A (PARTIAL) DEFENSE OF § 501(C)(4)'S "CATCHALL" NATURE

*Lloyd Hitoshi Mayer**

* Professor, Notre Dame Law School. I am very grateful for helpful comments from Ellen Aprill, Victoria Bjorklund, Roger Colinvaux, Rosemary Fei, Eric Gorovitz, David Miller, Richard Schmalbeck, and other participants in the 2017 New York University School of Law National Center on Philanthropy and the Law Conference.

INTRODUCTION

Internal Revenue Code ("Code") § 501(c)(4) provides for exemption from federal income tax for:

> Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.[1]

Other than the addition in 1996 of a prohibition on private inurement (i.e., on the distribution of net earnings to a private shareholder or individual), this language has remained almost unchanged for close to 100 years.[2] In fact, Congress included the exemption for "any civic league or organization not organized for profit, but operated exclusively for the promotion of social welfare" in the first 1913 version of what is now the Code.[3] Congress added the language relating to local associations of employees in 1924, and that language has remained unchanged ever since.[4]

The vagueness of the first phrase, and the failure of the Treasury Department and Internal Revenue Service ("IRS") to interpret it in a manner that would significantly limit that vagueness, has led some commentators to criticize the "catchall" nature of this exemption category.[5] Other authors in this issue are addressing the application of

---

1. I.R.C. § 501(c)(4)(A) (2012).

2. *See* Taxpayer Bill of Rights 2, Pub. L. No. 104-168, § 1311(b)(1), 110 Stat. 1452, 1477-78 (1996) (codified at I.R.C. § 501(c)(4)(B)). In 2015 Congress enacted changes to other sections of the Internal Revenue Code that affected § 501(c)(4) organizations, including with respect to the applicability of the gift tax, a notice requirement, and a declaratory judgment process. Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Div. Q, §§ 405(a), 406(a), 408(a), 129 Stat. 3040, 3118-21 (codified at I.R.C. §§ 506, 2501(a)(6), 7428(a)(1)(E)).

3. Tariff Act of Oct. 3, 1913, ch. 16, § II(G)(a), 38 Stat. 114, 172.

4. *See* Revenue Act of 1924, ch. 234, § 231(8), 43 Stat. 253, 282.

5. *See, e.g.*, James A. Amdur, *Tax Exemption of Social Welfare Organizations*, 45 TAXES 292, 292, 300 (1967); Frances R. Hill, Citizens United *and Social Welfare Organizations: The Tangled Relationships Among Guidance, Compliance, and Enforcement*, 43 STETSON L. REV. 539, 544-47 (2014); *see also* JAMES L. FISHMAN & STEPHEN SCHWARZ, CASES AND MATERIALS: NONPROFIT ORGANIZATIONS 581 (2d ed. 2000) ("§ 501(c)(4) has become the 'dumping ground' for organizations that fail to make the grade as a § 501(c)(3) charity but nonetheless provide a substantial public benefit"); JEREMY KOULISH, URBAN INST., FROM CAMPS TO CAMPAIGN FUNDS: THE HISTORY, ANATOMY, AND ACTIVITIES OF 501(C)(4) ORGANIZATIONS 4 (2016) http://www.urban.org/research/publication/camps-campaign-funds-history-anatomy-and-activities-501c4-organizations ("Section 501(c)(4) serves as a sort of dumping ground for organizations otherwise difficult to categorize, assuming the organizations have a significant social welfare mission."). *But see* Benjamin Moses Leff, *Tax Planning for*

§ 501(c)(4) to organizations engaged in political campaign activity and lobbying, as well as to some of the most common types of § 501(c)(4) organizations, such as community service clubs and prepaid medical plans, so I do not focus on this criticism as it applies in those contexts. Instead, I focus on the many other types of organizations that have found a home in § 501(c)(4).

More specifically, after briefly reviewing the very limited legislative history of this provision, I survey these other types of organizations and, as best as can be determined, examine why they have claimed this status and how they have managed to do so successfully. I then critique these myriad uses of § 501(c)(4). Based on this review, I conclude that not only is the "catchall" nature of § 501(c)(4) not inconsistent with its language and limited legislative history, but that nature is generally defensible as the appropriate tax classification for these various entities. The only exceptions are the relatively rare instances where Congress intended to create an exclusive exemption category for a particular type of organization with specific restrictions. In those situations, allowing that type of organization to instead qualify for exemption under § 501(c)(4) would permit it to avoid the restrictions Congress intended to place on that type as a condition for exemption. This appears to be the case with respect to two categories of entities: charitable organizations that federal tax law would classify as private foundations if they were exempt under Code § 501(c)(3); and electric and water cooperatives that Congress intended to receive exemption exclusively under § 501(c)(12).

First, however, I should note that this analysis is hindered by certain data limitations. While the IRS includes § 501(c)(4) organizations in its various statistical publications,[6] and the Urban Institute recently issued a study parsing the § 501(c)(4) universe,[7] more fine-grained data are difficult to acquire. I have therefore relied on a variety of GuideStar searches to attempt to get a sense of the approximate number of the types of organizations I will discuss, as well as to locate the

Marijuana Dealers, 99 IOWA L. REV. 523, 558 (2014) (defending the catchall nature of § 501(c)(4), at least to the extent § 501(c)(4) organizations are permitted to engage in a greater quantity of non-exempt activities than organizations described in I.R.C. § 501(c)(3)).

6. *See, e.g.*, INTERNAL REVENUE SERV., 2017 DATA BOOK 55-57 (2018); *SOI Tax Stats – Charities & Other Tax-Exempt Organizations Statistics*, INTERNAL REVENUE SERV., https://www.irs.gov/statistics/soi-tax-stats-charities-and-other-tax-exempt-organizations-statistics (last visited Feb. 8, 2019).

7. KOULISH, *supra* note 5.

IRS Form 990 annual returns for illustrative entities.[8] Nonetheless, it must be acknowledged that GuideStar is also limited in a variety of ways. There are possible accuracy issues with the IRS Forms 990, both as originally filed and as interpreted or recorded by GuideStar for searching purposes, as well as accuracy and coverage issues with the National Taxonomy of Exempt Entities ("NTEE") coding system that is used in some searches.[9] In recognition of these limitations, my observations regarding the numbers and finances of the various types of nonprofits that claim exemption under § 501(c)(4) are only rough approximations.

I.
LEGISLATIVE HISTORY

Both the legislative history for what is now Code § 501(c)(4) and the analysis of that history have been sparse. The current statutory language can be traced to a Senate amendment of the Tariff Act of October 3, 1913 ("Tariff Act of 1913").[10] The IRS in an internal training document states that "[i]t is generally assumed . . . that its enactment was the result of a U.S. Chamber of Commerce request for an exemption for 'civic and commercial' organizations," an observation that appears to have first been made in print by James J. McGovern in 1976 when he was with the IRS Exempt Organizations Technical Branch.[11] Careful review of the U.S. Chamber of Commerce's original request indicates that the current broad interpretation of § 501(c)(4) is not inconsistent with its original meaning for the following reasons.[12]

---

8. *See GuideStar History*, GUIDESTAR, https://learn.guidestar.org/about-us/history (last visited Feb. 8, 2019). GuideStar is a nonprofit organization that has created a comprehensive, accessible, and searchable database of tax-exempt nonprofit organizations, primarily by obtaining publicly available information for such organizations.

9. *See generally National Taxonomy of Exempt Entities*, NAT'L CTR. FOR CHARITABLE STAT., http://nccs.urban.org/classification/national-taxonomy-exempt-entities (last visited Feb. 6, 2019).

10. *See* S. REP. NO. 63-80 at 3 (1913), *reprinted in* 1939-1 (part 2) C.B. 1, 4, 1913 WL 20195.

11. *See* James J. McGovern, *The Exemption Provisions of Subchapter F*, 29 TAX LAW. 523, 530 (1976); John Francis Reilly, Carter C. Hull & Barbara A. Braig Allen, *IRC 501(c)(4) Organizations*, *in* EXEMPT ORGANIZATIONS: CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM FOR FISCAL YEAR 2003, at I-1, I-2 (2002), https://www.irs.gov/pub/irs-tege/eotopici03.pdf.

12. *See* STAFF OF S. COMM. ON FIN., 63D CONG., TARIFF SCHEDULES: BRIEFS AND STATEMENTS FILED WITH THE COMM. ON FIN. UNITED STATES SENATE SIXTY-THIRD CONGRESS FIRST SESSION ON H.R. 3321 AN ACT TO REDUCE TARIFF DUTIES AND TO PROVIDE REVENUE FOR THE GOVERNMENT, AND FOR OTHER PURPOSES, 2001 (Comm.

First, the U.S. Chamber of Commerce ("Chamber") noted that in the 1909 version of the federal corporate income tax, the imposition of that tax was modified by a "for profit" requirement.[13] While the Chamber did not mention it, the 1894 version of the federal income tax included similar language.[14] It therefore appears that all nonprofit entities were exempt from these earlier versions of the federal income tax imposed on non-natural persons, although these earlier laws also included a specific exemption for entities furthering charitable, religious, or educational purposes. At least for the 1909 version, this specific exemption appears to have been motivated by a concern of some members of Congress that the "for profit" language was insufficient to exempt nonprofit organizations that generated a profit in a financial sense, even though that profit was dedicated to the organization's purposes and not available to any owners.[15] The Tariff Act of 1913 did not include a "for profit" requirement, however, which the Chamber cited as the reason for its request.[16]

Second, the Chamber only asked that an exemption be added for "commercial organizations not organized for profit" (which presumably would include the Chamber and similar organizations), although a second commentator that otherwise repeated the Chamber's comments proposed an exemption for "*civic or* commercial organizations not organized for profit" (emphasis added).[17] The language Congress ulti-

---

Print 1913) [hereinafter BRIEFS AND STATEMENTS] (statement of Elliot H. Goodwin, General Secretary, Chamber of Commerce of the United States of America).

13. *See* Act of Aug. 5, 1909, ch. 6, § 38, 36 Stat. 11, 112 ("[E]very corporation, joint stock company or association, *organized for profit* and having a capital stock represented by shares . . . shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation . . . ." (emphasis added)). The Supreme Court upheld the constitutional validity of this tax in *Flint v. Stone Tracy Co.*, 220 U.S. 107 (1911).

14. Revenue Act of 1894, ch. 349, § 32, 28 Stat. 509, 556 ("[T]here shall be assessed, levied, and collected . . . a tax . . . on . . . all other corporations, companies, or associations *doing business for profit*. . . ." (emphasis added)). The Supreme Court declared this version of the income tax unconstitutional in 1895, which led to the adoption of the Sixteenth Amendment in 1913. *See* Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895).

15. *See* 44 CONG. REC. 4151 (daily ed. July 6, 1909) (statement of Sen. Bacon); Harvey P. Dale, The Crux of Charity: Inurement, Private Benefit, and Excess Benefit Transactions 2-5 (Oct. 28, 2004) (unpublished manuscript), https://ncpl.law.nyu.edu/wp-content/uploads/pdfs/2004/Conf2004_Dale_DRAFT.pdf (describing relevant legislative history); *supra* notes 13-14.

16. *See* BRIEFS AND STATEMENTS, *supra* note 12 (statement of Elliot H. Goodwin, General Secretary, Chamber of Commerce of the United States of America).

17. *See* BRIEFS AND STATEMENTS, *supra* note 12, at 2002 (statement of Elliot H. Goodwin, General Secretary, Chamber of Commerce of the United States of America); *id.* at 2040 (statement of Charles L. Criss, Secretary, American Warehousemen's Association (Inc.)).

mately adopted was broader than both requests, however, providing an exemption for "any civic league or organization not organized for profit, but operated exclusively for the promotion of social welfare," as well as for "business leagues," "chambers of commerce," and "boards of trade."[18] This was the case even though some members of Congress took the position that the use of the term "net income" in the relevant provision of the Tariff Act of 1913 necessarily exempted all organizations not doing business for or acquiring profit.[19]

Further historical research indicates that this language was even broader than it may appear to a modern reader. In the late 1800s and early 1900s, the term "civic league" was commonly associated with politically active organizations that generally pursued what would be characterized today as "good government" and progressive causes, including prison reform and women's suffrage, which do not appear to have been the focus or even within the scope of the Chamber's request.[20] The political activity of such civic leagues included in at least some instances evaluating candidates for election to public office.[21]

The creation by Congress of a separate exemption for "any civic league or organization," in addition to an exemption for "chambers of commerce" and similar commercial nonprofit organizations, therefore significantly broadened the range of nonprofits exempted from the new federal income tax.[22] While the addition of "operated exclusively for the promotion of social welfare" is a limiting factor on the "any civic league or organization" exemption, there does not appear to have been a commonly used or accepted legal definition of "social welfare" at the time. The only relevant legal authority appears to be a New Jersey state court decision concluding that the term was broader than

18. *See supra* notes 3 and 10.

19. *See* 50 CONG. REC. 1306 (daily ed. May 7, 1913) (statement of Rep. Cordell Hull); Boris I. Bittker & George K. Rahdert, *The Exemption of Nonprofit Organizations from Federal Income Taxation*, 85 YALE L.J. 299, 303 (1976) (citing *id.*).

