

Meeting 4/30/13

Attendees:

Capitol Hill staff

Laura Stuber (Majority Senior Counsel)

Elise Bean (Majority Staff Director and Majority Chief Counsel)

Henry Kerner (Minority Staff Director and Minority Chief Counsel)

Stephanie Hall (Minority Counsel)

Scott Wittmann (Minority Research Assistant)

Aaron Fanwick (Majority Law Clerk)

IRS

Nikole Flax

Lois Lerner

Nan Marks

Janine Cook

Susan Brown

Catherine Barre

Suzanne Sinno

Judith Kindell

Laura Stuber asked about the EO office structure. Lois Lerner explained that she oversaw three main functions. CE&O managed our website, coordinated our public speaking appearances and created our brochures and other publications. The Exam function, in addition to doing traditional exams (or audits) also had other units. One is the Review of Operations (ROO) which generally looks at public information without contacting the organization to see if there is an issue with the organization and, if so, refer it for an examination. Their work is generated from several sources. For example, if we examine an organization and they are generally compliant but there were some issues discovered during the exam, the ROO will do a follow-up to see if the organization continues to be compliant. The ROO also does the hospital community benefit reviews mandated by the ACA. The ROO also will do a post-determination review of a random sample of organizations who were recognized as exempt by the IRS. They also review organizations flagged by the Determinations function if the Determinations agent sees issues of concern when reviewing the application that are not sufficient to warrant a denial of the application. The ROO is one function of the Exempt Organization Compliance Area (EOCA). The other function of the EOCA is the Exempt Organization Compliance Unit (EOCU). The EOCU does compliance checks where they may be asking an organization for information missing from a Form 990. They also send out compliance check questionnaires, where we gather information from a large number of organizations. We have used these for hospitals, credit counseling and colleges and universities. These are not exams, so the organizations are not required to respond, but we may refer them for an exam if they do not. We generally get a very high response rate, 95% to 98%. We make the questionnaires public so that even those that don't get the questionnaires can see what we are interested in. We generally issue a public report on our findings from the questionnaire. We also may

select some organizations for exam based on information on the questionnaire, their Form 990 filings and other information. The EOCU sends out the questionnaire and may do some of the data analysis.

Henry Kerner asked how many people work in the ROO. Lois Lerner did not have the numbers but could get them. In our latest annual report we stated that there were 516 EO Exam employees. Henry Kerner asked how many questions were on the questionnaires. Lois Lerner said that it depends. We have a couple active questionnaires out now and available on our website. They are being done electronically, so that the organization only sees the questions that are relevant to them. In the C&U questionnaire, we sent it to 400 organizations and asked questions on their demographics, possible UBI activities, compensation and investment practices.

Elise Bean asked if we were looking into section 501(c)(4) organizations that were engaged in political campaign activities. Lois Lerner said that in our self-declarers questionnaire we asked about lots of things, most relating to the tax year of their most recently filed Form 990 (either 2010 or 2011). We also included a section asking about any political campaign activities in calendar year 2012, which we would not otherwise have since their 2012 Form 990 is not yet due. The questionnaire was sent to all self-declared section 501(c)(4), (5) and (6) organizations that filed Form 990. Elise Bean asked about the scope of the universe. Nikole Flax clarified that the questionnaires were only sent to organizations that filed Form 990 in 2010 or 2011 and not the organizations that filed Form 990-EZ or Form 990-N. Laura Stuber asked what the deadline for responding to the questionnaire was. Lois Lerner explained that the questionnaires were not all sent at once because the staff could not handle it, but were sent out in waves. The organizations are given 60 days to respond, but may request an extension, so it could be 90-120 days before they respond. The last of the questionnaires went out last week. Henry Kerner asked if we had received any responses yet. Lois Lerner said she was sure we had but had not checked. Henry Kerner asked about the process and whether we checked any of the answers to the questionnaire. Lois Lerner explained that we don't verify the responses, we report on what we are told by the organizations. We do select for examination organizations that appear to have issues. In the C&U study, we looked at compensation and UBI issues and selected organizations for exam based upon information on the questionnaire and their Form 990. Henry Kerner asked about checking with other organizations. Lois Lerner explained that other organizations may define things differently. We had a situation a few years ago where someone referred an organization based upon their reporting to another agency. When we looked at the information, we determined there was no issue because the other agency had a different definition. There is also the issue of the timing of the reporting. For example, the FEC has real time reporting. The reporting to the IRS looks at previous years. That is why in the self-declarers questionnaire we asked about 2012 data as we won't be getting the Forms 990 for some time. In putting together the questionnaires, we work with our Research function to ensure that we are getting information that we can apply to the universe being studied. In some instances, this will mean asking the question a little differently. They also help us ensure that we have a statistically valid sample so that we can take the

