Reforming the Charitable Contribution Substantiation Rules*

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In May, 2012 the Tax Court issued two decisions denying income tax deductions for gifts to charitable organizations because the taxpayers had failed to comply with applicable substantiation rules. In *Mohammed v. Commissioner*,[1] the taxpayer in 2003 and 2004 donated real property unquestionably worth more than $15 million to his charitable remainder unitrust. The taxpayer filled out the Form 8283 required for certain noncash contribution himself without reading the instructions. He did not fill out the form completely and did not attach the required appraisal (although, as the Tax Court acknowledged, the Form 8283 at the time directed that an appraisal be attached only for art worth at least $20,000.) Moreover, the taxpayer, an experienced real property appraiser, prepared the appraisal himself. Because of the taxpayer's position as donor (and, as trustee of the charitable remainder trust, also as donee), his appraisal was not an independent appraisal. It did not and could not meet the requirement of a qualified appraisal under Treas. Reg. § 1.170A-13(c)(5)(iv)(A) and (C).[2]

The Tax Court rejected the taxpayer's argument that the deduction be allowed on the basis of substantial compliance with the regulations' requirements. The Tax Court explained that substantial compliance is not possible without a qualified appraisal, because such an appraisal is an essential requirement of the statutory scheme. The opinion concluded with this regret:

> We recognize that this result is harsh--a complete denial of charitable deductions to a couple that did not overvalue and may well have undervalued, their contribution—all reported on forms that even to the Court's eyes seemed likely to mislead someone who didn't read the instructions. But the problems of misvalued

[1] T.C. Memo. 2012-152 (2012).
[2] All subsequent statutory references, both in text and footnotes, are to the Internal Revenue Code of 1986, as amended, unless otherwise specified.

> property are so great that Congress was quite specific about what the charitably inclined have to do to defend their deduction, and we cannot in a single sympathetic case undermine those rules. [3]

Fewer than two weeks earlier, in *Durden v. Commissioner*,[4] the Tax Court had denied a charitable contribution deduction claimed in 2007 for cash contributions of more than $25,000 given primarily to the taxpayers' church. The taxpayers had failed to obtain a contemporaneous acknowledgement from the church stating whether any goods or services had been provided in consideration for the contribution, as required by § 170(f)(8)(B) and Treas. Reg. § 1.170A-13(f)(2) for any contribution of $250 or more. The taxpayers received such a letter in 2009, but that letter did not meet the "contemporaneous" requirement.[5]

The taxpayers argued that they had substantially complied with the statutory requirements. As in *Mohamed,* the Tax Court rejected the substantial compliance argument. It found a specific and timely statement regarding provision of goods or services provided, including a specific statement if none were provided, to be essential information required by the statute, since such information is necessary to determine the deductible amount of the taxpayers' contributions. The Tax Court acknowledged that it

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[3] *Id.* at 26 (slip opinion).

[4] T.C. Memo 2012-140 (2012).

[5] A contemporaneous written acknowledgment is required for any contribution of $250 or more in order for a donor to take the charitable contribution deduction. It must include the amount of cash and a description (but not value) of any property other than cash contributed, whether the donee organization provided any goods or services in consideration, in whole or in part, for any property contributed, and a description and good faith estimate of the value or service provided by the done organization (other than intangible religious benefits). A written acknowledgment is contemporaneous if it is obtained by the taxpayer on or before the earlier of (1) the date the taxpayer files the original return for the taxable year of the contribution or (2) the due date (including extensions) for filing the original return for the year. §170(f)(8)(C); Treas. Reg. § 1.170A-13(f)(3). Quite surprisingly, the requirements for a contemporaneous written acknowledgement do not include stating the date of the contribution. The date of contribution, however, is important. An acknowledgment received after January 1 of Year 2, but before the filing or due date of the taxpayer's return for Year 1 could relate to a gift either in Year 1 or Year 2. Because of such an ambiguity, the year of contribution of an almost million dollar gift and the validity of the written acknowledgment were important issues in the recent criminal tax trial of Los Angeles businessman Howard Berger. Berger was acquitted of the charge related to the charitable contribution along with all charges. *See* http://santamonica.patch.com/articles/santa-monica-man-acquitted-of-tax-fraud. Although most organizations probably include the date of contribution currently, I suggest that the regulations applicable to the contemporaneous written acknowledgment be revised to require the acknowledgment to include the date of the contribution.

had permitted charitable contribution deductions in some situations where taxpayers had demonstrated only substantial compliance with the statutory requirements. It described those cases as involving, unlike this one, "procedural requirements where, despite a lack of strict compliance, the taxpayer substantially complied by fulfilling the essential statutory purpose."[6]

These two cases lit a firestorm of outrage in various circles, including on the tax law professor listserv. That a group of academics who tend to be pro-rule and pro-government objected so vociferously to these cases should give us pause. (I will return at the end of this paper to their suggestions for change.) The line that the Tax Court draws between failures that satisfy the judicial doctrine of substantial compliance and those that do not also calls for examination. The question of how to determine the appropriate use of the substantial compliance doctrine becomes particularly compelling for gifts after June 2004, when Congress explicitly enacted a "reasonable cause" exception for failures related to the qualified appraiser and qualified appraisal requirements.[7]

This paper will begin by reviewing two reasons why the charitable contribution substantiation rules applicable to the income tax merit scrutiny. First, the charitable contribution deduction is important for both its size and its distribution, and the substantiation rules work to safeguard its integrity. Second, in the case of the charitable contribution, unlike many other income tax provisions, the Treasury and the IRS cannot look to third parties with self-interested incentives that help ensure compliance. The substantiation rules substitute for third party corroboration. Part II of the paper will set out, as briefly as possible, the complicated regime regarding the substantiation of charitable contributions, including the legislative history and applicable regulations. Part III will review applicable case law. Review of legislation, regulation, and case law suggests strongly that we make an effort to reform the current scheme, and the paper in Part IV presents a number of possible reforms. Finding approaches that appropriately balance the

[6] *Durden*, slip opinion, at 6. Tax Court cases permitting substantial compliance are discussed *infra*.
[7] Sec. 170(f)(11)(A)(ii)(II), added by American Jobs Creation Act of 2004 (Pub. L. No. 108-357, sec. 883, 118 Stat. 1631).

need to control overvaluation with the need to encourage legitimate charitable contributions is a difficult but important challenge.

I. The Importance of the Charitable Contribution Substantiation Rules

The charitable contribution substantiation rules matter for two quite different reasons – first, the place of the charitable contribution deduction in the federal income tax system makes protection of its integrity important and, second, these rules demonstrate the need for special enforcement mechanisms when the government cannot take advantage of third parties to monitor compliance.[8]

The size of the charitable contribution deduction demonstrates its importance to the federal income tax. It is costly to the federal government. According to the Joint Committee on Taxation, the revenue loss for the charitable contribution deduction in Fiscal Year 2012 by individuals and corporations amounts to $42.4 billion and for Fiscal Years 2011-15 the projected total is $242.6 billion.[9] The charitable contribution deduction ranks among the top ten tax expenditures.[10]

A key rationale for the charitable contribution deduction is that it operates as a subsidy to provide an incentive for giving.[11] Many countries envy the record in the United

[8] I thank Celia Roady for encouraging me to explore these considerations.
[9] JOINT COMMITTEE ON TAXATION, ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2011-15, JCS-1-12 (January 17, 2012) (numbers listed separately for deduction for charitable contributions to educational institutions, those for health organizations, and those for charitable contributions other than for education and health added together by author).
[10] *See, e.g.,* The Committee for a Responsible Budget, *Top Ten Tax Expenditures: JCT Releases Its Annual Report*, *available at* http://crfb.org/blogs/top-ten-tax-expenditures-jct-releases-its-annual-report. Tax expenditures are the subject of voluminous scholarship, but for purposes of this paper the definition on the tax expenditure publications page of the Joint Committee on Taxation will suffice: "In general, tax expenditures include any reductions in income tax liabilities that result from special tax provisions or regulations that provide tax benefits to particular taxpayers." https://www.jct.gov/publications.html?func=select&id=5.
[11] *See* C. Eugene Steuerle & Martin A. Sullivan, *Toward More Simple and Effective Giving: Reforming the Tax Rules For Charitable Contributions and Charitable Organizations,* 12 AM. J. TAX POL'Y 399, 403 (incentives as primary purpose of the deduction).

States of charitable giving. In 2011, The World Giving Index of the Charities Aid Foundation of Britain ranked the United States first among countries globally.[12]

The many supporters of the deduction subsidy point out that so-called Treasury or dollar efficiency justifies its cost. Treasury or dollar efficiency means that the deduction increases giving to charitable organizations by more than the amount lost to the fisc.[13] Of course, Treasury or dollar efficiency requires that amounts taken as charitable contributions accurately state the amounts charities receive. The substantiation rules seek to ensure this match.

The charitable contribution deduction is available only to those who itemize deductions and not to those who take the standard deduction. In 2010, for those who itemized, the charitable contribution deduction represented the third largest itemized deduction.[14] The worth of the deduction to a taxpayer depends on the taxpayer's marginal rate. "Because high-income taxpayers tend to be in higher marginal tax rate brackets, higher income taxpayers generally have a lower tax price of giving than do lower income taxpayers. As a result of this differential, high-income taxpayers may face the largest tax incentives for giving, while low-income taxpayers may face relatively small tax incentives for giving even if they itemize."[15]

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[12] CHARITIES AID FOUNDATION, WORLD GIVING INDEX 11,*available at* https://www.cafonline.org/pdf/World_Giving_Index_2011_191211.pdf.

[13] *See* Lillian Faulhaber, *Introduction to Hypersalience,* 92 B.U. L. Rev. 1307, 1334, 1339 (2012); Brian Galle, *The Role of Charity in the Federal System,* 53 WM. & MARY L. REV. 777, 821, 831-33 (2012); Ilan Benshalom, *The Dual Subsidy Theory of Charitable Deductions,* 84 IND. L. J. 1047, 1059-61 (2009); David Pozen, *Remapping the Charitable Deduction,* 39 CONN. L. REV. 531-57 (2006); Ellen P. Aprill, *Churches, Politics, and the Charitable Contribution Deduction,* 42 B.C. L. REV. 843, 856-60 (2001). Galle, Benshalom, and Pozen discuss additional justifications for the deduction, as has Miranda Fleischer. *See* Miranda Perry Fleischer, *Equality of Opportunity and the Charitable Tax Subsidies,* 91 B. U. L. REV. 601(2011); Miranda P. Fleischer, *Theorizing the Charitable Tax Subsidies: The Role of Distributive Justice,* 87 WASH. U. L. REV. 505 (2010); Miranda P. Fleischer, *Generous to a Fault? Fair Shares and Charitable Giving,* 93 MINN. L. REV. 165 (2008).

[14] INTERNAL REVENUE SERVICE, STATISTICS OF INCOME BULLETIN, Fall 2012, at 9, *available at http://www.irs.gov/PUP/taxstats/productsandpubs/12fallbul.pdf.*

[15] JOINT COMMITTEE ON TAXATION, PRESENT LAW AND BACKGROUND RELATING TO THE FEDERAL TAX TREATMENT OF CHARITABLE CONTRIBUTIONS, JCX-55-11 (Oct. 14, 2011), at 35.

