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UNDOING UNDUE FAVORS: PROVIDING COMPETITORS WITH STANDING TO CHALLENGE FAVORABLE IRS ACTIONS

Sunil Shenoi*

The Internal Revenue Service occasionally creates rules, notices, or regulations that allow taxpayers to pay less than they would under a strict reading of the law. Sometimes, however, these IRS actions are directly contrary to federal law and have significant economic impact. Challenging favorable IRS actions through litigation will likely be unsuccessful because no plaintiff can satisfy the requirements for standing. To address this situation, this Note proposes a statutory reform to provide competitors with standing to challenge favorable IRS actions in court.

I. Introduction

Most taxpayers dread the Internal Revenue Service (IRS) for its hard-earned reputation of finding ways to take away taxpayers' hard-earned money. Occasionally, the IRS creates rules, notices, or regulations that are actually favorable to taxpayers, in terms of allowing them to pay less than might be required under a strict reading of the law. As welcome a gift as this may be to the taxpayers that save money under the IRS action, some favorable actions by the IRS can be just as inappropriate as an IRS action that requires taxpayers to pay more than the law requires.

The inappropriateness of a favorable IRS action is not based on how much or how little a taxpayer must pay in taxes. Rather, some favorable IRS actions are inappropriate because they are directly contrary to federal law. The IRS may not have legal authority to take such actions, and such actions can have significant economic impact. Agency actions that are not authorized by statute or are contrary to federal law are inconsistent with the role of an administrative agency, lack accountability, and essentially bypass this country's system of checks and balances. Despite these grave consequences, little can be done to challenge favorable IRS actions, as it is unlikely that any party has standing to successfully bring a

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lawsuit against the IRS. Thus, favorable IRS actions are effectively unreviewable in a court of law.

This Note proposes a statutory reform to allow favorable IRS actions to be challenged in court. Part II will provide a sampling of favorable actions by the IRS that negate or override statutes and judicially-made law. Part II will then focus on IRS Notice 2008-83 as a recent example of favorable action and will describe the problems accompanying it, namely, the potentially huge economic costs, the IRS’s lack of authority to issue the notice, and the IRS’s effective waiver of existing federal law. Part III uses Notice 2008-83 to illustrate that currently available political and judicial remedies inadequately counteract a favorable IRS action’s harm. Part IV proposes a statutory reform that provides judicial standing for competitors to challenge favorable IRS actions. In addition, Part IV demonstrates that such a reform would withstand judicial scrutiny. Finally, Part IV considers a number of policy issues related to the proposed reform.

II. FAVORABLE IRS ACTIONS: WHAT ARE THEY AND WHY ARE THEY BAD?

As part of the IRS’s responsibility for administering and enforcing tax laws, the IRS provides interpretations of tax law to facilitate understanding and compliance by taxpayers. On some issues where the law is unclear, the IRS occasionally takes a position that is favorable to taxpayers, in the sense that taxpayers pay less in taxes under the position chosen by the IRS than they would under an alternative position the IRS could have taken. This Note focuses on IRS actions that are favorable to taxpayers but also directly contrary to federal law, whether such law is congressionally or judicially created. Such actions are problematic because the IRS may not have legal authority to take the favorable action and such action can have a significant economic impact. Favorable IRS actions with these characteristics also have serious policy implications, in that they are inconsistent with the role of an administrative agency, lack accountability, and essentially bypass this country’s system of checks and balances.

Surprisingly, the IRS has a history of acting in taxpayers’ favor and diverging from federal law. For example, the IRS contravened the Supreme Court regarding whether a company can deduct fees paid to investment banks to facilitate a merger. In *INDOPCO, Inc. v. Commissioner*, the Court held that such fees could not be deducted; instead, the fees had to be capitalized because they would yield
benefits beyond the current tax year. The IRS later backed away from the Court's "future benefit" test by establishing regulations that were more favorable to taxpayers than the Court's decision. The regulations permitted deductions for investment banking expenses, resulting in immediate tax savings, whereas the Court's decision would have caused taxpayers to realize benefits over a period of years.

The Court and the IRS have also differed over whether stock used in hedging transactions qualifies as a capital or an ordinary asset. This categorization is important because it affects the tax rate on gains from the sale of those assets. In Arkansas Best Corp. v. Commissioner, the Court held that the business motivation for acquiring and selling stock is irrelevant to determining whether stock is a capital asset. The Court stated, however, that business motivation is relevant for determining the applicability of statutory exclusions from capital assets, such as whether the stock qualified as inventory. The Court's decision suggested that sales of shares in hedging transactions were capital assets. The IRS responded by issuing regulations providing a number of hedging transactions with ordinary income treatment, in apparent conflict with the Court's decision in Arkansas Best. The IRS regulations were more favorable to the taxpayer because ordinary income tax rates are higher than capital income tax rates, and thus losses on ordinary assets save more in taxes than losses on capital assets.

While these examples provide a small sampling of favorable actions by the IRS that are contrary to Supreme Court decisions, the IRS's favorable actions can also conflict with federal statutes. This Note will focus on Notice 2008-83, one of the IRS's actions that has conflicted with a federal statute, to better illustrate the consequences of favorable IRS action.

2. See T.D. 9107, 2004-1 C.B. 448. The IRS's reversal is odd because the Court's opinion supported the position taken by the IRS during the litigation of that case. INDOPCO, 503 U.S. at 84.
3. WILLIAM A. KLEIN ET AL., FEDERAL INCOME TAXATION 501 (14th ed. 2006) ("The rules found in the regulations are in some respects more favorable to taxpayers than the more stringent rules that might have been imposed under existing precedent.").
4. 485 U.S. 212, 217 (1988) ("The broad definition of the term 'capital asset' explicitly makes irrelevant any consideration of the property's connection with the taxpayer's business . . . .").
5. Id. at 221.
6. KLEIN ET AL., supra note 3, at 694.
A. Overview of IRS Notice 2008-83

In mid-September 2008, the sudden demise of two of the largest financial institutions in the world, Lehman Brothers and Merrill Lynch, rocked the global economy. As the financial world focused on the U.S. government's proposed $700 billion bailout of the banking industry, the IRS and the United States Department of the Treasury Department (the Treasury) undertook a number of steps to provide their own form of relief for troubled financial institutions. One of these steps occurred on September 30, 2008, when the IRS issued Notice 2008-83. Within a few weeks, the controversy surrounding Notice 2008-83's questionable authority and potentially massive tax implications elevated it to the front pages of some of the largest newspapers in the country.

To understand the controversy surrounding Notice 2008-83, it is necessary to understand some basic principles of corporate tax law. As a taxable entity, a corporation has a number of tax attributes, such as earnings and profits, tax credits, or a net operating loss. A tax attribute may be considered favorable if it has a positive effect on the corporation, such as saving taxes or increasing revenue. When a corporation undertakes certain types of transactions, such as a merger, it may lose some of the tax attributes, favorable or otherwise, that it possessed prior to that transaction. For situations where a tax attribute would survive a transaction, Congress has enacted special rules to "prevent trafficking in favorable tax attributes."

Section 382 of the Internal Revenue Code is one such rule that limits the use of a favorable tax attribute. Section 382 applies when

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12. Id. ("[I]t is important to know whether that tax attribute survives: (1) a significant change in the ownership of the corporation's stock, (2) a significant change in the corporation's structure, (3) an absorption of the corporation's assets into a different corporation, (4) an amalgamation with one or more other corporations, or (5) a termination of the business previously conducted by the corporation.").
13. Id. at 969.
two requirements have been met. First, § 382 applies only to loss corporations,16 which are those corporations that have a net operating loss or a net unrealized built-in loss.15 A net operating loss means the amount by which a corporation’s tax deductions are greater than its gross income.16 A net unrealized built-in loss occurs with respect to an asset that the corporation owns when that asset’s fair market value is less than its cost.17 For example, a mortgage owned by a bank would have a $400,000 net unrealized built-in loss if the bank purchased it for $1 million at the peak of the housing boom, but the value of the mortgage later fell to $600,000 after the credit crisis started and the bank realized the lender was less likely to pay back the loan.18

The second § 382 requirement is that the loss corporation must undergo an “ownership change.”19 An ownership change occurs when a shareholder that owns five percent or more of the corporation’s stock, as of a given date, increases his ownership by more than fifty percent over a given period.20 Ownership changes may occur in the context of reorganizations, such as mergers.21

To illustrate the operation of § 382, consider the following hypothetical. If X Corporation has net unrealized built-in losses of $100 million, and then Y Corporation acquires X Corporation, Y Corporation may be able to deduct X Corporation’s $100 million in net unrealized built-in losses, which means that Y Corporation pays less in corporate taxes than it otherwise would.22 Y Corporation’s ability

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15. § 382(k)(1).
17. See § 382(h)(3)(A)(i). In arriving at this definition, I have used two simplifying assumptions. The first assumption is that the asset’s cost is a sufficient substitute for its “aggregate adjusted basis.” Id. Second, I will ignore the threshold requirement for net unrealized built-in losses described in § 382(h)(3)(B).
20. I.R.C. § 382(g); Temp. Treas. Reg. § 1.382-2T(a)(1). The above definition of ownership change leaves out the concept of testing date, Temp. Treas. Reg. § 1.382-2T(a)(2)(i), and testing period, Temp. Treas. Reg. § 1.382-2T(d), because they are not critical for the reader to understand the impact of Notice 2008-83.
21. KAHN & LEHMAN, supra note 11, at 1017 (“Section 382 limitations can apply to reorganizations if there is an ownership change.”).
22. The aggregate deduction may not be exactly equal to the amount of net operating losses or net unrealized built-in losses held by the acquired company prior to its acquisition. Id. at 1001 (Section 382 ‘permit[s] a deduction for such losses to approximately the same
to reduce its tax liability by acquiring X Corporation's losses makes those losses quite valuable. Section 382 limits "trafficking in tax attributes" by limiting the amount of X Corporation's losses that Y Corporation can deduct to offset its own gross income in any year after its acquisition of X Corporation. Thus, instead of Y Corporation deducting $100 million in losses acquired from Corporation X in the year after the acquisition, Y Corporation might have to wait a number of years to deduct the entire amount of the acquired losses.