information learned and make broad statements about the universe. For the organizations we select for exam, this is not a statistically valid sample. Therefore, the observations we make based upon the exams apply only to those organizations examined. When we report on our findings, we note any trends and concerns raised as well as any next steps we will be taking. Stephanie Hall asked whether the final report would identify organizations by name, Lois Lerner said no. Henry Kerner asked whether exam and audit were the same and Lois Lerner said yes.

Elise Bean then asked about the third function in the EO Division. Lois Lerner said this was the Rulings and Agreements function. This includes the Determinations function, which processes the applications for recognition of exemption.

Elise Bean said that they were trying to get the scope of the universe they were dealing with and asked what the breakdown of the organizations that received the self-declarers questionnaire. Lois Lerner said that she did not have it, but could get it.

Lois Lerner explained that the general exam function did traditional audits. There are various sources for these audits. Some of them arise out of our projects, like the C&U project. We also are using the Form 990 data to develop risk models. We also get referrals, both internal and external. The external referrals come from the public, the press and Congress. When we receive a referral, we have a classification unit that reviews the allegation to see if there is an indication that the organization may not be in compliance. While most cases are reviewed by a single classifier, some referrals are reviewed by a committee of experienced, career civil service employees. These are the more complex or sensitive issues. If the classifier or review committee determine that there is an issue in the referral that warrants examination, they will send it to the examination function. That does not necessarily mean that an exam will be opened immediately. We must wait for the Form 990 to be filed – we audit returns, not organizations. We also need to have an agent available to work the case with the appropriate level of experience.

Laura Stuber asked if we could deny an organization an extension for filing Form 990 if we are waiting on the filing to open the audit. Lois Lerner said that we could not. The first extension is automatic and the second extension is granted if the organization has a reasonable explanation for why it needs the extra time. Lois Lerner did note that we were discovering errors in filling out Form 990. The better the information on the form, the better are case selection. We have found cases where the organization filled the form out incorrectly and were selected for exam. When we examined, we found no issue, just the error in completing the form. Had the organization filled the form out correctly, it would not have been selected for exam. Form 990 fills an important transparency role, which is improved by having more accurate information on the form.

Henry Kerner asked about the time lag for filing from the election cycle. Lois Lerner explained that is the way the law is set up. This is like all taxpayers that need extra time to complete the forms, they can get an extension of time to do so.

Henry Kerner then asked about the penalty part, what happens if there is a problem. Lois Lerner said that if the organization is generally compliant, but there was one issue, we may issue an advisory letter. Henry Kerner asked what is an advisory letter. Lois Lerner explained that an advisory letter was issued when we saw an issue, but it was not sufficient to result in a change, but might be a problem if the organization continued. We would close the exam by issuing the no change letter with advisory telling them that we were not making a change to their exempt status or tax obligations, but advising them of issues that might affect their exempt status or tax obligations in the future. We have found that, for the most part, exempt organizations are a compliant sector. They want to comply with the law. They also want to look good because of the public disclosure of the Form 990. For the most part, they fix the problems we identify.

Lois Lerner discussed some of the issues we look at. We look at compensation issues, whether the organization is paying reasonable compensation. This is not an easy calculation. For section 501(c)(3) organizations there is an excise tax that is imposed on the person receiving the excess compensation, not the organization. The managers who knowingly approved the excess compensation may also be subject to the excise tax. We might issue an advisory about the organization's compensation practices if they had excess compensation. In other cases, there might be penalties or taxes, such as the unrelated business income tax. Ultimately, no one wants revocation. However, if we do revoke the organization's exempt status, the organization that applied for and received recognition of its exempt status can rely on the determination letter if it disclosed its activities in the application, so the revocation is prospective. If the organization did not apply, or if it engaged in activities that it did not disclose in its application, the revocation may be retroactive.

Henry Kerner asked whether section 501(c)(4), (5) or (6) organizations never have to apply. Lois Lerner confirmed that they do not. Most of the applications we receive are section 501(c)(3) organizations, because those organizations are required by the statute to apply. Section 501(c)(3) organizations receive more benefits, such as tax-deductible contributions, and therefore have higher standards to meet. The section 501(c)(3) organizations use Form 1023 to apply, all other section 501(c) organizations use Form 1024.