Yet, only 34.4 % of individual taxpayers itemized deductions in 2010, down 1.5% from 2009.[16] Of those who itemized, 82 percent claimed the charitable contribution deduction, and the amount claimed amounted to $170.2 billion.[17] Non-itemizers, however, make substantial charitable contributions even though they do not receive a tax benefit for these gifts. Giving USA estimates total charitable contributions by individuals in 2010 at $211.77 billion.[18] For the same year, the IRS Statistics of Income reports total charitable contribution deductions of $170.24 billion.[19] Based on these numbers, taxpayers who did not itemize donated $41.53 billion to charity, or almost 20% of total charitable giving in 2010.[20]

That non-itemizers nonetheless contribute large amounts to charity heightens the importance of the charitable contribution substantiation rules. Taxpayers who do not itemize deductions receive fewer tax benefits from the same behavior than those who do.[21] If itemizers increase their charitable contribution deductions by overvaluing the amount of the contributions, non-itemizers suffer further in comparison. If such overvaluations were seen as pervasive, the disparity between tax benefit enjoyed by itemizers and non-itemizers

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[16] INTERNAL REVENUE SERVICE, STATISTICS OF INCOME BULLETIN, Fall 2012, at 8.
[17] INTERNAL REVENUE SERVICE, STATISTICS OF INCOME BULLETIN, Fall 2012, at 9, with percentage calculated by author based on numbers in Figure E.
[18] Giving USA Foundation, Giving USA 2011: The Annual Report on Philanthropy for Year 2010: Executive Summary, at 5, *available at* *http://big.assets.huffingtonpost.com/GivingUSA_2011_ExecSummary_Print-1.pdf*.
[19] INTERNAL REVENUE SERVICE, STATISTICS OF INCOME BULLETIN, Fall 2012, at 9.
[20] JOINT COMMITTEE ON TAXATION, PRESENT LAW AND BACKGROUND RELATING TO THE FEDERAL TAX TREATMENT OF CHARITABLE CONTRIBUTIONS, JCX-55-11 (Oct. 14, 2011), at 37-39, undertook a similar comparison of charitable contributions claimed on tax returns as reported by IRS Statistics of Income data and individual donations as reported by Giving USA for 2008 and found that an estimated $56.4 billion in charitable contributions came from non-itemizers.
[21] Of course, the standard deduction assumes a certain amount of charitable contributions, and if non-itemizers would benefit more from itemizing than taking the standard deduction, they would switch to itemizing. As John Brooks has written, "If the standard deduction is intended to be a proxy for personal deductions like the charitable deduction, then non-itemizers are already getting the benefit of their charitable deductions--and then some. But to many taxpayers, it probably does not *feel* like they are getting the benefit, and in part they are right, since they do not feel the incentive effects of the tax deduction at the margin." John R. Brooks II, *Doing Too Much: The Standard Deduction and the Conflict between Progressivity and Simplification,* 2 COLUM. J. TAX. L. 203, 228 (2011) (footnotes omitted). For a brief period beginning in 1981, non-itemizers were allowed to take the deduction, in whole or in part. Pub. L. No. 97-34. Suggestions to permit again the charitable contribution deduction for non-itemizers surface regularly. *See, e.g.,* S. 2020 (Nov. 18, 2005); CONGRESSIONAL BUDGET OFFICE, OPTIONS FOR CHANGING TAX TREATMENT OF CHARITABLE GIVING (May 2011) , at 15-17.

would grow, and public faith in tax system as a whole could diminish. As Professor John Brooks has written about the standard deduction more generally, "If middle-income taxpayers see themselves as being taxed on a different tax base than high-income taxpayers, it could undermine belief in the tax system as fundamentally fair."[22] If the tax base of many high-income taxpayers is reduced--or perceived to be reduced-- because of overvaluing charitable contributions, fundamental fairness evaporates. Indeed, the legislative history of the Deficit Reduction Act of 1984 (DEFRA), which introduced detailed substantiation rules, spoke specifically of such overvaluation leading to a "disrespect for the tax laws."[23]

Overvaluation is a particular risk with the charitable contribution deduction. Then IRS Commissioner Mark W. Everson explained at a Senate hearing in 2005, "Overvaluations are difficult to identify, substantiate and litigate. Further, donors and recipient charities do not have adverse interests that would help establish a correct valuation."[24] Overvaluation of charitable contribution appears annually on the IRS list of the dozen top tax scams.[25]

In other contexts, tax administrators can rely on third parties. As Leandra Lederman has discussed,[26] the government looks to third parties in order to ensure compliance with tax laws in a variety of situations. Information reporting and withholding by third parties have proven particularly successful.

> Amounts subject to withholding (*e.g.*, wages and salaries) have a net misreporting percentage of only 1.2 percent. Amounts subject to third party information

[22] John R. Brooks II, *Doing Too Much: The Standard Deduction and the Conflict between Progressivity and Simplification,* 2 COLUM. J. TAX. L. 203, 231 (2011). He further observes that "[t]he standard deduction also has the effect of minimizing any well-intentioned incentives written into the Code." *Id.* at 230.
[23] JOINT COMMITTEE ON TAXATION, GENERAL EXPLANATION OF THE REVENUE PROVISIONS OF THE DEFICIT REDUCTION ACT OF 1984, JCS-41-84 (December 31, 1984) 504.
[24] *Exempt Organizations: Enforcement Problems, Accomplishments, and Future Direction: Hearing before the S. Comm. on Finance,* 109th Cong. 166 (2005) (statement of Mark W. Everson), *available at http://www.finance.senate.gov/imo/media/doc/metest040505.pdf.*
[25] IRS Releases the Dirty Dozen Tax Scams for 2012, IR-2012-22 (Feb. 16, 2012), *available at* http://www.irs.gov/uac/IRS-Releases-the-Dirty-Dozen-Tax-Scams-for-2012.
[26] Leandra Lederman, *Statutory Speed Bumps: The Roles Third Parties Play in Tax Compliance,* 60 STAN. L. REV. 695 (2007).

> reporting, but not to withholding (*e.g.,* interest and dividend income) have a slightly higher net misreporting percentage of 4.5 percent. Amounts subject to partial third-party reporting (*e.g.,* capital gains) have a still higher net misreporting percentage of 8.6 percent. Amounts not subject to withholding or other information reporting (*e.g.,* Schedule C income or other income) are the least visible, with a much higher net misreporting percentage of 53.9 percent.[27]

The government can also take advantage of situations "in which third parties, in acting out of their own self-interest" will "act as verifiers of taxpayers' claims, as well as those in which they are more likely to collude in noncompliance."[28] According to Lederman, compliance concerns, particularly concerns about false claims, explain asymmetrical treatment of various tax items. For example, section 104 excludes from income amounts recovered for personal injury, but does not permit a deduction for unrecovered amounts. If a taxpayer is injured in a car accident, amounts received from the tortfeasor for the injured party's uninsured medical expenses, pain and suffering, and lost wages are excluded from the taxpayer's income. If, however, the injured taxpayer is unable to recover these amounts, because, for example, the tortfeasor lacks insurance, the taxpayer cannot take a deduction for the costs he or she bears. In the former but not the latter case, a third party has an economic incentive to vet the injured taxpayer's claim. Similarly, employers have an incentive not to underreport employees' wages because they deduct as a business expense the wages they report as paid to their employees. In some cases, tax treatment of one party depends directly on another party's treatment of a tax item. For example, employers can generally deduct nonqualified deferred compensation only when the amounts are included in income by employees.[29]

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[27] Leandra Lederman, *Statutory Speed Bumps: The Roles Third Parties Play in Tax Compliance,* 60 STAN. L. REV. 695, 698 (2007) (*quoting* Charles P. Rettig, *Nonfilers Beware: Who's That Knocking at Your Door?,* J. TAX PRAC. & PROC., OCT.-NOV. 2006, at 15, 15-16).
[28] Leandra Lederman, *Statutory Speed Bumps: The Roles Third Parties Play in Tax Compliance,* 60 STAN. L. REV. 695 , 700, 695 (2007).
[29] *See* §§ 83(h), 404(a)(5), 409A.

When the third party does not have an arm's length relationship with the taxpayer, however, the government cannot rely on the third party to help ensure compliance. Lederman offers nonresident aliens, foreign corporations, and, as Commissioner Everson noted, tax-exempt entities as examples of tax-indifferent third parties without an offsetting inclusion that motivates the third party to verify a U.S. taxpayer's income tax benefits.[30]

A charity receiving a contribution has no tax or economic incentive to judge independently the amount reported as a deduction by a donor. Under current law, the recipient organization has only limited reporting obligations. As part of the contemporaneous written acknowledgment that a donor must obtain to take a deduction for a charitable contribution of $250 or more, a recipient organization must value any goods or services it provides to the donor.[31] The recipient, however, has no obligation to determine or report the amount of a property donation. While the Form 8283 that a donor must file with his or her tax return for certain property donations requires the donee's acknowledgment, it specifies that the acknowledgment "does not indicate agreement with the claimed fair market value."[32]

The substantiation rules attempt to substitute for the lack of arm's length third-party verification.[33] For most contributions of property valued at more than $5,000, a qualified appraisal, described in more detail below, is required. Thus, an appraiser does report information as a third party. The appraiser, however, does not have a self-interest opposed to the donor. Changes made to the charitable contribution substantiation rules

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[30] Leandra Lederman, *Statutory Speed Bumps: The Roles Third Parties Play in Tax Compliance,* 60 STAN. L. REV. 695 , 734 (2007).
[31] Sec. 170(f)(8)(B). Also, for a quid pro quo contribution in excess of $75, the organization must provide the donor with a good faith estimate of the good or services provided. § 6115(a)(2).
[32] However, if the donee disposes of contributed property valued at more than $500 within three years of receipt, it must file Form 8282 and disclose the amount received upon disposition.
[33] Like the charitable contribution deduction, the business deduction for travel meals and entertainment has also proved susceptible to abuse through overvaluation. As a result, Congress since 1962 has imposed special substantiation rules for these expenses, although the requirements are not as onerous as those for the charitable contribution deduction. Section 274(d) requires a taxpayer to be able to substantiate the amount of the expense, its time and place, business purpose of the item, and the business relationship of any person entertained.

by the Pension Protection Act of 2006 look to professional norms by requiring credentials, training and experience from appraisers as well as increased penalties on appraisers for gross overvaluation. These requirements attempt to serve as a surrogate for an adverse third-party self-interest as a means of obtaining more accurate and reliable appraisals.[34]

In other contexts, however, we do not require elaborate substantiation to support self-interested reporting. In particular, as noted above, Schedule C income has a high rate of misreporting. "According to government reports, most individuals with business income fail to pay all their taxes, although some appear to cheat more than others."[35] Underreporting of income from small businesses figures prominently in the tax gap, the difference between what taxpayers owe and what they pay. "In the aggregate, small business owners report less than half of their income."[36] Yet, we do not have a burdensome substantiation regime for small business deductions comparable to that for charitable contribution deductions.

How, then, can we justify this differential treatment? First, charitable deductions and business deductions play very different roles in our tax system. We tax net, not gross, income, allowing deductions for the costs of producing income. "[D]isallowing or limiting the business deductions of the self-employed would be inconsistent with a normative income tax. Moreover, allowing anything less than a full deduction for the business expenses of the self employed could stifle entrepreneurship, and, as a result, probably would not be politically viable."[37] In contrast, "charitable contributions are perhaps the purest example of personal deductions, having almost no business or income-producing

[34] *See infra* for additional discussion of these rules. These requirements are not as strict, of course, as the requirement of auditor independence, but they attempt to serve much the same function.
[35] Susan Cleary Morse, Stewart Karlinsky, & Joseph Bankman, *Cash Businesses and Tax Evasion,* 20 STAN. L. & POL. REV. 37, 37 (2009).
[36] *Id.* at 38 (citing INTERNAL REVENUE SERVICE AND U.S. DEP'T OF THE TREASURY, REDUCING THE TAX GAP: A REPORT ON IMPROVING VOLUNTARY COMPLIANCE 13-14 (2007)).
[37] Leandra Lederman, *Statutory Speed Bumps: The Roles Third Parties Play in Tax Compliance,* 60 STAN. L. REV. 695, 721-22 (2007) (footnotes omitted).

purpose."[38] The charitable contribution deduction, in other words, is particularly a creature of legislative grace.[39] Having fashioned the deduction, Congress can condition it, including requiring substantiation, as it sees fit.