Notice 2008-83, in only a couple of sentences, completely changed the operation of § 382 in the context of bank acquisitions of other corporations. Continuing with the hypothetical transaction between X Corporation and Y Corporation, Notice 2008-83 would treat the net unrealized built-in losses acquired from X Corporation as if they were not attributable to X before the acquisition—in effect, the losses would be treated as originating in Y Corporation. As a result, § 382's limitation on the amount of the losses that Y Corporation can deduct each year after the acquisition would not apply, and Y Corporation could deduct the entire amount of the net unrealized built-in losses in the tax year immediately after the acquisition.

Notice 2008-83's change to § 382's application was not merely theoretical; it had significant practical consequences as well. At the time of Wells Fargo's 2008 acquisition of Wachovia, Wachovia had $74 billion in mortgage-related losses. Consequently, Notice 2008-83 permitted Wells Fargo to immediately deduct the entire $74 billion in mortgage losses acquired from Wachovia. In contrast,
had § 382 been applied as Congress intended, the provision could have required Wachovia to spread the deductions from those mortgage losses over twenty years.  

B. Economic Impact

Notice 2008-83 provided significant economic benefits to banks because it allowed banks to offset their income with losses acquired from another corporation, which meant they paid less in taxes on that income. An equally important consequence was that every dollar of corporate tax saved by a bank as a result of Notice 2008-83 was a dollar that the federal government failed to collect in that year. Thus although Congress battled over the decision to spend $700 billion to bail out troubled banks, the true bailout cost was $700 billion plus corporate taxes lost by Notice 2008-83.

The question, then, is how much did Notice 2008-83 save banks and cost the federal government? The answer depends on determining the fair market value of a bank's assets, which is normally a complicated task. Since Notice 2008-83 greatly benefitted banks with mortgage losses, valuation of such losses is even more difficult due to the "currently contracted market for loans." A number of sources cite as authoritative a report that estimated the net tax savings to banks as $140 billion. The authors of the $140 billion estimate subsequently issued another report that qualified their $140 billion estimate as a maximum that relied on a number of

29. Id.
This report cautioned that the best way to determine the tax savings to banks is to review the actual amount of built-in gains and losses in the SEC filings for a bank acquisition, such as the two bank deals that occurred soon after Notice 2008-83 was issued. Presumably having performed this task, or relying on "those with actual knowledge of the real figures," the authors concluded that the tax "benefit [to banks] was not a significant tax subsidy." However, the report did not reveal a revised estimate of the actual monetary tax benefits to banks.

Nevertheless, other reports make clear that Notice 2008-83 provided extraordinary tax savings to banks and an equal amount of lost revenue for the federal government. Notice 2008-83 likely allowed Wells Fargo to save approximately $19.4 billion in taxes through its acquisition of Wachovia, specifically, its $74 billion in losses from mortgage-related securities and loans. Moreover, Wells Fargo only paid approximately $14.3 billion for Wachovia, so the tax savings paid for the acquisition. Similarly, PNC Financial Services Group likely enjoyed tax savings with a present value equal to the entire $5.2 billion it spent to acquire National City Corpora-


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\text{[E]xtrapolated from IMF estimates of $1 trillion of mortgage-related losses in the banking system, of which approximately $400 billion had not yet been taken into account. If those numbers were correct, if every bank with unrecognized losses had a change of ownership, if under applicable law all of those losses were in fact 'net built-in losses,' if there were no offsetting 'built-in gains,' and if the applicable 382 limitation would prevent, not just defer, the deduction of all such losses, then the total tax 'cost' of deducting those $400 billion of losses would be approximately $140 billion.}
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35. JENKS ET AL., supra note 34, at 3. The author reviewed Wells Fargo's SEC filings but did not find any listing of the amount of built-in gains and losses.

36. Id.

37. The report did note one non-monetary benefit of Notice 2008-83, which is that it provided clarity "to the tax calculations of the combined banks going forward." Id.

38. The accuracy of the data upon which some reports rely to estimate Notice 2008-83's impact is not clear because they do not mention the source of the data, such as SEC filings or inside sources with knowledge of the actual financial figures. See Drucker, supra note 8, at A5. In addition, this Note assumes that, if not specified, these estimates of tax savings are not discounted to their net present value and therefore could be slightly inflated.

39. Drucker, supra note 8, at A3.

40. Id.
Wells Fargo and PNC may not be able to utilize the full value of their acquired losses for quite some time because “[t]ax losses only work when you have a lot of income, and right now the [banks] don’t have a lot of income.” Nevertheless, Notice 2008-83 likely cost the federal government over $20 billion in future corporate tax revenue from only two bank acquisitions, such that even if the estimates are discounted to net present value, the federal government has still lost a tremendous amount of money.

Aside from the impact on the federal government, Notice 2008-83 also had financial implications for state government tax revenues. This secondary impact occurred because “states with corporate income taxes almost universally base their corporate taxes on federal rules.” Thus, if Notice 2008-83 reduced a bank’s federal tax liability, that bank could also have reduced state tax liability in any state in which that bank operates. California, for example, could have lost nearly $2 billion over the next ten years due to Notice 2008-83. Notice 2008-83’s impact on states is not unique to California—the financial services industry provides a substantial portion of the gross domestic product for Delaware (32.5%), New York (18%), Connecticut (16.5%), and Rhode Island (12.1%).

States are free to decouple their tax laws from federal tax laws, so that a change at the federal level will not automatically apply to them, and California has attempted to do just that. However, the regulatory process can take nine to twelve months to complete. In


42. Id. However, this argument may be weak due to some banks’ increased profits after Notice 2008-83. See Ari Levy, Wells Fargo Profit Climbs 53 Percent on Mortgages, BLOOMBERG, Apr. 22, 2009, http://www.bloomberg.com/apps/news?pid=20601208&sid=a6Yumun7TcA3Q (on file with the University of Michigan Journal of Law Reform).


45. Bennett, supra note 33, at 2.


the meantime, states lose significant tax revenues—in 2008 alone, California could have lost approximately $300 million in corporate tax revenue due to Notice 2008-83. This is not to say that the Treasury should consult with state governments before making changes. Nevertheless, implementing a rule change with such sweeping economic magnitude through the legislative process instead of an IRS notice would have provided state governments with notice and time to decouple their own laws before losing corporate tax revenue.

Beyond tax savings and lost tax revenue, Notice 2008-83 affected the economy by providing "an artificial competitive advantage to banks that can afford to expand now by effectively offering a tax break for acquiring other banks." The Notice had an immediate impact on the competitive landscape of the financial industry. For example, Wachovia had agreed to be purchased by Citigroup on September 29, 2008, the IRS issued Notice 2008-83 on September 30, and then Wells Fargo—which had earlier tried to acquire Wachovia—made a larger and ultimately successful bid to acquire Wachovia. The Treasury's foray into economic policy may have been further misguided because Notice 2008-83 "could have [had] the unintended consequence of motivating more financial firms wanting future tax deductions to shelter their earnings to buy competitors, leading to more consolidation in the financial industry than would be necessary to restore stability in the financial sector."

Notice 2008-83 had a significant impact on the tax revenues of the federal government, as well as many state governments. Lower tax revenues may mean that federal and state governments will be forced to impose a higher tax on their citizens to make up the lost revenues. Alternatively, federal and state governments may be forced to cut programs and services, which could disproportionately impact needy populations. In addition, Notice 2008-83 altered the financial industry's competitive landscape by facilitating transactions that were unlikely to happen on their own, and by

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49. The Treasury Department admitted it did not consider Notice 2008-83's impact on state governments, even though it had been working on Notice 2008-83's rule changes for weeks. Id.
causing transactions to happen in a way they otherwise would not have. Considering these severe consequences, "favorable" IRS actions may not be as welcome or appropriate as originally imagined.\textsuperscript{53}

\textbf{C. Policy Implications}

The impact of favorable IRS actions goes far beyond the economic realm. Favorable IRS actions may be contrary to Congress's clear statement on a subject and such action may be taken without legal authority. Actions with these characteristics, if unchecked, are troublesome because they imply that agencies—which members are not elected by the public—can act outside their role and supersede Congress, without accountability through the political process.