20. *See, e.g.*, Webster Wheelock, *Recent Municipal Progress in St. Paul*, 3 MUN. AFF. 491, 499-500 (1899) (describing the newly created Civic League in St. Paul, Minnesota); Franklin H. Giddings, *Sociological Notes*, 14 ANNALS AM. ACAD. POL. & SOC. SCI. 148, 154 (1899) (describing the creation of the Massachusetts Civic League); *History*, WOMAN'S CIVIC LEAGUE OF PASADENA, http://wclpasadena.org/?page_id=36 (last visited Feb. 6, 2019) (describing founding in 1911); *see also* Philip T. Hackney, *A Response to Professor Leff's Tax Planning "Olive Branch" for Marijuana Dealers*, 99 IOWA L. REV. BULL. 25, 28 n.15 (2013) (discussing "civic leagues" as they existed in the early 1900s).

21. *See, e.g.*, *Ex parte* Harrison, 212 Mo. 88 (1908) (involving the Kansas City Civic League "formed for the purpose of investigating the character, fitness or qualifications of candidates or nominees for public office").

22. *See supra* note 18.

"charitable" for purposes of determining whether a trust created to further social welfare failed as a charitable trust for indefiniteness.[23]

While far from definitive, this history indicates that the language now found in § 501(c)(4) was broad enough to encompass politically active organizations and a relatively wide range of "civic" organizations. As the Chamber highlighted, the elimination of the "for profit" requirement for corporations to be subject to the federal income tax created a perhaps unintended risk of imposing that tax on a broad range of existing nonprofit organizations, and Congress may have responded by enacting the broad and vague language that has now survived for more than 100 years. Thus, to the extent this exemption is too broad, a concern I will return to later, it arguably is the statutory language and not subsequent executive branch interpretations of that language that ultimately is at fault. The next part describes that breadth.

II.
THE MANY USES OF § 501(C)(4)

For fiscal year 2017, the IRS reported that there were 81,935 organizations that claimed tax-exempt status under § 501(c)(4).[24] In addition, a recent study by Jeremy Koulish, then with the Urban Institute, provides a broad analysis of the many different types of entities that claim this status.[25] Although both the IRS and Koulish numbers are not completely reliable (as Ellen Aprill details in her article), they likely are sufficient for purposes of getting a general sense of the relative proportion of the numbers and financial resources of various types of § 501(c)(4) organizations, and so I have relied on them in this article.[26] I also reviewed the largest 150 § 501(c)(4) organizations in terms of revenues and assets, as found in GuideStar, to identify promi-

23. *See* Livesey v. Jones, 55 35 A. 1064 (1896), *aff'd sub nom.* Chadwick v. Livesey, 41 A. 1115 (1897).

24. INTERNAL REVENUE SERV., 2017 DATA BOOK 57 (2018). This figure is similar to the 81,589 § 501(c)(4) organizations identified by Koulish based on the IRS Master Business File (June 2014) and the Urban Institute National Center for Charitable Statistics' Core File (2012). *See* KOULISH, *supra* note 5, at 6. It is also similar to the 80,226 current § 501(c)(4) organizations found in the GuideStar database. *See* GUIDESTAR, https://www.guidestar.org (last visited Feb. 6, 2019) (search for subsection 501(c)(4), with revoked and defunct or merged organizations excluded).

25. KOULISH, *supra* note 5.

26. *See* Ellen Aprill, *History and Policy: Mapping Social Welfare Organizations*, 21 N.Y.U. J. LEGIS. & PUB. POL'Y 345, 360-63 (2018).

nent examples of many of the types of entities that Koulish identified.[27]

While the media and academics have paid the most attention in recent years to politically active § 501(c)(4) organizations, such organizations represent well under ten percent of all § 501(c)(4) entities despite being a somewhat greater proportion of the larger § 501(c)(4) entities based on revenues.[28] The type of entity with the largest number of § 501(c)(4) organizations is community service clubs, constituting almost forty percent of § 501(c)(4) organizations and including the well-known Kiwanis, Lions, and Rotary clubs.[29] In terms of revenues, the largest concentration is found with the relatively small number of health maintenance organizations ("HMOs") and other prepaid medical plans, with the fewer than 500 such groups receiving almost three-quarters of the revenues for all § 501(c)(4) organizations.[30]

The focus of this Article is not on these relatively common and well known types of § 501(c)(4) entities, as other authors in this issue are covering them thoroughly. It is worth noting, however, that politically active § 501(c)(4) entities and community service clubs appear to fit within the original understanding of this exemption category, particularly given the existence in 1913 of both politically active "civic leagues" and Rotary clubs.[31] With respect to prepaid medical plans, their qualification under § 501(c)(4) was a twentieth-century development when it became evident that the IRS and courts would generally not allow them to qualify for exemption as charities under § 501(c)(3), as discussed in Ellen Aprill's article.[32]

Instead, this Article's focus is on the many more obscure uses of § 501(c)(4), including for organizations that generally benefit a group or engage in activities that do not allow them to qualify for exemption under any other available Code provision (including such organiza-

27. *See* GUIDESTAR, https://www.guidestar.org (last visited Feb. 6, 2019) (search for subsection 501(c)(4), with revoked and defunct or merged organizations excluded, sorted by gross receipts or assets).

28. KOULISH, *supra* note 5, at 24.

29. *Id.* at 6, 7 (finding 31,811 (39.0%) community service clubs).

30. *Id.* at 6 (finding that 459 (0.6%) health providers and insurers make up $63 billion (72.5%) in revenue).

31. *See* JEFFREY A. CHARLES, SERVICE CLUBS IN AMERICAN SOCIETY: ROTARY, KIWANIS, AND LIONS 9 (1993); *supra* notes 20-21 and accompanying text (discussing civic leagues). Kiwanis clubs and Lions clubs began shortly after 1913. CHARLES, *supra*, at 10.

32. *See, e.g.*, IHC Health Plans v. Comm'r, 325 F.3d 1188 (10th Cir. 2003); Geisinger Health Plan v. Comm'r, 985 F.2d 1210 (3d Cir. 1993); Aprill, *supra* note 26, at 380-83. *But see* Sound Health Ass'n v. Comm'r, 71 T.C. 158, 191 (1978) (finding that "staff model" HMO qualified for exemption under § 501(c)(3)), *acq.*, 1981-2 C.B. 2.

tions that are part of a network of related entities that fall within a variety of exemption categories), organizations that appear to be able to qualify for exemption under § 501(c)(3) but for some reason—that is not always apparent—have chosen not to do so, and organizations that appear to better fit another exemption category (other than § 501(c)(3)) but have chosen—again for reasons that are not always apparent—to claim exemption under § 501(c)(4). The descriptive issues raised by such uses include how widespread they are, how they developed, and whether they actually qualify for exemption under current § 501(c)(4). The third part of this Article will then address whether any of these uses are unwise in some fashion that argues for changes either to the interpretation or to the language of § 501(c)(4) to prevent such organizations from qualifying for exemption under this (or perhaps any) Code provision.

A. Non-Charitable Community Benefit Organizations (Exclusively § 501(c)(4) Organizations)

Perhaps the least surprising use of § 501(c)(4) is by organizations that either benefit a community that is too limited to qualify the organization for exemption as a charity under § 501(c)(3) but broad enough to qualify for exemption as a social welfare organization under § 501(c)(4), or engage in activities that go beyond those allowed for § 501(c)(3) organizations but not beyond those allowed for § 501(c)(4) organizations.[33] As Ellen Aprill details in her article, for not only community service clubs and prepaid medical plans but also low-income housing organizations, sports and recreation groups, and homeowners, tenants, neighborhood, and community associations, § 501(c)(4) helps the IRS to safeguard the limits of § 501(c)(3) by providing such organizations with a tax-exempt alternative if they are unable to satisfy the requirements of § 501(c)(3) (as interpreted by the IRS and the courts).[34] Similarly, Roger Colinvaux, Rosemary Fei, and Eric Gorovitz detail in their articles how § 501(c)(4) allows more political and lobbying activities than § 501(c)(3) does and so provides an exemption for organizations engaged in a level of those activities that disqualifies them from exemption under § 501(c)(3).[35] Of course,

33. *See* Aprill, *supra* note 26, at 368-75.

34. *See* Aprill, *supra* note 26, at 375-79.

35. *See* Roger Colinvaux, *Social Welfare and Political Organizations: Ending the Plague of Inconsistency*, 21 N.Y.U. J. LEGIS. & PUB. POL'Y 337, 481 (2018); Rosemary E. Fei & Eric K. Gorovitz, *Practitioner Perspectives on Using § 501(c)(4) Organizations for Charitable Lobbying: Realities and An Alternative*, 21 N.Y.U. J. LEGIS. & PUB. POL'Y 337, 535 (2018).

§ 501(c)(4) status comes with certain downsides as compared to § 501(c)(3) status in exchange for these more relaxed requirements for exemption, including the downside of donors not being able to deduct their gifts as charitable contributions.[36]

Setting aside organizations that may better fit into an exemption category other than § 501(c)(3) and § 501(c)(4), which are discussed in the third section of this Part II, approximately fifty-eight percent of existing § 501(c)(4) organizations are in this group of non-charitable community benefit organizations, according to the Koulish report.[37] In addition, probably a significant portion of the approximately twenty-eight percent of § 501(c)(4) entities that Koulish characterizes as "Other" organizations also fall within this group.[38] There are four specific types of such organizations that are worth considering here: (1) organizations that perform activities that make § 501(c)(4) their only available exemption category but do so as part of a network of related organizations that fall within a variety of exemption categories; (2) animal-related organizations; (3) gaming organizations; and (4) organizations that are relatively uncommon but collectively may represent a significant part of the § 501(c)(4) universe.

1. Networks of Organizations

As Roger Colinvaux, Rosemary Fei, and Eric Gorovitz detail elsewhere in this issue, the most well-known use of § 501(c)(4) organizations as part of a network of tax-exempt organizations is to house lobbying and political activities that either are not compatible with the exempt status of other organizations within the network or would be subject to undesirable requirements (for example, the public disclosure of most donors requirement for § 527 political organizations) if conducted through another type of tax-exempt entity.[39] Indeed, this use of § 501(c)(4) is widespread enough to have led the IRS to develop inter-

36. *See* I.R.C. § 170(c) (2012) (listing entities eligible to receive tax deductible charitable contributions, which do not include social welfare organizations).

37. *See* KOULISH, *supra* note 5, at 6 (finding 31,811 (39.0%) community service clubs, 459 (0.6%) health providers and insurers, 5,695 (7.0%) homeowner, tenant, neighborhood, and community associations, 978 (1.2%) housing communities and developments, and 8,265 sports and recreation groups (10.1%)).

38. *See* KOULISH, *supra* note 5, at 6, 16 (listing the types of organizations classified as "Other").

39. *See* Colinvaux, *supra* note 35, at 486-91; Fei & Gorovitz, *supra* note 35, at 560 [Part 3]; *see also* B. HOLLY SCHADLER, THE CONNECTION: STRATEGIES FOR CREATING AND OPERATING 501(C)(3)S, 501(C)(4)S AND POLITICAL ORGANIZATIONS 3 (4th ed. 2018), *https://bolderadvocacy.org/resource/the-connection-strategies-for-creating-and-operating-501c3s-501c4s-and-political-organizations*; Miriam Galston, *Campaign Speech and Contextual Analysis*, 6 FIRST AMEND. L. REV. 100, 119 (2007).

nal training materials discussing the permissible roles and relationships of organizations involved in such networks.[40] These networks can be quite extensive; for example, the national NAACP and a couple of its affiliates are § 501(c)(3) organizations, but its many local bodies are § 501(c)(4) organizations.[41]

The creation of such networks of tax-exempt organizations, including one or more § 501(c)(4) organizations, is not limited to the political context, however. For example, and as discussed further in the next section, the § 501(c)(4) American Kennel Club has affiliated § 501(c)(3) organizations that each engage in a narrower set of activities than the Club itself, permitting them to qualify for § 501(c)(3) status and the additional benefits it provides (including, probably most importantly, deductibility of contributions for donors).[42] Similarly, the § 501(c)(4) AARP has four related § 501(c)(3) organizations that engage in activities such as helping persons over fifty years old who are at social and economic risk, providing free or low cost legal assistance and education to the elderly in D.C., and engaging adults over fifty years old as mentors to school children, as well as a § 501(c)(4) affiliate that holds certain group health insurance policies.[43] The parent organizations for the three major community service club networks (Kiwanis, Lions, Rotary) all have one or more related § 501(c)(3) organizations.[44]

The existence of one or more § 501(c)(4) organizations within such networks therefore permits the allocation of activities to the type of tax-exempt organization best suited for each activity. It also per-

40. *See* Ward L. Thomas & Judith E. Kindell, *Affiliations Among Political, Lobbying and Educational Organizations*, *in* EXEMPT ORGANIZATIONS: CONTINUING PROFESSIONAL TECHNICAL INSTRUCTION PROGRAM FOR FISCAL YEAR 2000, at 255 (1999), http://www.irs.gov/pub/irs-tege/eotopics00.pdf.

41. *See* NAACP, 2015 Form 990, Sch. R, Pt. II (2016) (listing two related § 501(c)(3) organizations); Mark Hrywna, *NAACP Picks New CEO, Plans to Create (c)(4) Organization*, NONPROFIT TIMES (Oct. 23, 2017), http://www.thenonprofittimes.com/news-articles/naacp-picks-new-ceo-plans-to-create-c4-organization/.

42. *See infra* notes 48-52 and accompanying text.

