

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318. *Id.* (Proposed Treasury Regulations § 1.513-4(g), Example 3). Of course, if the auto company displays a price sticker in the window, it might arguably violate the "price information" limitation on acknowledgement. *See id.* at 5690 (Proposed Treasury Regulations § 1.513-4(c)(2)).

319. *Id.* at 5690-91 (Proposed Treasury Regulations § 1.513-4(g), Example 4).

320. *Id.* at 5691 (Proposed Treasury Regulations § 1.513-4(g), Example 5).

321. *Id.* (Proposed Treasury Regulations § 1.513-4(g), Example 6).

322. *Id.* (Proposed Treasury Regulations § 1.513-4(g), Example 8).

323. *Cf.* Guidelines, *supra* note 10, at 52.

324. *Id.*

325. Marlis L. Carson & Barbara Kirchheimer, *Tax Forum Covers Wide Range of EO Issues*, 8 EXEMPT ORGANIZATION TAX REV. 642, 643 (1993) (discussing Form 990-T); *see also* HOPKINS, *supra* note 5, at 1094-97 app. e (showing example of Form 990-T).

326. Proposed Regulations, *supra* note 13, at 5688.

327. Rev. Rul. 67-246, 1967-2 C.B. 104.

328. *Id.*

329. *Id.*

330. *See* Proposed Regulations, *supra* note 13, at 5688 ("Thus, the proposed regulations permit an exempt organization to exclude the portion of a payment from a sponsor that can be shown to be in excess of the fair market value of the advertising benefit received by the sponsor."). This is an interesting interpretation of the holding of Rev. Rul. 67-246, 1967-2 C.B.

Claiming to follow the Revenue Ruling, the proposed regulations permit an exempt organization to exclude from unrelated business taxable income the portion of the payment in excess of the fair market value of the advertising received.<sup>331</sup> Thus, small organizations fearing IRS challenge will have an incentive to *increase* the fair market value of the advertising services provided in order to avoid IRS audit. Small organizations will then pay higher amounts of taxes per dollar of corporate sponsorship income than large organizations. Indeed, this provision will have little effect on the large corporations that sponsor bowl games, because those games already offer advertising services at below market value.<sup>332</sup> Recall that John Hancock Company received \$5.1 million in advertising services in exchange for a \$1.6 million corporate sponsorship payment.<sup>333</sup> It is difficult to imagine a situation where a large, responsible corporation would sponsor an event and not get at least fair market value for its advertising dollars.

The proposed regulations also hurt small organizations through a device known as the tainting rule.<sup>334</sup> The regulations state that “[i]f any activities, messages or programming material constitute advertising with respect to sponsorship payment, then all related activities, messages or programming material that might otherwise be acknowledgments are considered advertising.”<sup>335</sup> In other words, if any portion of the acknowledgement activities are advertising, the entire message is advertising, and all income produced may be taxed as unrelated business income.<sup>336</sup>

Critics decried the tainting rule as hurting small organizations.<sup>337</sup> The proposed regulations form a trap for unwary small organizations, particularly those unable to regularly consult legal counsel.<sup>338</sup> Others noted that the rule violated the IRS’s traditional “fragmentation rule,” in which revenue sources are broken into their respective components.<sup>339</sup>

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104, because the revenue ruling discusses neither donee tax-exemption nor donee exclusions from gross income, but instead addresses donor § 170 deductions.

331. Proposed Regulations, *supra* note 13, at 5688.

332. *See supra* part III.C.

333. *See supra* part III.C.

334. Avakian-Martin, *supra* note 281.

335. Proposed Regulations, *supra* note 13, at 5690 (Proposed Treasury Regulations § 1.513-4(c)(2)).

336. Avakian-Martin, *supra* note 281.

337. *Id.*

338. *Id.*; see Juliann Avakian-Martin, *Tainting Rule Testimony Highlights Hearing on Corp. Sponsorship Regs.*, 60 TAX NOTES 152, 152 (1993); Judith E. Golub & Robert P. Bergman, *Arts Group Deplores Tainting Principle in Sponsorship Regs*, TAX NOTES TODAY 137-35 (1993) available in LEXIS, Fedtax Library, TNT File.

339. Avakian-Martin, *supra* note 338, at 152.

A proposed protection for small organizations was a de minimis rule.<sup>340</sup> Such a rule would provide a de minimis exception to the tainting rule when five percent or less of a contribution turns out to be advertising.<sup>341</sup> In light of these legitimate criticisms, tax commentators predicted that the IRS would "back off" from its "harsh stance" on the tainting-rule issue.<sup>342</sup> Consequently, small organizations may be spared from the tainting rule.