1. IRS Supersedes Congress on Substantive Policy

Notice 2008-83 modified § 382's operation in two ways that were inconsistent with the plain meaning of § 382's text. The first modification to § 382 dealt with the types of losses that are subject to § 382's limitation. The statute unambiguously states that in the years after a corporation undergoes an ownership change, the post-change corporation is limited in how much it can offset its taxable income with "pre-change losses."\textsuperscript{54} Pre-change losses are losses incurred by the corporation prior to the ownership change, and include both net operating losses\textsuperscript{55} and net unrealized built-in losses.\textsuperscript{56} In addition, pre-change losses must have been incurred in the same taxable year as the ownership change\textsuperscript{57} and must be "allocateable to the period . . . before the" date of ownership change.\textsuperscript{58} Notice 2008-83 exempted net unrealized built-in losses from § 382's coverage by stating that they were not allocable to the period

\textsuperscript{53} IRS action that provides favorable treatment to certain taxpayers may also be inappropriate when Treasury and IRS have potential conflicts of interest with those taxpayers. See Press Release, U.S. Senate Comm. on Fin., Grassley Seeks Inspector General Review of Treasury Bank Merger Move (Nov. 14, 2008) (on file with the University of Michigan Journal of Law Reform), available at http://finance.senate.gov/press/Gpress/2008/prg111408c.pdf. However, the role of conflicts of interest is beyond the scope of this Note.

\textsuperscript{54} I.R.C. § 382(a) (2006). The amount of the limitation is defined in § 382(b).

\textsuperscript{55} § 382(d)(1).

\textsuperscript{56} § 382(b)(1)(B).

\textsuperscript{57} § 382(d)(1)(A) ("[T]he taxable year ending with the ownership change or [the year] in which the change date occur[ed].").

\textsuperscript{58} § 382(d)(1)(B) (emphasis added).
before the date of ownership change.\textsuperscript{59} Thus, Notice 2008-83 was plainly inconsistent with § 382.

Notice 2008-83 then went a step further and allowed only banks to claim the exemption on net unrealized built-in losses.\textsuperscript{60} This extremely favorable treatment\textsuperscript{61} for banks has no textual basis in the statute because § 382 states that it applies to "any new loss corporation,"\textsuperscript{62} which "includes any corporation with a net unrealized built-in loss."\textsuperscript{63} Thus, Notice 2008-83 was inconsistent with § 382's text.

The Treasury also disregarded Congress's policy for implementing § 382. Under § 382(k), the Treasury can use regulations to redefine which corporations, including those with net unrealized built-in losses, qualify as a loss corporation.\textsuperscript{64} However, the Treasury and the IRS did not implement a new definition of loss corporation through regulations.\textsuperscript{65} By using a notice instead, the IRS contravened Congress's specified mechanism for implementing statutory policy.

Beyond outright inconsistencies, Notice 2008-83 also departed from the history and legislative intent of § 382. Prior to the Tax Reform Act of 1986, § 382 eliminated "all or a portion of a corporation's net operating loss carryover" when an ownership change occurred.\textsuperscript{66} The 1986 amendments to § 382 adopted the current approach, which permits only a fraction of the net operating loss carryover to be deducted each year after the ownership change.\textsuperscript{67} Consequently, the IRS should not have used Notice 2008-83 to override a carefully considered legislative scheme that has been in existence for over twenty years.\textsuperscript{68}
2. IRS Acts Without Legal Authority

Notice 2008-83's end-run around the established legislative scheme of § 382 raises the question of whether the IRS or the Treasury Department had the legal authority to issue the notice. Media coverage of Notice 2008-83 included discussion of this issue but statements that the Treasury lacked legal authority to issue Notice 2008-83 were conclusory and lacked legal analysis or explanation.  

Various parties have put forth justifications for Notice 2008-83's legal authority. The most common of these relies on § 382(m), which expressly permits the Treasury Secretary to "prescribe such regulations as may be necessary or appropriate to carry out the purposes of this section."70 However, Notice 2008-83's exclusion of net unrealized built-in losses from the definition of pre-change losses, resulting in unfettered deductions of net unrealized built-in losses, did not seem to "carry out the purposes"71 of § 382, when the purpose was to "limit[] the extent to which ... built-in losses ... can be utilized."72 Indeed, the Joint Committee on Taxation found that "Notice 2008-83 [was] inconsistent with the congressional intent in enacting ... section 382(m)" and that "the legal authority to prescribe Notice 2008-83 [was] doubtful."73

Moreover, "there is no ambiguity in the language of 382 that the Notice [was] intended to cure."74 Of course, § 382(m) lists only five

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69. See, e.g., Drucker, supra note 8, at A3 (Robert Willens, an independent corporate tax analyst, said, "It doesn't seem possible that they have this authority."); Paley, supra note 10, at A6 ("More than a dozen tax lawyers interviewed for this story—including several representing banks that stand to reap billions from the change—said the Treasury had no authority to issue the notice."); id. at A1 (George K. Yin, the former chief of staff of the Joint Committee on Taxation, stated, "Did the Treasury Department have the authority to do this? I think almost every tax expert would agree that the answer is no.").

70. I.R.C. § 382(m) (2006). In fact, the Treasury Department itself, along with tax lawyers that represent banks, has turned to § 382(m) as a justification of its authority to issue Notice 2008-83. Paley, supra note 10, at A6 (Andrew C. DeSouza, a Treasury spokesperson, and others have said "the legal authority came from Section 382 itself, which says the secretary can write regulations to 'carry out the purposes of this section.'").

71. § 382(m).

72. KAHN & LEHMAN, supra note 11, at 1001.


types of allowable regulations, and Congress's use of the phrase "including (but not limited to)" when describing five types of allowable regulations indicates that Congress expected the Treasury to create other types of regulations. However, § 382(m) does not seem to authorize Notice 2008-83 because § 382(m) "does not authorize the Secretary to provide exemptions or special rules that are restricted to particular industries or classes of taxpayers." In addition, the IRS did not create regulations through a notice and comment process, which might permit an administrative agency to issue policy with broader scope that it otherwise might have. An alternative justification for 2008-83's legal authority comes from the Troubled Asset Relief Program (TARP). Under TARP, "Treasury [has] broad authority to purchase assets and securities." However, "[TARP] does not grant authority to re-write tax legislation in whatever manner promotes bank mergers. . . . If Congress wanted to give Treasury the authority to fiddle with 382, it clearly could have done so." Congress could have also chosen to allow the Treasury to waive sections of the Internal Revenue Code, but it chose not to. The argument that Congress could or should have been more specific is a standard response to any question of legislative interpretation. In this case, however, it is especially relevant considering Congress gave Treasury only very specific, narrow authority to create regulations regarding gains or losses of preferred stock in Fannie Mae and Freddie Mac. Thus, TARP is unlikely to provide Treasury with valid authority to issue Notice 2008-83.

Another theory authorizing Notice 2008-83 relies on Notice 2003-65. The theory is that Notice 2008-83 was a "continuation of the regulatory authority exercised in Notice 2003-65," in which the Treasury and the IRS provided initial guidance on the identification of built-in gains and losses under § 382(h). The problem

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75. § 382(m). The statute provides a non-exhaustive list of five types of potential regulations in § 382(m)(1)–(5).
76. JOINT COMM. ON TAXATION, supra note 73, at 12; see also Fleischer, supra note 74 (stating that it is unlikely that "Congress delegated lawmaking authority to the Treasury to make [a] new exception to the statutory language").
77. Fleischer, supra note 74 ("Administrative law principles do provide somewhat broader latitude for regulations that go through the notice and comment procedure, but that hasn't happened here.").
79. Fleischer, supra note 74.
80. Id.
82. JENKS ET AL., supra note 34, at 2.
with this theory is that the Treasury's legal authority to issue Notice 2008-83 would depend upon another notice it issued; the Treasury, however, cannot set the bounds of its own authority. Moreover, just because Treasury issued Notice 2003-65 does not mean it had legal authority to issue Notice 2008-83. Notice 2003-65's validity likely stems from the fact that it provided guidance on the meaning of a key term in 382(h), in contrast to Notice 2008-83, which waives application of 382(h) (1)(B) altogether. Consequently, Notice 2003-65 does not appear to authorize Notice 2008-83's sweeping changes to § 382.

Notice 2008-83 might also be justified based on absolute need. In this case, the need arises from "illiquidity in the financial markets," difficulty in valuing financial assets, and a generally dire economic climate. A regulatory agency's powers are limited, however, to those delegated from Congress in an authorizing statute, and dire conditions do not legally justify the agency's reach for powers beyond those provided in the authorizing statute.

Ultimately, the IRS's legal authority to issue Notice 2008-83 likely did not exist. Although no judicial opinion was issued to support this conclusion, recent federal legislation confirmed that "[t]he legal authority to prescribe Internal Revenue Service Notice 2008-83 [was] doubtful." Nevertheless, Notice 2008-83 demonstrates that a favorable IRS action can supersede a Congressional statute, and that such an action can be taken without legal authority. Allowing an administrative agency to act in such a way is dangerous because the agency lacks direct political accountability. Combined with the significant economic consequences to federal and state governments, as well as to private industry, it is clear that permitting favorable IRS action is not desirable and that such action must be challenged.

III. CURRENT REMEDIES ARE INSUFFICIENT

To challenge favorable IRS actions, opponents can appeal to Congress to overturn the action via statute, petition the IRS to

84. JENKS ET AL., supra note 34, at 2.
85. Id.
86. Lujan v. Defenders of Wildlife, 504 U.S. 555, 577 (1992) ("'When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted.'" (quoting Stark v. Wickard, 321 U.S. 288, 309-10 (1944))).
revoke its action, avail themselves of the tax whistleblowing statute, or challenge the IRS action directly through a lawsuit. Each of these methods has drawbacks, and, using Notice 2008-83 as an example, this Part will demonstrate that such methods are unlikely to reverse the damage done by favorable action.