43. *See* AARP, 2016 Form 990, Sch. R, Pt. II (2017) (listing these affiliates and listing entities that are disregarded as separate entities for federal tax purposes and related taxable entities); GRANTTHORNTON, AARP CONSOLIDATED FINANCIAL STATEMENTS TOGETHER WITH REPORT OF INDEPENDENT CERTIFIED PUBLIC ACCOUNTANTS, DECEMBER 31, 2016 AND 2015, at 7-8, https://www.aarp.org/content/dam/aarp/about_aarp/about_us/2017/2016-financial-statements-AARP.pdf.

44. *See* Kiwanis International Inc., 2015 Form 990, Sch. R, Pt. II (2017) (listing two related § 501(c)(3) organizations, one for youth education and another for fundraising, as well as a related § 501(c)(4) youth education affiliate); The International Association of Lions Clubs, 2015 Form 990, Sch. R, Pt. II (2017) (listing a related § 501(c)(3) "humanitarian foundation"); Rotary International, 2015 Form 990, Sch. R, Pt. II (2017) (listing a related § 501(c)(3) organization).

mits, to the extent compatible with each organization's exemption category, the sharing of resources, such as facilities and staff (thereby taking advantage of economies of scale), the provision of financial or other support between organizations as needed (including in the form of grants and loans), and certain joint activities, such as fundraising, website operations, and mailing lists.[45] For example, the AARP reports numerous financial transactions between its related organizations, including grants, the sharing of in-kind services and rent, and the sharing of the costs of certain employees.[46] Of course, maintaining multiple organizations and ensuring appropriate financial and legal relationships between them has its own costs and therefore such networks are likely primarily used by relatively well-resourced organizations, for which the benefits provided by such a network outweigh the administrative costs.[47]

2. Animal-Related Organizations

The § 501(c)(4) American Kennel Club ("AKC") is "a purebred dog registry dedicated to promoting the sport of purebred dogs, responsible dog breeding, canine health and well-being, and the rights of all dog owners" with over $60 million in revenue for 2015 (including revenue received by its 623 member clubs).[48] The breadth of that mission is in contrast to the more limited mission of the § 501(c)(3) AKC Canine Health Foundation "to fund, advance, and communicate canine health research,"[49] and AKC's two related § 501(c)(3) affiliates, the AKC Companion Animal Recovery and the AKC Humane Fund Inc.[50] While not completely clear, the dividing line between § 501(c)(3) animal-related nonprofits and their § 501(c)(4) counterparts appears to be based on the language of the former with respect to animals ("prevention of cruelty to . . . animals") and the limitation of "educational"

45. *See* SCHADLER, *supra* note 39, at 39-54 (detailing permissible resource sharing, financial transactions, and joint activities between § 501(c)(3) organizations and related § 501(c)(4) organizations).

46. *See* AARP, 2016 Form 990, Sch. R, Pt. V (2017).

47. *See* SCHADLER, *supra* note 39, at 1 (creating new entities entails costs and administrative burdens that may not make doing so the best strategy for every nonprofit organization).

48. American Kennel Club, Inc., 2015 Form 990, at 1, Sch. D & Sch. O (2016).

49. American Kennel Club Canine Health Foundation, 2015 Form 990, at 1 (2016).

50. *See supra* note 48 at Sch. R, Pt. II (also listing a related § 527 political organization, the American Kennel Club PAC); American Kennel Club Companion Recovery Corporation 2015 Form 990, at 1 (2016) ("American Kennel Club Companion Animal Recovery's . . . mission is to reunite lost pets with their owners."); The AKC Humane Fund Inc. 2015 Form 990, at 1 (2016) ("the AKC Humane Fund's mission is to unite a broad spectrum of animal . . . lovers in promoting the joy and value of responsible pet ownership through education, outreach & grant-making.").

purposes under § 501(c)(3) to human beings.[51] For example, the United States Tax Court upheld the denial of exemption under § 501(c)(3) to an organization involving dog training based on its conclusion that "educational," as used in § 501(c)(3), is limited to educating human beings, not (other) animals, and its rejection of the argument that such training is as much or more about educating the dog owners as it is about educating the dogs.[52]

The AKC is far from alone. A GuideStar search reveals there are at least nine hundred animal-related § 501(c)(4) organizations, including not only dog-, cat-, and horse-focused organizations but also safari clubs and advocacy groups such as the Humane Society Legislative Fund.[53] While there is no court or other precedential ruling specifically addressing the qualification of such organizations for § 501(c)(4) status, the IRS held in a Technical Advice Memorandum that an organization established to increase interest in a specific type of animal commonly owned as pets, to improve the breeds of that animal, and to hold an annual show for that animal qualified for exemption under § 501(c)(4),[54] even though in the same year the IRS also ruled against § 501(c)(4) status for an organization with the primary activity of a dog show.[55] The fatal flaw with the latter organization, however, may have been that the manner in which it operated its dog show resulted in it too closely resembling a for-profit activity.

---

51. *See* I.R.C. § 501(c)(3) (2012).

52. Ann Arbor Dog Training Club v. Comm'r, 74 T.C. 207, 211-12 (1980); *see also* Rev. Rul. 71-421, 1971-2 C.B. 229 (same conclusion).

53. GUIDESTAR, https://www.guidestar.org/Home.aspx (last visited Feb. 2, 2019) (finding 937 results in a search for NTEE category D (animal related) and subsection 501(c)(4), with revoked and defunct or merged organizations excluded) (Mar. 2, 2018). This figure may be low both because there are not NTEE categories assigned to all § 501(c)(4) organizations and because some animal-related § 501(c)(4) organizations may be classified under a different NTEE category; for example, the Westminster Kennel Club is classified under NTEE category N (recreation, sports, leisure, athletics) instead. At the same time, this search captures some organizations that do seem to fit in this set of entities; for example, for some reason its results included the (apparently inactive) Beardsley Fireman's Relief Association. Finally, GuideStar lists about half of these organizations as having no current gross receipts or assets.

54. I.R.S. Tech. Adv. Mem. 98-05-001 (Oct. 7, 1997).

55. I.R.S. NSAR 0243R, 1997 WL 33810412 (finding organization does not qualify for exemption under § 501(c)(4) because it its primary activity is "conducting dog shows"). The only other arguably relevant IRS ruling is Rev. Rul. 67-293, 1967-2 C.B. 185, but in that ruling the organization was focused on preventing cruelty to animals, a purpose that would have qualified it for § 501(c)(3) status except that it attempted to influence legislation as a substantial part of its activities and so instead qualified under § 501(c)(4).

3. Gaming Organizations

A possibly unique state statute has led to the creation of two large gaming organizations in Iowa with ties to local governments and § 501(c)(4) status.[56] Iowa law provides that "[a] qualified sponsoring organization licensed to operate gambling games . . . shall distribute the [net] receipts of all gambling games . . . as winnings to players or participants or shall distribute the receipts for educational, civic, public, charitable, patriotic, or religious uses."[57] These organizations have therefore claimed § 501(c)(4) status, apparently based on this provision, along with their role in "providing a source of recreation for the community, and providing a generally positive economic impact."[58]

The IRS did, however, recently question the § 501(c)(4) status of at least the largest of these two organizations. In 2016, the Prairie Meadows Race Track and Casino had to fight off an IRS-proposed revocation of its tax-exempt status.[59] According to press reports, the state law requirement relating to distributions appears to have been critical to the favorable result for the organization.[60] While the other such entity, the Dubuque Racing Association, does not appear to have faced a similar challenge, it likely would have if the IRS had successfully revoked Prairie Meadows' tax-exempt status.

4. Other, Relatively Uncommon, Organizations

Finally, there is a hodgepodge of other relatively uncommon nonprofit entities that have found a home under § 501(c)(4) and that likely would not qualify under any other exemption category. These nonprofit entities include local associations of employees, which Congress specifically placed under § 501(c)(4) in 1924,[61] inaugural committees, such as the 58th Presidential Inaugural Committee formed to support the inaugural activities of President Trump and Vice President

56. *See* Jason Clayworth, *Prairie Meadows Can Keep Its Tax-Exempt Status, IRS Says*, DES MOINES REGISTER (Dec. 21, 2016, 7:07 PM), https://www.desmoinesregister.com/story/news/investigations/2016/12/21/prairie-meadows-can-keep-its-tax-exempt-status-irs-says/95718368/ (identifying these organizations as "the only casinos in the nation organized under 501(c)(4)").

57. IOWA CODE ANN. § 99F.6(f)(a)(2) (West 2018).

58. Prairie Meadows Race Track and Casino Inc., 2015 Form 990, at 2 (2016); *see also* Dubuque Racing Association, Ltd., 2015 Form 990, at 2 (2016) (describing the organization's mission as "operation of a casino gaming facility with profits distributed to the City of Dubuque and local nonprofit organizations to lessen the burden of government and promote social welfare").

59. Clayworth, *supra* note 56.

60. *Id.*

61. *See supra* note 4 and accompanying text.

Pence,[62] and foreign organizations, such as the Switzerland-based FH Association (associated with the § 501(c)(3) Food for the Hungry and the § 501(c)(3) Food for the Hungry Foundation).[63] The rarity and variety of these entities makes it hard to make any generalizations regarding them, other than to observe that they further illustrate § 501(c)(4)'s catchall nature.

B. Possible Charities

A perhaps more surprising, or at least less well-known, use of § 501(c)(4) is as a basis for exemption by organizations that almost certainly could also qualify for exemption under § 501(c)(3). It is often not clear why such organizations have chosen exemption under § 501(c)(4) as opposed to under the generally more beneficial § 501(c)(3), although as detailed in this Section, there are indications of the likely motivations in some instances.

It appears the most common types of organizations in this group are § 501(c)(4) entities that engage in activities generally associated with government agencies and that often, although not always, have close ties to local governments. As detailed in the first three sub-sections below, this category includes organizations involved in economic, housing, or other development activities, public safety-related entities, and municipal financing vehicles. While not always clear, at least two reasons suggest why these types of groups might not choose § 501(c)(3) status. One is that on closer examination, the organization cannot in fact qualify for exemption under § 501(c)(3) because it is not sufficiently lessening the burdens of government and does not otherwise fit within that section. The other is that the organization could qualify for exemption under § 501(c)(3) but found § 501(c)(4) to be the more attractive option. For example, § 501(c)(4) might be more attractive because, unlike § 501(c)(3), it does not usually require the filing of an exemption application (and even if an application is filed under § 501(c)(4) that application may receive less scrutiny from the

62. *See* 58th Presidential Inaugural Committee 2016 Form 990, at 1 (2017); *see also* I.R.S. Gen. Counsel Mem. 39,867 (Dec. 18, 1991), 1991 WL 538822 (concluding that an inaugural committee for a state governor did not qualify for exemption under § 501(c)(3)).

63. *See, e.g.*, FH Association, 2015 Form 990, at 1 & Sch. R, Pt. II (2016); CAPIN-CROUSE, FOOD FOR THE HUNGRY CONSOLIDATED FINANCIAL STATEMENTS WITH INDEPENDENT AUDITORS' REPORT, SEPTEMBER 30, 2016, at 7, https://www.fh.org/wp-content/uploads/2017/03/FH_2016_FS.pdf. These foreign organizations include also grantmaking foreign organizations discussed in David Miller's article. *See* David S. Miller, *Social Welfare Organizations as Grantmakers*, 21 N.Y.U. J. LEGIS. & PUB. POL'Y 413, 422-27 (2018).

IRS than a § 501(c)(3) application does) and because the organization did not need the benefits of § 501(c)(3) status, such as deductibility of contributions.[64] Other possible motivations are a desire to avoid the political and lobbying activity limits or the private inurement prohibition imposed by § 501(c)(3), although the latter now also applies to § 501(c)(4) organizations.[65] Publicly available information on these organizations, however, does not generally indicate significant political or lobbying activity or possible private inurement.

It should be noted that such government-related entities might also be thought to be eligible for exemption from federal income tax as an integral part of a state or political subdivision, though this would not be the case if the organization was not affiliated closely enough.[66] And while organizations that qualify as an integral part of a state or local government are not eligible for exemption under any paragraph of § 501(c) because they are not considered a separate entity from that government,[67] such qualification is often uncertain, so an organization might choose to claim § 501(c)(4) status as insurance in case the IRS concluded it did not qualify as an integral part of a government.[68] Similarly, a government-related organization might not qualify for exemption under Code § 115, relating to income of states and municipalities, either because its income is not derived from a public utility or the exercise of an essential governmental function or because its income does not accrue to a state or political subdivision thereof.[69] Such

64. The two exceptions to the voluntary nature of filings by organizations claiming exemption under § 501(c)(4) are for credit counseling organizations, which are required to file an exemption application if they are claiming either § 501(c)(3) or § 501(c)(4) status, and for § 501(c)(4) organizations formed after December 17, 2015, which are required to file a notice with the IRS (but not an exemption application). *See* I.R.C. §§ 501(q)(3), 506 (2012).

65. *See* Colinvaux, *supra* note 35, at 509 (political activity limit); Fei & Gorovitz, *supra* note 35, at 539-41 (lobbying limit); *supra* note 2 and accompanying text (addition of private inurement prohibition to I.R.C. § 501(c)(4) (2015), § 1311(b)(1), 110 Stat. 1452, 1477-78 (1996).

66. *See generally* Ellen Aprill, *The Integral, the Essential, and the Instrumental: Federal Income Tax Treatment of Governmental Affiliates*, 23 J. CORP. L. 803, 810 (1998); Richard A. McCray, Sr. & Marvin Friedlander, *Organizations Closely Affiliated with State or Indian Tribal Governments Reference Guide*, *in* EXEMPT ORGANIZATIONS: CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM FOR FISCAL YEAR 2004 (2003), https://www.irs.gov/pub/irs-tege/eotopich04.pdf. The closeness of affiliation required to be considered an integral part is not completely certain, but the IRS generally requires significant control of the organization by the relevant government and, more recently, a significant financial commitment on the part of the government to the organization. Aprill, *supra*, at 813.