Second, evidence suggests that underreporting of business income, particularly for cash businesses, derives primarily from failure to report income, not from overstating deductions. Authors of a recent survey found that "interviewees generally considered overstating deductions an inferior strategy relative to misreporting income. 'Never do anything with deductions,' one business owner told us."[40]

Thus, justifications exist for establishing a special set of substantiation requirements for the charitable contribution deduction. These justifications, however, do not give guidance regarding the appropriate content of such requirements in order to balance the dual needs of encouraging charitable giving and discouraging abuse. Over the decades, the substantiation rules have grown more and more intricate, as described below, and the question arises as to whether they continue to achieve their purpose or impose too great a burden compared to their benefit.

II. The Substance of the Substantiation Rules

Currently, an elaborate and complicated set of statutory provisions require substantiation of charitable contributions for them to be eligible for deduction from the

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[38] John R. Brooks II, *Doing Too Much: The Standard Deduction and the Conflict between Progressivity and Simplification,* 2 COLUM. J. TAX. L. 203, 217 (2011).

[39] "Whether and to what extent deductions shall be allowed depends upon legislative grace; and only as there is clear provision therefore can any particular deduction be allowed." *New Colonial Ice Co. v. Helvering*, 292 U.S. 435, 550 (1934). There are those, however, who believe that the charitable contribution deduction is required to measure income accurately because contributions to others diminish ability to pay. For the classic statement of this point of view, *see* William D. Andrews, *Personal Deductions in an Ideal Income Tax,* 86 HARV. L. REV. 309 (1972). Robert J. Shiller, professor of economics and finance at Yale University, recently stated this position in the NEW YORK TIMES: "Income that is freely given away should not even be considered as taxable income." Robert J. Shiller, *Economic View: Please Don't Mess With the Charitable Deduction,* NEW YORK TIMES, BU 7, (Dec. 16, 2012).

[40] Susan Cleary Morse, Stewart Karlinsky, & Joseph Bankman, *Cash Businesses and Tax Evasion,* 20 STAN. L. & POL. REV. 37, 51 (2009).

income tax. Requirements vary with the nature and amount of property donated. The statutory provisions explicitly state that no deduction will be allowed if a taxpayer fails to meet the substantiation and recordkeeping requirements provided.[41] The following describes the applicable rules generally because recounting all the specific rules for various types of property would take more pages than, I believe, readers would have the patience to read.

The charitable contribution deduction dates back to 1917 as part of the War Revenue Act of 1917, just four years after the introduction of the federal income tax. From the first enactment of the charitable contribution deduction, Congress has expressed concern about substantiating the amount claimed as a deduction. The 1917 provision provided a deduction for:

> Contributions or gifts actually made within the year to corporations or associations organized and operated exclusively for religious, charitable, scientific, or educational purposes, or to societies for the prevention of cruelty to children or animals, . . . Such contributions or gifts shall be allowable as deductions *only if verified under rules and regulations prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury*.[42]

Over the past 30 years Congress has repeatedly returned to the charitable contribution substantiation rules and strengthened them each time in an attempt to prevent abuse, in particular overvaluation. The first effort took place in connection with the Economic Recovery Tax Act of 1981 (ERTA). This legislation permitted a temporary deduction for charitable contributions by non-itemizers, and legislative history reflected "the expectation that the regulations would be developed to provide appropriate substantiation requirements."[43] New legislative rules regarding substantiation were

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[41] As an overview and summary of those rules, I recommend Worksheet 1 from BARBARA L. KIRSCHTEN AND CARLA NEELEY FREITAG, 521-3RD, T.M. CHARITABLE CONTRIBUTIONS: INCOME TAX ASPECTS.
[42] *See* War Revenue Act of 1917, ch. 63, § 1201(2), 40 Stat. 300, 330 (1917) *(emphasis added)*.
[43] Notice of Proposed Rulemaking, 48 FR 17616 (April 25, 1983).

introduced as part of the DEFRA,[44] in 1993 as part of the Omnibus Budget Reconciliation Act (OBRA),[45] in 2004 as part of the American Jobs Creation Act (AJCA),[46] and most recently in 2006 as part of Pension Protection Act (PPA).[47]

Prior to January 1, 1983, Treasury regulations explain, the income tax return was the source for reporting on charitable contributions.[48] Contributions of money required reporting of the name of the donee as well as the amount and date of the payment of each contribution. Property contributions called for reporting the kind of property contributed, the method used to determine its fair market value at the time of contribution, and, if relevant, application of section 170(e), which reduces the deduction by the amount of gain that would not have been long-term capital gain if the property had been sold at its fair market value, among other information. For claimed deductions above $200, additional information was required in an attachment.[49]

As the Joint Committee on Taxation has explained, under ERTA, the Treasury and the IRS were permitted to use their "authority under the Code to prescribe additional regulations, rules, and tax return requirements as needed to assure substantiation and verification of charitable deductions."[50] Relying on this legislative history, the IRS and Treasury promulgated Reg. § 1.170A-13, effective for contributions made in taxable years beginning after 1982. These regulations require taxpayers making a charitable contribution of money to keep a cancelled check, a receipt, or other reliable written records showing the name of the donee, the date of the contribution, and the amount of the contribution.[51] For donations of property, the donor had to have a receipt with the name of donee, the date and location of the contribution, a reasonably detailed description of the property, including its value, as well as a reliable written record. For contributions

[44] Pub. L. No. 98-369, 98 Stat. 691.
[45] Pub. L. No. 103-66, 107 Stat. 312.
[46] Pub. L. No. 108-357, 118 Stat. 1418.
[47] Pub. L. No. 109-280, 120 Stat. 780.
[48] Treas. Reg. § 1.170A-13(d).
[49] BARBARA L. KIRSCHTEN AND CARLA NEELEY FREITAG, 521-3RD T.M. CHARITABLE CONTRIBUTIONS: INCOME TAX ASPECTS VI-A.
[50] JOINT COMMITTEE ON TAXATION, JCS-71-81, GENERAL EXPLANATION OF THE ECONOMIC RECOVERY TAX ACT OF 1981 at 50.
[51] T.D. 8002, 49 FR 50663 (Dec. 31, 1984).

over $500 of property other than money, the regulations required additional records, including the manner of acquisition and, for property held less than six months prior to contribution, its cost or other basis.

Shortly after promulgations of these regulations, Congress, as part of DEFRA, set forth in an off-Code provision expected substantiation requirements and a directive to Treasury to issue regulations under section 170(a)(1), which provides that a charitable deduction is allowed only if the contribution is verified in the manner specified by Treasury regulations. Section 155(a) of DEFRA provided that, for non-cash donations in excess of $5,000 for most property and $10,000 for nonpublicly traded stock, regulations be promulgated requiring a taxpayer to obtain a qualified appraisal by an appraiser other than the taxpayer or the donee and to attach an appraisal summary to the first return on which the deduction is claimed.[52]

Because these rules represent the first detailed Congressional foray into substantiation requirements, I quote section 155 of DEFRA in full:

> Sec. 155. Substantiation of Charitable Contributions; Modifications of Incorrect Valuation Penalty.
>
> (a) Substantiation of Contributions of Property. --
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> (1) In general. -- Not later than December 31, 1984, the Secretary shall prescribe regulations under section 170(a)(1) of the Internal Revenue Code of 1954, which require any individual, closely held corporation, or personal service corporation claiming a deduction under *section 170* of such Code for a contribution described in paragraph (2) --
>
> (A) to obtain a qualified appraisal for the property contributed,
>
> (B) to attach an appraisal summary to the return on which such deduction is first claimed for such contribution, and

[52] *See* Form 8283 for the current required appraisal summary.

(C) to include on such return such additional information (including the cost basis and acquisition date of the contributed property) as the Secretary may prescribe in such regulations.

Such regulations shall require the taxpayer to retain any qualified appraisal.

(2) Contributions to which paragraph (1) applies. -- For purposes of paragraph (1), a contribution is described in this paragraph --

(A) if such contribution is of property (other than publicly traded securities), and

(B) if the claimed value of such property (plus the claimed value of all similar items of property donated to 1 or more donees) exceeds $ 5,000.

In the case of any property which is nonpublicly traded stock, subparagraph (B) shall be applied by substituting "$ 10,000" for "$ 5,000".

3) Appraisal summary. -- For purposes of this subsection, the appraisal summary shall be in such form and include such information as the Secretary prescribes by regulations. Such summary shall be signed by the qualified appraiser preparing the qualified appraisal and shall contain the TIN of such appraiser. Such summary shall be acknowledged by the donee of the property appraised in such manner as the Secretary prescribes in such regulations.

(4) Qualified appraisal. -- The term "qualified appraisal" means an appraisal prepared by a qualified appraiser which includes --

(A) a description of the property appraised,
(B) the fair market value of such property on the date of contribution and the specific basis for the valuation,
(C) a statement that such appraisal was prepared for income tax purposes,
(D) the qualifications of the qualified appraiser,
(E) the signature and TIN of such appraiser, and
(F) such additional information as the Secretary prescribes in such regulations.

The Joint Committee on Taxation has explained that, while these provisions were prompted in part by marketed tax shelter schemes,[53] "Congress believed that these substantiation requirements will prove more effective in deterring taxpayers from inflating claimed deductions than relying solely on the uncertainties of the audit process and on penalties imposed on those overvaluations that are detected on audit."[54] The legislative history continues:

> The Congress understands that the Treasury Department remains concerned whether the substantiation and penalty provisions of the Act will prove sufficient to preclude taxpayers from overvaluing charitable donations of property in all circumstance. . . . The Congress expects the Treasury and Internal Revenue Service to monitor the effectiveness of the new provisions and to notify the tax-writing committees if there are continuing valuation concerns that should be addressed by further legislation. . . . The Treasury and Internal Revenue Service are encouraged to utilize fully [their] regulatory authority and compliance tools available under the present law with respect to improper or overvalued claims of charitable deductions, . . .[55]

Treasury responded with Treas. Reg. § 1.170A-13(c), incorporating these requirements for contributions made after 1984.[56] The regulations require that an appraisal be made not more than 60 days prior to the date of contribution of the appraised

[53] As the Joint Committee on Taxation described, in the typical tax shelter, donors would acquire artwork, hold it for the required capital gains period, and donate it at an appreciated fair market value. "The shelter package may include an 'independent' appraisal, and the potential donor may be assured that his or her subsequent gift will be accepted by a charitable organization." JOINT COMMITTEE ON TAXATION, GENERAL EXPLANATION OF THE REVENUE PROVISIONS OF THE DEFICIT REDUCTION ACT OF 1984, JCS-41-84 (December 31, 1984), at 503.

[54] JOINT COMMITTEE ON TAXATION, GENERAL EXPLANATION OF THE REVENUE PROVISIONS OF THE DEFICIT REDUCTION ACT OF 1984, JCS-41-84 (December 31, 1984), at 504. DEFRA sec. 155(b)(1) also added § 6501L, requiring a donee to report disposition of charitable contribution property within 2 years of its receipt. The PPA§ 1215(1)-(2) changed the period of time to 3 years, *see* Form 8282, and section 1215(a)(1) added a provision codified at section 170(e)(7), limiting or recovering the donor's tax benefits for such dispositions of tangible personal property.

[55] JOINT COMMITTEE ON TAXATION, GENERAL EXPLANATION OF THE REVENUE PROVISIONS OF THE DEFICIT REDUCTION ACT OF 1984, JCS-41-84 (December 31, 1984), at 504-05.