A. Legislative and Executive Remedies

One way to overturn an agency action is for Congress to pass a statute. Recourse through legislation is a significant impediment because of the difficulty in obtaining sufficient political support for a legislative proposal. Favorable IRS actions may be even more difficult to overturn via statute because favorable actions tend to mean fewer taxes, which is usually a popular position across the political spectrum. In the case of Notice 2008-83, overturning an action meant to help the economy may have been politically impossible because it could have been seen as unpatriotic or could have invited blame for ushering in another Great Depression. Even if Congress is successful in overturning an IRS action, considerable time may pass before the legislative repeal occurs or takes effect.

Notice 2008-83 was a rare instance of a favorable IRS action that proved so unpopular, Congress repealed it only four and a half months after the IRS issued it. Still, Notice 2008-83's repeal occurred in the midst of a number of unique circumstances. First, in the November 2008 elections the Democrats gained control of the Presidency and strengthened their control over Congress. In addition, America was in the midst of a severe economic crisis, the financial industry received a large portion of the blame for the economic crisis, and corporations that received seemingly unwarranted benefits during the economic crisis faced significant

Undoing Undue Favors

While these factors aligned to favor repeal of an action benefitting an unpopular group, such alignment is infrequent and legislative repeal is typically more difficult to obtain.

Even though Congress did repeal Notice 2008-83, the repeal was prospective. Consequently, Congress’s action did not fully counteract Notice 2008-83’s effects, such as the huge tax breaks enjoyed by Wells Fargo and PNC in their acquisitions of Wachovia and National City Corporation, respectively. Understandably, Congress was concerned that retroactive repeal might create a chilling effect on compliance with future IRS actions. Retroactive repeal could also exacerbate the financial crisis that Notice 2008-83 sought to ameliorate, as the banks that acquired distressed banks due to their increased value under Notice 2008-83 would instead be saddled with those distressed banks’ enormous losses. Nevertheless, prospective repeal is problematic because for the four and a half months it took for Congress to pass the necessary legislation, the IRS blatantly operated beyond its authority, waived a clear provision of a federal statute, and caused significant economic impact. Thus, even if a prospective legislative repeal occurs, it may be useful to have a way to prevent or rectify the harm that occurred prior to such repeal.

Another method of seeking repeal of a favorable IRS action is to petition the IRS to revoke it. In most cases, however, the IRS has little incentive to reverse course on a notice, especially in the absence of judicial or statutory opposition to the IRS position. Additionally, the issues that arise when petitioning the IRS to take action are similar to those when lobbying Congress to take action: persuading the IRS to issue new guidance is difficult, considerable time may pass before such guidance is obtained, and the IRS may hesitate to issue retroactive repeal due to concerns about a chilling effect on compliance with future guidance and rulings. Furthermore, in contrast to the legislative repeal context, even if the IRS

96. See supra Part II.B.
98. Zelenak, supra note 88, at 890.
were to find a retroactive repeal palatable, the agency’s legal authority to issue a retroactive repeal of a notice is unclear. Thus, seeking recourse from the IRS is likely to be unsuccessful.

It is possible that an existing provision of the Internal Revenue Code could be used to address the problem of lost tax revenue from favorable IRS treatment. The Secretary of the Treasury has the power to initiate administrative or judicial action against individuals who underpaid their taxes or violated the internal revenue laws. In 2006, Congress aided the Secretary’s efforts by creating a tax whistleblowing program, which enables individuals to provide the Secretary with information about parties that violate tax laws. Individuals can provide public or non-public information and the Treasury can reward them accordingly for their help. This information can then be used by the Treasury and the IRS to initiate a suit against the party that saved taxes as a result of the IRS’s favorable action. Such a suit is desirable because to determine whether that party’s reduced tax liability was actually an underpayment in violation of tax laws, a court would have to evaluate the legitimacy of the IRS’s favorable action in the first place. Yet for that very reason, the IRS is unlikely to bring such a suit. Thus, the Internal Revenue Code’s whistleblowing provisions are not likely to address the problem of favorable action.

B. Judicial Remedies

The final category of recourse against favorable IRS action is a lawsuit against the IRS that would seek declaratory or injunctive relief against application of the action. Declaratory or injunctive relief is advantageous because it sidesteps the thorny issue of retroactive repeal. If a successful lawsuit blocks application of the IRS action, then the harmful effects, such as the tax savings resulting from acquisitions under Notice 2008-83, may never materialize.

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99. Professor Zelenak persuasively argues that the IRS can retroactively revoke Notice 2008-83 but concedes that “[t]he issue is not free from doubt.” Id. at 893.
102. § 7623(b).
103. The IRS’s unwillingness to initiate the necessary litigation could be circumvented if private individuals could sue on behalf of the government to recover the lost tax revenue. Currently, suits of this sort are not permitted. However, Professor Ventry proposed an interesting reform that would permit such suits by “using the [False Claims Act] as a model for the tax whistleblower statute, and extending qui tam to tax.” Dennis J. Ventry, Jr., Whistleblowers and Qui Tam for Tax, 61 TAX LAW. 357, 359 (2008).
Judicial recourse has its own obstacle, however: a plaintiff who brings suit to challenge a favorable IRS action is likely to have his case dismissed for lack of standing.

1. Overview of Standing Requirements

A plaintiff must have standing for a "court [to] decide the merits of the dispute or of particular issues." The Supreme Court has articulated a number of requirements that a plaintiff must satisfy to be granted standing. The first set of requirements derives from Article III of the U.S. Constitution, which restricts federal court jurisdiction to cases or controversies. Since Article III's restrictions are constitutional, and therefore applicable in all contexts, Congress cannot override them by statute. Article III requires that a plaintiff suffer an injury in fact. In addition, the injury must be fairly traceable to the defendant's conduct, not the conduct of a third party. Finally, a favorable court decision must be able to redress the injury.

The Court has detailed the injury in fact requirement through many cases. To satisfy the injury in fact requirement, a plaintiff must allege a concrete and particularized injury that is actual or imminent. The requisite injury may result from a violation of constitutional rights, common law rights, or statutory rights. Moreover, qualifying injuries may be economic or non-economic, such as injuries that "reflect 'aesthetic, conservational, and recreational'" values.

The standing requirement related to injury in fact bars "generalized grievances." A plaintiff's claim may be a generalized

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108. Id. This requirement is typically referred to as the causation requirement.
109. Id. at 561. This requirement is typically referred to as the redressability requirement.
110. Id. at 560.
111. See CHEMERINSKY, supra note 106, at 69–73.
113. At one point, the Supreme Court indicated that the bar on generalized grievances was prudential in nature; however, more recently, the Court has indicated that the requirement is constitutional. Compare Warth v. Seldin, 422 U.S. 490, 499 (1975) (noting that aside from the "minimum constitutional mandate," jurisdiction is still not warranted when a plaintiff claims a generalized grievance), with Lujan v. Defenders of Wildlife, 504 U.S. 555, 573–74
grievance if it is "shared in substantially equal measure by all or a large class of citizens." Thus, a plaintiff will not have standing if "their only injury is as a citizen or a taxpayer concerned with having the government follow the law." A second set of standing requirements may be overridden by statute because they are derived, not from Article III, but from the Supreme Court. These requirements are called prudential standing requirements, because the Court based them on prudent judicial administration. The first prudential requirement is that a plaintiff may only sue under her own legal rights and not those of another person.

Another prudential requirement, called the zone of interests test, applies when a person challenges an administrative agency regulation. The zone of interests test requires that the interest that the plaintiff seeks to protect must be arguably within the zone of interests to be protected or regulated by the statute at issue in the lawsuit. To understand the interests Congress sought to protect in a comprehensive statutory scheme, a court may even consider the interests protected by statutes beyond the particular statute under which the plaintiff sued. The zone of interests test "is not meant to be especially demanding." To fail the zone of interests test, the plaintiff's interests must be "so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." Aside from prudential requirements, a plaintiff may have standing if it meets the Article III standing requirements plus either the requirements of the taxpayer or legislator standing doctrines.

(1992) ("[A] plaintiff raising only a generally available grievance . . . does not state an Article III case or controversy.").

114. Warth, 422 U.S. at 499.
115. CHEMERINSKY, supra note 106, at 89.
116. Id. at 63.
117. Id.
119. Id. (stating that the plaintiff's claim must "fall within the zone of interest protected by the law invoked" in the lawsuit); Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153 (1970) ("[T]he interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.").
120. Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 401 (1987) ("As Data Processing demonstrates, we are not limited to considering the statute under which respondents sued, but may consider any provision that helps us to understand Congress' overall purposes in the National Bank Act.").
121. Id. at 399. "[I]n particular, there need be no indication of congressional purpose to benefit the would-be plaintiff." Id. at 399–400.
122. Id. at 399.
To sue as a taxpayer, *Flast v. Cohen* requires the plaintiff to challenge an expenditure of funds under the Constitution's taxing and spending clause. In addition, the taxpayer must show that the expenditure violates a constitutional provision. Currently, taxpayer standing only seems permissible pursuant to the Establishment Clause. Members of Congress can achieve standing in a lawsuit by either claiming individual harm or an institutional injury.

