November 6, 2025

VIA E-MAIL: eoclass@irs.gov
IRS TEGE Classification
1100 Commerce Street
Mail Code 4910DAL
Dallas, TX 75242-1027

Re: Complaint Against Tax-Exempt Organization
New Venture Fund EIN: 20-5806345
Engaging in Excess Benefit Transactions and Operating in Violation of the Internal Revenue Code

Dear Sir or Madam,

The American Accountability Foundation[1] respectfully submits this memorandum in connection with the Tax-Exempt Organization Complaint (Form 13909) (the "Complaint") to which this memorandum is appended. The Complaint concerns New Venture Fund ("NVF") (EIN: 20-5806345), a nonprofit corporation currently classified as tax exempt under Internal Revenue Code ("IRC") section 501(c)(3). As set forth in more detail below, we have serious concerns regarding NVF's conduct, which calls into question the legitimacy of its tax-exempt status.

We have reason to believe that NVF has solicited hundreds of millions of dollars in donations from the public, a substantial portion of which have been diverted to NVF's founder and other senior officers through an administrative services agreement with Arabella Advisors LLC ("Arabella Advisors"), which was controlled by those same individuals. If so, NVF has engaged in improper excess benefit transactions by paying Arabella Advisors more than $200 million since 2006. And it has violated the IRC's operational test by providing improper benefits to (i) Eric

[1] The American Accountability Foundation is a 501(c)3 recognized educational organization that uses research and public outreach to educate the public on important public policy and civil society issues.

Kessler, who founded and exercised control over both NVF and Arabella Advisors[2]; (ii) Wilbur Priester, who was Chief Financial Officer ("CFO") of both NVF and Arabella Advisors from 2015 to 2019; and (iii) Andrew Schulz, who was General Counsel of both NVF and Arabella Advisors from 2015 to 2021.

We also have reason to believe that NVF provided funding to a third-party law firm absent evidence that the funding was intended to—or in fact did—further NVF's exempt purpose, which is to protect and preserve the environment and educate the public on environmental preservation. Since 2021, NVF has paid more than $8 million in grants and payments to Sher Edling—a California-based law firm that represents plaintiffs in high-profile litigation. NVF's Forms 990 describe these payments as for "environmental programs." Sher Edling, by contrast, has claimed that those grants and payments fund its "general operations." If true, those grants and payments are not in furtherance of NVF's tax-exempt purpose and, therefore, violate the IRC's operational test.

Because most of the key details of these improper dealings are not publicly available, only the Internal Revenue Service, using its investigatory and related enforcement powers, can compel the production of information necessary to discern whether NVF has run afoul of the IRC.

I. Factual Background

A. Eric Kessler

[2] Americans for Public Trust has identified similar issues regarding Mr. Kessler in its August 15, 2023, submission to the IRS, *Complaint Against Several Tax-Exempt Organizations Paying Compensation Directly or Indirectly, to Eric Kessler* (Ex. 1).

Mr. Kessler, an environmental advocate, formed Arabella Advisors in 2005 and formed NVF in 2006.[3] He subsequently played key roles in managing both organizations through at least August 2019.[4] Mr. Kessler was NVF's President from 2006 through 2014, Chairman of the Board from 2015 through 2017, and Secretary of the Board from 2018 through August 2019.[5]

B. Wilbur Priester

Mr. Priester is an experienced CFO and is the current CFO of Management Leadership for Tomorrow,[6] a nonprofit organization focused on economic mobility and increasing the number of underrepresented minorities in positions of leadership.[7] Mr. Priester was the CFO of both NVF and Arabella Advisors from 2015 through September 2019.[8] In 2017, he also kept NVF's books and records.[9] Mr. Priester described his role at Arabella Advisors as "aligning financial systems and operational policies to more effectively and efficiently serve Arabella's clients"—i.e., clients that presumably included NVF.[10]

C. Andrew Schulz

[3] *See* New Venture Fund (formerly known as "Arabella Legacy Fund") Certificate of Amendment (2006) (Ex. 2 at 2); NVF Articles of Incorporation (Ex. 2 at 3-6). Arabella Advisors was initially formed in Virginia in 2005 under the name Arabella Philanthropic Investment Advisors, LLC. The organization changed its name to Arabella Advisors, LLC on February 8, 2011. *See* Commonwealth of Virginia State Corporation Commission Certificate of Amendment, February 8, 2011 (Ex. 3 at 5-6). This memorandum refers to both entities collectively as Arabella Advisors. From 2005 to 2023, Arabella Advisors registered to do business in 35 states and territories. Copies of all documents and exhibits cited in this memorandum have been separately transmitted.

[4] For example, Mr. Kessler was the sole member of Arabella Advisors in 2006 (Ex. 22 at 29). In 2019, he continued to own a 35% stake in Arabella Advisors. *See* NVF 2019 Form 990 (Ex. 17), Schedule L Part V.