Finally, the regulations also hurt small organizations through their treatment of allocations governing exploitation.<sup>343</sup> In the past, exploitation was a subject on which there had been little guidance.<sup>344</sup> The lone previous example of exploitation of exempt purposes was the sale of advertising in a periodical published by an exempt organization that contained editorial material related to the accomplishment of the exempt organization's purpose.<sup>345</sup> Tax-exempt organizations have an incentive to allocate their expenses in order to lower the unrelated business income they must report. Generally, when gross income is derived from an unrelated trade or business, tax-exempt organizations may not deduct expenses, depreciation, or similar items in computing unrelated business income.<sup>346</sup> However, expenses, depreciation, and similar items attributable to the unrelated activity may be deducted from unrelated business income when the unrelated activity (1) exploits the tax-exempt function, (2) is normally carried on by taxable organizations for profit, and (3) is normally conducted by tax-exempt organizations in pursuit of such business.<sup>347</sup>

Although the proposed regulations do not add any rules to Treasury Regulation § 1.512(a)-1<sup>348</sup>—the provision of the I.R.C. that prevents ex-

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340. *Id.* at 153.

341. Avakian-Martin, *supra* note 281. Such a rule would be in addition to the \$1000 de minimis exception that already exists on income for exempt organizations. *Id.*; cf. John J. Salmon & Annette J. Guarisco, *Attorneys Criticize Corporate Sponsorship Regs.*, 8 EXEMPT ORGANIZATION TAX REV. 601, 602 (1993) (arguing for de minimis threshold of 10% of value of corporate sponsorship payment before triggering relatedness provision).

342. Paul Streckfus, *Owens Alerts College Business Officers to IRS Concerns*, TAX NOTES TODAY 144-6, July 9, 1993, available in LEXIS, Fedtax Library, TNT File.

343. Proposed Regulations, *supra* note 13, at 5689-90 (Proposed Treasury Regulations § 1.512-1(e)).

344. John Junker, *Comments on Proposed Regulations Regarding Taxation of Tax-Exempt Organizations' Income from Corporate Sponsorship*, 8 EXEMPT ORGANIZATION TAX REV. 356, 357 (1993).

345. Treas. Reg. § 1.512(a)-1(d)(1) (as revised in 1991); see Priv. Ltr. Rul. 93-45-004 (Nov. 12, 1993).

346. Treas. Reg. § 1.512(a)-1(d)(1).

347. *Id.* § 1.512-1(a)-1(d)(2).

348. *Id.* § 1.512(a)-1.



ploitation of tax-exempt purposes by nonprofit organizations<sup>349</sup>—they do add three examples which aid in the definition of exploitation.<sup>350</sup> The three new examples of exploitation of tax-exempt purposes that can give rise to unrelated business income are: (1) the sale of apparel featuring the name and logo of the bowl game,<sup>351</sup> (2) a bowl association leasing a stadium it owns to a professional football team for an event unrelated to the bowl game,<sup>352</sup> and (3) an art museum sponsoring a photography exhibition.<sup>353</sup>

The bowl games have objected to two of these examples.<sup>354</sup> In particular, they argue that the sale of apparel is not regularly carried on because it is at an annual event. Further, they contend that apparel sales are substantially related to the exempt organization's educational purpose.<sup>355</sup> In addition, the bowl game organizations argue that income from the lease of real property is never unrelated business taxable income.<sup>356</sup> These additional examples suggest that the exploitation rules may receive more scrutiny from the IRS than they have in the past. Perhaps the exploitation rules will be the next major area of contention in the game of unrelated business taxable income. In reality, the lenient position adopted by the IRS in constructing the proposed regulations will probably just embolden exempt organizations to demand more and more concessions.<sup>357</sup>

### B. *The 1994 Mobil Cotton Bowl Classic*

New Year's Day is an important day for football fans across the country.<sup>358</sup> New Year's Day, 1994, saw the broadcast of the Mobil Cotton Bowl Classic on NBC from Dallas, Texas.<sup>359</sup> Texas A&M, the SouthWest Conference Champion, was playing Notre Dame, and Mobil Oil was the corporate sponsor.<sup>360</sup>

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349. *Id.*

350. Junker, *supra* note 344, at 357.

351. Proposed Regulations, *supra* note 13, at 5689 (Proposed Treasury Regulations § 1.512(e)-1, Example 2).

352. *Id.* at 5689 (Proposed Treasury Regulations § 1.512(e)-1, Example 3).