Lois Lerner explained how we process applications. All applications received get screened by our most experienced determination agents. They quickly look at the application and determine whether the organization has provided sufficient information to determine that it meets the requirements for exemption. If so, we send the determination letter recognizing the organization's exempt status. Approximately 70% of the applications last year were screened. This is a pretty stream-lined process for organizations that completely filled out the application form and there were no questions on the face of the application. If the application can't be screened, there is a second category it may fall into. If the organization basically appears okay, but there is some missing information or a minor change needed (for example, its articles of incorporation do not have the required purpose or dissolution clause). In those cases, we quickly request the needed information to finish the process. The remaining cases need to be

fully developed. These cases may have missing information, provide cursory information about their proposed activities, have inconsistencies, or raise legal questions. The cases must be assigned to a determinations agent that has the appropriate level of experience for the case. In addition, for some issues, we designate certain groups as specialists for that issue in order to promote consistency. As a result, these cases may wait for a while before being assigned to an agent to be worked. We have a tool on our website regarding how long the wait to be assigned is. We are working to improve that tool. Once a case has been assigned, the agent reviews the case and sends a letter to the organization with development questions. Most cases are handled that way. Cases involving issues of first impression are transferred to the R&A office in DC which is staffed primarily by lawyers who work in conjunction with the lawyers in the Chief Counsel's office.

The R&A office in DC consists of the Technical and Guidance functions which handle exemption applications that present unique issues, private letter ruling and technical advice requests, congressional correspondence and working with Counsel and Treasury on guidance projects. They also provide support and technical advice to the CE&O, Examinations and Determinations functions. They work closely with Counsel on issues.

Elise Bean asked if the section 501(c)(4) issue has exploded. Nikole Flax said it was fair to say it has taken a lot of time. Lois Lerner said that in the last year it felt like a lot. Elise Bean said they were trying to get a feel for the size of the issue, they expect it to be a fairly small size. She said she was glad we are doing the self-declarers questionnaire. Lois Lerner explained that the 1.5 million organizations were those filing annual Forms 990 with us. Most of those organizations are section 501(c)(3). With certain exceptions, all exempt organizations have to file annually with us, either the Form 990, the Form 990-EZ, or the Form 990-N. Elise Bean asked how many were section 501(c)(4) organizations. Lois Lerner said she did not have that number, but could get it. She explained that we receive approximately 60,000 applications every year. Henry Kerner asked how many organizations have fallen off the list. Lois Lerner said that the enactment of PPA provided the first time for us to get a sense for how many fall off. So far, approximately 500,000 organizations have had their exempt status automatically revoked for failure to file for three years.

Stephanie Hall asked how do we know about organizations that don't apply and don't file. Lois Lerner explained that we have no systemic way of knowing, but someone may refer the organization. If the organization has been holding itself out as exempt but not filing Forms 990 and then files an application, we will auto revoke the organization. Last year, in addition to the 60,000 applications we generally receive, we also received an additional 20,000 applications seeking reinstatement. That was a requirement of the law, if they were auto-revoked, they had to apply for recognition going forward. Stephanie Hall asked if we assessed taxes going back. Lois Lerner explained that the organizations may request retroactive reinstatement. We had some transition relief in the first year and provided a lower user fee for small organizations seeking reinstatement. Elise Bean asked when the first year was. Lois Lerner told her it was

2010. Elise asked for a ballpark percentage of section 501(c)(4) organizations. Lois Lerner said that SOI has that information and we would get it for them. Nikole Flax said we could get several years worth of information. Lois Lerner pointed out that not all section 501(c)(4) organizations are involved in political campaign activity.