[5] Arabella Legacy Fund Application for Recognition of Exemption Form 1023 (filed Nov. 3, 2006) ("NVF Form 1023") (Ex. 22 at 3). New Venture Fund was initially formed under the name "Arabella Legacy Fund" then later changed its name (*see* Ex. 2 at 9). *See also* NVF 2006-2019 Forms 990 (Exs. 4-17).

[6] https://www.linkedin.com/in/wilbur-priester-84612b/.

[7] https://mlt.org/; *see also* Nell Gallogly, *The D.E.I. Retreat Has Some Notable Holdouts*, N.Y. Times (Jan. 22, 2025), https://www.nytimes.com/2025/01/22/business/dei-programs-initiatives-costco-microsoft.html.

[8] NVF 2015-2019 Forms 990, Part VII (Exs. 13-17).

[9] NVF 2017 Form 990 (Ex. 15).

[10] https://www.linkedin.com/in/wilbur-priester-84612b/.

Mr. Schulz is currently a Principal at Adler & Colvin, a District of Columbia- and San Francisco-based law firm focused on providing legal counsel to the nonprofit sector.[11] Mr. Schulz was General Counsel of both NVF and Arabella Advisors from 2015 to January 2021.[12] NVF's 2015 Form 990 listed Mr. Schulz as General Counsel working 40 hours per week for no compensation. This is the same year in which he began his role as General Counsel of Arabella Advisors.

D. Arabella Advisors

Arabella Advisors is a consulting firm that provides operational and administrative support to organizations claiming tax-exempt status. It is a District of Columbia-based company that Mr. Kessler formed as a Virginia LLC in 2005. Mr. Kessler had at least a 35% interest in Arabella Advisors until 2020, and Arabella Advisors has received more than $230 million in fees from NVF since 2006. Mr. Priester was CFO of Arabella Advisors from 2013 to 2023, and Mr. Schulz was General Counsel of Arabella Advisors from 2014 to January 2021.

E. New Venture Fund

New Venture Fund is a District of Columbia-based section 501(c)(3) tax-exempt organization that purports to support a wide range of public interest projects focused on conservation, global development, and education. From 2021 through 2023, NVF disclosed that it paid $8.3 million to Sher Edling for "environmental programs,"[13] while Sher Edling's statements

[11] https://www.adlercolvin.com/andrew-schulz/.
[12] NVF 2015-2021 Forms 990, Part VII (Exs. 13-19); https://www.linkedin.com/in/andrew-schulz-534045b/.
[13] NVF 2021-2023 Forms 990, Schedule I Part II (Exs. 19-21).

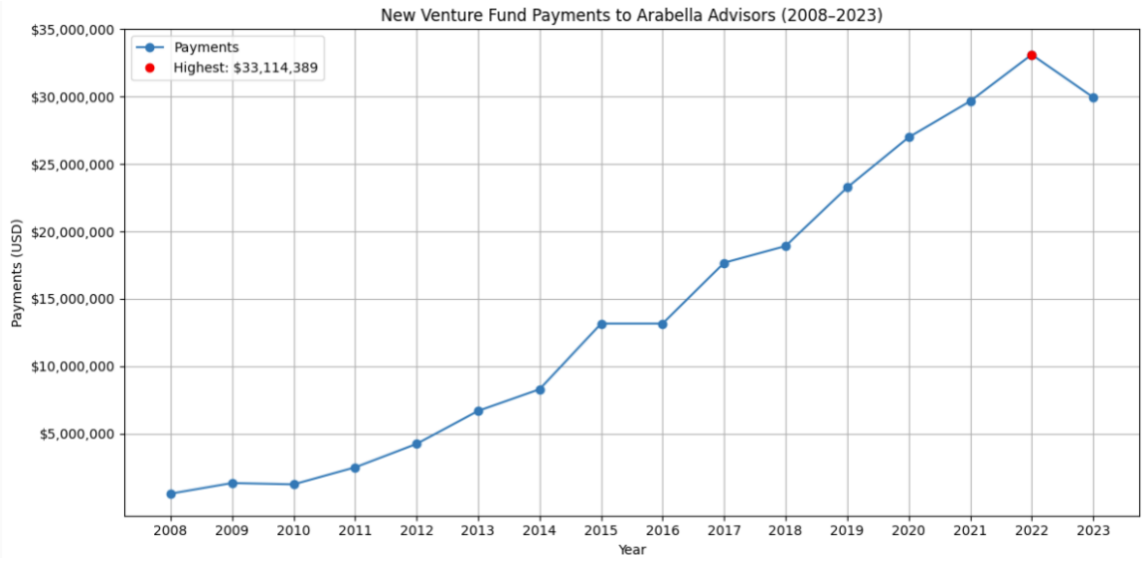
to Congress described these payments as going toward Sher Edling's "general operations[.]"[14] At present, all of these tax returns remain open for the IRS to audit.