2. Lack of Standing to Challenge Favorable IRS Actions

Using Notice 2008-83 as an example, this Part will demonstrate that a plaintiff would be unsuccessful in challenging a favorable IRS action through litigation due to a lack of standing.

The first step in challenging the legitimacy of a favorable IRS action is to identify an appropriate plaintiff and defendant. In the case of Notice 2008-83, potential plaintiffs might have included a person (or group of people) suing as a citizen, a person (or group of people) suing as a taxpayer, members of Congress, competitor banks that could not take advantage of Notice 2008-83’s waiver of § 382, or non-banking corporations that were not subject to Notice 2008-83’s provisions. The likely defendants in such an action would have been the IRS or the banks that benefitted from Notice 2008-83.

Once the parties have been identified in a given suit, the plaintiff must meet judicial standing requirements. A person suing as a citizen, a competitor bank, or a non-banking corporation could have alleged that Notice 2008-83 was inconsistent with existing

123. *392 U.S. 83, 102 (1968)* ("First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked."); see also *CHEMERINSKY, supra* note 106, at 91.

124. *Flast*, 392 U.S. at 102 ("Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged."); *CHEMERINSKY, supra* note 106, at 92.

125. *CHEMERINSKY, supra* note 106, at 93 ("[T]he only situation in which taxpayer standing appears permissible is if the plaintiff challenges a government expenditure as violating the establishment clause.").

126. *See Powell v. McCormack*, 395 U.S. 486, 498–500 (1969) (finding that a legitimate monetary interest in recovering back pay was sufficient to grant standing to a Congressman who challenged his exclusion from Congress); *Bond v. Floyd*, 385 U.S. 116, 122–26 (1966) (finding that an interest in asserting First Amendment rights was sufficient to grant standing to a newly elected state representative who was excluded from his seat due to his anti-war rhetoric).

127. *See Coleman v. Miller*, 307 U.S. 433, 438 (1939) (stating that state senators have an "interest in maintaining the effectiveness of their votes" and therefore have standing to challenge an improper tie-breaking procedure that effectively nullified their votes).
law" and that it allowed a select group of parties to unfairly save taxes. Such claims are unlikely to satisfy the injury in fact requirement because none of the parties "personally suffered some actual or threatened injury." The complained-of injuries would more likely be generalized grievances that were shared by large portions of the population. The non-personal nature of the injuries would be the same with either the IRS or a beneficiary bank as the defendant. Thus, the failure to assert a valid injury in fact indicates that a person suing as a citizen, a competitor bank, and a non-banking corporation is unlikely to have standing.

A bank could have alternatively claimed that the Notice 2008-83 caused it to suffer a competitive injury due to the benefits enjoyed by one of its competitors. Continuing with the Wells Fargo-Wachovia example, the plaintiff bank could have been a competitor of Wells Fargo, which saved taxes under Notice 2008-83, or a competitor of Wachovia, which became more valuable after issuance of the Notice. Therefore, the competitive injury suffered might have qualified as a valid economic injury. Nevertheless, the plaintiff bank might still have difficulty satisfying the remaining standing requirements. Specifically, the benefit enjoyed by the plaintiff's competitor might have been more properly traced to the IRS's conduct, rather than that of the competitor bank. Thus, while the causation requirement would likely have succeeded in a suit against the IRS, it would likely fail in a suit against a competitor bank. A suit against the IRS also might have satisfied the redressability requirement, because a favorable court decision granting declaratory or injunctive relief could have prevented application of Notice 2008-83, thereby rectifying the competitive injury suffered.

Even if the Article III requirements have been met on the basis of a competitive injury, however, a court must still apply the zone of interests test. Applying this test, a suit by a competitor against the

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128. See supra Part II.C.1 (discussing how Notice 2008-83 was inconsistent with existing federal law).
131. See supra Part II.B.
134. Inv. Co. Inst. v. FDIC, 815 F.2d 1540, 1543-44 (D.C. Cir.), cert. denied, 484 U.S. 847 (1987) ("Competitive injury alone does not confer standing. Once we find such injury, we must turn to the 'prudential' or 'zone of interests' standing test . . . ." (citations omitted)).
IRS would likely fail. The plaintiff’s interests in this suit might have included interests in not allowing any taxpayer to obtain unwarranted tax breaks, not allowing a competitor to obtain a highly valuable tax break, not allowing government agencies to favor one industry over another, or not allowing government agencies to favor certain groups in an industry over other groups in the same industry. However, none of these interests appear to be what Congress had in mind when enacting § 382,\textsuperscript{135} or any other provision of the Code.\textsuperscript{136} Thus, the zone of interests test would likely fail, and the competitor plaintiff would not have standing to maintain his suit against the IRS.

A plaintiff who might have sued as a taxpayer, against either the IRS or a beneficiary of Notice 2008-83, would not likely have standing because the two-prong Flast v. Cohen test would not be satisfied.\textsuperscript{137} First, Notice 2008-83 did not involve an expenditure of funds under the Constitution’s taxing and spending clause, as required by Flast.\textsuperscript{138} Since there was no expenditure, the secondary requirement that the expenditure violate a constitutional provision, in particular, the establishment clause,\textsuperscript{139} need not be reached.

Members of Congress who sue to combat favorable IRS action would likely not have standing on the basis of either individual or institutional harm. Under Notice 2008-83, for example, a member of Congress could not have claimed individual harm because nobody was “singled out for specially unfavorable treatment” and nobody had been “deprived of something to which they personally are entitled,” such as their seat in Congress.\textsuperscript{140} In addition, a member of Congress could not claim an institutional injury because Notice 2008-83 did not impact Congress’s ability to pass or reject legislation on the same subject in the future.\textsuperscript{141} Thus, members of Congress would not likely have standing to challenge Notice 2008-83.

\textsuperscript{135} See Kahn & Lehman, supra note 11, at 969 (stating that § 382 aimed to prevent trafficking in tax attributes).

\textsuperscript{136} One statute that aims to check agency actions favoring regulated entities is the Administrative Procedures Act. The zone of interests test derives from the APA’s own provision permitting suit by persons “aggrieved by agency action within the meaning of a relevant statute.” 5 U.S.C. § 702 (2006). It seems unlikely that the APA itself would qualify as a “relevant statute” because in the Notice 2008-83 context, the plaintiff is aggrieved by the agency action relating to I.R.C. § 382.

\textsuperscript{137} 392 U.S. 83, 102 (1968).

\textsuperscript{138} Id.

\textsuperscript{139} See Chemerinsky, supra note 106, at 93.


\textsuperscript{141} Id. at 824.
Currently available litigation strategies fall short of either preventing or remedying the harm from favorable IRS actions. The difficulty in obtaining a federal statute or IRS action overturning an earlier favorable IRS action makes it unlikely to prevent harm occurring from the favorable action. In addition, even if a federal statute or IRS action is obtained, such remedy is likely to be prospective and would not rectify past harm. A suit seeking injunctive or declaratory relief can prevent realization of harm that occurs before and after the initiation of a lawsuit. A judicial remedy, however, has less chance of succeeding than legislation or agency action because current case law makes it unlikely that any person would have standing to challenge favorable IRS action. As the law stands, a suit with the fewest standing obstacles is a suit against the IRS by competitors of the beneficiaries of favorable IRS action.

IV. SOLUTION: CONGRESS SHOULD PASS A STATUTE AUTHORIZING STANDING

Congress should pass a statute providing standing for competitors to challenge favorable IRS actions. The harms from favorable IRS action range from concrete, economic consequences to more theoretical concerns about the proper role of agencies, Congress, and political accountability. The seriousness of these harms demonstrates that favorable IRS actions should be challenged. This Part will review past efforts by Congress to provide standing through a statute, describe the details of a statutory reform that will permit standing to challenge favorable IRS action, analyze the legal validity of such a reform, and evaluate policy issues related to the statutory reform.

A. Past Attempts by Congress to Create Statutory Standing

The Supreme Court has stated that Congress has the power to create statutory standing.\(^{142}\) Congress has used this power to confer standing based on a wide variety of injuries. To better understand the likelihood that the reform this Note proposes would survive judicial scrutiny, it is necessary to review some of Congress's attempts to confer statutory standing.

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\(^{142}\) Warth v. Seldin, 422 U.S. 490, 514 (1975) ("Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute.").
In *Trafficante v. Metropolitan Life Insurance Co.*, the Supreme Court upheld standing for a group of tenants in an apartment complex who alleged that the complex's owners discriminated in the renting of apartments.\(^{143}\) The plaintiffs sued under the Fair Housing Act, which permitted suits by "persons aggrieved," defined broadly as "[a]ny person who claims to have been injured by a discriminatory housing practice."\(^{144}\) The Court held that the "alleged injury to existing tenants by exclusion of minority persons from the apartment complex [was] the loss of important benefits from interracial associations."\(^{145}\) The Court acknowledged that the plaintiffs qualified as "persons aggrieved" because doing so was consistent with "vindicating a policy that Congress considered to be of the highest priority."\(^{146}\) Absent the statute, the plaintiffs' alleged injury may not have been sufficient to warrant standing.\(^{147}\) *Trafficante* illustrates that plaintiffs must suffer an injury to have standing, but also that standing based on a broadly defined injury is more likely to be found if a greater policy issue is at stake.