67. *See* Treas. Reg. § 301.7701-1(a)(3) (2016); McCray & Friedlander, *supra* note 66, at 9.

68. *See* Aprill, *supra* note 66, at 810-14.

69. *See* I.R.C. § 115 (2012); *see* Aprill, *supra* note 66, at 814-19.

an organization could qualify for exemption under § 115, but obtaining a favorable § 501(c)(4) determination letter may be easier and less costly than obtaining the private letter ruling necessary to confirm § 115 status.[70]

In addition to government-related organizations, there are a number of other § 501(c)(4) organizations that appear to qualify as charities under § 501(c)(3) but that have not chosen that classification, including some relatively large organizations financially. The reasons for this choice are often not evident, although for some of these organizations one likely motivation is avoidance of the relatively restrictive rules that apply to private foundations. The last portion of this section discusses this sub-group and makes some educated guesses as to why they have made this choice.

1. Economic, Housing, and Other Development

The largest of the economic, housing, and other development § 501(c)(4) organizations appears to be the Los Angeles LOMOD Corporation ("LOMOD"), which in 2015 had annual revenues and expenses of over $400 million relating to its mission to "support housing needs for low income families."[71] According to its website, LOMOD manages Section 8 housing projects in Southern California, with over 47,000 units of affordable housing.[72] The Housing Authority of the City of Los Angeles, a public housing authority and related § 501(c)(3) organization (according to LOMOD's Form 990), founded the organization in 1973.[73] Another prominent housing development example is Phipps Houses, which began through a state legislative action in 1905 and currently is "the oldest and largest not-for-profit developer, owner, and manager of affordable housing in New York

70. *See* McCray & Friedlander, *supra* note 66, at 3 (noting that a private letter ruling may be requested regarding whether income is excluded from federal tax under I.R.C. § 115). While the IRS will not charge a § 115 organization to issue a "governmental information letter" confirming its exemption and ability to receive deductible contributions (under I.R.C. § 170(c)(1)), it may still be costly to prepare the request for such a letter. *See Governmental Information Letter*, INTERNAL REVENUE SERV., https://www.irs.gov/government-entities/federal-state-local-governments/governmental-information-letter (last updated Feb. 13, 2018).

71. *See* Los Angeles LOMOD Corporation, 2015 Form 990, at 2 (2016).

72. *About* L.A. LOMOD, L.A. LOMOD, http://www.lomod.org/AboutLOMOD/responsibilities.aspx (last visited Feb. 6, 2019). Section 8 refers to the Housing Choice Voucher Program that provides assistance to very low-income families. *See Housing Choice Voucher Program (Section 8)*, BENEFITS.GOV, https://www.benefits.gov/benefits/benefit-details/710 (last visited Feb. 6, 2019).

73. *See About* L.A. LOMOD, *supra* note 72; Los Angeles LOMOD Corporation, 2015 Form 990, Sch. R, Pt. 2 (2016).

City."[74] This organization may not be able to qualify under § 501(c)(3), however, because it builds housing for moderate-income families as well as low-income families, which may also explain why it has a § 501(c)(3) affiliate (Phipps Neighborhoods, Inc.) to provide educational and social services to residents of its housing.[75] A GuideStar search for § 501(c)(4) entities involved in housing-related activities for low or moderate income individuals indicates there are at least several hundred such organizations.[76]

Not all such organizations focus solely on housing. For example, the Maryland Economic Development Corporation describes itself as "an instrumentality of the State of Maryland created by the General Assembly to serve as a statewide economic development engine."[77] Similarly, JobsOhio is "a private non-profit corporation designed to drive job creation and new capital investment in Ohio through business attraction, retention, and expansion efforts."[78] For accounting purposes, it is considered a "component unit" of the State of Ohio, which means that the State of Ohio is financially accountable for it.[79] More globally, a GuideStar search reveals there are almost five hundred § 501(c)(4) organizations engaged in community improvement or capacity building with the term "economic" in their name or mission scattered across almost all 50 states.[80]

---

74. *Press Center*, PHIPPS HOUSES, http://www.phippsny.org/about/press-center/ (last visited Feb. 6, 2019).

75. *Housing*, PHIPPS HOUSES, http://www.phippsny.org/properties/housing/ (last visited Feb. 6, 2019); *Corporate Structure*, PHIPPS HOUSES, http://www.phippsny.org/about/corporate-structure/ (last visited Feb. 6, 2019).

76. GUIDESTAR, https://www.guidestar.org (last visited Feb. 6, 2019) (finding 432 results in a search for NTEE category L (housing, shelter), "income," and subsection 501(c)(4), with revoked and defunct or merged organizations excluded). In contrast to a number of the other searches, GuideStar reported no current gross receipts or assets for very few (less than three percent) of these organizations.

77. *About*, MD. ECON. DEV. CORP., http://medco-corp.com/at-a-glance/about/ (last visited Feb. 6, 2019).

78. *About Us Jobs Ohio*, JOBSOHIO, http://jobs-ohio.com/about-jobsohio/ (last visited Feb. 6, 2019).

79. *See* DELOITTE & TOUCHE LLP, JOBSOHIO FINANCIAL STATEMENTS JUNE 30, 2017 AND 2016, at 1 (2017), http://jobs-ohio.com/site/assets/files/2012/jobsohio_fy17_financial_statements_with_independent_auditor_report.pdf; GOVERNMENTAL ACCOUNTING STANDARDS BOARD (GASB), STATEMENT NO. 14: THE FINANCIAL REPORTING ENTITY, para. 20 (1991), https://www.gasb.org/jsp/GASB/Document_C/DocumentPage?cid=1176160030209&acceptedDisclaimer=true (defining a "component unit").

80. GUIDESTAR, https://www.guidestar.org (last visited Feb. 6, 2019) (finding 487 results in a search for "economic," NTEE category S (community improvement, capacity building), and subsection 501(c)(4), with revoked and defunct or merged organizations excluded). GuideStar lists approximately fifteen percent of these organizations as having no current gross receipts or assets.

In general, it appears that these organizations—whether focused on housing or economic development more generally—are neither sufficiently tied to state or local governments to qualify as integral parts of such governments nor perform an essential government function that would qualify their income for exemption under § 115. It is less clear, however, why such organizations have not sought exemption under § 501(c)(3) given that their close ties to such governments and activities arguably could qualify them for that status on the basis of lessening the burdens of government.[81] In addition, some of these organizations, particularly the housing-related ones, might be able to qualify because they are relieving the poor and distressed or underprivileged.[82]

In general, for an organization to qualify for § 501(c)(3) status on the first basis, a government must demonstrate that it considers the organization's activities to be its burden and the organization's activities must actually lessen the burdens of government.[83] The mere fact that the government sometimes undertakes the organization's activities or that a government official expresses approval of the organization is insufficient.[84] As the examples already cited illustrate, however, it appears that these development organizations often have the necessary connections to government—including often being founded by governments and those governments being financial accountable for the organizations—to meet the lessening the burdens of government standard. Again, some of these organizations might instead or in addition qualify based on the economic needs of the populations or communities they serve. In fact, similar GuideStar searches under § 501(c)(3) reveal that thousands of such organizations have qualified for exemption under that section, although it is unclear on what specific grounds.[85] That said, since these organizations that qualify for exemption under § 501(c)(4) tend to rely on government grants and fees (such as rents) as opposed to private donations, and they ap-

81. *See* Treas. Reg. § 1.501(c)(3)-1(d)(2) (as amended in 2017) (including "lessening of the burdens of Government" within the term "charitable" for purposes of § 501(c)(3)).

82. *See id.* (including "relief of the poor and distress or of the underprivileged" within the term "charitable" for purposes of § 501(c)(3)).

83. *See* Rev. Rul. 85-1, 1985-1 C.B. 177; Rev. Rul. 85-2, 1985-1 C.B. 178.

84. *See* Rev. Rul. 85-2, *supra* note 83.

85. GuideStar, https://www.guidestar.org (last visited Feb. 2, 2019) (finding 9,531 results in a search for NTEE category L (housing, shelter), "income," and subsection 501(c)(3) public charities, with revoked and defunct or merged organizations excluded, and 4,187 results found in a search for "economic," NTEE category S (community improvement, capacity building), and subsection 501(c)(3) public charities, with revoked and defunct or merged organizations excluded).

pear to be able to access tax-exempt bond financing through their affiliated governments, it may be that they do not need the advantages of § 501(c)(3) status and so instead have opted for the easier claim to § 501(c)(4) status.

2. *Public Safety*

There are over 5,000 § 501(c)(4) organizations identified as volunteer public safety organizations.[86] Based on a GuideStar search, over 4,000 of these groups are involved in fire protection and appear to be either volunteer fire departments or firemen relief associations (the latter of which provide benefits such as cash stipends and pension funds to paid or volunteer firefighters).[87] Their qualification for § 501(c)(4) status appears to stem from many states' intentional efforts to statutorily create a close enough relationship with local governments such that these organizations lessen the burdens of government.[88] These efforts were critical at least for relief associations because the IRS and courts had taken the position that relief associations for first responders generally did not qualify for such status, since their primary purpose was to provide financial security for their members, only incidentally promoting social welfare.[89]

As of 2015, there were over 800,000 volunteer firefighters in over 25,000 fire departments (almost 20,000 of which were all volunteer), generally serving smaller communities.[90] Many appear to qualify for exemption under § 501(c)(3), as a GuideStar search indicates there are over 9,000 organizations involved in fire prevention, protec-

86. KOULISH, *supra* note 5, at 6.

87. GUIDESTAR, https://www.guidestar.org (last visited Feb. 2, 2019) (finding 4,033 results in a search for NTEE Code M24 (fire prevention/protection/control) and subsection 501(c)(4), with revoked and defunct or merged organizations excluded). GuideStar lists approximately thirty percent of these organizations as having no current gross receipts or assets.

88. *See* Rev. Rul. 87-126, 1987-2 C.B. 150; Debra Cowen & Terry Berkovsky, *Volunteer Firefighters' Relief Organizations: A Second Look*, *in* EXEMPT ORGANIZATIONS: CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM FOR FISCAL YEAR 2000, at 105, 106-07 (1999), https://www.irs.gov/pub/irs-tege/eotopicg00.pdf; Sadie Copeland & Debra Cowen, *Volunteer Firefighters' Relief Organizations*, *in* EXEMPT ORGANIZATIONS: CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM FOR FISCAL YEAR 1996 (1995), https://www.irs.gov/pub/irs-tege/eotopicn96.pdf.

89. *See* Police Benevolent Ass'n v. United States, 661 F. Supp. 765, 768-69 (E.D. Va.), *aff'd per curiam*, 836 F.2d 547 (4th Cir. 1987); Rev. Rul. 81-58, 1981-1 C.B. 331.

90. *See* HYLTON J.G. HAYES & GARY P. STEIN, U.S. FIRE DEPARTMENT PROFILE—2015, at v (2017), http://www.nfpa.org/news-and-research/fire-statistics-and-reports/fire-statistics/the-fire-service/administration/us-fire-department-profile.

tion, and control that have successfully claimed that status.[91] There are a variety of reasons why such groups might not qualify or may have chosen not to qualify for that status but are still eligible for exemption under § 501(c)(4), such as having social activities as a significant although not primary purpose or wanting to avoid the burden of having to file the required application for § 501(c)(3) status.[92] As for the remaining volunteer fire departments, it seems likely that they qualify as integral parts of governments and so do not need to claim (and indeed cannot claim) exemption under § 501.[93]

As for relief associations, it is likely that they are declining in number over time because of the current availability of other exemption provisions for employee benefit plans under §§ 401(a) and 457(b). Possibly because of inertia, a number remain exempt under § 501(c)(4), however, with a GuideStar search for "pension" revealing close to two hundred such organizations.[94] A majority of them fall under the NTEE Code for fire prevention, protection, and control, indicating that they are associated with fire departments (both volunteer and paid).[95] The largest appears to be the Bloomington Fire Department Relief Association in Minnesota, with net assets of $155 million as of the end of 2016.[96]

3. Municipal Financing

Another type of "public sector" § 501(c)(4) organization comprises entities formed and controlled by municipalities to support the financing of government purchases. Such organizations appear to be

91. *See* GUIDESTAR, https://www.guidestar.org (last visited Feb. 2, 2019) (finding 9,335 results in a search for NTEE Code M24 (fire prevention/protection/control) and subsection 501(c)(3) public charities, with revoked and defunct or merged organizations excluded).

92. *See* Rev. Rul. 66-179, 1966-1 C.B. 139 (finding that a garden club that engages in social functions as a substantial but not primary activity qualifies for exemption under § 501(c)(4) but not under § 501(c)(3)).

93. *See supra* notes 66-67 and accompanying text.

94. GUIDESTAR, https://www.guidestar.org (last visited Feb. 2, 2019) (finding 185 results in a search for "pension" and subsection 501(c)(4), with revoked and defunct or merged organizations excluded). GuideStar lists approximately ten percent of these organizations as having no current gross receipts or assets.

95. GUIDESTAR, https://www.guidestar.org (last visited Feb. 2, 2019) (finding 111 results in a search for NTEE Code M24 (fire prevention/protection/control), "pension," and subsection 501(c)(4), with revoked and defunct or merged organizations excluded). GuideStar lists approximately five percent of these organizations as having no current gross receipts or assets.