[56] T.D. 8003, 49 FR 50657 (Dec. 31, 1984)(temporary regulations); T.D. 8199, 53 FR 16076 (May 5, 1988)(final regulations). A qualified appraisal was not required for publicly traded stock.

property and that the appraiser's fee not be based on a percentage of the appraised value of the property. They define a qualified appraiser as one who includes on the appraisal summary, to be made on Form 8283, a declaration that the individual either holds himself or herself out to the public as an appraiser or performs appraisals on a regular basis; and that, among other requirements, that the appraiser's qualifications described in the appraisal render the appraiser qualified to make the appraisal and that the appraiser not be a person excluded from being a qualified appraisal, such as the donee or the taxpayer. The regulations provide an opportunity for the donor to submit the appraisal summary within 90 days of a request from the IRS if the donor has failed to attach an appraisal summary to the donor's return as required, so long as the failure to include the summary is a good faith omission. (In Announcement 90-25, the IRS directed that for deductions of art totaling $20,000 or more, the qualified appraisal must be attached with the summary appraisal Form 8382, as well as an 8 x 10 color photograph.[57])

Not quite a decade later, as part of the OBRA 1993, Congress enacted section 170(f)(8) effective for contributions made on or after January 1, 1994.[58] This provision requires a contemporaneous written acknowledgment from the charitable donee for contributions of $250 or more, rather than relying solely on a canceled check. The written substantiation from the charity to the donor is to state in writing whether the donee provided any good or services in connection with the contribution and to include a good faith estimate of the value of any goods or services provided. Legislative history specifies that if the charity provides no goods or services, the acknowledgment must include a statement to that effect.[59] Goods or services that "consist solely of intangible religious benefits" that are not "generally sold in a commercial transaction outside the donative context" need to be acknowledged but not valued. OBRA also added requirements for quid pro quo contributions exceeding $75 requiring the charity to

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[57] 1990-8 I.R.B. 25 (Feb. 20, 1990). The announcement also observed that a significant percentage of taxpayers fail to attach the Form 8283 to their tax returns to support noncash charitable contribution deductions and reminded them to do so.

[58] OBRA § 13172(a). OBRA also made numerous changes to the penalty and provisions for tax underpayments and valuation overstatements, including those for fraud, all which are applicable to taxpayers who claim excessive charitable contribution deductions.

[59] H.R. CONF. REPT. NO. 103-213 at 565 n. 30.

inform the contributor in writing of a good faith estimate of the value of goods or services furnished in a part gift, part sale. The Joint Committee on Taxation estimated that the contemporaneous written acknowledgment requirement and the requirement regarding quid pro quo contributions would raise $469,000 between 1994 and 1998.[60]

An acknowledgment is contemporaneous if the taxpayer obtains it on or before the sooner of the date on which the taxpayer files a return for the taxable year in which the contribution was made or by the due date, including extensions, for filing the return. The legislative history also explains that the substantiation requirement for contributions of $250 or more does "not impose an information reporting requirement upon charities; rather, it places the responsibility upon taxpayers who claim an itemized deduction for a contribution of $250 or more to request (and maintain in their records) substantiation from the charity of their contribution and any good or service received in exchange."[61]

On May 27, 1994, the IRS and Treasury, after providing some transition guidance, issued temporary and proposed regulations implementing these procedures, including special rules for contributions made through payroll deductions.[62] After a public hearing, further proposed regulations were issued on August 4, 1995.[63] The 1995 proposed regulations, among other things, expand the category of goods or services of items that could be disregarded, such as certain annual membership payments below $75. They also address substantiation of out-of- pocket expenses. The proposed regulations regarding payroll deductions were finalized in October, 1995,[64] and the rest of the proposed regulations related to the acknowledgment requirement in December, 1996.[65]

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[60] JOINT COMMITTEE ON TAXATION, ESTIMATED BUDGET EFFECTS OF THE REVENUE PROVISIONS OF H.R. 2264 (THE OMNIBUS BUDGET RECONCILIATION ACT OF 1993) AS AGREED TO BY THE CONFEREES, JCX-11-93 (August 4, 1993). I assume that the revenue estimate is based on taxpayers no longer claiming as charitable deductions amounts that are not in fact contributions, such as school tuition or scrip.

[61] SENATE FINANCE COMMITTEE REPORT ON THE REVENUE PROVISIONS OF THE OMNIBUS BUDGET RECONCILIATION ACT OF 1993, 93 TNT 132-38 (June 22, 1993).

[62] T.D. 8544, 59 FR 27458 (May 27, 1994)(temporary regulations); 59 FR 27515 (May 27, 1994) (proposed regulations).

[63] 60 FR 39896 (August 4, 1994).

[64] T.D. 8623, 60 FR 53126 (Oct. 12, 1995).

[65] T.D. 8690, 61 FR 65946 (Dec. 16, 1996).

A little more than a decade after OBRA 1993, Congress returned again to the charitable contribution substantiation rules in the AJCA, applicable to contributions made after June 3, 2004.[66] Congress extended to all C corporations the requirement of a qualified appraisal for property over $5,000. Congress also specified in the Code that, for contributions over $500, taxpayers, with the exception of certain C corporations, must include with the return a description of the property "and such other information as the Secretary may require." The AJCA also provided that if the amount of the contribution of property other than cash, inventory, or publicly traded securities exceeds $5,000, then the donor (whether an individual, partnership, or corporation) must attach the qualified appraisal to the donor's tax return. "Congress believed that requiring C corporations to obtain a qualified appraisal for charitable contributions of certain property in excess of $5,000, and requiring that appraisals be attached to a taxpayer's return for large gifts, would reduce valuation abuses."[67] The legislation specified that no deduction shall be allowed if the taxpayer failed to meet requirements regarding obtaining a qualified appraisal and attaching information about the property or including information regarding the property unless failure to meet these requirements as applicable "is due to reasonable cause and not to willful neglect."[68]

The AJCA established a special and elaborate set of rules regarding deductions for contributions of used vehicles (automobiles, boats, and airplanes), effective after December 31, 2004, limiting the donor's deduction in most cases to the gross proceeds received by the donee upon sale of the vehicle, which the donee must report to the donor and which the donor must include with his or her tax return.[69]

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[66] AJCA § 883.

[67] JOINT COMMITTEE ON TAXATION, GENERAL EXPLANATION OF TAX LEGISLATION ENACTED IN THE 108TH CONGRESS, JCS-505 (May 31, 2005), at 462.

[68] P.L. 108-357, § 883(a), codified at § 170(f)(11)(A)(ii)(II). The AJCA also included exceptions from the new requirements for contributions of more than $5,000 and those of more than $500,000 for readily valued property, including publicly traded securities, as defined in § 6050L.

[69] AJCA § 884, codified at § 170(f)(12). The legislation also included a special provision limiting the tax deduction for gifts of copyrights, patents, etc., in general, to the amount of income received by the donee. AJCA § 882(b)(1), codified at § 170(m).

Congress did not wait another decade to tighten further the charitable contribution substantiation requirements. Just two years later, in the PPA, Congress made additional changes, effective after August 17, 2006. It provided that no deduction is to be allowed for any contribution of a cash, check or other monetary gift unless the donor maintains as a record of the contribution a bank record or a written communication from the donee showing the name of the donee organization, the date of the contribution, and the amount of the contribution.[70] The Joint Committee on Taxation has explained that this provision "is intended to provide greater certainty, both to taxpayers and to the Secretary, in determining what may be deducted as a charitable contribution."[71] The PPA provided statutory requirements for "qualified appraisal" and "qualified appraiser." These provisions specify, for example, that a qualified appraisal be conducted by a qualified appraiser "in accordance with generally accepted appraisal standards" and that, in general, a qualified appraiser has "earned an appraisal designation from a recognized professional appraiser organization or has otherwise met minimum education and experience requirements set forth in regulations prescribed by the Secretary" as well as regularly perform appraisals for compensation.[72] The PPA also introduced special rules for conservation easements on historic property, including submission of photographs, description of development, and a fee of $500 if a taxpayer is claiming a deduction in excess of $10,000.[73]

The PPA made a number of changes to the penalty regime for valuation misstatements. It added a new penalty provision applicable to appraisers when the claimed value of property based on an appraisal results in a substantial or gross valuation misstatement under section 6662. In such cases, new section 6695A imposes a penalty on any person who prepared the appraisal and who knew, or reasonably should have known,

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[70] PPA § 1217, codified at § 170(f)(17).

[71] JOINT COMMITTEE ON TAXATION, TECHNICAL EXPLANATION OF H.R. 4, THE "PENSION PROTECTION ACT OF 2006," (2006), at 305-06.

[72] PPA § 1219(c)(1), codified at § 170(f)(11)(E).

[73] PPA § 1213(c), codified at § 170(f)(13). The PPA also added a requirement that for donations to Donor Advised Funds the contemporaneous acknowledgment from the sponsoring organization must state that it has exclusive control over the donated funds. PPA § 1234(a), codified at § 170(f)(18)(B).

the appraisal would be used in connection with a return or claim for refund.[74] The PPA also expanded the scope of valuation misstatements by lowering the threshold for imposing accuracy-related penalties on donors under section 6662.[75] Prior to the PPA, a substantial valuation misstatement took place if a taxpayer misstated value by 200% of the correct valuation and a gross valuation misstatement if the value was misstated by 400%. The PPA lowered these triggers to 150% and 200% respectively.

On November 13, 2006, the IRS issued a notice giving transition relief for the qualified appraisal and appraiser rules, applicable to claimed deductions of property for more than $5,000, for returns filed after August 17, 2006 and before the effective date of anticipated regulations.[76] The Notice explained, for example, that an appraisal will be treated as having been conducted in accordance with generally accepted appraisal standards "if, for example, the appraisal is consistent with the substance and principles of the Uniform Standards of Professional Appraisal Practice." To satisfy education and experience requirements in valuing the type of property, the appraiser needs to make "a declaration in the appraisal, that because of the appraiser's background, experience, education and membership in professional associations," the appraiser is so qualified. For real property, an appraiser must be licensed or certified for the type of property being appraised in the state where the property is located. For property other than real property, the appraiser needs to have "successfully completed college or professional-level coursework" relevant to the property being valued and have at least two years of experience. The notice requested comments.

In December 2006, the IRS published a notice giving guidance on how taxpayers making charitable contributions by payroll deduction could comply with the reporting requirements of the PPA for contributions of less than $250, by requiring documents from

[74] PPA § 1210.
[75] *Id.* The penalty taxes imposed on donors did not change. They remain 20% of the underpayment of the underpayment for a substantial valuation misstatement and 40% for a gross misstatement. The PPA, however, removed a "reasonable cause" defense in the case of gross valuation misstatements.
[76] Notice 2006-96, 2006-46 I.R.B. (Nov. 13, 2006).

the employer as well as the pledge card or other document showing the name of the donee.[77]

In August 2008, the IRS and Treasury issued proposed regulations to implement the statutory requirements for the substantiation and recordkeeping requirements introduced both by the AJCA and the PPA.[78] They provide that the required bank record or other written communication for charitable contributions include the name of the donee, the date of the contribution, and the amount of the contribution. The proposed regulations provide, that to satisfy the reasonable cause exception of section 170(f)(11)(A)(ii)(II), the donor must submit with the return a detailed explanation of why the failure to comply was due to reasonable cause and not to willful neglect, and must have timely obtained a contemporaneous written acknowledgment and a qualified appraisal, if applicable. The proposed regulations warn, "Consistent with the Congressional purpose for enacting *section 170(f)(11)* of reducing valuation abuses, the IRS and the Treasury Department anticipate that the 'reasonable cause' exception will be strictly construed to apply only when the donor meets the requirements for the exception as specified in the regulations."[79]

The qualified appraiser and appraisal requirements in the proposed regulations are similar to, but not identical with, the rules announced in Notice 2006-96. For example, the proposed regulations do not include the provision in the notice that, for real estate appraisers, education and experience are sufficient if the appraiser holds a license or certificate to value the type of property in the state where the property is located, because the proposed regulations "set forth more specific requirements applicable to all appraisers." These proposed regulations have yet to be finalized,[80] and, thus, further detail regarding them seems unnecessary and overly burdensome to the reader.

[77] Notice 2006-110, 2006-51 I.R.B. (Dec. 18, 2006).
[78] 73 FR 45908 (Aug. 7, 2008).
[79] *Id.*
[80] Finalizing these regulations is one of the items on the IRS and Treasury 2012-2013 Priority Guidance Plan, *available at http://www.irs.gov/PUP/pub/irs-utl/2012-2013_pgp.pdf*.