NVF has paid over $230 million to Arabella Advisors for services since 2006, including $130 million between 2006 and 2019 when Mr. Kessler was President, Chairman, or Secretary of NVF's Board and had at least a 35% interest in Arabella Advisors.

NVF's payments to Arabella Advisors increased significantly during the period in which Mr. Kessler, Mr. Priester, and Mr. Schulz were involved in these entities. As Figure 1 reflects, Mr. Kessler began diverting funds from NVF to Arabella Advisors shortly after he created both organizations. And that effort only greatly accelerated when Mr. Priester and Mr. Schulz became involved in 2015. Indeed, NVF's payments to Arabella Advisors nearly tripled from approximately $8 million in 2014 to almost $24 million in 2019, by which time all three men had held positions with both NVF and Arabella Advisors for five years.

Figure 1

[14] Letter from Sher Edling counsel, Kaiser Dillon PLLC, to Sen. Ted Cruz (October 6, 2023) (Ex. 23 at 4). Sher Edling's counsel stated, in full, to Senator Cruz that "[d]onations to Sher Edling do not finance any particular [climate] lawsuit; rather, such donations support only the firm's general operations in this area." Senator Cruz's initial September 25, 2023, letter is attached, as well, for reference as Exhibit 24.



In its 2006 application for tax-exempt status, NVF disclosed that it had a "business relationship with a company operated by Eric Kessler," Arabella Advisors.[15] NVF noted that, despite Mr. Kessler's 35% interest in Arabella Advisors, NVF intended to pay Arabella Advisors to "provide [NVF] financial management and administrative support services" and "administer payroll and benefits on behalf of [NVF's] employees" under an administrative services agreement where NVF agreed to pay Arabella Advisors on a "cost-plus" basis, reimbursing Arabella Advisors for its costs, plus a five percent surcharge.[16]

The IRS flagged this arrangement several weeks later, asking NVF how it could be sure that, by contracting with Arabella Advisors, NVF had "the best available services at the best available price without a competitive bid?"[17] NVF responded that the agreement with Arabella

[15] NVF Form 1023 (Ex. 22 at 26).
[16] *Id*. at 29.
[17] *See* Letter from IRS to Arabella Legacy Fund (Nov. 30, 2006) (Ex. 22 at 36-37). The letter directs NVF (prior to its renaming, see footnote 5 above) to respond to the following: "It does not appear that services from [Arabella] Advisors are obtained or will be obtained on a competitive bid. Does this mean that Eric Kessler's business have (*sic.*) the exclusive right to the service agreement? If so, how will you, as a nonprofit organization, determine that you have the best available services at the best available price without a competitive bid? Does Mr. Kessler take part in negotiating the service agreement with his business on your behalf? Discuss." (Ex. 22 at 36-27).

Advisors would be approved by NVF's two disinterested directors who would "closely monitor costs and [] seek outside bids if they believe they are warranted," that the arrangement was "anticipated to be temporary and, indeed, only has a one-year term," and that "[a]s soon after this period as [NVF] has adequate funding, it will no longer require the services of [Arabella Advisors]."[18] NVF further pledged that the agreement would be in effect only until NVF had "sufficient financial resources to make the operation of its own back office cost-efficient."[19] NVF subsequently grew to an organization with over $1 billion in assets—presumably large enough to follow through on its promise to administer its own payroll and other benefits—but continued to pay Arabella Advisors millions of dollars for these back office services for nearly twenty years.

F. Sher Edling

Sher Edling is a San Francisco-based boutique litigation law firm that represents states, municipalities, public agencies, and businesses in high-profile environmental cases. It is common for Sher Edling to advance all out-of-pocket litigation costs in return for a contingency fee if the litigation is successful in obtaining a judgment or settlement.[20] These agreements also typically provide that a state, municipality, or other entity will support Sher Edling's application for an award of attorneys' fees and costs if the litigation is resolved on the basis of injunctive relief alone.[21] Since 2021, Sher Edling has received over $8 million from NVF in the form of grants

[18] NVF Form 1023, Supplemental Questions & Answers (Dec. 21, 2006) (Ex. 22 at 45).
[19] *Id.*
[20] *E.g.*, City of San Francisco and Sher Edling LLP Retention Agreement §§ 4.1(a), 4.2 (Ex. 25 at 4-6); State of Minnesota and Sher Edling Special Attorney Appointment Agreement, Exhibit A ¶ 1 (Ex. 26 at 48)).
[21] *See* Ex. 25 at 6; Ex. 26 at 44.

that Sher Edling has said are for its "general operations" and "do not finance any particular lawsuit."[22]

II. Apparent Violations

A. New Venture Fund's payments to Arabella Advisors provided private inurement or private benefits to Mr. Kessler, Mr. Priester, and Mr. Schulz and still provide a private benefit to Mr. Kessler in violation of the IRC's operational test.