96. Bloomington Fire Department Relief Association, 2016 Form 990, at 1 (2017).

concentrated in California for reasons that are unclear.[97] While in terms of numbers they appear to be relatively few—a couple hundred at most and likely significantly fewer because it was difficult to isolate such organizations from other types of § 501(c)(4) organizations—they are significant in terms of revenues and assets.[98] The largest municipal financing entity is the Municipal Improvement Corporation of Los Angeles, which, for the fiscal year ending June 30, 2016, reported over $63 million in revenue and over $2 billion in assets and liabilities,[99] and the organizations in Riverside, San Bernardino, Sacramento, and San Diego reported revenues in the tens of millions annually and assets and liabilities in the hundreds of millions.[100]

These organizations are closely enough related to governmental entities that they appear to be considered "component units" of those entities for accounting purposes because they operate exclusively for the benefit of the related governmental entity.[101] The board members of these entities also appear to generally be appointees of the related governmental entity.[102] Given these common characteristics, it appears these entities could qualify for exemption under § 501(c)(3) because they are lessening the burdens of government.[103] It is not clear

97. Based on a GuideStar search for "finance" and subsection 501(c)(4) and then reviewing the results for organizations of this type, the two such organizations of comparable size to the largest California such entities are both in Arizona, although there are several others scattered around the country. *See* City of Scottsdale Municipal Property Corporation, 2015 Form 990, at 1 (2017); City of Glendale Municipal Property Corp., 2015 Form 990, at 1 (2017).

98. *See* GUIDESTAR, https://www.guidestar.org (last visited Feb. 2, 2019) (finding 336 results in a search for "finance" and subsection 501(c)(4), with revoked and defunct or merged organizations excluded, but this includes a significant number of other types of § 501(c)(4) organizations).

99. *See* Municipal Improvement Corporation of Los Angeles, 2015 Form 990, at 1 (2017).

100. *See* County of Riverside Asset Leasing Corporation, 2015 Form 990, at 1 (2017); Inland Empire Public Facilities Corporation, 2015 Form 990, at 1 (2017) (located in San Bernardino County); Sacramento County Public Facilities Financing Corporation, 2015 Form 990, at 1 (2016); San Diego County Capital Asset Leasing Corporation, 2015 Form 990, at 1 (2016).

101. *E.g.*, MGO, MUNICIPAL IMPROVEMENT CORPORATION OF LOS ANGELES, FINANCIAL STATEMENTS: JUNE 30, 2016 AND 2015, at 1, 11 (2017), http://clkrep.lacity.org/onlinedocs/2017/17-0184_misc_2-16-17.pdf; *see* GASB, *supra* note 79. These entities also tend to list their relevant local governments as related tax-exempt organizations on their Forms 990. *E.g.*, Municipal Improvement Corporation of Los Angeles, 2015 Form 990, Sch. R, Pt. 2 (2017) (listing City of Los Angeles); County of Riverside Asset Leasing Corporation, 2015 Form 990, Sch. R, Pt. 2 (2017) (listing County of Riverside).

102. *E.g.*, Submittal from Kevin Jeffries, Supervisor, to Bd. of Supervisors, Cty. of Riverside, State of Calif. (June 13, 2017), http://rivcocob.org/proceeds/2017/p2017_06_13_files/02.02001.pdf.

103. *See supra* notes 83-84 and accompanying text.

why they have chosen § 501(c)(4) status instead, although as mentioned previously it may be that they did not need any of the advantages of § 501(c)(3) status and choosing § 501(c)(4) status allowed them either to avoid filing an application with the IRS or to receive easier and quicker approval of their application if they chose to file one. The apparent concentration of such entities in California may also indicate a state-specific reason, but if so, that reason is not apparent.

4. Other Charities on Their Face

There are a number of other § 501(c)(4) organizations, including several that are relatively large financially, that appear to be able to qualify for exemption under § 501(c)(3) but have chosen not to do so. For example, the $216 million Beaumont Foundation of America grew out of a settlement with Toshiba relating to alleged defects with its notebook computers and originally funded efforts to close the digital divide, although today it focuses on helping the poor and disenfranchised more generally.[104] Because of its lawsuit origins, Toshiba presumably did not need to (and likely could not) claim a charitable contribution deduction for its initial funding, although it probably was instead able to deduct that amount as a business expense, so there was no need for § 501(c)(3) status and the private foundation restrictions that would come with it. Similar reasons may explain why the $130 million, Commonwealth Edison-funded Illinois Clean Energy Community Foundation also is classified under § 501(c)(4), in that the Illinois Legislature conditioned approval of the sale by Commonwealth Edison of seven power plants on Commonwealth Edison creating and funding the foundation.[105] At least several such entities grew out of the conversions of Blue Cross entities from nonprofit to for-profit status, with § 501(c)(4) status perhaps being attractive to avoid the excess business holdings rule applicable to private foundations.[106]

104. *See* Kelly Holleran, *Toshiba 10 Years later: Formation of the Beaumont Foundation of America*, SE TEX. REC. (Nov. 2, 2009), https://setexasrecord.com/stories/510611807-toshiba-10-years-later-formation-of-the-beaumont-foundation-of-america; Beaumont Foundation of America, 2016 Form 990, at 1 (2017); BEAUMONT FOUND. OF AM., http://www.bmtfoundation.com/ (last visited Feb. 6, 2019).

105. *See* Ill. Clean Energy Cmty. Found. v. Filan, 392 F.3d 934, 935 (7th Cir. 2004); Illinois Clean Energy Community Foundation, 2016 Form 990, at 1 (2017); *About the Foundation*, ILL. CLEAN ENERGY CMTY. FOUND., https://www.illinoiscleanenergy.org/about-foundation (last visited Feb. 6, 2019).

106. *See* James Fishman, *Checkpoints on the Conversion Highway: Some Trouble Spots in the Conversion of Nonprofit Health Care Organizations to For-Profit Status*, 23 J. CORP. L. 701, 715 (1988) ("After the conversion three organizations may exist: in addition to the for-profit corporation and the foundation, a section 501(c)(4) organization may be created to receive and hold the stock for later sale and to remit the

More generally, and as David Miller details in his article, the likely motivation for domestic and international grant-making entities with a single funding source to choose § 501(c)(4) status even when they might also qualify under § 501(c)(3) is to avoid the private foundation restrictions while still obtaining exemption for their usually significant (United States) investment income.[107] At the same time, presumably these organizations do not need the benefits of § 501(c)(3) status, including the ability of donors to deduct their gifts as charitable contributions. This motivation may explain why, in addition to the examples already provided, organizations as varied as the Conference on Jewish Material Claims Against Germany,[108] the Mangrove Foundation (associated with Atlantic Philanthropies),[109] and the Rose Hills Foundation (created by the § 501(c)(13) Rose Hills Memorial Park)[110] are all exempt under § 501(c)(4) despite their activities' clearly charitable nature.

At least one other large § 501(c)(4) organization that likely could qualify under § 501(c)(3) is less easy to explain. Karing is a vehicle founded by Brown University to hold property and help develop an educational and research facility in a particular neighborhood in Providence, Rhode Island.[111] It may be that specific but not easily discoverable characteristics of this organization either make it ineligible for § 501(c)(3) status or make such status unnecessary. There probably

---

proceeds to the foundation."); L. Pitesa, *Regulatory Agency Action: Department of Corporations*, CAL. REG. L. REP., Winter 1995, at 105, 107 (attributing the choice to classify the California Healthcare Foundation as a § 501(c)(4) organization to the advantage of the Foundation being able to continue to own stock in the resulting for-profit entity); California Healthcare Foundation, 2015 Form 990 (2016); The Missouri Foundation for Health, 2015 Form 990 (2016); *About the Foundation*, MO. FOUND. FOR HEALTH, https://mffh.org/the-foundation/ (last visited Feb. 6, 2019).

107. Miller, *supra* note 63, at 434-35; *see, e.g.*, FINRA Investor Education Foundation, 2015 Form 990, at 1 (2016) (reporting $4.6 million in investment income out of $55.3 million in total annual revenue); *About Us*, FINRA INV. EDUC. FOUND., https://www.finrafoundation.org/about-us (last visited Feb. 6, 2019) (noting that the FINRA Investor Education Foundation was established by the § 501(c)(6) Financial Industry Regulatory Authority).

108. *See* Conference on Jewish Material Claims Against Germany, 2015 Form 990, at 1 (2015) (reporting $2.1 million in investment income out of $680.5 million in total annual revenue); *About Us*, CLAIMS CONF.: THE CONF. ON JEWISH MATERIAL CLAIMS AGAINST GERMANY, http://www.claimscon.org/about/ (last visited Feb. 6, 2019).

109. *See* The Mangrove Foundation, 2015 Form 990, at 1 (2016) (reporting $49.6 million in total annual revenue, all of which was investment income).

110. *See* The Rose Hills Foundation, 2016 Form 990, at 1, 9 (2017) (reporting $10.7 million in total annual revenue, all of which was investment income); *About the Foundation*, THE ROSE HILLS FOUND., http://www.rosehillsfoundation.org/TheFoundation.htm (last visited Feb. 6, 2019).

111. *See* Karing, 2016 Form 990 (2017); KPMG, BROWN UNIVERSITY FINANCIAL STATEMENTS JUNE 30, 2017 AND 2016, at 6 (2016).

are at least a handful of smaller organizations in similar situations, but short of reviewing information relating to every existing § 501(c)(4) individually, it is difficult, if not impossible, to identify such organizations.

C. Possible Other Exemption Categories

The last group of § 501(c)(4) organizations to consider are those that appear to better fit exemption categories other than § 501(c)(4) and § 501(c)(3). These include electric and water cooperatives given § 501(c)(12), veterans' organizations given § 501(c)(19), and homeowners associations given § 528.[112]

1. Electric and Water Cooperatives

A number of relatively large § 501(c)(4) organizations are associated with the provision of electricity and water. The largest is the National Rural Utilities Cooperative Finance Corporation, which provides financing to rural electric cooperatives and others to the tune of over a billion dollars in annual revenue and is organized as a cooperative.[113] Most of these entities, however, are cooperatives directly providing various communities with access to electricity and water, where the members of the organization serve as both its owners and its customers. A GuideStar search reveals slightly over a hundred § 501(c)(4) organizations classified as public utilities, with almost all appearing to be cooperatives involved in the delivery of electricity or water to various communities.[114] They also appear to have been sufficiently numerous (and politically influential) to have received a limited exemption to the private inurement prohibition added to § 501(c)(4) in 1996.[115] While this exemption applies to all § 501(c)(4)

112. *See* I.R.C. §§ 501(c)(12), 501(c)(19), 528 (2012).

113. *See* National Rural Utilities Cooperative Finance Corporation, 2015 Form 990, at 1 (2017); *Overview*, NAT'L RURAL UTILS. COOP. FIN. CORP., https://www.nrucfc.coop/content/cfc/about_cfc/overview.html (last visited Feb. 6, 2019). For this organization's description of its history, see generally PATRICIA LLOYD WILLIAMS, THE CFC STORY: HOW AMERICA'S RURAL ELECTRIC COOPERATIVES INTRODUCED WALL STREET TO MAIN STREET (1995).

114. GUIDESTAR, https://www.guidestar.org (last visited Feb. 2, 2019) (finding 111 results in a search for NTEE category W80 (public utilities), and subsection 501(c)(4), with revoked and defunct or merged organizations excluded). GuideStar lists approximately forty percent of these organizations as having no current gross receipts or assets.

115. *See* Taxpayer Bill of Rights 2, Pub. L. No. 104-168, § 1311(b)(2), 110 Stat. 1452, 1478 (1996) ("In the case of an organization operating on a cooperative basis which, before the date of the enactment of this Act, was determined by the Secretary of the Treasury or his delegate, to be described in section 501(c)(4) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such Code, the

organizations operating on a cooperative basis, outside of the utilities context, most organizations that function as cooperatives are not eligible for § 501(c)(4) status.[116]

These organizations are often formed under statutes specifically designed to support their creation. With respect to electricity generation and distribution, the relevant federal statute is the Rural Electrification Act of 1936, which created the Rural Electrification Administration ("REA") and authorized its Administrator's loans for rural electrification.[117] States then facilitated the creation of such entities through various state statutes, sometimes modeled on the Rural Electric Cooperative Act drafted by the REA.[118] Rural water cooperatives appear to have a similar history of government support through statutes to facilitate their creation and funding.[119]

Given their cooperative, membership structures, it is likely that these organizations would not qualify for exemption under § 501(c)(3) for similar reasons as prepaid medical plans.[120] In fact, most such cooperatives appear instead to be tax-exempt under § 501(c)(12), which provides specifically for "mutual or cooperative electric" companies and requires that such companies receive eighty-five percent of their income from their members to qualify for exemption.[121] According to the latest IRS Data Book there are over 5,000 organizations recognized as exempt under that paragraph, and a GuideStar search indi-

---

allocation or return of net margins or capital to the members of such organization in accordance with its incorporating statute and bylaws shall not be treated for purposes of such Code as the inurement of the net earnings of such organization to the benefit of any private shareholder or individual. The preceding sentence shall apply only if such statute and bylaws are substantially as such statute and bylaws were in existence on the date of the enactment of this Act.").