Elise Bean said they were interested in the section 501(c)(4) organizations that reported independent expenditures to the FEC. She asked if we had any arrangements with the FEC where we got information about section 501(c)(4) organizations reporting independent expenditures. Lois Lerner asked whether the FEC would know whether an organization was a section 501(c)(4) organization. Laura Stuber said that the organization would have an FEC number. Lois Lerner said that she did not know if the FEC required organizations to identify themselves as section 501(c)(4) organizations. Elise Bean asked if the FEC were required to identify section 501(c)(4), (5) and (6) organizations, would the IRS be able to use that information in the FEC database. Lois Lerner said that there was still a timing issue with respect to the Form 990 filing. Elise Bean said that if the IRS wanted to find organizations to monitor, would this information be helpful. Lois Lerner said that the organizations were required to report on the Form 990 what they are spending. Laura Stuber said that sometimes comparing the 2010 FEC filings to the 2010 IRS filings revealed differences. Lois Lerner explained that even when comparing the same time period, there still might be differences. For example, the FEC electioneering communications rules rely on a bright line test while the IRS looks at all of the facts and circumstances. Elise Bean asked whether it would be useful to us to have the FEC identify section 501(c)(4), (5) and (6) organizations making independent expenditures and the amount of those expenditures. Nikole Flax said there was still a timing issue. Even if the organization was spending lots of money on political campaign activity, we would not know on what else the organization was spending money. These organizations may engage in political campaign activity without jeopardizing their exemption, but we have to look at their activities for the entire year. We would not know in real time whether this was an issue. Lois Lerner said that any information that we have is useful, we just want to manage expectations about the use of the information. Elise Bean asked whether we could ask the FEC to add something. Nikole Flax said that we are open to talking to them, but that decision rests with them. With respect to the differences in what was reported to the IRS and the FEC, Lois Lerner expressed concerns about how the research was done. Henry Kerner asked if that was because of the different definitions. Lois Lerner said that it was also due to the different types of information. While section 501(c) organizations would report their independent expenditures to the FEC, if they make contributions to political committees, it is the political committee that reports the information to the FEC. Both types of expenditures would need to be reported to the IRS. Nikole Flax said there was not a clean match-up for the information. Elise Bean said that it could be a good place to start. Lois Lerner said that it is always useful to have information.

Elise Bean asked what percentage of section 501(c)(4) organizations did file Form 1024. Lois Lerner said that a significant number of section 501(c)(4) organizations do apply for recognition. One of the questions we are asking in the self-declarers questionnaire is why those organizations that do not apply choose not to

do so. Elise Bean asked for a ballpark on how many section 501(c)(4) organizations file Form 1024 and what percentage file Form 990s. Lois Lerner said that anyone not compliant after three years is automatically revoked. Nan Marks noted that organizations can attempt to hide. Lois Lerner said that one of our projects is looking at skip filers – organizations that file at least once every three years, but not every year.

Stephanie Hall asked if we had noticed any difference in the desire to be compliant in section 501(c)(3) organizations versus other section 501(c) organizations, since section 501(c)(3) organizations receive more benefits. Lois Lerner noted that most of our enforcement is in the section 501(c)(3) area, but when we do look at other section 501(c) organizations, we also see a desire to be compliant with the tax rules.

Laura Stuber asked about the IRS staff focused on political campaign activity. Are there certain staff who work on these issues? Lois Lerner said that there are designated folks looking at political campaign issues in the Determinations function. We provided training to these folks and they work with technical experts in the DC office. Many cases are also coordinated with Counsel. The application process is a paper representation of what are the organization's current plans for its future activities. Once an organization has been recognized as exempt, it could change its activities and report that change on the Form 990. We have provided training on political campaign issues to the R&A function, both the Determinations staff and the staff in the DC office, and to the Examination function. In addition to the self-declarers project, we are also looking at referrals alleging political campaign activity and we are identifying potential indicators of political campaign activity on the Form 990 that we are testing. Exam agents that work on these projects were trained. For any project, the technical experts put together training on the issue.

Laura Stuber asked about the 643 examinations of section 501(c)(4) organizations that we identified in our response. Of those 643, there were 22 that reported using PIC codes that political campaign intervention was an issue in the exam. In our response, we explained the limitations of the PIC codes and said that we would have to do a manual review for more information. When the manual review was requested, the IRS declined to do so. Nikole Flax reiterated what we told them in our letter. Lois Lerner said that the PIC code could indicate they looked at the issue, but the determination could be that the issue was not present. For example, there may have been an allegation of political campaign activity, but we determined that the organization did not intervene. Elise Bean said that in less than 5% of the cases, we identified political activity as an issue, using the 22 cases as a ceiling. Nikole Flax said that the 22 was not necessarily a ceiling. Nan Marks explained that the agents identify the most important issues in the case when choosing the PIC codes. There could be cases where the agent looked at political campaign activity issues, but also had UBI, employment tax or other issues that resulted in a change that were considered more important. Nevertheless, the 22 number is pretty accurate, it is more likely to be ceiling. Elise Bean asked if they could say less than 25 cases involved political campaign activity. Nan Marks said that was probably in the right ballpark. Elise Bean asked if we had any comment on the low number of cases involving political campaign activity.