353. *Id.* at 5689-90 (Proposed Treasury Regulations § 1.512(e)-1, Example 4).

354. Junker, *supra* note 344, at 357-58.

355. *Id.*

356. *Id.* at 358 (citing I.R.C. § 512(b)(3)(i) (1988)).

357. Streckfus, *supra* note 9, at 379.

358. Rick Reilly said it best: "Man requires food, water, shelter, love and once a year, 13 straight hours in front of an array of radiation emitting television sets, watching every New Year's Day bowl game." *Bowled Over, Bowled Out*, SPORTS ILLUSTRATED, Jan. 11, 1993, at 32.

359. *The Mobil Cotton Bowl Classic* (NBC television broadcast, Jan. 1, 1994).

360. *Id.*

The television broadcast began with the traditional appeal to both schools' rich football history. To the accompaniment of beautiful campus shots, heroic action on the gridiron, and inspirational music, Charlie Jones, the NBC announcer intoned:

Tradition and history are important parts of Texas A&M, where the spirit of Aggieland exists in full force. . . .

Notre Dame wrote the book on tradition: the legendary Knute Rockne, the Four Horsemen, seven Heisman Trophy winners, and customs that go back generations. When you play for Notre Dame, you take your place in history.<sup>361</sup>

The stirring beginning would send chills down anyone's spine; as the opening wound down, the camera focused on an American flag gently waving in the background.<sup>362</sup> But Charlie Jones had not finished, and he concluded the introduction by saying, "Good afternoon everybody and welcome to the fifty-eighth Mobil Cotton Bowl: Notre Dame and Texas A&M."<sup>363</sup>

Other acknowledgements followed. Each player wore a patch which said, "Mobil Cotton Bowl Classic 1994."<sup>364</sup> The patch could be easily read whenever the camera focused on an individual player.<sup>365</sup> The phrase "Mobil Cotton Bowl" was chalked into both end zones, so that any camera shot from either end zone would show the Mobil name, albeit upside down.<sup>366</sup> "Mobil Cotton Bowl Classic" was also written into the middle of the field with the "o" from "Mobil" written in red.<sup>367</sup> The goalposts also had the phrase "Mobil Cotton Bowl Classic" written on them.<sup>368</sup> The CBAA chalked the red pegasus, Mobil's corporate logo, onto both sides of the field between twenty-five and thirty yard lines.<sup>369</sup> Further, a banner identifying the game as the "Mobil Cotton Bowl Classic" hung outside the entrance to the stadium,<sup>370</sup> and the winner's trophy had the inscription "1994 Mobil Cotton Bowl Classic."<sup>371</sup>

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361. *Id.*

362. *Id.*

363. *Id.*

364. *Id.* The players could have been forced to wear two big patches, one on each shoulder. This was done in the USF&G Insurance Sugar Bowl. *The USF&G Insurance Sugar Bowl* (ABC television broadcast, Jan. 1, 1994).

365. *The Mobil Cotton Bowl Classic* (NBC television broadcast, Jan. 1, 1994).

366. *Id.*

367. *Id.*

368. *Id.*

369. *Id.*

370. *Id.* The stadium in which the game is played is called the "Cotton Bowl." *Id.*

371. *Id.*

Acknowledgement of Mobil continued throughout the game. For example, after a player had made a big play, the player's name and picture would appear on the television.<sup>372</sup> As the camera returned to live action, a bar emblazoned with the phrase "Mobil Cotton Bowl Classic" descended from the top of the television screen to the bottom.<sup>373</sup> If the announcers wanted to know the direction of the wind, the camera focused not on the American flag, nor the Texas flag, but rather on the "Mobil Cotton Bowl Classic" flag.<sup>374</sup> Occasionally, the camera zoomed in on the words "Mobil Cotton Bowl Classic" written on the rim of the upper deck of the stadium.<sup>375</sup> When the score was flashed during the game, the words "Mobil Cotton Bowl Classic" also appeared.<sup>376</sup> Finally, during historical flashbacks to great moments in Cotton Bowl history,<sup>377</sup> the "Mobil Cotton Bowl Classic" insignia appeared.<sup>378</sup>

None of these forms of acknowledgement would give rise to taxable income under the proposed regulations. The phrase "Mobil Cotton Bowl Classic"<sup>379</sup> does not contain "comparative or qualitative descriptions of the sponsor's products, services, facilities or company."<sup>380</sup> The slogans do not exhort the viewer to buy Mobil's products, there are no price comparisons, or inducements to buy.<sup>381</sup> The facts of the 1994 Mobil Cotton Bowl Classic mirror Example 4<sup>382</sup> in almost precise detail.<sup>383</sup> In conclusion, the acknowledgements given to Mobil do not constitute advertising.