116. *See* Contracting Plumbers Coop. Restoration Corp. v. United States, 488 F.2d 684, 685 (2d Cir. 1973); Consumer-Farmer Milk Coop. v. Comm'r, 186 F.2d 68, 70 (2d Cir. 1950); Mutual Aid Ass'n of the Church of the Brethren v. United States, 578 F. Supp. 1451, 1457 (D. Kan. 1983), *aff'd*, 759 F.2d 792 (10th Cir. 1985). *But see* Rancho Santa Fe Ass'n v. United States, 589 F. Supp. 54, 55-57 (C.D. Cal. 1984) (finding that homeowners' association organized as a cooperative qualified for § 501(c)(4) status).

117. *See* Rural Electrification Act of 1936, 7 U.S.C. § 902 (2012).

118. *See* HARRY SLATTERY, RURAL AMERICA LIGHTS UP 45-47 (1940).

119. *See Research on the Economic Impact of Cooperatives*, UNIV OF WIS. CTR. FOR COOPS., http://reic.uwcc.wisc.edu/water/ (last visited Feb. 2, 2019).

120. *See* Aprill, *supra* note 26, at 380-83.

121. I.R.C. § 501(c)(12)(A), (C); *see generally* Michael Seto & Charyl Chasin, *General Survey of I.R.C. 501(c)(12) Cooperatives and Examination of Current Issues*, *in* EXEMPT ORGANIZATIONS: CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM FOR FISCAL YEAR 2002, at 175 (2001), https://www.irs.gov/pub/irs-tege/eotopice02.pdf; W.G. Beecher, Note, *Is It Time to Revoke the Tax-Exempt Status of Rural Electric Cooperatives?*, 5 WASH. & LEE J. ENERGY, CLIMATE, & ENV'T 221, 229 (2013).

cates that over 3,000 of them are involved in managing water systems and almost 900 of them are involved in managing electrical systems.[122] The very limited legislative history of § 501(c)(12), first enacted in 1916 and amended to lower the membership income requirement from 100% to 85% in 1924, indicates, but does not affirmatively state, that it was meant to be the exclusive exemption provision for such cooperatives.[123] Indeed, prior to 1916, but after the initial enactment of what is now § 501(c)(4), the Treasury Department held that cooperatives were generally subject to the federal income tax.[124]

It is unclear why a relatively small number of such cooperatives—slightly over a hundred, as noted previously—have instead chosen to be exempt under § 501(c)(4). One possibility is that they are not able to satisfy the eighty-five percent membership income requirement of § 501(c)(12).[125] The basis for the exemption of such entities under § 501(c)(4) can be found in a 1946 federal appellate court decision, which held that "[p]roviding electricity at low cost to citizens of a community, in some instances where electricity was not available before, is promoting social welfare."[126] The IRS subsequently ruled that an organization formed for the purpose of establishing and maintaining a system for the storage and distribution of water to increase underground water levels in a community also qualified for exemption under § 501(c)(4) because it was operating to benefit the entire community.[127] Despite these rulings, there is no acknowledgement in the four IRS internal training documents that have focused on coopera-

122. *See* INTERNAL REVENUE SERV., *supra* note 24, at 57; GUIDESTAR, https://www.guidestar.org (last visited Feb. 2, 2019) (finding 3,249 results in a search for "water" and subsection 501(c)(12), with revoked and defunct or merged organizations excluded; finding 869 results in a search for "electric" and subsection 501(c)(12), with revoked and defunct or merged organizations excluded).

123. *See* S. REP. NO. 68-398, at 29 (1924); 1 WALTER E. BARTON & CAROLL W. BROWNING, BARTON'S TAX LAWS CORRELATED: THE FEDERAL INCOME, ESTATE, AND GIFT LAWS FROM THE REVENUE ACT OF 1913 TO THE INTERNAL REVENUE CODE OF 1954 AS AMENDED 186-87 (2d ed. 1954) (showing first appearance of the predecessor to current § 501(c)(12) in the Revenue Act of 1916); Clayton S. Reynolds, *Tax-Exempt Electric Cooperatives: A Discussion of Issues Relating to the 85% Member Income Requirement*, 55 TAX LAW. 585, 585 & n.3, 588 (2002); Seto & Chasin, *supra* note 121, at 176.

124. HENRY CAMPBELL BLACK, A TREATISE ON FEDERAL TAXES INCLUDING THOSE IMPOSED BY THE WAR TAX ACT OF CONGRESS OF 1917, THE INCOME TAX LAW AS AMENDED, AND OTHER UNITED STATES INTERNAL REVENUE ACTS NOW IN FORCE § 136, at 162 (1918).

125. *See supra* note 121 and accompanying text.

126. Unites States v. Pickwick Elec. Membership Corp., 158 F.2d 272, 277 (6th Cir. 1946).

127. Rev. Rul. 66-148, 1966-1 C.B. 143.

tives or in the few scholarly articles regarding the tax treatment of such cooperatives that a number of such cooperatives have claimed exemption under § 501(c)(4).[128]

2. Veterans' Organizations

According to the Koulish report, there are over 6,000 military and veterans' organizations that have claimed tax-exempt status under § 501(c)(4).[129] This is somewhat surprising given that § 501(c)(19)'s exemption provision more specifically targets such organizations and that according to the latest IRS Data Book, there are almost 30,000 organizations recognized as exempt under that paragraph.[130] But this choice may be driven both by § 501(c)(19)'s relatively strict membership requirements[131] and by historical inertia, in that most veterans' groups claimed exemption under § 501(c)(4) before the 1972 enactment of § 501(c)(19) and some may simply never have bothered to switch exemption categories.[132]

Unlike the situation with electric and water cooperatives, there does not appear to be any indication that Congress viewed

128. *See* Seto & Chasin, *supra* note 121; Donna Moore & Robert Harper, *Internet Service Providers: Exempt Issues Under IRC 501(c)(3) and 501(c)(12)*, *in* EXEMPT ORGANIZATIONS: CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM FOR FISCAL YEAR 1999, at 55 (1998), https://www.irs.gov/pub/irs-tege/eotopicc99.pdf; Patrick K. Orzel & Edward K. Karcher, *Current Issues Affecting Certain Cooperatives and Like Organizations Described Under IRS 501(c)(12)*, *in* EXEMPT ORGANIZATIONS: CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM FOR FISCAL YEAR 1994 (1993), https://www.irs.gov/pub/irs-tege/eotopicd94.pdf; *Current Technical Issues: Electric Cooperatives and Cooperative Telephone Companies Described in IRC 501(c)(12)*, *in* EXEMPT ORGANIZATIONS: CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM FOR FISCAL YEAR 1980 (1979), https://www.irs.gov/pub/irs-tege/eotopici80.pdf; Reynolds, *supra* note 123; Beecher, *supra* note 121, at 228.

129. KOULISH, *supra* note 5, at 6 (finding 6,365 (7.8%) military and veterans' organizations); *see also* Reilly et al., *supra* note 11, at I-22 (describing how a veterans' organization may qualify under § 501(c)(4)).

130. *See* INTERNAL REVENUE SERV., *supra* note 24, at 57.

131. *See* I.R.C. § 501(c)(19)(B) (2012) (requiring the organization's membership to be composed of "at least 75 percent past or present members of the Armed Forces of the United States and substantially all of the other members of which [to be] individuals who are cadets or are spouses, widows, widowers, ancestors, or lineal descendants of past or present members of the Armed Forces of the United States or of cadets" to qualify for exemption).

132. *See* Weingarden v. Comm'r, 86 T.C. 669, 676-77 (1986), *rev'd on other grounds*, 825 F.3d 1027 (6th Cir. 1987); *Veterans' Organizations*, *in* EXEMPT ORGANIZATIONS: CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM FOR FISCAL YEAR 1986, at 1 (1985), https://www.irs.gov/pub/irs-tege/eotopicp86.pdf [hereinafter *Veterans' Organizations*].

§ 501(c)(19) as an exclusive category for veterans' organizations.[133] Rather, it appears that most veterans' organizations have voluntarily chosen that category because of the disadvantages of other available categories, particularly with respect to application of the unrelated business income tax.[134] The IRS has also generally been quite flexible when it comes to veterans' organizations, long holding that such organizations may qualify for exemption under a variety of provisions and not just § 501(c)(4) and § 501(c)(19).[135]

3. Homeowners' Associations

There is no IRS data publicly available regarding the number of organizations claiming exemption under § 528, as compared to the between 6,000 and 7,000 such entities that currently claim exemption under § 501(c)(4).[136] As detailed in Ellen Aprill's article, homeowners' associations and similar organizations formed by the owners or renters of residential property in a given geographic location sometimes have difficulty qualifying for exemption under even § 501(c)(4)'s relatively loose requirements.[137] This difficulty led Congress to enact § 528 for such entities—a provision that grants exemption for their membership dues, fees, and assessments but not for investment or other income (in contrast to § 501(c)(4)), subject to the association meeting certain membership income and expenditure requirements.[138] As this history indicates, Congress did not intend § 528 to be an exclusive provision for such organizations (unless they could not meet § 501(c)(4)'s requirements), as the IRS has acknowledged.[139]

---

133. *See Weingarden*, 86 T.C. at 680-81; S. REP. NO. 92-1082, at 2-3, 4-5 (1972) *as reprinted in* 1972 U.S.C.C.A.N. 3141, 3142-43, 3144-45.

134. *See* I.R.C. § 512(a)(4) (excluding certain premium payments relating to members or their dependents from unrelated business taxable income for § 501(c)(19) organizations); *Veterans' Organizations*, *supra* note 132, at 1-3.

135. *See* Rev. Rul. 66-150, 1966-1 C.B. 147 (finding that a veterans' organization's subsidiary that owned meeting space used by the parent veterans' organization qualified for exemption under § 501(c)(7)); INTERNAL REVENUE SERV., TAX GUIDE: VETERANS' ORGANIZATIONS 21-24 (2013) (describing how veterans' organizations may qualify under §§ 501(c)(8) and 501(c)(10)).

136. *See* KOULISH, *supra* note 5, at 6 (finding 5,695 (7.0%) homeowner, tenant, neighborhood, and community associations, and 978 (1.2%) housing communities and developments).

137. *See* Aprill, *supra* note 26, at 388-89.

138. *See* I.R.C. § 528; Aprill, *supra* note 26, at 389-90.

139. *See* Reilly et al., *supra* note 5, at I-1, I-12, I-20 to I-21, https://www.irs.gov/pub/irs-tege/eotopici03.pdf.

III.
Rethinking the Uses of § 501(c)(4) Organizations

The enormous variety of organizations that currently claim exemption from federal income tax under § 501(c)(4) naturally raises the concern mentioned previously that the "catchall" nature of this section may, at least in some situations, be inappropriate or undesirable as a policy matter. To determine whether and in what specific contexts this concern is valid requires understanding how § 501(c)(4) status differs from other possible tax classifications, the theory or theories generally justifying exemption under this section, and careful consideration of the many specific uses of this section previously identified.

A. Comparing and Contrasting § 501(c)(4) Status

If an organization qualifies under § 501(c)(4), it enjoys a broad exemption from federal tax on its net income with only two exceptions.[140] One exception is for unrelated business taxable income ("UBTI"), i.e., income that is from a regularly carried on trade or business that is not substantially related to the purpose or purposes that qualify the organization for exemption under § 501(c)(4), and that does not fall under any of the exceptions to UBTI.[141] UBTI also includes certain debt-financed income.[142] UBTI is usually subject to not only federal income tax but also state income tax.[143] The other exception is for the lesser of net investment income or amounts spent on influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any public office or office in a political organization.[144]

The breadth of the exemption for § 501(c)(4) organizations contrasts not only with the general taxability of net income for for-profit entities but also with the more limited exemption for certain other categories of tax-exempt organizations.[145] For example, § 501(c)(7) social clubs, § 501(c)(9) voluntary employees' beneficiary associations,

140. *See* I.R.C. § 501(a), (c)(4).
141. *See id.* §§ 511-513.
142. *See id.* § 514.
143. *See* Marianne Evans, Allison Hedges & Kathleen Zack, *State Taxation of Exempt Organizations' Unrelated Business Income*, Tax Adviser (June 1, 2013), https://www.thetaxadviser.com/issues/2013/jun/clinic-story-03.html; Bazil Facchina, Evan A. Showell, Jan E. Stone, *Privileges & Exemptions Enjoyed by Nonprofit Organizations*, 28 U.S.F. L. Rev. 85, 99 (1993).
144. *See* I.R.C. § 527(e), (f).
145. *See* Daniel Halperin, *Income Taxation of Mutual Nonprofits*, 59 Tax L. Rev. 133, 148 (2006) (referring to these three tax treatments as full exemption, full taxation, and partial exemption).

§ 501(c)(17) supplemental unemployment compensation benefit trusts, and § 528 homeowners' associations are subject to tax on their income from non-members and on their investment income, essentially leaving only member income exempt from tax.[146] In addition, § 527 political organizations are subject to tax not only on their investment income but also on any other income not dedicated to their political purposes.[147]

At the same time, § 501(c)(4) organizations enjoy some but not all of the federal tax benefits enjoyed by certain other categories of tax-exempt organizations. Most notably, their donors are not eligible for a charitable contribution deduction for federal income tax and federal estate tax purposes, unlike donors to § 501(c)(3) charities and certain veterans' organizations.[148] Thanks to a recent statutory clarification by Congress that resolved some previous uncertainty, however, their donors are now clearly able to avoid federal gift tax on their contributions, similar to several other categories of tax-exempt organizations, including § 501(c)(3) organizations.[149] In common with most tax-exempt organizations but not § 528 political organizations, donors to § 501(c)(4) entities of appreciated property do not realize the gain built into donated property and so usually do not pay tax on such gains.[150] Finally, and in contrast primarily to § 501(c)(3) organizations, § 501(c)(4) organizations generally do not enjoy exemption from state taxes other than income taxes and also do not enjoy most of the non-tax benefits enjoyed by § 501(c)(3) entities.[151]

B. The Theory

The basis for exemption for nonprofit organizations generally, including § 501(c)(4) organizations, starts with the insight that the act of

146. *See* I.R.C. § 512(a)(3); David S. Miller, *Reforming the Taxation of Exempt Organizations and Their Patrons*, 67 TAX LAW. 451, 455 (2014).