This legislative and regulatory history carries several implications. On one hand, Congress considers substantiation necessary and important. On the other, frequent changes and strengthening of these rules seem to indicate that Congress has not been satisfied that substantiation efforts have yet achieved their purpose. The failure of the IRS and Treasury to finalize regulations proposed in 2008 suggests that the IRS and Treasury find keeping up with Congressional requirements challenging.

At the same time, two circuit courts have recently urged IRS and Treasury to promulgate yet further regulations. In *Kaufman v. Commissioner*,[81] the First Circuit rejected the IRS's "overly aggressive interpretations of existing regulations" as to the requirements of a qualified appraisal,[82] but also observed that "one can imagine IRS regulations that require appraisers to be functionally independent of donee organizations . . . and require more specific market-sale based information to support any deduction."[83] In *Scheidelman v. Commissioner*,[84] the Second Circuit wrote, "And, of course, the Treasury Department can use the broad regulatory authority granted to it by the Internal Revenue Code to set stricter requirements for a qualified appraisal."[85] (Both of these cases involved conservation easements and will be discussed further below in a section of the paper addressing case law for these types of charitable contributions.)

All of this suggests that the current regime is not working satisfactorily. As discussed below, judicial invocation of the substantial compliance doctrine in some situations, but not others, further complicates enforcement and raises additional questions about the current scheme.

III. Judicial Gloss

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[81] 687 F.3d 21 (1st Cir. 2012).
[82] This year, conservation easements have received considerable attention. *See* David van den Berg, *IRS Scrutinizing Conservation Easements,* 2012 TNT 190-4 (Oct. 1, 2012). Issues in these cases frequently involve substantiation requirements, as discussed further below.
[83] 687 F.3d at 31. The court continued, "Forward looking regulations also serve to give fair warning to taxpayers." *Id.* at 31-32.
[84] 682 F.3d 189 (2nd Cir. 2012).
[85] *Id.* at 198.

Long-standing section 170(a)(1) provides that a charitable contribution "shall be allowable as a deduction only if verified under regulations prescribed by the Secretary." Section 170(f)(8), enacted in 1993, states that no deduction shall be allowed for any contribution of $250 or more unless the taxpayer obtains a contemporaneous written acknowledgment. In 2004, Congress provided in section 170(f)(11) that no charitable contribution deduction shall be allowed unless the taxpayer meets applicable substantiation requirements, including other requirements the Secretary may impose. Despite this language, at some times, but not others, courts, in particular the Tax Court, have permitted substantial compliance with the substantiation and recordkeeping requirements.[86] The contours and limits of the substantial compliance doctrine are uncertain, and the application of the doctrine to this area of tax law is further complicated by the 2004 enactment of a reasonable cause exception to certain appraisal requirements.

Some provisions of the Internal Revenue Code and the Treasury regulations explicitly permit substantial compliance.[87] None of the statutes or regulations governing substantiation of the charitable contribution deduction provides for "substantial compliance." Judicial invocation of the substantial compliance doctrine, however, is not unusual or unique to the tax law. It has perhaps been most thoroughly examined by Professor John Langbein of Yale Law School in connection with the requirements for execution of wills.[88] As he has explained, courts have used the substantial compliance doctrine as a "near-miss standard."[89]

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[86] The Tax Court, however, frequently denies a charitable contribution deduction for taxpayers who fail to satisfy the substantiation requirements without any discussion of substantial compliance. *See, e.g., Linz v. Commissioner*, T.C. Memo 2011-264; *Perry v. Commissioner*, T.C. Summary Opinion 2011-76; *Kirman v. Commissioner*, T.C. Memo 2011-28.

[87] *See, e.g.,* § 2642(g)(2) (allocation of GST exemption); Treas. Reg. § 1.167(a)-11(f)(2)(flush language)(method of making depreciation election).

[88] *See* John H. Langbein, *Substantial Compliance with the Wills Act,* 88 HARV. L. REV. 489 (1975); John H. Langbein, *Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law,* 87 COLUM L. REV. 1 (1987).

[89] John H. Langbein, *Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law,* 87 COLUM L. REV. 1, 53 (1987). A court invoking substantial compliance is to be differentiated from a court of equity ignoring statutory requirements. Indeed, when taxpayers who failed to comply strictly or substantially with the charitable contribution deduction appraisal requirements asked the Tax Court to nonetheless allow the deduction despite their failure because it would be inequitable not to do

The Tax Court cases applying the substantial compliance doctrine to the charitable contribution substantiation requirements rely primarily on *Bond v. Commissioner*.[90] There, taxpayers in 1986 donated two blimps to an organization exempt from tax under section 501(c)(3). Their appraiser filled out the relevant sections of the appraisal summary on Form 8283, but the appraiser did not prepare or send to the petitioners any other separate written appraisal before the due date for petitioners' filing of their 1986 return, as required by the applicable regulations. The appraiser supplied his qualifications and details regarding his appraisal methods in a letter shortly after the beginning of the taxpayers' audit.

The government asserted that, by not obtaining and attaching to their income tax return a written appraisal of the blimps, the taxpayers failed to satisfy the requirements for a charitable deduction. The Tax Court concluded, however, that the reporting requirements of the regulations, "while helpful to respondent in the process and auditing of returns on which charitable deductions are claimed," do not "relate to the substance or essence of whether or not a charitable contribution was actually made" and are therefore "directory [advisory] and not mandatory."[91] The Tax Court concluded that the taxpayers had substantially complied with the regulatory requirements:[92]

> [The] petitioners . . . met all of the elements required to establish the substance or essence of a charitable contribution, but merely failed to obtain and attach to their return a separate written appraisal . . . even though substantially all of the specified information except the qualifications of the appraiser appeared in the Form 8283 attached to the return. The denial of a charitable deduction

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so, the Tax Court explained, "[W]e are not a court of equity and do not possess general equitable powers." *Ney v. Commissioner*, T.C. Summary Opinion 2006-154. The Tax Court, however, has acknowledged that it applies equitable principles, including that of substantial compliance. *See Woods v. Commissioner,* 92 T.C. 776, 784 (1989) ("[W]e have applied equity-based principles of waiver, duty of consistency, estoppels, substantial compliance, abuse of discretion, laches, and the tax benefit doctrine.") (footnotes omitted). *See generally* Leandra Lederman, *Equity and the Article I Court: Is the Tax Court's Exercise of Equitable Power Constitutional,* 5 FLA. TAX REV. 356 (2001).

[90] 100 T.C. 32 (1993).

[91] *Id.* at 41.

[92] *Id.* at 41-42.

under these circumstances would constitute a sanction which is not warranted or justified.

That is, the Tax Court in *Bond* sees as crucial the conducting of the appraisal by a qualified appraiser, not timely reporting regarding the appraisal. In a later case, *Hewitt v. Commissioner*,[93] the taxpayers did not obtain qualified appraisals prior to filing their return, and the Tax Court did not permit the deduction. As *Hewitt* explained, nothing in *Bond* "relieves petitioners of the requirement of obtaining a qualified appraisal."[94]

Nonetheless, I find the Tax Court's conclusion in *Bond* questionable and internally inconsistent. Despite the reporting requirements being mandated by Congress in DEFRA, the court states that they are directory and not mandatory; the question the court sets for itself is whether a charitable contribution was made. If such is the case, appraisal information could always be submitted after the due date of the return so long as the appraisal summary of Form 8283 is completed and submitted. Moreover, the court looks to the Form 8283, one of the reporting requirements, and asks whether it gives substantially all of the required information, an inquiry inconsistent with the question that it had just announced-- whether a charitable contribution has in fact been made. Then, to conclude that the information on the Form 8283 is adequate, the court not only discounts the importance of disclosing the appraiser's qualifications, but also wrongly asserts that only the appraiser's qualifications were lacking. In fact, only in the letter later submitted does the appraiser describe the methods used in the appraisal.[95] The Tax Court in *Bond* ignores completely the *ex ante* impact of the qualified appraisal requirement, and its reasoning flies in the face of the Congressional intent in

[93] 109 T.C. 258 (1997), aff'd without opinion, 106 F.3d 332 (4th Cir. 1998).
[94] *Id.* at 264. *Hewitt* further noted, *Bond* "held that the appraisal summary itself constituted the required appraisal." *Id.* The case explained that the primary purpose of DEFRA section 155 was to "provide a mechanism whereby respondent would obtain sufficient return information in support of the claimed valuation of charitable contributions of property to enable respondent to deal more effectively with the prevalent use of overvaluations." *Id.* at 265.
[95] The opinion states that "[i]n performing the appraisal, [the appraiser] made written computations, schedules and notes, but was unable to locate them at the time of the trial." 100 T.C. at 33-34.

enacting the DEFRA provisions to no longer rely "solely on the uncertainties of the audit process."[96]

Indeed, the Tax Court's doctrine of substantial compliance has been criticized by the Seventh Circuit en banc. In *Prussner v. United States*,[97] a case involving the qualified use valuation under the estate tax, an opinion by Judge Posner characterized the Tax Court's formulation as both confusing and difficult to apply. He wrote:

> Reading the Tax Court's decisions on the subject of substantial compliance is enough to make one's head swim. Tax lawyers can have no confidence concerning the circumstances in which noncompliance with regulations governing the election of favorable tax treatment will or will not work a forfeiture. The result has been a surge of unnecessary litigation well illustrated by the present suit. We think the doctrine should be interpreted narrowly . . . . The common law doctrine of substantial compliance should not be allowed to spread beyond cases in which the taxpayer had a good excuse (though not a legal justification) for failing to comply with either an unimportant requirement or one unclearly or confusingly stated in the regulations or the statute. [98]

In Bruzewicz v. United States,[99] an Illinois District Court applied this critique explicitly both to *Bond* and the Tax Court's approach to substantiation of the charitable contribution deduction.[100]

In the recent *Mohamed* case, Judge Holmes asserts that, since *Bond*, "few taxpayers have succeeded in showing substantial compliance"[101] and nicely

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[96] *See* text at *supra* note 54.
[97] 896 F.2d 218 (7th Cir. 1990).
[98] *Id.* at 224.
[99] 604 F. Supp. 2d 1197 (N.D. IL 2009).
[100] *See also Hendrix v. United States*, 2010 U.S. Dist. Lexis 7399 (S.D. Ohio July 21, 2010) (denying substantial compliance with qualified appraisal requirements on grounds that 6th Circuit limits the doctrine to statutory provisions that specifically provide for substantial compliance). The case also explains that, should the doctrine be considered, "The substantial compliance doctrine is not a substitute for missing entire categories of content; rather, it is at most a means of accepting a nearly complete effort that has simply fallen short in regard to minor procedural errors or relatively unimportant clerical oversights." *Id.*
[101] *Mohamed*, slip opinion at 19.

summarizes the Tax Court cases that declined to apply the substantial compliance doctrine on the grounds that the taxpayer failed to comply with an "essential requirement" of a governing statute. For our purposes today, I will rely on and quote his discussion of those cases:[102]

> * Failing to get an appraisal. See *Todd v. Commissioner, 118 T.C. 334, 336, 347, 118 T.C. 354 (2002)*; *Hewitt, 109 T.C. at 260, 264*; *Jorgenson v. Commissioner, T.C. Memo. 2000-38, 2000 Tax Ct. Memo LEXIS 38, at *25-*26*.
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> * Failing to fill out section B of Form 8283 (the appraisal summary). See *Hewitt, 109 T.C. at 260, 264*; *Smith v. Commissioner, T.C. Memo. 2007-368, 2007 Tax Ct. Memo LEXIS 387, at *51*, aff'd, *364 Fed. Appx. 317 (9th Cir. 2009)*.[103]
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> * Having someone without expertise in appraisals complete the appraisal, see *Smith, 2007 Tax Ct. Memo LEXIS 387, at *48* (CPA wasn't licensed appraiser); *D'Arcangelo v. Commissioner, T.C. Memo. 1994-572, 1994 Tax Ct. Memo LEXIS 575, at *24* (high-school principal not qualified to appraise art supplies, and was employee of donee and therefore ineligible to be qualified appraiser).
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> * Having an appraisal prepared at the wrong time (i.e., either more than 60 days before the gift or after the return was filed), see *Jorgenson, T.C. Memo 2000-38, 2000 Tax Ct. Memo LEXIS 38, at *13, *25-*26* (appraisal prepared after tax return filed); *D'Arcangelo v. Commissioner, T.C. Memo 1994-572, 1994 Tax Ct. Memo LEXIS 575, at *28-*29* (appraisal at least six years before gift); see also *Fehrs Fin. Co. v. Commissioner, 487 F.2d 184, 189 (8th Cir. 1973)* (in case about complete redemption of stock, taxpayers provided

[102] *Id.* at 19-20.
[103] It is hard for me to see how the cases finding that this failing violates an essential requirement of the governing statute are consistent with *Bond*.

statutorily required agreement to IRS only after adverse decision by Tax Court), aff'g *58 T.C. 174 (1972)*; *Friedman v. Commissioner, T.C. Memo 2010-45, 2010 Tax Ct. Memo LEXIS 46, at *11* (appraisals performed years after due dates of returns).