The available facts suggest that NVF provided and continues to provide private benefits to Mr. Kessler, Mr. Priester, and Mr. Schulz through Arabella Advisors, or that Mr. Kessler established NVF to direct tax-exempt charitable contributions to himself and his colleagues for personal gain. In fact, from 2020 onward, NVF's Florida state disclosures affirmatively admit that part of the assets or income of the organization inure to the benefit of NVF's officers or members.[23]

1. Legal Overview

To qualify for tax-exempt status, an organization must be "operated exclusively for one or more of the purposes specified" in section 501(c)(3).[24] This operational test requires that a tax-exempt organization "primarily" engage in activities that further its exempt purpose or purposes and that the organization's net earnings do not inure in whole or in part to the benefit of private shareholders or individuals.[25] A tax-exempt organization may engage in activities that do not further its exempt purpose, but only to an insubstantial degree.[26]

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[22] *See* Memorandum from the U.S. Senate Committee on Commerce, Science, and Transportation and U.S. House of Representatives Committee on Oversight and Accountability, Republican Staff Re: *Investigation into the Funding of Sher Edling, LLP's Lawfare Against American Energy Companies* (October 7, 2024) (Ex. 27 at 6); Ex. 23 at 6.
[23] NVF 2020-2025, Florida Department of Agriculture and Consumer Services Charitable Organization Application, Application Questionnaire (Exs. 28-33).
[24] Treas. Reg. § 1.501(c)(3)-1(a)(1).
[25] Treas. Reg. § 1.501(c)(3)-1(c).
[26] *Id*.

As such, an organization is not operated exclusively for one or more exempt purposes if (i) "its net earnings inure in whole or in part to the benefit of private shareholders or individuals"[27] or (ii) it serves a private interest rather than the public interest.[28] When an organization "operates for the benefit of private interests such as designated individuals . . . the organization by definition does not operate exclusively for exempt purposes."[29]

For example, in *International Postgraduate Medical Foundation v. Commissioner*, the Tax Court revoked an organization's tax-exempt status where the organization's founder caused the organization to make substantial payments to his for-profit company for "secretarial, clerical and administrative" fees.[30] Similarly, in *Airlie Foundation v. United States*, a federal district court upheld the revocation of an organization's tax-exempt status, affirming it was operated for private benefit when an individual who controlled the organization also managed a for-profit entity that significantly profited from transactions with the tax-exempt organization.[31] The extent of the benefits was such that the for-profit entity would not have existed without the support it received from the tax-exempt organization.[32]

2. Application

When Mr. Kessler was on NVF's Board of Directors from 2006 through 2019 (while he also maintained an interest in Arabella Advisors), NVF paid over $110 million to Arabella Advisors in the form of cash and publicly traded securities for "admin. operations & management services"

[27] *Id*.
[28] Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii).
[29] *Am. Campaign Academy v. Comm'r*, 92 T.C. 1053, 1065-66 (1989).
[30] T.C. Memo 1989-36 (1989).
[31] 826 F. Supp. 537, 539, 552 (D.D.C. 1993).
[32] *Id*.

including "HR, payroll, and legal support services."[33] In 2019 alone, when Mr. Kessler was NVF's Secretary of the Board of Directors and had a 35% interest in Arabella Advisors, NVF paid Arabella Advisors $23 million for "administrative services,"[34] 35% of which could have yielded an $8 million windfall to Mr. Kessler. NVF paid over $86 million to Arabella Advisors between 2015 and 2019 when Mr. Kessler, Mr. Priester, and Mr. Schulz held positions with both organizations.[35] In 2017, Mr. Priester was CFO of both NVF and Arabella Advisors, kept the books of NVF, and as NVF's CFO presumably oversaw its $17 million payment to Arabella Advisors—the highest payment to date at that time.

To find evidence of inurement, your office need not look further than NVF's own yearly Florida Charitable Organization Applications. In those filings NVF is asked whether "any part of the assets or income of the organization or sponsor inured to the benefit of or paid to any officer or member?" From 2020 onward, NVF simply answers "yes." Strikingly, NVF affirmatively states that it has violated the Code's prohibition on inurement "in whole or in part" to the benefit of individuals, which opens the door for IRS examination and audit.