Nikole Flax noted that the numbers would not include the 2010 tax year. Elise Bean said that these cases would all be pre-*Citizens United*. Nikole Flax said that they should not look at those numbers as the current posture. Laura Stuber asked what happened to those 22 cases. Lois Lerner referred to page 3 of the November 23, 2012 letter where we discussed the revocation letters. Elise Bean asked what happened to the 22 cases. Lois Lerner explained that we track how a case closed differently from the PIC codes. Nan Marks said an example would be a case with political activity, compensation and unrelated business income issues. The case was closed no change with an advisory, but we can't relate the closing code to the PIC code. Lois Lerner said that agents would be dealing with different issues, we would not know without looking at the case files.

After the break, Lois Lerner explained that when we open cases where political campaign activity might be an issue, we do look at FEC data.

Laura Stuber asked whether it was a red flag if a group reapplies under another name. Lois Lerner said that we do ask on the Form 1023 and Form 1024 whether they had a different name or had applied before. Laura Stuber said it looked bad. Lois Lerner said that without knowing the facts, she couldn't say. There may be legitimate reasons to change the name. For example, if there is bad press about a person associated with an organization that taints the public perception of the organization, the organization may decide to end its relationship with the person and change its name. We have seen some auto-revoked organizations that try to join a group ruling rather than applying for reinstatement, but we find them.

Elise Bean asked about the interpretation of "primarily" as allowing up to 49% of other activities. Where did people get that? Judith Kindell explained that when GCMs were released to the public, one was released with some supporting background memos. In one of those memos, there was a statement that while the 51/49 was not supportable for section 501(c)(3), it was a reasonable interpretation of the section 501(c)(4) regulations. Elise Bean asked for a copy of that GCM. Laura Stuber asked if the GCM was released around the time that the IRS was considering a change to the regulations. Nan Marks explained that GCMs used to be internal documents. Tax Analysts brought a case against the IRS seeking disclosure of these internal documents which they won in the early 1980s.

Elise Bean said that on the primarily issue, everyone wants a bright line rule. Why is there no bright line guidance? Nikole Flax said that one issue is 49% of what – we have a facts and circumstances test. Lois Lerner said the real question is what is the political campaign activity. Susan Brown used an example of an organization that supports the cherry trees that has a lot of volunteers doing work with the cherry trees, but very few expenditures, most or all of which are for political campaign activity. Under the facts and circumstances test, we can look at all of the volunteer activity and determine that this is a good organization. Under a pure expenditure test, that organization would have a problem. Elise Bean agreed that looking at volunteer activity is important, but why not a percentage test. Laura Stuber noted that section 501(c)(3) has a 20% test. Susan

Brown explained that section 501(c)(3) organizations can not intervene in political campaigns, but can engage in a limited amount of lobbying. That was originally under a facts and circumstances test. Congress enacted section 501(h) to allow section 501(c)(3) organizations to elect to be subject to a pure expenditure test. With respect to the regulations, Janine Cook pointed out that we have to look to the law as a whole and that the section 501(c)(3) regulations have the same language. Lois Lerner said that they have to be careful about unintended consequences.

Elise Bean asked whether it would make sense to have a similar rule for section 501(c)(4). Susan Brown asked to clarify whether it would be for all non-exempt activity. Elise Bean said that it would be a rule for political campaign activity. Lois Lerner said that under existing rules we have to look at all non-social welfare activity.

Elise Bean asked about the primary test for section 527 organizations. Judith Kindell explained that, while the test for tax exempt status is whether the organization is organized and operated primarily to accept contributions and make expenditures for a section 527 exempt function, the way it is taxed further limits the amount of non-political campaign activity it can do. The statute excludes from taxable income certain types of income, provided they are segregated for section 527 purposes. If a section 527 organization has one fund and makes more than insubstantial non-section 527 expenditures from that fund, it is no longer segregated and all of the income to that fund is taxable income. If a section 527 organization has more than one fund and makes more than insubstantial non-section 527 expenditures from one of the funds, that fund is no longer segregated and the income to that fund is taxable, but the other funds remain segregated so the income to those funds may be excluded from taxable income. In both cases, the organization still may be primarily engaged in exempt function activities and therefore still treated as a tax-exempt section 527 organization.