* Including insufficient information or inappropriate information in an appraisal or appraisal summary, see *Smith, T.C. Memo 2007-368, 2007 Tax Ct. Memo LEXIS 387, at *48* (appraisal of partnership shares "terse" and appraisal actually of assets held by partnership, not the shares themselves).

Judge Holmes, however, failed to discuss the cases, besides *Bond,* where the Tax Court has found substantial compliance. My summary of cases relying on substantial compliance with the charitable contribution substantiation rules, in the format that Judge Holmes adopted, includes the following:

* Recordkeeping failures. *Fair v. Commissioner,* T.C. Memo 1997-328 (1997) (no receipt from donee or written records but good faith attempt to provide information); *Van Dusen v. Commissioner,* 136 T.C. 515 (2011) (records acceptable substitute for cancelled checks for out-of-pocket expenses of less than $250).

* Failure to meet contemporaneous written acknowledgment meeting requirements. *Simmons v. Commissioner,* T.C. Memo 2009-208 (deeds satisfy contemporaneous acknowledgement requirement; no mention in case of required "no goods or services" statement; *Mudd v. Commissioner,* T.C. Summary Op. 2004-1, 2004 TNT 6-15 (charity supplied only letter that received items claimed to be donated; no discussion in case of required "no goods or services" statement).[104]

[104] These decisions are particularly surprising, given that *Durden* stated that the "no goods or services" statement was necessary for a charitable contribution deduction and cited two earlier cases, both after *Mudd,* but one before *Simmons*. *Durden*, slip opinion at 7.

*Appraisal premature by several months. *Consolidated Investors Group v. Commissioner,* T.C. Memo 2009-290 (appraisal three months premature nonetheless obtained prior to filing tax return).

*Uncertainty regarding dates in appraisal report. *Friedberg v. Commissioner,* T.C. Memo 2011-238 (ambiguity in report as to date appraised and value on date of contribution of conservation easement but within 60 days of contribution).[105]

*Failure to specify that appraisals prepared for income tax purposes. *Simmons v. Commissioner,* T.C. Memo 2009-208 (statement that owner was contemplating donation of conservation easements sufficient).

Both *Friedberg* and *Simmons* involve conservation easements. Of late, cases involving substantiation of this type of charitable contribution from the Tax Court and the Article III courts have been particularly numerous. As a recent article related,[106] a large number of conservation easement decision were handed down in 2012, many, but not all, of which deal with substantiation issues.[107] In the article, some practitioners allege that the IRS has been taking an aggressive litigation position, pushing the boundaries of interpretation, and thwarting Congressional intent by using "procedural non-substantive compliance to deny otherwise legitimate deductions."[108] These practitioners call for increased reliance on the substantial compliance doctrine and clarifying regulations. An IRS attorney responded that challenges at issue involve noncompliance with the statute, not technical foot faults.

Several very recent cases reject the substantial compliance doctrine, but nonetheless come to conclusions that seem consistent with it. As in *Simmons,* the

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[105] The Tax Court nonetheless found the appraisal report not to be qualified on other grounds, as discussed below with other conservation easement cases.
[106] David van den Berg, *IRS Scrutinizing Conservation Easements,* 2012 TNT 190-4 (September 24, 2012).
[107] Other frequently encountered issues are perpetuity requirements, subordination, and valuation. *Id.*
[108] *Id.*

Tax Court in *Averyt v. Commissioner*[109] accepted the conservation deed as a contemporaneous acknowledgment. The court was satisfied that the deed "recites no consideration received in exchange for it." According to the court, "the conservation deed, taken as a whole, provides that no goods or services were received in exchange for the contribution." The case makes a claim, to me unconvincing, that, while *Durden* held that the statute requires an "affirmative statement" as to whether the donee organization provided any goods or services, "we did not hold, and the statute does not require, that the statement take any particular form or contain any particular wording." *Averyt* ignores the legislative history, quoted in *Durden:* "If the donee organization provided no goods or services to the taxpayer in consideration of the taxpayer's contribution, the written substantiation is required to include a statement to that effect."[110]

RP Golf LLC v. Commissioner[111] and *Irby v. Commissioner*[112] followed the lead of *Averyt*. It held that a conservation agreement stating that the easement contribution was made "in consideration of the covenants and representations contained herein and *for other good and valuable consideration* (emphasis added) nonetheless stated that "no goods or services were received in the exchange," when taken as a whole. In *Irby*, Tax Court found that the contemporaneous written acknowledgment requirement satisfied for a bargain sale of a conservation easement by combining statements in the Option Agreements for the Purchase of Conservation Easement; Forms 8283 attached by taxpayers to income tax returns; the settlement agreements prepared by the title company in the transaction, which listed the amounts paid as part of the bargain sale; and the deeds for the easements, which described the properties and listed the responsibilities ad rights of the donors and donees. The Tax Court explained that it had found "no authority to indicate that the contemporaneous written acknowledgment may not be made up of a series of

[109] T.C. Memo 2012-198.
[110] H.R. CONF. REPT. NO. 103-213, at 565 n.30 (1993).
[111] T.C. Memo 2012-282.
[112] 139 T.C. No. 14 (Oct. 25, 2012).

documents."[113] That is, in all of these cases, the Tax Court went beyond *Simmons* and decreed that with silence taxpayers had satisfied strict, not simply substantial, compliance with the requirement of an affirmative statement.[114]

As forgiving as the Tax Court has been regarding the contemporaneous acknowledgement in the conservation easement context, it has been unforgiving regarding the need for a qualified appraisal to include a valuation method and specific basis for the determined value. When it comes to these factors, the Tax Court has recently rejected substantial compliance because it sees them as essential. In *Friedberg v. Commissioner,* it recognized that the method of valuation and specific basis requirements in Treas. Reg. § 1.170A-13(c)(3)(ii) "relate to the substance or essence of the contribution and the substantial compliance doctrine therefore does not apply."[115] In *Scheidelman v. Commissioner,* the Tax Court decreed, "Without any reasoned analysis . . . [the appraiser's report] in useless."[116] In *Rothman v. Commissioner,* the Tax Court went further and declared, "The substantial compliance doctrine has continuing but limited effect in a post-section 170(f)(11) world."[117] In both *Scheidelman* and *Rothman,* the Tax Court rejected, when applying the before and after approach to determine an easement, the practice of an

[113] 139 T.C. No. 14 (Oct. 25, 2012).

[114] Another recent case, *Cohan v. Commissioner,* T.C. Memo 2012-8, did discuss and reject the substantial compliance doctrine in connection with a contemporaneous acknowledgement of a $4.5 million dollar gift of real estate interests. There, however, the donee The Nature Conservancy had failed to include consideration that the taxpayers had received, consideration of which the taxpayers were aware. The letter failed to include crucial information, and, given their knowledge, the taxpayers could not reasonably rely on it. Thus, there was no substantial compliance.

[115] T.C. Memo 2011-238. The appraiser in that case used property in Washington, D.C. and New Orleans to determine the after value of property subject to an easement in New York City.

[116] 2010 T.C. Memo, 2010-151 (2010) (quoting *Friedberg v. Commissioner*, T.C. Memo. 2010-45 (2010) (alteration in original).

[117] *Rothman v. Commissioner*, T.C. Memo 2012-218 (2012), reconsidered at T.C. Memo 2012-218 (2012) (vacated as to valuation method and specific basis in light of *Scheidelman v. Commissioner,* 682 F.3d 189 (2d Cir. 2012), discussed immediately below, but concluding nonetheless that the appraisal was not qualified because of numerous other failings, such as description of property, disclosure of terms of agreement, communication of mortgages, among others.) The Tax Court determined in both the first and second *Rothman* opinions that whether the taxpayers could rely on the reasonable cause exception of § 170(f)(11)(A)(ii)(II) was an issue to be decided after trial. *Id.*

appraiser applying a fixed percentage to the before value of the property in order to arrive at the after value.[118]

In sum, in these very recent conservation easement cases, the Tax Court has asked only whether strict compliance has been met. It has found strict compliance regarding contemporaneous acknowledgment satisfied by language in deeds and found it lacking in valuation method and specific basis for valuation.

At the same time that the Tax Court claims to be moving away from substantial to strict compliance, two Courts of Appeals have embraced the reasoning underlying the doctrine. In *Kaufman v. Commissioner*,[119] after rejecting the Tax Court's conclusion that the taxpayer failed to comply with the extinguishment requirement for a conservation easement, the First Circuit rebuffed the IRS's alternative claim that the appraisal at issue was not a qualified appraisal because the appraiser lacked "analytical moorings." The Court of Appeals wrote that "whether the valuation was overstated, grossly or otherwise, is a factual question different from whether the formal procedural requirements were met, either strictly or under the 'substantial compliance' doctrine, which may forgive minor discrepancies."[120]

That is, the court claims to shun the question of substantial compliance with the substantiation requirement. Yet, the court goes on to say that failures with the Form 8283, such as not including the date and manner of acquisition of the property or its cost or other basis, were not defects that in any way prejudiced the IRS. Such is precisely the reasoning the Tax Court adopted in developing and applying its substantial compliance doctrine. Moreover, contrary to the appellate court's

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[118] The percentage was based on an article by an IRS employee entitled "Façade Easement Contributions." Prof. Roger Colinvaux has explained that the easement in *Scheidelman* was donated at a time when it was common to use a discount rate in accordance with information IRS guidance, but that the IRS has since revoked that guidance. *See* David van den Berg, *IRS Scrutinizing Conservation Easements,* 2012 TNT 190-4 (September 24, 2012).
[119] 687 F.3d 21 (1st Cir. 2012).
[120] *Id.* at 21-22 (footnote omitted).

assertion, the date of acquisition and the cost or other basis give the IRS crucial information as to possible overvaluation.[121]

In *Scheidelman v. Commissioner*,[122] the Second Circuit rejected the Tax Court's position regarding valuation method and specific basis for valuation. To the appellate court, the appraiser's "reasoned analysis" may be "unconvincing," but "it is incontestably there." In the Second Circuit's view, that is all the regulations require. In reaching its conclusion, the court cited *Hewitt v. Commissioner*,[123] to assert that the appraisal at issue "provides the IRS with sufficient information to evaluate the claimed deduction and 'deal more effectively with the prevalent use of overvaluations.'"[124] Again, a circuit court relies on the reasoning the Tax Court has adopted for applying the substantial compliance doctrine.

The Second Circuit also looks to substantial compliance explicitly in *Scheidelman*. In rejecting the IRS argument regarding failures in the Form 8283, the court observed that the taxpayer had submitted two Forms 8283, which together gave all the required information. The court accepted treating these two forms as one, either on the doctrine of substantial compliance or under the reasonable cause exception of section 170(f)(11)(A)(ii)(II).