Even after *Trafficante*, the validity of citizen-suit provisions has been contested. In *Lujan v. Defenders of Wildlife*, the plaintiffs filed a suit against the Department of the Interior under the citizen-suit provision of the Endangered Species Act (ESA).\(^{148}\) The ESA requires federal agencies to consult with the Secretary of the Interior to ensure that their actions do not jeopardize species on the Interior's endangered species list.\(^{149}\) The Secretary promulgated a regulation requiring "consultation only for actions taken in the United States or on the high seas."\(^{150}\) Plaintiffs sued to restore the prior regulation, which extended the consultation requirement to actions taken overseas.\(^{151}\) The Court rejected standing in this case because "the injury-in-fact requirement [was not] satisfied by

\(^{143}\) 409 U.S. 205, 206 (1972).

\(^{144}\) Id. at 206 n.1 (citation omitted).

\(^{145}\) Id. at 209–10. Specifically, the plaintiffs stated "that (1) they had lost the social benefits of living in an integrated community; (2) they had missed business and professional advantages which would have accrued if they had lived with members of minority groups; (3) they had suffered embarrassment and economic damage in social, business, and professional activities from being 'stigmatized' as residents of a 'white ghetto.'" Id. at 208.

\(^{146}\) Id. at 211 (noting that the statute played an important role in the Civil Rights Act of 1968 and that the purpose of the law "was to replace the ghettos 'by truly integrated and balanced living patterns.'") (citations omitted).

\(^{147}\) See id. at 212 (White, J., concurring) (stating that without the statutory grant of standing in the Civil Rights Act of 1968, he was unlikely to conclude that plaintiffs had standing).


\(^{149}\) Id. at 558.

\(^{150}\) Id. at 559.

\(^{151}\) Id.
congressional conferral upon all persons of an abstract, self-contained, noninstrumental 'right' to have the Executive observe the procedures required by law.\textsuperscript{152}

Despite \textit{Lujan}’s apparent limitation on citizen-suit provisions, the Court did not bar citizen-suit provisions entirely. In \textit{Bennett v. Spear}, the Bureau of Reclamation was operating a project under the authority of the Endangered Species Act to protect two species of fish by limiting water levels in two reservoirs.\textsuperscript{153} Under the ESA’s citizen-suit provision, the plaintiffs claimed the project’s restriction on reservoir water injured them through their reduced use of the water for “‘recreational, aesthetic and commercial purposes, as well as for their primary sources of irrigation water.’”\textsuperscript{154} The Court agreed that the adverse impact from the water restrictions was a satisfactory injury in fact.\textsuperscript{155} Thus, citizen-suit provisions could be used successfully if the plaintiffs met the Article III injury in fact requirement.

In addition to the use of enforcement-based citizen-suit provisions, Congress has established stand-alone, statutory rights as in the Federal Election Campaign Act (FECA).\textsuperscript{156} FECA allows “aggrieved” persons to file a complaint with the Federal Election Commission if a violation of the statute occurs.\textsuperscript{157} In \textit{Federal Election Commission v. Akins}, the Federal Election Commission (FEC) decided that a particular group was not a “political committee” subject to FECA’s reporting requirements.\textsuperscript{158} Plaintiffs challenged the FEC’s decision on the basis that the group was a political committee and that the group’s failure to disclose information was a violation of the statute that injured the plaintiffs.\textsuperscript{159} The Court agreed that the plaintiffs’ inability to obtain information under FECA was a valid injury in fact.\textsuperscript{160}

After \textit{Lujan}, \textit{Bennett}, and \textit{Akins}, it is clear that standing exists if Congress grants a statutory right and a person suffers a cogniza-
ble injury in fact from violation of that right.\textsuperscript{161} However, not all Congressional attempts to create statutory rights to justify standing survive judicial scrutiny. \textit{Raines v. Byrd} involved a challenge to the Line Item Veto Act, which permitted the President to “‘cancel’ certain spending and tax benefit measures after he has signed them into law.”\textsuperscript{162} The Act authorized legal relief for those adversely affected by the Act.\textsuperscript{163} Six present and former members of Congress sued, claiming they were entitled to legal relief because the Act “adversely affected” them by “dilut[ing] their Article I voting power.”\textsuperscript{164} The Supreme Court rejected standing because the plaintiffs had not been “deprived of something to which they personally [were] entitled.”\textsuperscript{165} \textit{Raines} illustrates that to survive judicial scrutiny the injury in fact must be personal and that the statutory right should focus on an injury and/or target the plaintiff more narrowly than “any individual adversely affected.”\textsuperscript{166}

Judicial scrutiny of Congressional attempts to provide private individuals with standing provides crucial lessons about how to successfully craft such a statute. The review of cases above shows that a plaintiff claiming to have suffered a statutorily defined injury will still need to satisfy the Article III requirement of injury in fact.\textsuperscript{167} In addition, a statute that defines an injury broadly is more likely to be upheld if the statute attempts to effectuate an important social policy.\textsuperscript{168} Furthermore, a properly drawn statutory right should provide an injury that is personal to the individual plaintiff.\textsuperscript{169}

161. \textit{See}, e.g., \textit{Lujan v. Defenders of Wildlife}, 504 U.S. 555, 578 (1992) (“Congress['] elevation to the status of legally cognizable injuries concrete, \textit{de facto} injuries that were previously inadequate in law.”); \textit{id.} (“Nothing in this contradicts the principle that ‘[t]he . . . injury required by Art. III may exist solely by virtue of ‘statutes creating legal rights, the invasion of which creates standing.’’’” (citation omitted)); \textit{see also Chemerinsky, supra} note 106, at 73 (“So long as the plaintiff meets Article III’s injury requirement, and infringement of a statutory right is sufficient in this regard, standing is permitted under a federal statute permitting citizen suits.”); \textit{Richard H. Fallon, Jr. et al., Hart \& Wechsler’s The Federal Courts and the Federal System} 153 (5th ed. 2003) (citing \textit{Lujan’s} approval that an Article III injury may be satisfied by the invasion of a statutory right and also stating that \textit{Akins} stands as a “now-settled example” of Congress’s ability to create a right).


163. \textit{Id.} at 815.

164. \textit{Id.} at 817 (citation omitted).

165. \textit{Id.} at 821.

166. 2 U.S.C. § 692(a)(1) (2006); \textit{see Raines}, 521 U.S. at 829 (leaving open the possibility of a suit challenging the Line Item Veto Act “by someone who suffers judicially cognizable injury as a result of the Act”).

167. \textit{See supra} note 161.


B. Proposed Statutory Reform

A statutory reform to challenge favorable action by the IRS must appropriately define what favorable means. The term "favorable," as used in this Note, is synonymous with "beneficial," which means that a person receives or is entitled to an advantage. An advantage is a "superiority of position or condition," and the notion of superiority implies the existence of another person with a lesser status. Thus, between two people, X and Y, who start at the same position, an action is favorable if it causes X to be in a relatively better position than Y. The range of favorable actions may be summarized as follows:

<table>
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<tr>
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<th>X's Change in Status</th>
<th>Y's Change in Status</th>
<th>Net Result</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Increase by A</td>
<td>No change (or decrease)</td>
<td>X's status is greater by A</td>
</tr>
<tr>
<td>2</td>
<td>Increase by A + B</td>
<td>Increase by A</td>
<td>X's status is greater by B</td>
</tr>
<tr>
<td>3</td>
<td>No change (or increase)</td>
<td>Decrease by A</td>
<td>X's status is greater by A</td>
</tr>
<tr>
<td>4</td>
<td>Decrease by A</td>
<td>Decrease by A + B</td>
<td>X's status is greater by B</td>
</tr>
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</table>

To satisfy Article III's injury in fact requirement, an attempt to create statutory standing must focus on the relative injury suffered by person Y. The injury cannot focus exclusively on the effect on person Y, however, because in two of the four situations listed in Table 1 above, Y either feels no impact or benefits in some way from the IRS action. Thus, the statutory right, the violation of which would cause an injury in fact, must focus on the net result—the change in relative position between X and Y—in which Y ends with a lesser status in all four "favorable" scenarios.

This Note proposes a statutory reform to combat favorable IRS actions by creating a right to be free from "competitive disadvantage" due to an unlawful IRS action. This provision would provide that any party suffering such "competitive disadvantage" could sue the IRS for injunctive or declaratory relief. Under the

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171. Id. at 18.
172. For simplicity, this Note focuses on two people who have the same initial status. Of course, in practice there are likely numerous permutations of the starting positions of X and Y. However, discussing the effects of a given action on X and Y's relative starting position only serves to distract from the main point, which is that a favorable action creates a change in relative position between two parties.
173. Congress can create a statutory right, the violation of which would create an injury in fact that forms the basis for standing. *See supra* note 161.
_undoing undue favors

statute, competitive disadvantage would be a decrease in competitive position resulting from IRS action that:

1) provides one party with a measurable financial benefit, provides that party’s competitor with either no financial benefit or a less valuable financial benefit, and the benefit is not created according to a proportional basis,\textsuperscript{174} or

2) causes one party to suffer a measurable financial loss or detriment, causes that party’s competitor to suffer either no loss or detriment, or a lesser loss or determent, and the loss is not created according to a proportional basis.\textsuperscript{175}

Both clauses above use two terms that warrant clarification. First, the term “measurable” means that a party must be able to estimate the dollar amount of the benefit or loss and have a reasonable basis for such estimate.\textsuperscript{176} Requiring that the IRS action have a measurable impact, and that the plaintiff must have a reasonable basis for its estimate of the impact, helps weed out frivolous litigation. To further limit frivolous litigation, the proposed statute could require that defendants have high gross incomes and/or require that the IRS action create a sizeable competitive disadvantage in terms of the tax savings to the defendant.\textsuperscript{177}

Another phrase requiring clarification is “proportional basis.” The term proportional basis intends to weed out IRS actions that apply to all entities equally, but may have disparate impacts on two entities based on the relative proportions of some neutral characteristic of those entities. For example, an IRS regulation that lets each corporation deduct $1,000 of ordinary income for each employee would permit Company X, which has ten employees, to deduct more than Company Y, which has five employees. However, such a regulation should not be considered favorable because the deduction is simply proportional to a characteristic of Company X’s business.