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372. *Id.*

373. *Id.* According to the Author's stopwatch, it took between 1/2 second and 3/4 second for the bar to descend from the top of the screen to the bottom.

374. *The Mobil Cotton Bowl Classic* (NBC television broadcast, Jan. 1, 1994). Notre Dame had a poor kicking game entering into the game, and the wind was an important concern. *Id.* Notre Dame won the game with a 31-yard field goal: 24-21. *Id.*

375. *Id.*

376. *Id.*

377. Such as the flashback to the 1954 Cotton Bowl, when Rice's Dickey Magel was awarded a 95-yard touchdown run after Alabama hero Tommy Lewis jumped off the bench during a play and blindsided the All-American Magel at Rice's forty yard line. *Id.* Rice won the game 28-6. *Id.*

378. *Id.*

379. *Id.*

380. Proposed Regulations, *supra* note 13, at 5690 (Proposed Treasury Regulations § 1.513-4(c)(1)).

381. *Id.* at 5690 (Proposed Treasury Regulations § 1.513-4(c)(2)); *see supra* part V.A.

382. *Id.* at 5690-91 (Proposed Treasury Regulations § 1.513-4(g), Example 4).

383. *Compare id. with The Mobil Cotton Bowl Classic* (NBC television broadcast, Jan. 1, 1994) (acknowledgements provided to Mobil are similar to acknowledgements provided to corporate sponsor in Example 4).

However, when the football game goes to commercial break, Mobil's advertising onslaught begins,<sup>384</sup> and the line between advertising and acknowledgement blurs indistinguishably.<sup>385</sup> During the commercial breaks, Mobil advertises its products, services, and facilities. Thus, the acknowledgements broadcast during the game reinforce the impact of Mobil's advertising.

For example, the first commercial break featured Mobil's red "o" rippling in the waters off the Gulf of Mexico, as the oil company advertised its concern for the environment.<sup>386</sup> The advertisement touts Mobil's safe oil-drilling facilities, a comparison that would be advertising if it appeared as an acknowledgement.<sup>387</sup> As the broadcast returned from its first commercial break, a bar appeared on the screen saying "Mobil 1: Synthetic Motor Oil," and an announcer intoned, "The Mobil Cotton Bowl is brought to you by Mobil 1, the advanced synthetic motor oil. It keeps your engine running like new."<sup>388</sup> This statement clearly appears to be advertising. It promotes a product and makes a qualitative statement about how effectively the product works.<sup>389</sup> Yet, because this statement appeared during a commercial break, this statement is advertising, not an acknowledgement and no laws restricting corporate sponsorship have been violated.<sup>390</sup>

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384. *The Mobil Cotton Bowl Classic* (NBC television broadcast, Jan. 1, 1994).

385. For example, in one corporate sponsorship agreement, the corporate sponsor was contractually required not only to give money to the exempt organization, but also to purchase 30-second advertising spots from the broadcaster. Tech. Adv. Mem. 92-31-001 (Oct. 22, 1991).

386. *The Mobil Cotton Bowl Classic* (NBC television broadcast, Jan. 1, 1994).

387. Cf. Proposed Regulations, *supra* note 13, at 5690 (Proposed Treasury Regulations § 1.513-4(c)). This advertisement ran twice during the broadcast. *The Mobil Cotton Bowl Classic* (NBC television broadcast, Jan. 1, 1994).

388. *The Mobil Cotton Bowl Classic* (NBC television broadcast, Jan. 1, 1994).

389. Cf. Proposed Regulations, *supra* note 13, at 5690 (Proposed Treasury Regulations § 1.513-4(c)).

390. Consider one of Mobil's ads that ran during the Mobil Cotton Bowl Classic:

You're looking at the fountain of youth: Advanced Formula Mobil 1 Synthetic Motor Oil. [The video image is a gushing spout of motor oil.] In a test it protected an engine for 200,000 miles. The result? Vital engine parts that looked as young as the day they were born. There was virtually no engine wear. If you're looking for the fountain of youth, you'll find it in a container of motor oil. Mobil 1 Synthetic, it keeps your engine running like new.