Equating substantial compliance and reasonable cause seems to me analytically suspect. Substantial compliance excuses near misses; reasonable cause can excuse far greater failures. Yet, both these approaches demonstrate the importance -- and the difficulties-- of developing a way to accommodate the seemingly irresistible judicial urge to permit the deduction for valuable contributions to charities that fail to comply strictly with the applicable rules.

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[121] Consider, for example, real property bought in January for $1,000,000, which the owner donates three months later (that is, less than the holding period for long-term capital gain), claiming a value of $1,500,000. The information regarding the cost and date of acquisition signals overvaluation to the IRS. *See also* §170(e) (reduction of charitable contribution deduction by the amount that would not have been long-term capital gain had the property been sold at its fair market value at the time of contribution). I thank Karin Gross for this example.
[122] 682 F.3d 189 (2nd Cir. 2012).
[123] 109 T.C. 258 (1977) *aff'd*, 166 F. 3d 332 (4th Cir. 1998) (*per curiam*).
[124] 682 F.3d at 198, quoting *Hewitt*, 109 T.C. at 265.

IV. What Can Be Done?

Our system risks drowning under the weight of the charitable contribution substantiation requirements. Stretching the analogy more than a little, we might say that the rules resemble those developed for the Ptolemaic universe, becoming more and more elaborate awaiting the paradigm shift presented by Copernicus's theory, as described by Thomas Kuhn in his famous book, *The Structure of Scientific Revolutions.*

We currently have pages upon pages of regulations setting forth rules for substantiating charitable contributions, but these regulations have yet to address changes made by either the 2004 AJCA or the 2006 PPA. Appellate courts, practitioner and academics struggling with conservation easements in particular call upon our tax administrators to issue yet further regulations. The current state of affairs regarding substantiation of charitable contribution deductions cries out for reform. How to reform the regime in a way both practical and effective, however, is less clear. Below, I sketch out a number of possibilities.

Tax professors offended by *Mohamed* and *Durden* offered a number of suggestions for reform. One proposed giving the Tax Court authority to provide equitable relief when there has been a legitimate charitable gift to a legitimate charity. The equitable relief now available to innocent spouses might offer a model in this regard, although experience under the innocent spouse provision suggests that giving the Tax Court authority to provide equitable relief must be done with great care, with attention to process as well as substance.[125]

Another model for equitable relief would be the harmless error provision in the Uniform Probate Code,[126] which, at the urging of Professor Langbein,[127] is intended to replace the substantial compliance doctrine. Under the harmless error

[125] *See* Bryan Camp, *The Unhappy Marriage of Law and Equity in Joint Return Liability,* 108 TAX NOTES 1307 (2005).
[126] Uniform Probate Code section 2-501 (1990 as amended 1997).
[127] *See supra* note 88.

doctrine (also known as a dispensing power), a court can admit a document to probate even if it fails to follow the required formalities of execution if clear and convincing evidence establishes that the decedent intended the document to be his will. An analogous provision for substantiation could permit a charitable contribution that failed to comply with substantiation requirements nonetheless to be deducted if clear and convincing evidence established that it was a legitimate gift.[128] Perhaps any equitable forgiveness of substantiation failures could give rise to a partial, rather than a full, deduction in order to maintain an incentive for strict compliance.[129]

The analogy to the harmless error provision of the Uniform Probate Code, however, is limited at best. The Uniform Probate Code introduced the harmless error provision in order that required formalities of execution, intended to protect the testator,[130] do not in fact prevent fulfillment of the testator's intent. The charitable contribution substantiation rules, in contrast, are designed to protect the federal fisc, not the donor, by ensuring that an objectively appropriate amount, not the donor's desired value, is deducted as a charitable contribution.[131]

Another professor on the taxprof listserv suggested relief along the lines of section 9100, which permits automatic six and twelve month extensions of time in which to file for certain elections. Such an approach seems to me promising, but it would require that the taxpayer become aware of the need to satisfy the substantiation requirements. Thus, continued use of the regulations permitting the

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[128] *See* Victoria Levin, *Substantial Compliance in Tax Law: Equity vs. Efficiency,* 40 UCLA L. REV. 1587 (1993).

[129] Other changes discussed below could also consider allowing only a partial, rather than a full, deduction in the case of substantiation failures.

[130] *See* Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers,* 51 YALE L. J. 1, 2-5, 9-10 (1941).

[131] I thank Professor Susan Gary for her articulation of this point at the NYU National Center on Philanthropy and Law October 2012 conference.

taxpayer to supply substantiation information within 90 days of an IRS request, as described below, might be preferable.[132]

Going beyond suggestions from the taxprof listserv, I, like others, believe that rethinking conservation easement contributions as a whole would seem a high priority. A number of scholars have offered reform suggestions. Daniel Halperin has urged that the deduction for such contributions be eliminated and replaced with either a program of direct grants or limited-budget tax credits administered by an expert agency.[133] Roger Colinvaux also has argued for converting the deduction to a credit with different levels of tax benefit depending on satisfaction of various conservation criteria, but also offers as a second-best approach changing the measure of the tax benefit to the fair market value of the underlying fee interest.[134] Recommendations made by Nancy McLaughlin include having the Land Trust Alliance establish formal accreditation program for government agencies and land trusts and the Treasury Department establish clear and comprehensive conservation easement appraisal standards.[135]

For at least some real estate donations, an advisory council similar to the IRS Art Advisory Panel could be helpful.[136] The Art Advisory Panel, created in 1968, provides advice and makes recommendation to the Art Appraisal Service unit of the IRS Office of Appeals. Twenty-five renowned art experts, who volunteer their time, evaluate and review appraisals of works of art in closed meetings. All tax returns with an appraisal of a single work of art or cultural property valued at $50,000 or more that has been selected for audit must be referred to the panel. The panel's

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[132] This professor also suggested a broad reasonable cause exception. I discuss this approach below, in connection with the current reasonable cause exception.
[133] See, e.g., Daniel Halperin, *Incentive for Conservation Easements: The Charitable Deduction or a Better Way,* 74 LAW & CONTEMP. PROBLEMS 29 (2011).
[134] Roger Colinvaux, *The Conservation Easement Tax Expenditure: In Search of Conservation Value,* 37 COLUM. J. ENV. L. 1 (2012).
[135] Nancy McLaughlin, *Increasing the Tax Incentives for Conservation Easement Donations—A Responsible Approach,* 31 ECOLOGY L.Q. 1 (2004).
[136] This description is based on the Annual Summary Report for Fiscal Year 2011 of the Art Advisory Panel of the Commissioner of the Internal Revenue, *available at* http://www.irs.gov/pub/irs-utl/annrep2011.pdf and the IRS webpage on Art Appraisal Services at http://www.irs.gov/Individuals/Art-Appraisal-Services.

recommendations are advisory, but the IRS has adopted 93% of the panel's recommendations in full. While the work of the panel goes to valuation issues during audit rather than substantiation of deductions claimed on tax returns, expanding such panels might make it possible to loosen some substantiation rules. Expansion of appraisal panels to other types of gifts, would, of course, involve costs.

Under current law, taxpayers who make a charitable contribution of an item of art that has been appraised at $50,000 or more may request a Statement of Value from the IRS for income tax charitable deduction purposes. Such a request must include a qualified appraisal, an appraisal summary and a user fee in the amount of $2,500 (for up to three items of art) and must be filed prior to filing the first income tax return that reports the charitable contribution.[137] The availability of Statements of Value, with appropriate user fees, could be expanded to other types of property.

Changes to regulations are also possible. Both section 170(f)(8), the provision requiring the contemporaneous written acknowledgment, and section 170(f)(11), the provision setting forth requirements for the qualified appraisal and qualified appraiser, authorize regulations "that may provide that some or all of the requirements [of the respective provisions] do not apply in appropriate cases."[138] Thus, IRS and Treasury have the ability to promulgate regulations to give relief from the rigors of the substantiation rules.

The IRS and Treasury, perhaps with Congressional urging or direction, could revise the proposed regulations regarding "reasonable cause" for failure to follow the qualified appraisal and qualified appraiser rules. Rather than strictly construing the exception, the IRS and Treasury could provide some safe harbors that address some of the commonly encountered problems, such as failure to specify that an appraisal was done for income tax purposes. Given the regulatory authority to

[137] Rev. Proc. 96-15; *see also* the IRS webpage on Art Appraisal Services at http://www.irs.gov/Individuals/Art-Appraisal-Services

[138] § 170(f)(8)(E) and § 170(f)(11)(H). I thank John Easton for his comments at the NYU Center for Philanthropy and Law October 2012 conference emphasizing the importance of this regulatory authority.

create exceptions, even without legislative action, "reasonable cause" relief could be extended as well to the contemporaneous acknowledgment requirement for taxpayers unable to obtain the required documentation from the charity, despite attempts to do so. (A donee charity, for example, could have dissolved or not respond to a donor's request for the information.)

I would recommend continuing and expanding the current rule of Treas. Reg. § 1.170A-13(c)(4)(H), which permits a donor who fails to file a Form 8283 appraisal summary with the return can do so within 90 days of a request from the IRS if the original failure is a good faith omission. Such an approach gives the taxpayer an opportunity to correct an error upon notice, protecting both the taxpayer and the tax administrator.

Expanding the 90 day provision to permit either receipt of written acknowledgment of a contribution from the donee charity after the fact or make a showing that the donee refuses to provide the acknowledgement despite repeated requests seems to me reasonable. Unlike obtaining appraisals, obtaining the required acknowledgment rests in the control of the donee, not the donor, and thus allowing some corrective mechanism seems appropriate.

In contrast, allowing appraisals to be undertaken long after the contribution would not sufficiently protect the government. Thus, the proposed regulations on the reasonable cause exception introduced in the AJCA require a timely appraisal, and I would not endorse a change to that requirement.

At the same time that I support loosening the contemporaneous written acknowledgment requirement in some circumstances, I also recommend revising the regulations to require that the contemporaneous written acknowledgment be a separate document, specifically drafted to satisfy this substantiation requirement. I made this recommendation in light of the recent Tax Court decisions in *Averyt,*[139] *RP*

[139] T.C. Memo 2012-198.

Golf LLC,[140] and *Irby,*[141] which found various documents and combinations of documents to satisfy the contemporaneous written acknowledgment requirement. The acknowledgment, as noted earlier, should also be required to give the date of the contribution.

Making increased use of technology, such as matching Forms 8282, the form required of a donee that disposes of a charitable gift within three years of receipt, and the Form 8283 Summary Appraisal could also aid enforcement for those charitable contributions disposed of by the donee charity within three years. Given section 170(e)(7), added by the PPA, to limit or recapture part the donor's deduction for such dispositions of tangible personal property, perhaps the IRS is already doing so, although I found nothing in my research identifying such a program.

Other technologies also need to be taken into account. Charities have begun encouraging donors to text contributions.[142] After the devastating January 12, 2010, earthquake in Haiti, Congress quickly passed special legislation to aid in relief. The legislation included a provision that specifically for "cash contributions made for the relief of victims in areas affected by the earthquake in Haiti . . . a telephone bill showing the name of the done organization, the date of the contribution, and the amount of the contribution shall be treated as meeting the recordkeeping requirements of section 170(f)(17),"[143] which otherwise requires that donors of less than $250 maintain a bank record or written communication from the donee. A

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[140] T.C. Memo 2012-282.
[141] 139 T.C. No. 14 (Oct. 25, 2012).
[142] *See, e.g.,* Lauren McGann, *Attention Nonprofits: Young adults love texting donations,* Nieman Journalism Lab, *available at http://www.niemanlab.org/2010/07/attention-nonprofits-young-adults-love-texting-donations/;* American Red Cross, Text Message, *available at* http://www.redcross.org/support/donating-fundraising/donations/text-messaging. At least one section 501(c)(3) groups has formed to provide exempt organizations with the ability to accept donations by text. *See* Mobile Giving Foundation, http://www.mobilegiving.org/.
[143] H.R. 4462 (2010). President Obama signed the bill on January 22, 2010. *See* *http://www.govtrack.us/congress/bills/111/hr4462*. As of January 15, more than $10 million had been raised for Haiti through mobile texting, of which more than $8 million went to the Red Cross. Douglas Stanglin, *Mobile texting to the Red Cross for Haiti now tops $8 million,* USA Today (Dec. 15, 2010), *available at* http://content.usatoday.com/communities/ondeadline/post/2010/01/mobile-texting-donations-to-red-cross-for-haiti-now-tops-5-million-/1#.UM9nReRX2_8.

statute or regulations should expand the phone record rules to all charitable contributions to which section 170(f)(17) applies.[144]

The IRS could also work with charities and phone providers to determine if there is a way for phone records to generate statements that satisfy the "no goods or services" statement required of a contemporaneous written acknowledgment for donations of $250 or more.[145] I imagine that there could be special text numbers for donations for which no good and services are provided, and thus, the contemporaneous written acknowledgment could be provided, with the phone company deemed to be acting as the agent of the charity.