NVF's Florida Charitable Organization Applications and the available facts demonstrate that NVF directly conferred a private benefit on Arabella Advisors and, therefore, indirectly conferred a benefit on Mr. Kessler, who owns Arabella Advisors, and potentially Mr. Priester, and Mr. Schulz, who were employed by Arabella Advisors. These facts also suggest that Mr. Kessler organized NVF to funnel tax-exempt charitable funds to himself and his advisory firm for his and

[33] NVF 2006-2019 Forms 990, Part VII B, and Schedule O (Exs. 4-17). Arabella Advisors or Mr. Kessler himself have also maintained the books and records of NVF since 2006 (with the exception of 2017, when Mr. Priester, who was CFO of NVF, kept the books). *See* NVF 2017 Form 990 Schedule O (Ex. 15).
[34] NVF 2019 Form 990, Schedule L Part IV (Ex. 17).
[35] NVF 2015-2019 Forms 990, Part VII B, and Schedule O (Exs. 13-17).

his colleagues' personal benefit. These circumstances demonstrate that NVF likely violated the rules requiring a tax-exempt organization to operate exclusively for an exempt purpose.[36] Relevant here, courts have found inurement and revoked the tax exemption of organizations involved in similar transactions—such as those described in *International Postgraduate Medical* and *Airlie*—where an organization serves a private interest.[37]

In fact, Arabella Advisors was NVF's most highly compensated independent contractor each year from 2010 to 2021.[38] Like the organization that had its exempt status revoked in *Airlie*, it is conceivable that Arabella Advisors would not have been founded, or at least would not have remained in business, absent NVF's repeated large payments.

B. NVF's payments to Arabella Advisors suggest excess benefit transactions, potentially subjecting NVF to loss of exempt status and Mr. Kessler, Mr. Priester, Mr. Schulz, and Arabella Advisors to tax and penalties.

NVF and Arabella Advisors have possibly engaged in excess benefit transactions that may (i) lead to the revocation of NVF's tax-exempt status and/or (ii) subject Arabella Advisors, Mr. Kessler, Mr. Priester, and Mr. Schulz to tax and penalties.

1. Legal Overview

Where a person or organization provides services to an exempt organization in exchange for an economic benefit, the value of those services is the "reasonable compensation" that would be paid for those services by like enterprises (either taxable or tax-exempt).[39] Payments for

[36] *See, e.g.*, *Founding Church of Scientology v. U.S.*, 412 F.2d 1197, 1201 (Ct. Cl. 1969), *cert. denied*, 397 U.S. 1009 (1970).
[37] *See also Spokane Motorcycle Club v. U.S.*, 222 F. Supp. 151 (E.D. Wash. 1963) (organization was not operated exclusively for exempt purpose when members received "not large" amounts of refreshments, goods, and services from the net profits of the organization); *Curt Teich Found. v. Comm'r*, 48 T.C. 963 (1967) (the presence of inurement itself can lead to loss of exempt status, and the amount or extent of inurement is not a determinative factor).
[38] NVF 2006-2021 Forms 990, Part VII B, and Schedule O.
[39] Treas. Reg. § 53.4958-4(b)(1)(ii)(A).

services are presumed to be reasonable if (i) the payments were approved by the disinterested directors of the exempt organization, (ii) the authorized body that approved the payments obtained and relied upon appropriate comparative data prior to making its determination, and (iii) the authorized body adequately and concurrently documented the basis for its determination.[40]

IRC section 4958 imposes an excise tax penalty on "disqualified persons" and "organization managers" who engage in "excess benefit transactions" with tax-exempt organizations. A disqualified person is defined as an individual with substantial influence who (i) is a voting member of the organization's governing body, (ii) regardless of title, has ultimate responsibility for implementing the decisions of the governing body or for supervising the management, administration, or operation of the organization, or (iii) has ultimate responsibility for managing the finances of the organization.[41] A 35% controlled entity is also defined as a disqualified person.[42] An "organization manager" is defined as "any officer, director, or trustee" of a tax-exempt organization.[43]

2. Application

NVF risks losing its tax exemption if it engaged in excess benefit transactions that were egregious or repeated and failed to implement safeguards to prevent future excess-benefit transactions.[44] Although NVF has a conflict-of-interest policy and reports its payments to Arabella Advisors on NVF's Forms 990 as business transactions involving interested persons, these payments strongly suggest unreasonable compensation.

[40] Treas. Reg. § 53.4958-6(a)(1)-(3).
[41] Treas. Reg. § 53.4958-3(c).
[42] IRC § 4958(f)(1)(C).
[43] IRC § 4958(f)(2).
[44] *See* Treas. Reg. § 1.501(c)(3)-1(f)(2)(ii); *Caracci v. Comm'r*, 118 T.C. 379, 417 (2002), *rev'd on other grounds*, 456 F.3d 444 (5th Cir. 2006).

NVF is at risk of having its exemption revoked because it purchased significant services from a board member for greater than fair market value, failed to implement safeguards to prevent such transactions, and did not subsequently seek to correct the transactions.[45] Here, NVF purchased hundreds of millions of dollars' worth of services over nearly 20 years from an entity controlled by one of its board members—specifically after NVF assured the IRS that such payments would be temporary. While it is unclear exactly what NVF received in return for its large payments, it is virtually impossible to conclude that the payments were not excessive relative to any services or other benefits that NVF received from Arabella Advisors.