*The Mobil Cotton Bowl Classic* (NBC television broadcast, Jan. 1, 1994).

This statement is advertising. It gives qualitative information about Mobil 1 Oil. See Proposed Regulations, *supra* note 13, at 5690 (Proposed Treasury Regulations § 1.513-4(c)(2)). This advertisement ran five times during the game. *The Mobil Cotton Bowl Classic* (NBC television broadcast, Jan. 1, 1994). Consider another advertisement:

Now getting gasoline at the Big Red "O" is as easy as one, two, three. Just drive into a Mobil "Pay At The Pump" station. Use your ATM or credit card. It doesn't cost you any more. Then, pump away. Take your receipt and drive away. "Pay At The Pump" at Mobil: It's the fastest way to drive your engine clean.

By blurring the lines between advertising and acknowledgement, corporate sponsors can reinforce advertising with acknowledgements, in effect turning acknowledgements into advertisements. Significantly, the proposed regulations fail to instruct the IRS to examine advertising during bowl game commercials to determine if the nonprofit organization is engaged in advertising.<sup>391</sup>

The IRS does not examine outside advertising because the advertising transactions made by NBC and Mobil are separate from the corporate sponsorship transactions made between the CBAA and Mobil. Yet corporate sponsors are clearly bargaining for the net advertising results of both transactions.<sup>392</sup> Moreover, the contracts of some sponsorship agreements require that the corporate sponsor "purchase [from the broadcaster a certain number of] thirty second commercial spots at prescribed rates."<sup>393</sup> Often sponsors purchase one-quarter to one-half of the advertising time during broadcasts they sponsor.<sup>394</sup> Nevertheless, the IRS does not examine related transactions, or investigate outside advertising during the broadcast, a rule that is advantageous for the bowl games, networks, and certain exempt organizations.

In addition, based on the actions of the broadcast network during the game, a strong argument can be made for the IRS to examine outside advertising. Midway through the third quarter, Notre Dame began a drive at its own thirty-five yard line.<sup>395</sup> Quarterback Kevin McDougal handed off to Lee Becton, who picked his way through the Aggie defense for a fifteen-yard gain.<sup>396</sup> Then NBC handed off to its sideline correspondent, John Dockery, who was with the obviously excited Allen E. Murray, Chairman and Chief Executive Officer of Mobil Oil.<sup>397</sup>

[*Dockery:*] What do you think of the game so far?

[*Murray:*] Hey, John this is great, we got a good one this time.

Anybody can win this game yet!

[*Dockery:*] A spectacular one. I know you've re-upped for the uhhh for five years, from what ninety-six through 2000?

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*Id.*

This advertisement ran three times during the game. *Id.* Just like the other advertisements, the content of this commercial does not pass the requirements for being termed an acknowledgement.

391. Proposed Regulations, *supra* note 13, at 5689-90 (Proposed Treasury Regulations § 1.513-4(g), Example 4).

392. *See supra* part III.C (describing study on John Hancock Company and Sun Bowl).

393. Tech. Adv. Mem. 92-31-001.

394. *Id.* at n.1.

395. *The Mobil Cotton Bowl Classic* (NBC television broadcast, Jan. 1, 1994).

396. *Id.*

397. *Id.*

[*Murray:*] The year 2000, right.

[*Dockery:*] Something must be working, eh?

[*Murray:*] Well, everything's going well: SouthWest Conference, Dallas, the people, Notre Dame, what more could you want? Yeah, we're very happy to be associated with the Cotton Bowl.<sup>398</sup>

On the next play, McDougal took the ball on a keeper up the middle for another first down,<sup>399</sup> yet NBC, Mobil, and the Cotton Bowl Athletic Association had clearly won the game. Because of the proposed corporate sponsorship regulations, all three parties could continue their symbiotic relationship, and could continue to take advantage of what amounts to a federal subsidy for college bowl games. By avoiding taxation, this symbiotic relationship becomes parasitic: Others pay higher taxes to compensate for lost revenue.