Increased use of technology should also involve tax preparation software. Schedule A of Form 1040 includes a reminder to see the instructions if the taxpayer has made a contribution of $250 or more and that Form 8283 must be attached for contributions other than by cash or check of more than $500. Such reminders may or may not be effective. But even if they are, only a small percentage of individual tax returns are now filed manually, using the paper forms. According to IRS Filing Season Statistics for Week Ending June 8, 2012, more than 82 percent of individual income tax returns were e-filed.[146]

Thus, it becomes important to know to what extent tax preparation software encourages compliance with the charitable contribution substantiation rules by reminding taxpayers about the contemporaneous written acknowledgment and qualified appraisal rules. TurboTax, for example, generates Form 8283, but asks its

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[144] Many websites, for example, mistakenly assume that the special Haiti rules now apply to all charitable contributions made by phone. *See, e.g.,* Joanne Fritz, *How To Make a Charitable Contribution with Your Mobile Phone,* About.com: Nonprofit Charitable Orgs, *available at* http://nonprofit.about.com/od/fordonors/a/How-To-Make-A-Charitable-Donation-With-Your-Mobile-Phone.htm; Ben Alexander, *Thoughts on Charitable Giving,* Accounting Web, *available at http://www.accountingweb.com/article/thoughts-charitable-giving/220425.*

[145] I thank Robert J. Shiller for this suggestion.

[146] Author's calculations based on IRS Filing Seasons Statistics for Week Ending June 8, 2012, *available at* http://www.irs.gov/uac/Filing-Season-Statistics-for-Week-Ending-June-8,-2012. The total number of Individual Income Tax Returns received as of 6/8/12 are 137,200,000. Total e-filing receipts are 113,074,000, with 71,017,000 of that total filed by tax professionals and 42,056,000 self-prepared. *Id.* I thank Larry Zelenak for help in locating these numbers.

users only about donations over $500.[147] That is, it does not include any reminders regarding the contemporaneous written acknowledgment for donations of donations of $250 or more. Accountants whom I polled informally at a recent conference also reported that their tax preparation software will generate the Form 8283, but does not include reminders about the contemporaneous written acknowledgment. Treasury and the IRS could work with tax preparation software companies to request that the programs include questions about contemporaneous written acknowledgment.

Legislative changes, of course, are also possible. The $250 threshold for the written acknowledgment and the over $500 and $5000 thresholds for additional substantiation could be raised from time to time or be automatically adjusted for inflation.[148] In theory, at least, establishing adverse tax interests between donors and done charities could also improve compliance. Legislation, for example, could subject charities to some kind of tax penalty for failing to provide the contemporaneous written acknowledgment. Charities could face penalties for gross overvaluations for property contributions that they acknowledge on Form 8283. They could be required to report to the donor the value assigned to contributed property on Form 990.[149] As a practical matter, however, Congress would

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[147] *See* TurboTax Deluxe Online, at https://turbotax.intuit.com/login/start.jsp?priorityCode=3468337910&productid=16&abtest=random%3D87670&loginpage=start2. There are some issues with generation of Form 8283 on TurboTax. For the Tax Year 2011, TurboTax Support notes that "TurboTax does not group similar donated items for which a deduction of more than $5,000 is claimed for Section B of Form 8283. In this case, separate Section Bs of Form 8283 must be completed for each recipient organization." Calculations Not Supported by TurboTax for Tax Year 2011, *available at* http://turbotax.intuit.com/support/iq/Fed-Form-Availability/Calculations-not-Supported-by-TurboTax-for-Tax-Year-2011/GEN83848.html. I was unable to determine whether H&R Block at Home, another well-known tax software package for people who prepare their own taxes, also generates Form 8283 without asking any questions about the contemporaneous written acknowledgment, because the on-line program reports that Schedule A will not be available until after January 4, 2013. *See* https://taxes.hrblock.com/hrblock/login/LoginRegistration.hrbx?TaxType=OPP&TaxYear=2012&PartnerID=2054&PS=Y&siteID=search_term_not_available&FV=F&HT=F.

[148] According to the CPI Inflation Calculator, $250 in 1994 is equal to $388 today. *See* http://146.142.4.24/cgi-bin/cpicalc.pl?cost1=250&year1=1994&year2=2012.

[149] § 170(f)(8)(D) provides that the contemporaneous written acknowledgment would not be required for "a contribution if the donee organization files a return, on such form and in accordance with such regulations as the Secretary may prescribe," giving the information required in the acknowledgment. No regulations permitting this safe harbor have been proposed or promulgated. A statute along the lines of this provision

undoubtedly view the burden to donee organizations of such changes to the law as in excess of possible benefits.[150] Currently, in egregious situations, a donee organization could find itself subject to penalties under the abusive tax shelter provisions.[151]

Approaches endorsed in connection with basic reform of the charitable contribution deduction more generally would also have an impact on substantiation. For example, some have suggested a floor that would permit deductions only for giving each year above a set percentage of AGI.[152] Such a floor would relieve taxpayers of the need to keep records of charitable contributions unless they expected to exceed the floor. In other areas of tax law, justifications for floors have included lessening the burden of recordkeeping for taxpayers. As the Joint Committee on Taxation wrote regarding imposition of the two-percent floor on miscellaneous itemized deductions introduced in the Tax Reform of 1986, "This floor will relieve taxpayers of the burden of recordkeeping unless they expect to incur expenditures in excess of the floor. Also, the percentage floor will relieve the Internal Revenue Service of the burden of auditing deductions for such expenditures when not significant in aggregate amount."[153] Similarly, Congress enacted the standard deduction in 1944 in part so that a taxpayer "is not required to itemize and substantiate his non-business deductions."[154]

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could give the Secretary authority to require the value assigned to donated property above some specified amount be included on an organization's Form 990 Annual Information Return.

150 As noted earlier, the Form 8283 currently specifies that acknowledgment by the donee does not represent agreement with the claimed fair market value.

151 *See* § 4965 (excise tax on tax-exempt entities entering into prohibited tax shelters). A prominent exempt organization practitioner has told me that a national university has been penalized under this provision.

152 "[F]loors . . . tend not to affect incentives at the margin, but instead simply provide less of a subsidy for the first dollars of contribution that more likely would be given anyway." ROGER COLINVAUX, BRIAN GALLE, AND EUGENE STEUERLE, EVALUATING THE CHARITABLE DEDUCTION AND PROPOSED REFORMS, URBAN INSTITUTE 11-12 (June 2012); CONGRESSIONAL BUDGET OFFICE, OPTIONS FOR CHANGING TAX TREATMENT OF CHARITABLE GIVING, 13 (May 2011) (footnote omitted).

153 JOINT COMMITTEE ON TAXATION, 99TH CONG., GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1986, at 56.

154 S. REP. NO. 78-885, reprinted in 1944 C.B. 858, 860 (1944).

Of course, a floor would not address substantiation concerns for contributions of very valuable real estate, art or other property that raise particular concern about abuse. Small contributions, however, have a large revenue effect in the aggregate. In 2009, for example, the total claimed value of deductions for clothing and household items shown on Form 8283 was $11.2 billion, representing 36.2 percent of total claimed value of contributions on Form 8283 and 88% of the number of donations so reported. [155]

More revolutionary departures from current law would also influence substantiation requirements. We could eliminate the charitable contribution deduction for contributions of at least some tangible personal property. As Colinvaux, Galle, and Steuerle point out, "In-kind donations account for roughly a quarter of the amount of all gifts. There is good reason, however, to think that deductions for some gifts of tangible personal property are problematic, for example where valuation is difficult or the gift likely would be made anyway (depreciated property in clothes or household goods.)."[156] If such a path were to be pursued, careful thought as to the treatment of artwork would be needed because of concern for museums. Perhaps only contributions of depreciable personal property could be limited or prohibited.

Another revolutionary departure would be to rely on direct grants to charities triggered by private donations, such as the British grants called Gift Aid. Such an approach offers another reform that could ease substantiation concerns as well as, according to one study, make taxpayers more responsive. [157] Under this program, the charity can claim from the government 20 percent of any donation it receives

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[155] Roger Colinvaux, *Contributions of Property: A Broken System Reimagined (on file with author)* at 52, relying on Pearson Liddell & Janette Wilson, *Individual Noncash Contributions, 2009,* STAT. OF INCOME BULL., Spring, 2012 at 62. In contrast, for 2009, the claimed value of deductions for art, for which the IRS has established both the Art Advisory Panel and the Statement of Value procedure as well as maintaining in-house expertise on art valuation, was only $984 million. *Id.* at 59.
[156] ROGER COLINVAUX, BRIAN GALLE, AND EUGENE STEUERLE, EVALUATING THE CHARITABLE DEDUCTION AND PROPOSED REFORMS, Urban Institute 17 (June 2012).
[157] ROGER COLINVAUX, BRIAN GALLE, AND EUGENE STEUERLE, EVALUATING THE CHARITABLE DEDUCTION AND PROPOSED REFORMS, Urban Institute 14-15, 21 (June 2012).

(20 percent is the basic income tax rate.) Taxpayers with tax rates over this 20% basic income tax rate are allowed to claim a reduction in their taxes for amounts above 20 percent[158] Gift Aid avoids the issues of property contributions, because, with the exception of donated goods to charity shops, it involves only gifts of money.

In connection with efforts to avoid the fiscal cliff, suggestions have been made to place a cap on itemized deductions in total or charitable contribution deductions in particular. Any such changes would also have an impact on substantiation rules. If a low cap were placed on total itemized deductions, itemized deductions that are more easily verified, such as state taxes and mortgage interest, could displace claimed charitable contribution deductions, "leaving upper-income taxpayers no incentives to give to charity."[159] Without contributions, there is no need for substantiation.

Given the options listed above, of the more radical changes to the charitable contribution deduction, I am personally enamored of a floor. For possible changes to the substantiation rules themselves, I urge expansion of the Statement of Value program and promulgation of regulations that give taxpayers the opportunity to obtain a written acknowledgment within 90 days of an IRS request if the failure was that of the donee organization. At the same time, I suggest having the government increase use of technology, in particular by working with cell phone providers to develop acceptable contemporaneous written acknowledgments and with providers of tax return software to include reminders about the need for the contemporaneous written acknowledgment in their programs.[160] The problems of enforcement and complexity that the charitable contribution deduction substantiation rules produce

[158] From my understanding of Gift Aid, claiming back a higher tax rate seems complicated and likely to involve some of the same recordkeeping issues we currently face. *See* HM Revenue and Customs, "Giving to Charity through Gift Aid," http://www.hmrc.gov.uk/individuals/giving/gift-aid.htm.

[159] *See* Tax Analysts, *Dollar Cap on Charitable Deductions Would Be Harsher Than Percentage Limit, Charity Reps Say*, 2012 TNT 240-8 (Dec. 13, 2010).

[160] Working with software providers to include reminders might be helpful for other tax compliance issues as well.

as well as the burdens they place on donors suggest strongly that we undertake the difficult task of reforming this area.