Well-known tax-exempt organizations do not pay contractors amounts close to what NVF has paid Arabella Advisors for similar services. In fact, NVF's payments to Arabella appear to be disproportionate when compared to other organizations.

In 2023, NVF reported $887 million in gross receipts and paid Arabella Advisors, its highest paid contractor, $30 million—3.38% of its gross receipts—for "admin. & operational support services."[46] In return, Arabella Advisors kept NVF's books and supplied NVF "the systems and services to ensure compliance with federal, state, and local regulations related to charitable solicitation" and provided "HR, compliance, payroll, and other administrative functions to New Venture Fund."[47] By contrast, that same year, the Tides Foundation, an organization with $576 million in gross receipts paid $842,333—just 0.15% of its gross receipts—to two contractors to "manage philanthropy services" and for "project management services."[48] Similarly, the World Wildlife Fund had $508 million in gross receipts and paid its highest compensated contractor $11

[45] Treas. Reg. § 1.501(c)(3)-1(f)(2)(iv), Example 1.
[46] NVF 2023 Form 990, Part VII Section B (Ex. 21).
[47] *Id*. Schedule O, Page 2 (Ex. 21).
[48] Tides Foundation 2023 Form 990, Part VII Section B (Ex. 34).

million—2.2% of its gross receipts—for printing, production and mailing services.[49] It paid less than $2 million—0.4%—for financial reporting and planned giving.[50] The Gates Foundation, with $8 billion in gross receipts—nearly ten times that of NVF—paid $37 million (0.4% of its gross receipts) to its highest paid contractor for polio immunization and support services.[51] No other Gates Foundation contractor is paid more than $30 million—the amount that NVF paid Arabella Advisors—and none of its five highest paid contractors appear to assist with operational and administrative support.[52]

No other organization—with the exception of the Gates Foundation, which is ten times the size of NVF—pays its contractors close to what NVF has paid Arabella Advisors (in terms of total dollars). Moreover, each of these organization's books are kept by its CFO, treasurer, or an employee[53] while NVF still entrusts Arabella Advisors with this duty. Simply put, based on comparable data and practices alone, NVF's payments to Arabella Advisors appear to be unprecedented.

In 2006, NVF promised the IRS that "[a]s soon after this period as the Organization has adequate funding, it will no longer require the services of the Advisors."[54] But NVF and Arabella Advisors continued to renew their administrative services agreement with the parties agreeing to a three-year extension in 2014 through 2017[55] and subsequent extensions in three- and five-year

[49] World Wildlife Fund 2023 Form 990, Part VII Section B (Ex. 35).
[50] *Id*.
[51] Gates Foundation 2023 Form 990, Part VII Section B (Ex. 36).
[52] *Id*.
[53] *See* Tides Foundation 2023 Form 990, Part VI Section C (Ex. 34); World Wildlife Fund 2023 Form 990, Part VI Section C (Ex. 35); Gates Foundation 2023 Form 990, Part VI-A (Ex. 36).
[54] NVF Form 1023 Supplemental Questions and Answers (Ex. 22 at 45).
[55] RSM US LLP, New Venture Fund 2016 Independent Auditors Report (Ex. 37 at 19).

increments through June 2025.[56] Moreover, what started as a five percent "cost-plus" arrangement has expanded into an agreement with much higher upside for Arabella Advisors. NVF now pays Arabella Advisors "a percentage of total contributions set forth for each project, but never to exceed 15% of each project's total contributions per year."[57] Whereas Arabella Advisors was previously capped at its costs plus five percent, it now earns tens of millions of dollars by taking an up to fifteen percent fee for all projects it works on.

Not only has NVF continued to pay Arabella Advisors, an LLC that was 35% owned by Mr. Kessler (and therefore, a disqualified person as a 35% controlled entity), it has done so for nearly two decades to the tune of hundreds of millions of dollars. That arrangement warrants further review. Why did NVF continue to pay Arabella Advisors when NVF had pledged to stop? And were the services that NVF received reasonable given its multi-million-dollar payments each year?

It also appears that Mr. Kessler, Mr. Priester, and Mr. Schulz were "disqualified persons" and/or "organization managers" with regard to NVF at different points between 2006 and 2022. From 2006 to 2019, Mr. Kessler was either President, Chairman, or Secretary of NVF's board and held substantial influence over the organization. Mr. Priester had ultimate responsibility for managing NVF's finances as its CFO from 2015 to 2019. Mr. Schulz was also an officer of NVF when he was General Counsel from 2015 to 2023 and was, therefore, an "organization manager." Therefore, Mr. Kessler and Mr. Priester were both disqualified persons and organization managers, and Mr. Schulz was an organization manager, each of whom may be subject to tax and penalties

[56] RSM US LLP, New Venture Fund 2016 Independent Auditors Report (Ex. 37 at 19); Moss Adams, New Venture Fund 2020 Independent Audit (Ex. 38 at 21).
[57] Ex. 38 at 21.

under IRC section 4958 if NVF engaged in excess benefit transactions when these individuals were involved with NVF. Finally, as disqualified persons, the IRS retains authority to subject all three individuals and Arabella Advisors to excise taxes and penalties stemming from their possible excess benefit transactions.