Moreover, the extension of the benefits of corporate sponsorship to all nonprofit organizations leads to a significant loss of tax revenue.<sup>400</sup> A 1992 congressional report estimated losses of tax revenue at \$281 million before deductions.<sup>401</sup> To understand how enormous a tax benefit the new corporate sponsorship regulations will represent to exempt organizations, one taxpayer comment stands out from all the rest. David Weiman, publisher of *World Airshow News*, had this to say about the IRS after examining the tax consequences of the proposed corporate sponsorship regulations:

I would like to commend the Internal Revenue Service on becoming a more gentler and kinder agency of the federal government. It is reassuring to know that the IRS employs competent and understanding people who are cooperative and helpful, and that the policies of the agency reflect this humanistic and pro-American philosophy.<sup>402</sup>

## VI. CONCLUSION AND RECOMMENDATION

The future of corporate sponsorship regulations is uncertain, yet the bowl games appear triumphant. The bowl games are now celebrating this victory, and they should, they earned it. It is certainly an achieve-

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398. *Id.*

399. *Id.*

400. Zimmerman, *supra* note 1, at 440.

401. *Id.*

402. David Weiman, *Quote of the Month*, 6 EXEMPT ORGANIZATION TAX REV. 62, 62 (1992) (author did not intend to be sarcastic).

ment for a collection of nonprofit organizations to defeat the IRS.<sup>403</sup> Ultimately, however, big-time college sports should be classified as for-profit activities. College athletic programs have made the decision to go for big stars, big TV, and big money. The abuses have become manifold, and in time the courts and legislatures should chip away at the laws that still protect the amateur status of big-time college athletics.

The IRS identified these trends back in 1991 in the Mobil Cotton Bowl Letter.<sup>404</sup> Ironically, because of the proposed treasury regulations, the IRS has been left to defend the innocence of college athletics, a notion that the rest of the law may have rejected as obsolete.<sup>405</sup>

In conclusion, of all the documents concerning corporate sponsorship regulations, the best reasoned was the Mobil Cotton Bowl Letter.<sup>406</sup> The Cotton Bowl Letter is a good basis for corporate sponsorship regulations for two main reasons. First and foremost the Letter represents the gradual, intellectual growth of the rules concerning corporate sponsorship regulations. The Letter represents a logical outgrowth of accepted tax laws and historically based tax policies. Second, the Letter follows accepted and proven procedural standards. Unlike the audit guidelines, which represented a procedural improvisation, and the proposed regulations, which represented an IRS attempt at legislation, the Letter was an appropriate method for adapting to changes in the field of corporate sponsorship.

Unfortunately, the IRS enacted the guidelines and in doing so exposed itself to enormous political pressure. This pressure put the IRS in a situation where it *had* to react to congressional action and, by replacing the guidelines with the proposed treasury regulations, compromised the integrity of the Service. In the end, the IRS had to renounce decades of careful, reasoned development of the rules governing corporate sponsorship. In the future, exempt organizations may now feel they have an incentive to place even more heat on a federal agency that is already subject to criticism from all sides.

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403. Just prior to the publication of this Comment, the University of Texas, Texas Tech, Texas A&M, and Baylor all voted to leave the SouthWest Conference (SWC) and join the Big 8. *Texas, Texas Tech Vote to Join the Big Eight*, L.A. TIMES, Feb. 26, 1994, at C7. The reason for the exodus was, of course, big money. *Id.* The SWC sends a representative to play in the Cotton Bowl each year. In the long run, how prestigious can the Cotton Bowl remain without a strong SWC?

404. Tech. Adv. Mem. 91-47-007 (Aug. 16, 1991).

405. On the other hand, the same forces that banded together to defeat the IRS may organize to successfully meet future challenges to the amateur status of collegiate sports.

406. Tech. Adv. Mem. 91-47-007.

The answer is simple. The IRS should withdraw the proposed treasury regulations and utilize the Mobil Cotton Bowl Letter as a guide for the future taxation of corporate sponsorship income. The Cotton Bowl Letter contains the most cogent and intellectually sound analysis of the arguments for and against taxation. The Author's opinion notwithstanding, an IRS decision to change its position and tax corporate sponsorship income will be vigorously challenged based on the arguments discussed in this paper. The IRS should aggressively defend its position, and the IRS should win.

*Nathan Wirschafter\**

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\* I would like to thank the members of the IRS and the exempt organization community who kindly took the time to patiently answer all my questions. Many of them spent hours with me, some just a few minutes when I needed them most. I thank them all. The reader will find many of their suggestions in the Comment, but the Author is solely responsible for its contents. I would also like to thank Professor Ellen P. Aprill for her encouragement and constructive comments and the staff and editors of the *Loyola of Los Angeles Law Review* for their hard work, enthusiasm, and dedication.

This paper is dedicated to Mishpachat Wirschafter. It is especially dedicated to Mom, who always knew that some day, if I put my mind to it, I could learn how to write.