\textsuperscript{174} This clause encapsulates the first two scenarios in Table 1.

\textsuperscript{175} This clause encapsulates the last two scenarios in Table 1.

\textsuperscript{176} Since the estimated dollar impact is likely based on the tax benefits of the favorable IRS action, a reasonable basis for the estimated impact of the IRS action could be ascertained by researching a potential defendant’s financial statements or other publicly available information.

\textsuperscript{177} The IRS already uses monetary thresholds in some enforcement situations. See, e.g., I.R.C. § 7623(b)(5) (2006) (limiting applicability of the tax whistleblowing statute to those taxpayers with gross income over $200,000 in a given year and a tax liability of $2 million or more).
Additionally, the statute would not be applicable if the defendant had already completed a transaction valued at $100 million or more in substantial reliance on the favorable IRS action. This provision aims to prevent criticism of suits under the proposed statute that, if successful, could have retroactive effect. Retroactive remedies are generally undesirable because they may discourage taxpayers’ reliance on valid IRS guidance.\textsuperscript{178} If the proposed statute had been in effect when Notice 2008-83 was issued, that Notice would have illustrated the problem of reliance. On September 29, 2008, Wachovia agreed to be purchased by Citigroup; on September 30, 2008, the IRS issued Notice 2008-83;\textsuperscript{179} on October 3, 2008, Wells Fargo outbid Citigroup for Wachovia;\textsuperscript{180} and Wells Fargo’s acquisition of Wachovia closed on December 31, 2008.\textsuperscript{181} From the timeline, it is clear that Wells Fargo relied on Notice 2008-83 in making its $11 billion bid for Wachovia. If Citigroup or another competitor sued prior to the deal’s closing,\textsuperscript{182} Wells Fargo could claim that Notice 2008-83 should not be invalidated because they would suffer an $11 billion penalty for substantially relying on the notice. However, Wells Fargo’s reliance claim would have little weight because the deal had not yet closed, Wells Fargo would not yet have received the tax benefits from Notice 2008-83, and Wells Fargo would have the option of cancelling the deal with the only penalty being the administrative costs of planning the merger, not the full $11 billion that the acquisition would have cost.

On the other hand, if Citigroup or a competitor attempted to sue after December 31, 2008, Wells Fargo would have already spent $11 billion on the acquisition and would have realized the tax benefits from Notice 2008-83. If a court then invalidated Notice 2008-83, Wells Fargo’s loss of its tax benefits would be fundamentally unfair because it had spent large amounts of money in reliance on Notice 2008-83. Thus, the “reliance threshold” aims to prevent suits where a party substantially relied on an IRS action. Although it is also unfair to invalidate tax benefits stemming from a $500 transaction, this Note employs a $100 million reliance threshold because if a defendant claims substantial reliance on the

\textsuperscript{179} Paley, supra note 10, at A1.
\textsuperscript{182} This scenario assumes that any suit filed prior to the deal’s closing would seek a preliminary injunction to prevent the deal from closing pending resolution of the case.
Undoing Undue Favors

IRS action to evade suit under the proposed statute, a high threshold value gives weight to the substantial reliance claim. Of course, this Note would advocate the adoption of a higher or lower reliance threshold if that value better indicated reliance.

Whatever the threshold amount, the proposed statute's use of a threshold invites criticism. The criticism may arise because one of the purposes of stopping favorable IRS action was to prevent economic harm from such actions and the reliance threshold allows some parties to get away with those economic benefits. This criticism is well-placed; effective enforcement of the tax laws, however, requires balancing policy concerns, such as reliance, with a strict desire to eliminate all economic harm from violation of the tax laws. A large enough reliance interest, stemming from a tangible, completed transaction that cannot be undone with minimal cost, may warrant limiting lawsuits. Of course, the reliance interest does not completely trump enforcement concerns, as a lawsuit could still be initiated prior to completion of the tangible transaction.

The statute would also encompass a number of smaller provisions. First, the statute should contain a severability provision, such that if a court holds invalid either the competitive disadvantage clause or the lost tax revenue clause, the remaining provision still has legal authority. Second, suits under the proposed statute should be confined to initiation in a particular court or circuit.

The benefit of this tactic is that duplicative suits brought under the competitive disadvantage provision or the lost tax revenue provision will be easier to detect and consolidate if they are brought in the same forum. In addition, having all cases in one court or circuit prevents problems stemming from consolidating separate suits that are brought in venues far away from each other.

183. The IRS is quite familiar with balancing policy concerns and enforcement. See, e.g., Ventry, supra note 103, at 385 (“[T]he Service has said it wants the Whistleblower Office to concentrate on large-dollar cases.”).

C. The Proposed Statute Withstands Judicial Scrutiny

The proposed statute is likely to withstand judicial scrutiny because it shares features with existing statutes and is consistent with case law upholding standing based on other federal statutes' standing provisions.

1. Features are Consistent with Past Precedent

The proposed statute is likely to be upheld because it shares a common goal with numerous federal statutes—the protection of competition. In some contexts, such as antitrust, unfair trade practices, and banking, Congress has explicitly allowed suits by competitors to protect them from injury. Where Congress has not been explicit, courts have held that statutes can protect certain groups from harmful effects on competition stemming from an agency action. Congress's frequent attempts to protect competition, combined with judicial validation of those attempts, suggest that the proposed statute is likely to be upheld.

The proposed statute is also likely to withstand judicial scrutiny because courts are familiar with the three substantive inquiries that must be undertaken when hearing a suit under the proposed statute. First, the substance of the statute involves the legitimacy of an underlying government action, and such an inquiry is one with which most courts are likely familiar. The second inquiry determines whether a defendant substantially relied on the IRS action in undertaking a transaction valued at $100 million or more. A factual inquiry based on reliance should be familiar to courts because reliance is a basic principal of contract law. Finally, courts must


187. See, e.g., 33 U.S.C. § 1365(a) (1994) (requiring assessment of whether the defendant's action violated the comprehensive provisions of the Clean Water Act); Fed. Election Comm'n v. Akins, 524 U.S. 11, 16-18 (1998) (the plaintiffs sued because the FEC's decision that a group was not a "political committee," and therefore not subject to reporting requirements under the FECA, violated the plaintiff's right to information).

188. RESTATEMENT (SECOND) OF CONTRACTS § 90 & cmts. a, b (1981).
assess the appropriateness of injunctive or declaratory relief under the proposed statute. Again, courts are likely familiar with the application of equitable relief standards. Thus, a court’s familiarity with both the merits and relief inquiries under the proposed statute suggest that the statute will withstand judicial scrutiny.

2. Standing is Likely to Be Upheld

The proposed statute’s utility comes from its ability to provide a plaintiff with standing to challenge a favorable IRS action. This Part will demonstrate that a suit brought under the competitive disadvantage provision satisfies Article III and prudential standing requirements: injury in fact, causation, redressability, and zone of interests.

The competitive disadvantage injury proposed by this Note will satisfy Article III’s injury in fact requirement because courts have frequently recognized similar competitive injuries as valid. In particular, increased competition resulting from agency action that is inconsistent with a statute can be a valid injury in fact. The increased competition need not materialize; a sufficient injury in fact may be one resulting from an agency action that clearly threatens to competitively injure a plaintiff. Competitive injuries, while most applicable to this Note for their frequent use in challenging agency actions, have also been recognized outside the administrative agency context. For example, courts have recognized that competitive injuries, such as a lesser opportunity to compete, satisfy the injury in fact requirement when challenging violations of the Equal Protection clause. Thus, a competitive injury suffered

189. See Inv. Co. Inst. v. Camp, 401 U.S. 617, 620 (1971) (recognizing that increased competition to a plaintiff from an agency regulation can be a valid injury in fact); Ass’n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 152 (1970) (emphasizing that the injury in fact test is satisfied when a plaintiff “allege[s] that competition . . . might entail some future loss of profits”); FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 477 (1940) (noting that Congress may confer standing on a person that is “financially injured by the issue of a license” under the Communications Act).

190. See Associated Gas Distrib. v. FERC, 899 F.2d 1250, 1259 (D.C. Cir. 1990) (noting that an injury in fact occurs when agency action authorizes “transactions that have the clear and immediate potential to compete with the [plaintiff’s] own sales” so the plaintiff “need not wait for specific . . . transactions to hurt them competitively”); Inv. Co. Inst. v. FDIC, 815 F.2d 1540, 1543 (D.C. Cir.), cert. denied, 484 U.S. 847 (1987) (“The FDIC will deal petitioners competitive injury by allowing insured nonmember banks to enter the securities field indirectly through subsidiaries and affiliates.”).

under this Note's proposed statute is likely to satisfy the injury in fact requirement of judicial standing.