C. NVF's payments to Sher Edling are not in furtherance of NVF's exempt purpose and may, therefore, violate the operational test.

1. Legal Overview

Treasury Regulation section 1.501(c)(3)-1(c)(1) provides that an organization will be deemed to be operated exclusively for an exempt purpose:

> [O]nly if it engages primarily in activities which *accomplish* one or more of such exempt purposes specified in section 501(c)(3). An organization will not be so regarded if more than an *insubstantial* part of its activities is not in *furtherance* of an exempt purpose. (Emphases added.)

Thus, under the regulation, activities are appropriate only if they "accomplish" or are substantially "in furtherance of" a recognized exempt purpose in section 501(c)(3).[58]

The IRS has recognized four types of litigating organizations that may be recognized for exemption under section 501(c)(3): (i) legal aid organizations; (ii) human and civil rights defense organizations; (iii) public interest law firms; and (iv) organizations that achieve charitable goals through instituting litigation as a plaintiff.[59]

Numerous Tax Court cases and IRS authority provide examples of situations where pursuing litigation is not considered an activity that accomplishes one or more exempt purposes. For example, in *Nationalist Movement v. Commissioner*, the Tax Court found that a white

[58] *See* G.C.M. 37661 (1978).
[59] IRS Exempt Organizations Continuing Professional Education, *Litigation by IRC 501(c)(3) Organizations* (1984) (Ex. 39 at 1).

nationalist organization's litigation activities were not in furtherance of its charitable purpose because the organization provided "very little detail about its litigation" and the court had "no way of knowing the precise [] issues raised" or the organization's "expectation about public impact[.]"[60] In Private Letter Ruling 201217026, the IRS determined that an organization was not operated exclusively for exempt purposes when its primary activity was pursuing drinking water-related litigation because over 90% of monetary awards were earmarked for attorney fees.[61] Moreover, the organization failed to demonstrate that its litigation activities were not motivated by private benefit to the attorneys because, according to the IRS, the organization did not sue defendants based on public benefit, and instead independently pursued defendants only in circumstances that could result in monetary settlements.[62]

The Tax Court has also denied exempt status to organizations that have failed to maintain records to support their claims of meeting the operational test. For example, in *Church in Boston v. Commissioner*, the Tax Court sustained the IRS's denial of an organization's tax-exempt status when the organization could not provide adequate documentation demonstrating whether its process of choosing grant recipients was in furtherance of its exempt purpose.[63]

Conversely, the IRS has found litigation to be in furtherance of an exempt purpose in specific limited circumstances. In Revenue Ruling 73-285, a tax-exempt human and civil rights organization was organized to raise money from the general public to fund the criminal defense of

[60] 102 T.C. 558, 580 (1994). *See also Council for Educ. v. Comm'r*, 106 T.C.M. (CCH) 669 at 11 (2013) (finding that litigation undertaken primarily to benefit tax-exempt organization was not an activity to accomplish an exempt purpose).
[61] P.L.R. 201217026 (Apr. 27, 2012).
[62] *Id*.
[63] 71 T.C. 102, 106-07 (1978).

third parties in lawsuits involving religious freedom.[64] The IRS found that the organization's funding of such litigation was in furtherance of a charitable exempt purpose because the litigation promoted social welfare.[65] The IRS did not require that the organization itself bring the litigation; instead, merely funding the litigation costs of others was found sufficient.[66]

In Revenue Ruling 80-278, the IRS found that an organization organized to protect and restore environmental quality was engaged in furtherance of its charitable exempt purpose when its principal activity consisted of hiring private attorneys to institute environmental litigation seeking injunctive relief as a party plaintiff.[67] Furthermore, the organization did not bring lawsuits "in cases where a substantial purpose [was] to benefit a private party or interest."[68] The IRS has since stated that the "real impact of the revenue ruling lies in the requirement" that such litigation is instituted as a party plaintiff.[69]

2. Application

Here, NVF does not qualify as one of the four types of "litigating organizations" defined by the IRS. NVF is not a legal aid organization, human and civil rights defense organization, or public interest law firm. Nor does it achieve its goals through instituting litigation as a plaintiff.