Elise Bean said that if an organization was primarily engaged in political campaign activities, it had no choice but to be treated as a section 527 organization. Susan Brown said that it could be a taxable section 527 organization. Elise Bean said that if a section 501(c)(4) organization had 70% of its expenditures on political campaigns and had no volunteer activity, clearly it wouldn't qualify for section 501(c)(4) and shouldn't it be a section 527 organization. Lois Lerner said that if it meets the requirements for section 527 it would, but it would not necessarily be tax-exempt. Judith Kindell explained that certain section 527 organizations were required to notify the IRS to be treated as tax-exempt. If they did not, they were taxable organizations and all of their income was included in gross income and they could only deduct those expenses that were directly connected to earning the taxable income. Therefore, they could deduct the fundraising expenses to generate their contribution income, but could not deduct the amounts spent on their political campaign activity. Lois Lerner said that when we see that an organization is not qualified under the code section it has applied under, we tell them they are taxable. Sometimes we work with the organization to get them to the right code section. Elise Bean said that if we want to encourage them to be section 527 organizations, why don't we take the step for section 501(c)(4) organizations that fail and tell them they are a section 527 organization. Judith Kindell noted that taxable

section 527 organizations are not required to disclose their donors. Lois Lerner said that based on her days at the FEC, if the organization made mistakes, the money was already gone. Elise Bean said they were interested in preserving the integrity of the tax code. The organization should not be able to say it is just a corporation, that it is a section 527 organization. Lois Lerner said they should consider the impact of the legislation. She expects organizations will just rack up enormous expenses with no money left. Henry Kerner asked how to get to the abuse of organizations claiming section 501(c)(4) but designed to be primarily political. Lois Lerner said the system works, but not in real time. Henry Kerner noted that these organizations don't disclose donors. Lois Lerner said that if they don't meet the requirements, we can come in and revoke, but it doesn't happen timely. Nan Marks said if the concern is that the organizations engaging in this activity don't disclose donors, then the system doesn't work. Henry Kerner said that maybe the solution is to audit so many that it is financially ruinous. Nikole noted that we have budget constraints. Elise Bean suggested using the list of organizations that made independent expenditures. Lois Lerner said that it is her job to oversee it all, not just political campaign activity. Lois Lerner said that she does have other tools. When we issue compliance check questionnaires, we are very transparent about it and post the questionnaire on our website.

Elise Bean asked about section 527 disclosures. Lois Lerner explained that these were on the IRS website in a searchable database. Susan Brown said that under the primarily test, an organization could fail to qualify as a section 501(c)(3) without automatically being section 527. Henry Kerner asked whether a taxable corporation could deduct business expenses. Lois Lerner noted that she never saw a rule that stopped the money from flowing in politics, it just moved it to another venue.

Elise Bean asked how we determined what is political activity and about the law, regulations and revenue rulings. Nan Marks said that revenue rulings are the opinion of the IRS as to how the law applies to a set of facts. They are precedential, but given less preference. We respect revenue rulings, even if we made a mistake. How we do revenue rulings have changed over time, but the recent practice of fairly long standing is for IRS, Counsel and Treasury to work together with sign off from all three offices from senior levels. Elise Bean asked about exam guidance and educational material. Lois Lerner said that generally this is not precedential, but if a judge wants to use it, the judge will. Nan Marks said that regulations are the drafted product of Chief Counsel, but they are Treasury regulations and all three offices (IRS, Counsel, Treasury) work on them and they are cleared through all three offices. Regulations do get deference.

Elise Bean said that the facts and circumstances test is not in the regulations, just in revenue rulings. Where did the facts and circumstances test come from. Nikole Flax said that absent a bright line, we generally use a facts and circumstances test. Nan Marks said this is a general rule prevalent in tax law. Elise Bean asked if there is a general regulation providing for the facts and circumstances test. She said that Senator Levin thinks there should be more bright line tests. Janine Cook noted that in the section 501(c)(3) regulations it states that all facts and circumstances are to be considered. Lois Lerner said that the problem with bright line tests is that there are

always exceptions. Elise Bean said that Senator Levin worked on BCRA which provided a bright line test for electioneering communications. Nan Marks suggested we step back and look at the generic issue. When you have line drawing at the statutory level, we follow those lines. If you have a fuzzy statute, some clarification is desirable, but to what extent is it appropriate to draw bright lines.

Elise Bean said that Senator Levin believes more regulations are needed, not revenue rulings. She said that the regulations should provide if you make an independent expenditure, that is political campaign activity. If you give money to a candidate, that is political campaign activity. The regulations should provide some bright line rules. Lois Lerner said that if you put out a regulation that says these 10 items are in, those are the only 10 items that are in. With a revenue ruling, we can say here are the facts and here is how we think about it. Elise Bean said that we are dealing with a regulation that is really old and two revenue rulings that are really old. When the issue is politics, the IRS gets creamed no matter what.