The causation and redressability requirements are also likely to be satisfied under the proposed competitive disadvantage provision. Causation will be met because, by definition, the competitive injury is caused by the IRS action. Injunctive or declaratory relief is also likely to redress some or all of the competitive disadvantages suffered, depending on the situation prior to the favorable IRS action, the nature of the favorable IRS action, and the competitive injury that results.

To better show how equitable relief can redress competitive injuries, this Note will evaluate injuries resulting from Notice 2008-83. Prior to Notice 2008-83, Citigroup planned to acquire Wachovia for $2.1 billion, but after the IRS issued Notice 2008-83, Wells Fargo swooped in and acquired Wachovia for $11.7 billion. Thus, Notice 2008-83 created three types of competitive disadvantage injuries. First, a competitor of Wachovia would have been disadvantaged by Wachovia's $9 billion increase in value because the future tax savings realized by a bank that acquired Wachovia under Notice 2008-83 made Wachovia a more attractive merger partner. Citigroup suffered a disadvantage from its loss of the specific benefits it would have gained had it completed the Wachovia acquisition as intended in the absence of Notice 2008-83. Finally, Wells Fargo's competitors, especially Citigroup, were disadvantaged by Wells Fargo's acquisition of the future benefits from Wachovia's business.

The short-term competitive advantage gained by Wells Fargo, and the corresponding short-term disadvantage to its competitors, turned out to be quite significant; the merger became final on December 31, 2008 and Wells Fargo reported a $3 billion profit in the first quarter of 2009, largely attributable to the Wachovia acquisition. The long-term disadvantage from the tax savings under Notice 2008-83 might be as high as $19.4 billion dollars. Thus, if

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192. See supra Part IV.B.
193. Wells Fargo-Wachovia Deal, supra note 132.
194. Id. See supra Part II.B for a discussion of the artificial competitive advantage resulting from Notice 2008-83. See also supra Table 1, scenario 1.
196. Drucker, supra note 8, at A3.
any of the competitors sued for injunctive or declaratory relief under the competitive disadvantage provision prior to the finalization of the Wells Fargo-Wachovia merger, a favorable court decision overruling or blocking Notice 2008-83’s tax benefits would likely redress the competitor’s disadvantage.197 If a competitor sued after the merger completed, injunctive or declaratory relief might also redress competitive disadvantages relative to the merged entity.198 These examples illustrate that a suit under the competitive disadvantage provision is likely to satisfy the redressability requirement.

Finally, the proposed statute is likely to satisfy the zone of interests test.199 A plaintiff’s interest in suing under the proposed statute is rooted in an interest in stopping the competitive disadvantage resulting from IRS actions. The proposed statute likewise aims to prevent the creation of competitive disadvantages from IRS actions. The zone of interests test is satisfied because the plaintiff’s interest in suing is among the interests Congress would seek to protect.200 Furthermore, courts have held that “competitors of financial institutions have standing to challenge agency action relaxing statutory restrictions on the activities of those institutions.”201 This holding is directly applicable to competitors who, under the proposed competitive disadvantage clause, would challenge favorable actions by the IRS—actions which can take the form of relaxed tax laws.202 Therefore, the zone of interests test is likely to be met, and, combined with satisfaction of the Article III requirements, a court is likely to uphold standing under the proposed statute’s competitive disadvantage clause.

197. A court could say that overruling Notice 2008-83 would not guarantee that Wachovia would return to its pre-Notice 2008-83 value. See, e.g., Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 45-46 (1976) ("[T]he complaint suggests no substantial likelihood that victory in this suit would result in respondents' receiving the hospital treatment they desire."). However, the fact that Wachovia’s $9 billion increase in value occurred within a couple days of Notice 2008-83’s issuance suggests that in the absence of Notice 2008-83, the market value would return to its pre-Notice 2008-83 value.

198. Judicial relief under the proposed statute is subject to a “reliance threshold.” See supra Part IV.B.

199. Congress can negate the zone of interest test by using broader language to authorize suits than it normally uses. Bennett v. Spear, 520 U.S. 154, 164-65 (1997). However, language restricting suits to “competitors” is not likely to negate prudential standing. Id. at 165. Thus, the issue is not applicable to this Note’s analysis of standing.


202. Notice 2008-83’s waiver of § 382 of the Internal Revenue Code could be considered a “relaxing” of the tax laws.
D. Policy Considerations

This Note proposes a reform that provides competitors with standing to challenge favorable IRS actions, and the previous Part demonstrates that courts are likely to grant standing to a party that sues under the proposed statute. The analysis is not complete, however, without considering policy implications of the proposed reform, such as whether a judicial remedy is an appropriate method of resolving the problem, whether the reform will flood the courts with litigation, and whether permitting private individuals to sue is a good idea.

One criticism of the proposed reform is that using the political process might be preferable to relying on a judicial remedy to address favorable IRS action. This argument relies on the notion that standing is "built on . . . the idea of separation of powers," which in turn gives courts pause when deciding whether an action taken by the executive or legislative branches is unconstitutional. Separation of powers also teaches that vindication of the public interest is the responsibility of the political branches of government, and therefore, standing may not be appropriate when a large class of citizens share the same harm. These concerns, while legitimate in theory, are not applicable to the problem of favorable IRS action. First, courts frequently decide the legality of agency actions and a federal statute clearly provides for such evaluations. Second, simply because a large number of people have been harmed by an action does not mean that they should not have standing. In particular, a concrete harm that is widely shared "does not deprive Congress of constitutional power to authorize its vindication in the federal courts." Thus, a judicial remedy is permissible to combat favorable IRS action.

Even if a judicial remedy is permissible, it may be criticized as facilitating a flood of frivolous or abusive lawsuits, designed to hurt a competitor or enemy. This argument has many problems. First,
standing is designed to weed out frivolous lawsuits\textsuperscript{211} and this Note proposes suits only by a group of competitors, not the general population. In addition, the proposed statute limits suits by requiring that a party have reasonable basis for their estimation of the competitive benefit or disadvantage incurred from a favorable IRS action.\textsuperscript{212} Furthermore, the statute could be modified to resemble the tax whistleblowing statute,\textsuperscript{213} which uses monetary thresholds to deter frivolous suits.\textsuperscript{214} Even if a party has standing, all suits brought under the proposed statute must be filed in the same jurisdiction, meaning duplicative suits can be eliminated or consolidated.\textsuperscript{215} Finally, high litigation costs always provide a deterrent against abusive litigation. Consequently, abusive litigation is not likely to be a significant problem.

Another criticism of the proposed judicial remedy is that the problem of favorable IRS action does not necessarily warrant reliance on individual citizens acting as private attorneys general. In Trafficante v. Metropolitan Life Insurance Co., the Court granted standing to plaintiffs who sued as private attorneys general under a federal statute.\textsuperscript{216} The Court permitted standing because suits by private persons were the "primary method of obtaining compliance with the [Civil Rights] Act."\textsuperscript{217} In addition, Congress considered compliance with Civil Rights Act "to be of the highest priority" because it protected the quality of citizens' daily lives.\textsuperscript{218}

Addressing discrimination in the civil rights era is far different from addressing the consequences of favorable IRS actions. However, the differing natures of the problems do not require different tactics to solve them, especially since the justifications for using private individuals to combat discrimination are also applicable to combating favorable IRS actions. For instance, suits by private individuals are likely the only effective remedy against favorable IRS actions, given that legislative and executive solutions are difficult to obtain or inadequate.\textsuperscript{219} In addition, the recent backlash against

\textsuperscript{211} CHEMERINSKY, supra note 106, at 61 ("Standing is said to serve judicial efficiency by preventing a flood of lawsuits by those who have only an ideological stake in the outcome.").

\textsuperscript{212} See supra Part IV.B.

\textsuperscript{213} I.R.C. § 7623(b)(5) (2006) (permitting suit only when monetary thresholds have been exceeded).

\textsuperscript{214} See Ventry, supra note 103, at 385 (noting that the whistleblowing statute's "dollar limitations shrink considerably the potential universe of [frivolous] actions").

\textsuperscript{215} See supra Part IV.B (discussing the exclusive jurisdiction requirement).

\textsuperscript{216} 409 U.S. 205, 212 (1972).

\textsuperscript{217} Id. at 209.

\textsuperscript{218} Id. at 211 (citation omitted).

\textsuperscript{219} See supra Part III.A.
bailed out banks using government funds to pay bonuses suggests that preserving tax revenues rightfully owed to the government is a high priority.\textsuperscript{220} While not the same as racial integration, tax revenues play an important role in the daily lives of a nation's citizens through social welfare programs and other government services. In summary, the justifications for using private attorneys general in the civil rights context are also present in the context of combating favorable IRS actions. Therefore, the proposed statute's reliance on suits by private individuals is acceptable.

V. Conclusion

Favorable IRS actions that are contrary to federal law are a serious problem because the IRS may not have legal authority to take such actions and such actions can have a significant economic impact. In addition, favorable IRS actions of this sort are inconsistent with the role of an administrative agency, lack accountability, and essentially bypass this country's system of checks and balances. Due to the lack of available remedies that can effectively counteract the effects of favorable IRS actions, this Note proposes a new statute to permit judicial challenges of favorable IRS actions. By focusing on the injuries created by favorable IRS actions, the proposed statutory reform provides standing to the competitors of those whom the IRS action favors. In enacting the proposed statute, Congress will help limit the effects of future IRS action that directly conflicts with federal law.