Instead, NVF provides "general funding" to Sher Edling for its discretionary use, which is not in furtherance of an exempt purpose. NVF's activities are akin to those described in *Nationalist Movement* and PLR 201217026. Like the organization in PLR 201217026 that earmarked 90% of its environmental litigation awards for attorney fees, Sher Edling's litigation activities appear

[64] Rev. Rul. 73-285, 1973-2 C.B. 174.
[65] *Id.*
[66] *Id.*
[67] Rev. Rul. 80-278, 1980-2 C.B. 175.
[68] *Id.*
[69] *Id.*

motivated by private benefit. If successful, Sher Edling's attorneys stand to gain tens or hundreds of millions of dollars from their climate litigation portfolio. Notably, NVF's disclosures provide little detail about the types of litigation that Sher Edling pursues, and Sher Edling's own disclosures conflict with NVF's representations about that litigation. This suggests that NVF's funding of Sher Edling's general operations is not an activity that furthers NVF's exempt purpose but is instead meant to financially benefit Sher Edling and its attorneys.

Pursuant to *Church in Boston* and *Nationalist Movement*, NVF should provide a detailed explanation for its payments to a recipient like Sher Edling. Those payments should be accompanied by specific grant requirements that restrict the use of those funds to activities that further NVF's exempt purpose. NVF's Forms 990, however, only vaguely describe its grants to Sher Edling as, for example, supporting "environmental programs," which, without further elaboration, lack the necessary specificity. Compounding this concern, Sher Edling has publicly asserted to a U.S. Senator that NVF's payments to Sher Edling "do not finance any particular lawsuit" and merely support "the firm's general operations."[70]

These "general operations" potentially encompass a wide range of possible uses of NVF payments by Sher Edling lawyers—for example, to pay increased partner compensation or to fund the costs of litigation that has nothing to do with NVF's exempt purpose.[71] Therefore, it appears that NVF's grants to Sher Edling are not in furtherance of NVF's exempt purpose.

[70] *See* Ex. 27 at 6; Ex. 23 at 4, 6.
[71] NVF's tax returns list "environmental programs" as the reasons for the payments to Sher Edling, which may be insufficient in proving the grants further NVF's exempt purposes. *See* NVF 2021 Form 990, Schedule I Part II (Ex. 19).

These "general" payments also jeopardize NVF's exemption because they constitute "more than an insubstantial" part of NVF's activities.[72] Given the size of the payments to Sher Edling—over $8 million through 2023—it is difficult to conclude that the payments are "insubstantial."[73] This determination would also take into consideration unreasonable compensation paid to Arabella Advisors. *See* pp. 8–9 *infra*.

Meanwhile, Revenue Rulings 73-285 and 80-278 are inapt for a few reasons. Revenue Ruling 73-285 involved a tax-exempt human and civil rights organizations whose sole mission was to provide criminal defense work for preserving religious rights. NVF is not a tax-exempt human and civil rights organization and does not share the same purpose as the organization in Revenue Ruling 73-285. And unlike Sher Edling's lawyers, the lawyers described in that ruling were not entitled to contingency fees or to otherwise share in damages recoveries.

Likewise, NVF's involvement in litigation is far more attenuated than the direct engagement described in Revenue Ruling 80-278, which required that the organization itself initiate litigation as a party plaintiff. Here, by contrast, NVF is several steps removed from litigation: it is not a party to any lawsuit, nor does it fund party plaintiffs directly. Instead, NVF funds a law firm—Sher Edling—that *might* use those funds to pursue litigation on behalf of state and local governments. And unlike the organization described in Revenue Ruling 80-278, which only sought injunctive relief in cases that conferred no substantial benefit to private parties, the Sher Edling litigation supported by NVF seeks monetary damages and has the potential to

[72] *See* Treas. Reg. § 1.501(c)(3)-1(c)(1).
[73] *See Better Business Bureau v. U.S.*, 326 U.S. 279 (1945) (holding that the presence of a single noncharitable purpose, if substantial in nature, will preclude exemption under section 501(c)(3) regardless of the number or importance of charitable purposes).

substantially enrich Sher Edling's attorneys—either through support for its "general operations" or future financial gain if a money judgment is awarded.

III. Conclusion

In summary, there is good cause for the IRS to investigate NVF, Mr. Kessler, and his former colleagues.

Since 2006, NVF has disbursed over $200 million to Arabella Advisors, during most of which time Mr. Kessler exercised control over both entities, and Mr. Priester and Mr. Schulz held executive roles in each. These payments raise serious concerns about excess benefit transactions and indicate that NVF may have violated the IRC's operational test by conferring prohibited private benefits on these individuals.

Separately, according to Sher Edling, NVF has paid over $8 million to support the firm's "general operations"—a use of funds that does not appear to further NVF's exempt purpose and, therefore, violates the IRC's operational test.

Accordingly, the American Accountability Foundation encourages the IRS to examine NVF to determine the extent to which it has abused its tax-exempt status. Should an investigation confirm such violations, the IRS should take appropriate action, including, but not limited to: revoking NVF's tax-exempt status, imposing excess benefit transaction excise taxes under IRC section 4958, and imposing any appropriate penalties.

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