147. *See* I.R.C. § 527(c)(1)(A).

148. *See id.* §§ 170(c), 2055(a).

149. *See* I.R.C. §§ 2501(a)(6), 2522(a); Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Div. Q, § 408, 129 Stat. 2242, 3120 (amending I.R.C. § 2501(a)); Barbara Rhomberg, *Constitutional Issues Cloud the Gift Taxation of Section 501(c)(4) Contributions*, 15 TAX'N EXEMPTS 164, 164 (2004); Barbara Rhomberg, *The Law Remains Unsettled on Gift Taxation of Section 501(c)(4) Contributions*, 15 TAX'N EXEMPTS 62, 62 (2003).

150. *See* I.R.C. § 84; Miller, *supra* note 146, at 499.

151. Memorandum from Erika Lunder, Legislative Attorney, Am. Law Div., to Joint Comm. on Taxation (Feb. 16, 2005), *in* STAFF OF JOINT COMM. ON TAXATION, 109TH CONG., HISTORICAL DEVELOPMENT AND PRESENT LAW OF THE FEDERAL TAX EXEMPTION FOR CHARITIES AND OTHER TAX-EXEMPT ORGANIZATIONS 195 (Comm. Print 2005); Facchina et al., *supra* note 143.

aggregating funds for the purpose of pursuing a collective, non-business (i.e., not for-profit) activity should not be subject to tax as long as any net income is either refunded to the persons supporting the activity (i.e., dues-paying members) or retained for future use that furthers the nonprofit's purposes.[152] This insight assumes that there is no subsidy provided by an income tax exemption under these circumstances, given that the persons supporting the activity presumably have already paid whatever income taxes were owed on the funds they used to support the nonprofit organization.

There is a flaw with this assumption, however. It ignores the time value of money and the resulting subsidy that occurs if the exemption extends to investment income or to funds used for capital expenditures.[153] For this reason, Daniel Halperin has proposed that social welfare organizations providing more than incidental benefits to their members (such that the members benefit significantly from any subsidy, as opposed to the public more generally) not enjoy exemption for their investment income.[154] Ellen Aprill agrees with this insight, although as she details in her article, she is concerned about the practical ability to determine when benefits to members become more than incidental.[155]

---

152. *See* Bittker & Rahdert, *supra* note 19, at 348-49; Halperin, *supra* note 145, at 134. *But see* Henry Hansmann, *The Rationale for Exempting Nonprofit Organizations from Corporate Income Taxation*, 91 YALE L.J. 54, 95-96 (1981) (conceding the force of this insight but arguing that exemption for such organizations creates a bias in favor of nonprofits over proprietary businesses with respect to activities covered by the exemption); Miller, *supra* note 146, at 468-69 (questioning the extent to which this insight is correct if members pay disproportionate fees or are entitled to disproportionate benefits).

153. *See* Bittker & Rahdert, *supra* note 19, at 354-55, 357; Halperin, *supra* note 145, at 145, 155-56; Miller, *supra* note 146, at 471-76.

154. Daniel Halperin, *The Tax Exemption Under I.R.C. § 501(c)(4)*, 21 N.Y.U. J. LEGIS. & PUB. POL'Y 519, 534 (2018). Halperin finds that at least with respect to what he labels "consumer mutual organizations," the time value of money issue raised by capital expenditures is of lesser concern. Halperin, *supra* note 145, at 147-48.

155. *See* Aprill, *supra* note 26, at 397-401. Halperin also argues that for mutual benefit nonprofits that are viewed by their customers as equivalent to commercial counterparts no exemption may be justifiable, which reasoning might apply to prepaid medical plans and possible electrical and water cooperatives. *See* Halperin, *supra* note 145, at 149; *see also* Miller, *supra* note 146, at 462-65 (making a similar argument with respect to § 501(c)(8) fraternal benefit societies that provide insurance). Prepaid medical plans are discussed at length in Aprill's article so I will not address this concern with respect to them. *See* Aprill, *supra* note 26, at 380-83. As for electrical and water cooperatives, they have their own exemption category that should be the exclusive basis for exemption for reasons discussed below, and it is beyond the scope of this article to consider whether that other exemption category is itself problematic. *See supra* notes 121-125 and accompanying text.

There is also another complication, as David Miller details.[156] The benefits flowing from tax-exempt status are not always limited to exemption from income tax. Most notably for § 501(c)(4) organizations, this includes the ability of donors to avoid including gain from donated appreciated property in their taxable income, which he argues provides a significant subsidy and violates principles of horizontal and vertical equity.[157] If, however, investment income, including realized and recognized gain, is not exempt from tax for the recipient § 501(c)(4) organizations, that would render this complication less significant. How less significant would depend both on how the tax rate applicable to the recipient § 501(c)(4) organization for such gain compared to the tax rate usually applicable to donors on such gain and on how much time usually passes between receipt of such donations and realization and recognition of that gain by the recipient § 501(c)(4) organization. For example, if a recipient § 501(c)(4) entity paid the current corporate income tax rate of twenty-one percent on such gain, which would be the same rate faced by corporate donors on such gain and similar to the tax rates usually faced by individual donors on such gain, and if recipient § 501(c)(4) entities usually sell donated assets shortly after receiving them so any gain is subject to tax shortly after the donation, then this complication would not be very significant.[158]

I find these points as developed by Aprill, Halperin, and Miller to be persuasive and so generally agree with their proposed fine-tuning of the tax rules for § 501(c)(4) organizations. That said, their insights do not undermine the basic rationale for exemption for § 501(c)(4) organizations. The question that remains, therefore, is whether the current broad range of organizations covered by § 501(c)(4) as detailed above is defensible, assuming appropriate fine tuning of the scope of the § 501(c)(4) exemption.

C. Problems on the Borders?

Section 501(c)(4) does not exist in isolation. It is part of a constellation of exemption provisions that Congress and the Treasury Department have developed over time to cover a broad array of

156. *See* Miller, *supra* note 146. David Miller also raises concerns relating to political activities, but since such issues are thoroughly covered in other articles in this issue, I will not address them here. *See* Colinvaux, *supra* note 35, at 509; Fei & Gorovitz, *supra* note 35, at 552.

157. Miller, *supra* note 146, at 498-500.

158. *See* I.R.C. § 1(h) (2012) (individual net capital gain tax rates); *id.* § 11 (corporate tax rate); *id.* § 1411(c) (additional individual tax on net investment income).

organizations and provide a varied set of tax benefits, as summarized briefly above. Ellen Aprill recognizes this fact in her article when she discusses a number of "border skirmishes" that highlight the trade-offs between different exemption categories for organizations that may be able to qualify under more than one such category.[159] Those trade-offs are worthy of further discussion in the context of the broader range of organizations I have considered in this Article. For purposes of this analysis, I consider first those organizations for which § 501(c)(4) is the only available exemption category, then ones for which it appears § 501(c)(3) may also be available, and finally ones for which a category other than § 501(c)(3) may be available.

1. Section 501(c)(4) or Bust

Organizations in the first set, for which the only options are taxability or exemption under § 501(c)(4), generally include prepaid medical plans (including HMO's), most animal-related groups, possibly some of the public sector entities, and likely also most of the residual organizations, such as inaugural committees.[160] Formed as nonprofits under state law but lacking an available exemption category outside of § 501(c)(4), the question is whether the rationale for exemption that supports § 501(c)(4) exemption generally also supports inclusion of these groups in that category.

In considering this question, it is important to remember that these organizations are subject not only to whatever limitations state law may impose on them and to the general positive requirements of § 501(c)(4) but also to the private inurement prohibition codified in § 501(c)(4) and supported by the intermediate sanctions available under § 4958.[161] The effect of these limitations, requirements, and prohibition is to effectively limit these § 501(c)(4) organizations to the types of collective activities that benefit a significant community and fit within the exemption's rationale, while at the same time preserving the greater benefits that come with § 501(c)(3) status for entities that more clearly provide significant public benefit. The availability of § 501(c)(4) exemption for this varied group of collective activity orga-

159. *See* Aprill, *supra* note 26, at 384-93.

160. *See supra* note 32 and accompanying text (noting that prepaid medical plans generally are not eligible for § 501(c)(3) exemption); *supra* notes 51-52 and accompanying text (noting the limited availability of § 501(c)(3) exemption for animal-related groups); *supra* note 62 (inaugural committees generally not eligible for § 501(c)(3) exemption).

161. *See* I.R.C. §§ 501(c)(4)(B), 4958(e)(1).

nizations therefore appears generally to be defensible.[162] It also provides, as Ellen Aprill discusses in more detail, an "escape hatch" for nonprofit organizations that likely would prefer § 501(c)(3) status but are willing to accept § 501(c)(4) status instead to avoid a lengthy administrative process and possibly a litigation dispute with the IRS, thereby reducing costs for both the organization and the government.[163]

2. When is a Charity Not a Charity?

Organizations in the second set include (1) probably most of the "public sector" § 501(c)(4) organizations discussed above, which may be capable of qualifying for § 501(c)(3) status either because they lessen the burdens of government or, less commonly, they relieve the poor and distressed or underprivileged, and also (2) the other "charities on their face" § 501(c)(4) organizations that appear to meet § 501(c)(3)'s requirements other than having actually applied for that status. Assuming these observations are correct, the key question is whether by instead choosing to be exempt under § 501(c)(4) these organizations escape any restrictions or requirements that should apply to them. With one exception, that does not appear to the case. While as § 501(c)(4) entities they avoid the requirement to file an application for recognition of exemption and the stricter limitations on political activities imposed by § 501(c)(3), this requirement and these limitations are generally justified by the significant subsidy § 501(c)(3) entities can receive because of the ability of donors to make tax deductible contributions. Having chosen not to take advantage of that subsidy (or indeed any of the many other benefits that usually are only available to § 501(c)(3) organizations), such organizations should also be free from the requirements and limitations justified by it.[164]

David Miller details the one exception in his article.[165] It appears that some organizations in this category would be classified as private

162. With the possible exception of prepaid medical plans that resemble commercial entities from the perspective of their members. *See supra* note 155.

163. *See* Aprill, *supra* note 26, at 405-08.

164. As already discussed, there are elements of the existing rules for § 501(c)(4) organizations that may provide a subsidy in a different manner, but that is a systemic issue for all § 501(c)(4) organizations and not just the ones in this category. *See supra* notes 153-157 and accompanying text.

165. *See* Miller, *supra* note 146, at 493. There does not appear to be any indication that the relatively few pension and other employee benefit plans that are exempt under § 501(c)(4) have chosen that category in order to avoid restrictions that otherwise would apply to such plans, especially since they are generally subject to extensive state statutory requirements and government oversight. *See, e.g.*, REBECCA OTTO, OFFICE OF STATE AUDITOR, STATE OF MINN., BLOOMINGTON FIRE DEPARTMENT RELIEF

foundations if they were under § 501(c)(3) and so subject to the additional restrictions applied by Congress to such entities if they were § 501(c)(3) organizations.[166] The ability of these § 501(c)(4) entities to escape the private foundation restrictions is problematic because Congress imposed some of those restrictions out of a concern that private foundations often improperly benefit the small group of individuals who control them, since such organizations lack public oversight given that they are not reliant on the public for financial support.[167] More specifically, Congress designed the § 4941 prohibition on self-dealing and the § 4943 limitation on excess business holdings to prevent the improper use of organizational assets for the private benefit of the organization's insiders.[168] This same risk exists for a § 501(c)(4) funded and controlled by a single entity or family and so not reliant on the broader public for financial support. Allowing what would otherwise be a private foundation to escape these restrictions only at the cost of giving up the charitable contribution deduction, which may not be particularly important for some funders, creates, in my view, the potential for abuse both with respect to private inurement (which § 4941 is designed to prohibit through the imposition of a relatively strict set of prohibitions on dealings with insiders) and with respect to maintaining control of a family business while placing it beyond the reach of the estate tax and possible takeover by non-family members (which § 4943 is designed to prevent by limiting the combined ownership of any given business by a private foundation and its insiders).

This result suggests that Congress should extend some of the private foundation restrictions—particularly §§ 4941 and 4943—to

---

ASSOCIATION 9 (2017), http://bfdra.org/images/2016_Bloomington_Fire_Department_Relief_Association.pdf.

166. *See* I.R.C. § 509 (defining private foundation); *id.* §§ 4940–4945 (detailing restrictions on private foundations). These organizations would be classified as private foundations if they were under § 501(c)(3) because they rely exclusively or almost exclusively on investment income from an endowment for their financial support, as opposed to relying on financial support from donors, members, or purchasers of goods or services. *See id.* §§ 170(b)(1)(A)(iv), 509(a)(1), (2) (providing various financial support tests § 501(c)(3) organizations must satisfy to avoid private foundation status); Johnny Rex Buckles, *Should the Private Foundation Excise Tax on Failure to Distribute Income Generally Apply to "Private Foundation Substitutes"? Evaluating the Taxation of Various Models of Charitable Entities*, 44 NEW ENG. L. REV. 493, 498 (2010) (describing these tests).

167. *See generally* Thomas A. Troyer, *The 1969 Private Foundation Law: Historical Perspective on Its Origins and Underpinnings*, 27 EXEMPT ORG. TAX REV. 52, 64 (2000).

168. *See id*. at 57, 58. The § 4945 limitations on certain expenditures also may stem in part from these characteristics and so partial extension of that provision should be considered as well. *See id.* at 60-61.

§ 501(c)(4) organizations that are not able to satisfy any of the grounds for escaping private foundation classification as a § 501(c)(3).[169] This recommendation assumes that the dangers addressed by §§ 4941 and 4943 were significant in practice and are also likely to occur in the § 501(c)(4) context if the donors involved do not need the charitable contribution deductions available for § 501(c)(3) organizations. This assumption seems likely to be correct particularly given the increasing experimentation by wealthy individuals with nontraditional vehicles for their philanthropic and civic activities, but it may take a clear example of such abuse to generate sufficient political support for such a statutory change.[170]

3. Options or Exclusivity?

Finally, there are several types of organizations for which Congress has created a separate exemption category, including electric and water cooperatives (which could also fall under § 501(c)(12)), veterans' organizations (which could also fall under § 501(c)(19)), and homeowners' associations (which could also fall under § 528). As noted above, for at least the first two types of organizations, most such organizations choose the separate available exemption category, but a significant number are still found under § 501(c)(4).

The issue is whether such organizations should be able to choose between § 501(c)(4) and that other category or whether instead there are reasons for concluding that the other category is or should be the exclusive category for such entities. Relying on congressional intent is one way to resolve this issue, but such intent is not always completely clear.[171] To supplement consideration of possibly unclear congressional intent, it is therefore also worth considering whether the other category imposes fewer or more restrictions than § 501(c)(4) and whether it provides fewer or more benefits than § 501(c)(4), and then to consider whether the trade-offs between the two categories are justifiable. For example, if the other category imposes more restrictions but also provides more benefits as compared to § 501(c)(4), and the additional restrictions are related to the additional benefits, then allowing organizations a choice may be appropriate. If, on the other

169. *See* I.R.C. § 509(a).

170. *See generally* Dana Brakman Reiser, Sharon C. Lincoln & Ingrid Mittermaier, *Using Non-501(c)(3) Vehicles to Accomplish Philanthropic Objectives*, TAXES, Dec. 2017, at 41, 45.

171. For an example of such intent in a different context, see Zeta Beta Tau Fraternity v. Comm'r, 87 T.C. 421, 435 (1986) (concluding that Congress intended for national fraternities to be exempt under § 501(c)(7) and not § 501(c)(10)).

hand, the other category imposes more restrictions but has the same or fewer benefits than § 501(c)(4), it may be that allowing an organization to choose § 501(c)(4) instead of the other category undermines Congress' purpose in creating the other category.

a. Electric and Water Cooperatives

The tax benefits of categorization under §§ 501(c)(4) and 501(c)(12) are identical, except for the exclusion of § 501(c)(4) organizations from the application of the federal gift tax.[172] That difference is probably irrelevant to these cooperatives, as they do not rely on donations, much less large donations, for financial support. Looking only at benefits, it therefore appears irrelevant which category a given cooperative chooses.

The restrictions imposed by these two provisions vary significantly, however. Section 501(c)(4) now has an explicit prohibition on private inurement that is absent from § 501(c)(12), while § 501(c)(12) strictly requires eighty-five percent of the organization's income to come from members for qualification under that provision.[173] But the private inurement provision is likely not significant to cooperatives that had § 501(c)(4) status before its enactment in 1996 because Congress included a limited exception for cooperatives as noted previously.[174] Therefore, it appears that the main effect of such cooperatives maintaining their § 501(c)(4) status is the ability to escape § 501(c)(12)'s membership income requirement.

As mentioned above, the very limited legislative history with respect to what is now § 501(c)(12) indicates that Congress intended that provision to be the sole basis for exemption because it was concerned that a cooperative with substantial non-member income too closely resembled a for-profit business.[175] While the application of § 501(c)(4)'s private inurement prohibition to new cooperatives may at least partially address that concern, that prohibition is not the mechanism Congress chose to address that concern in this context. Moreover, the prohibition also does not completely reach older cooperatives that had previously qualified under § 501(c)(4) because of the limited

172. *See supra* note 149 and accompanying text.

173. *Compare* I.R.C. § 501(c)(4)(B) *with id.* § 501(c)(12)(A), (C). Section 501(c)(4) organizations also have a limit on their amount of political activity in the form of supporting or opposing candidates for elected office as detailed in the article by Roger Colinvaux, but there is no indication that such activity is a significant part of the activities of § 501(c)(4) electric or water cooperatives. *See* Colinvaux, *supra* note 35, at 486-87.

174. *See supra* note 115 and accompanying text.

175. *See supra* note 123 and accompanying text.

exception Congress created for them. There is therefore at least an argument that the § 501(c)(4) cooperatives should be examined with an eye toward requiring, consistent with the apparent congressional intent, that they switch to § 501(c)(12) status (and limit their non-member income as required by that provision if necessary).

The court decision and Revenue Ruling cited earlier supporting § 501(c)(4) status for such cooperatives may be a barrier to forcing such changes through a Revenue Ruling or even regulations.[176] If there is evidence that a significant number of these § 501(c)(4) cooperatives have substantial non-member income, Congress may have to act to clarify that § 501(c)(12) is the exclusive exemption basis for such organizations (with appropriate transition provisions for existing § 501(c)(4) cooperatives). Before Congress does so, it should also consider whether there are any reasons to allow one or more existing § 501(c)(4) cooperatives to remain exempt, whether under that section or through some other mechanism, even if they do not satisfy § 501(c)(12)'s membership income requirements. For example, the financing structure of the National Rural Utilities Cooperative Finance Corporation may disqualify it for § 501(c)(12) status, but it may serve an important support role for rural utilities that would be significantly hindered by a loss of tax-exempt status.[177]

b. Veterans' Organizations

Veterans' organizations present a different situation, as compared to electric and water cooperatives, in two ways. First, qualification for deductibility of contributions for donors requires meeting significant membership requirements that are independent of the § 501(c)(4) or § 501(c)(19) requirements.[178] A veterans' organization that wants the subsidy provided by the charitable contribution deduction must meet this separate membership requirement, while one that cannot meet that requirement forgoes that significant benefit but without loss of exemption.

Second, while the scope of the benefits and restrictions imposed by § 501(c)(4) (which does not have an explicit membership require-

176. *See supra* notes 126-127 and accompanying text.

177. *See* National Rural Utilities Cooperative Finance Corporation, 2014 Form 990, at 2 (2017) (providing additional data for Part III, Line 4a, including its financing structure).

178. *See* Rev. Rul. 84-140, 1984-2 C.B. 56 (at least ninety percent of members must be war veterans, with substantially all of the other members either veterans (but not war veterans), cadets, or close relatives of war veterans, veterans, or cadets). The Revenue Ruling requirement also applies with respect to the estate tax deduction under I.R.C. § 2522(a)(4).

ment) are the same as found in § 501(c)(19) (which has an explicit membership requirement) because both provisions prohibit private inurement,[179] there is no evidence that Congress intended § 501(c)(19) to be the sole basis for exemption by veterans' organizations.[180] Consistent with this lack of intended exclusivity, the IRS has long held that such organizations may qualify for exemption under a variety of provisions and not just §§ 501(c)(4) and 501(c)(19).[181] It therefore appears that for veterans' organizations, the flexibility provided by having § 501(c)(4) as one option for exemption, but not the only one, is justifiable under the existing statutory scheme.[182]

c. Homeowners' Associations

As Ellen Aprill details in her article, Congress has recognized that homeowners' associations and similar entities face challenges qualifying for exemption under § 501(c)(3) and even under § 501(c)(4) because of the limited communities they tend to serve.[183] To address these challenges, Congress has therefore created effectively a sliding scale: (1) those associations that benefit the largest and most indefinite communities can qualify under § 501(c)(3) (and receive the subsidies and other benefits inherent with that status); (2) those that benefit a smaller or more definite population that makes up the entirety of a politically defined geographic area can qualify under § 501(c)(4) (and receive the broad exemption from income tax described previously); and (3) those that benefit an even smaller community can only qualify under § 528 (and receive a limited exemption

179. *Compare* I.R.C. § 501(c)(4) (2012) *with id.* § 501(c)(19).

180. *See supra* note 133 and accompanying text.

181. *See supra* note 135.

182. David Miller has argued that the combination of benefits currently enjoyed by § 501(c)(19) veterans' organizations, including not only broad exemption from federal income tax but also no limits on political activity or lobbying and, if separate membership requirements are satisfied, the ability to receive tax deductible contributions, is not justified on policy grounds. Miller, *supra* note 146, at 461, 476-77. While addressing that argument is beyond the scope of this Article, I would note that there are policy grounds for favoring veterans and the organizations that benefit them above and beyond other types of tax-exempt organizations in light of their service to our country. *See, e.g.*, Regan v. Taxation with Representation of Wash., 461 U.S. 540, 550-51 (1983) (rejecting a constitutional equal protection challenge to the limit on lobbying by § 501(c)(3) organizations based on the lack of such a limit for § 170(c)(3)/§ 501(c)(19) veterans' organizations because it is rational for Congress to favor veterans' organizations in this manner in light of the burdens borne by veterans for our country).

183. *See* Aprill, *supra* note 26, at 388-89.

that does not reach non-member or investment income).[184] While an organization that is on the border between these classifications may face some uncertainty, the overall trade-off of breadth of community served with benefits received is logical as well as clearly intended by Congress.[185] Therefore, as with veterans' organizations, the availability of § 501(c)(4) status for homeowners' associations that could also qualify for § 528 status is justifiable, while providing a homeowners' association that could but chooses not to qualify for § 501(c)(3) status, and so gives up the benefits of that status in exchange for the reduced requirements of § 501(c)(4) also appears reasonable. The only issue, however, is if Congress fine-tunes the scope of the § 501(c)(4) as proposed by Aprill, Halperin, and Miller described above.[186] Because homeowners' associations provide a significant benefit to their members, the vast majority of them would then lose their exemptions for non-member and investment income. In that case, the question of whether § 528 should become the exclusive exemption provision for homeowners' associations (that do not qualify under § 501(c)(3)) should be examined, especially given the § 528 limits on membership income and expenditures.

Conclusion

Section 501(c)(4)'s "catchall" nature makes it difficult to catalogue all of the various types of organizations that have successfully claimed exemption under this provision. Using IRS statistics, Urban Institute research, and the GuideStar database, however, it is possible to begin to get a sense of that variety. This information reveals that qualification for this status is generally justifiable both under the theoretical basis for exemption and the overall structure of the Code's exemption and related provisions, as well as upon consideration of apparent congressional intent. That said, there are several areas where qualification for § 501(c)(4) status could potentially undermine that structure.

The first and perhaps most obvious such situation is the possible use of § 501(c)(4) by organizations that would be considered private foundations if they claimed exemption under § 501(c)(3) to escape the application of the private foundation restrictions designed to prevent

184. *See generally Homeowners' Associations Under IRC 501(c)(4), 501(c)(7) and 528*, *in* Exempt Organizations: Continuing Professional Education Technical Instruction Program for Fiscal Year 1982 (1981), https://www.irs.gov/pub/irs-tege/eotopicr82.pdf.

185. *See supra* notes 138-139 and accompanying text.

186. *See supra* Section III.B.

abuses stemming from the control of the organization by a single entity or family. There does not appear to be any current evidence of such abuse in the § 501(c)(4) context, but the risk of abuse is likely increasing with both the growing interest in non-traditional philanthropic vehicles and the removal of the gift tax shadow from § 501(c)(4) organizations. At a minimum, a close examination of existing such entities and any newly formed ones is warranted to determine if those restrictions should be extended to such § 501(c)(4) organizations.

A second and less obvious situation is the use of § 501(c)(4) by a relatively small number of electric and water cooperatives even though it appears that Congress intended § 501(c)(12) to be the sole basis for exemption for such entities. Again, there does not appear to be any evidence that this use has led to abuses, such as avoidance of the membership income requirement imposed by § 501(c)(12) or, more importantly, operation in a manner closely resembling a for-profit business. But the possibility that such abuses exist because these § 501(c)(4) organizations have avoided the restrictions Congress sought to impose on cooperatives justifies closer examination of the situation. This is particularly true given that some of these entities are relatively large financially.

Outside these two relatively narrow areas, there does not appear to be any pressing need to consider curtailing § 501(c)(4)'s "catchall" nature. Rather, its availability appears to provide needed flexibility (1) to organizations that serve the community but in a manner that is too limited to qualify for § 501(c)(3) status; (2) to government-related and other entities that serve their communities but do not need the benefits of § 501(c)(3) status, and thus have no reason to assume the burdens of that status; and (3) to a variety of other nonprofit organizations that perhaps could qualify for other exemption categories but nevertheless fit the rationale for the § 501(c)(4) exemption. While there may be grounds for reducing the scope of that exemption generally, particularly with respect to investment income, this is a global change that does not suggest that the availability of § 501(c)(4) should be limited. Section 501(c)(4)'s "catchall" nature is therefore generally desirable and logical as part of the Code's overall exemption structure.