

Supporting Organizations Guide Sheet Explanation
Type III
March 24, 2008

This Guide Sheet Explanation is designed to provide an overview of exempt organization tax law rules applicable to Type III supporting organizations and to assist in preparation of the IRC 509(a)(3) Supporting Organizations Guide Sheet Type III. A separate explanation and guide sheet is available for Type I and Type II supporting organizations.

OVERVIEW

Background

Every organization described in IRC 501(c)(3) is further classified under IRC 509(a) as either 1) a private foundation, or 2) other than a private foundation if it qualifies under IRC 509(a)(1), (2), (3), or (4).

Private foundations typically have a single major source of funding (usually gifts from one family or corporation rather than funding from many sources). Organizations that are qualified under IRC 509(a)(1) include churches, hospitals, qualified medical research organizations affiliated with hospitals, schools, colleges and universities, and organizations that have an active program of fundraising and receive contributions from many sources, including the general public, governmental agencies, corporations, private foundations or other public charities. Organizations qualified under IRC 509(a)(2) receive income from the conduct of activities in furtherance of the organization's exempt purposes. Organizations qualified under IRC 509(a)(3) actively function in a supporting relationship to one or more IRC 509(a)(1) or (2) organizations.

An organization may request IRC 509(a)(3) status either 1) when it initially files a Form 1023 application for IRC 501(c)(3) exemption, or 2) subsequently, by requesting a determination letter that changes its existing foundation status. A nonexempt charitable trust described in IRC 4947(a)(1) may also request a determination that it is described in IRC 509(a)(3), even though it has not been recognized as an IRC 501(c)(3) organization, pursuant to Revenue Procedure 72-50, 1972-2 I.R.B. 830. For information about Rev. Proc. 72-50, see FY 1980 Continuing Professional Education text entitled *General Explanation of Trusts Subject to Section 4947 of the Internal Revenue Code*.

The Pension Protection Act of 2006 (PPA of 2006) modified the statutory scheme applicable to supporting organizations to address concerns that some supporting organizations were being used to inappropriately benefit private interests. This guide sheet inquires about supporting organization arrangements that lend themselves to private benefit abuses, including situations where a supporting organization makes loans, grants, or compensation payments to or for the benefit of donors or donors' families and businesses. The guide sheet also inquires about situations where the supporting organization is a recipient of closely held stock, personal residences, partnership interests, sole proprietorships, or insurance policies, as these asset types may be manipulated for

the benefit of donors or donors' families and businesses. In these circumstances, one needs to consider possible denial of IRC 501(c)(3) exemption, or possible denial of IRC 509(a)(3) supporting organization status.

Types

In general, supporting organizations have been identified by the type of relationship they have with their supported IRC 509(a)(1) or (2) organizations. Under the PPA of 2006, supporting organizations are classified into Type I, Type II, or Type III supporting organizations. The names are new, but they merely reflect the existing three relationships with supported organizations described in the current regulations. Type I supporting organizations are operated, supervised, or controlled by one or more IRC 509(a)(1) or (2) organizations. Type II supporting organizations are supervised or controlled in connection with one or more IRC 509(a)(1) or (2) organizations. Type III supporting organizations are operated in connection with one or more IRC 509(a)(1) or (2) organizations. The PPA of 2006 classifies Type III supporting organizations into the following two categories: Type III supporting organizations that are not functionally integrated or functionally integrated Type III supporting organizations.

Type III supporting organizations that are not functionally integrated are subject to excess business holding rules under IRC 4943 and must meet annual payout requirements. Further, private foundations are prohibited from treating grants made to Type III supporting organizations that are not functionally integrated as qualifying distributions under IRC 4942.

Functionally integrated Type III supporting organizations are not subject to excess business holding rules of IRC 4943, are not subject to annual payout requirements, and private foundations may treat grants to functionally integrated Type III supporting organizations as qualifying distributions under IRC 4942.

Until final guidance is issued that defines functionally integrated Type III supporting organizations as described in IRC 509(d) and 4943(f)(5)(B), the IRS is generally suspending the issuance of determination letters to this category of Type III organizations other than organizations that choose to meet the advance notice of proposed rulemaking. [See Advance Notice of Proposed Rulemaking (ANPRM), 72 Fed. Reg. 42335 (Aug. 2, 2007). This ANPRM is available from the IRS website at www.irs.gov under Charities and Nonprofits.]

The ANPRM sets forth criteria for qualifying as a functionally integrated Type III supporting organization. If a Type III supporting organization chooses to meet the ANPRM, IRS may issue a determination letter that classifies it as a functionally integrated Type III supporting organization. Of course, the organization would have to comply with the regulations that define functionally integrated Type III supporting organizations when they are finalized. If an organization chooses not to agree to comply with the ANPRM, it can qualify for a determination letter that classifies it as a Type III

supporting organization without determining whether it is or is not functionally integrated. In this case, Notice 2006-109, 2006-51 I.R.B. 1121, provides rules on which private foundations can rely to ensure they are not making grants to Type III supporting organizations that are not functionally integrated. Finally, Announcement 2006-93, 2006-48 I.R.B.1017, provides for an expedited process whereby organizations that are classified as IRC 509(a)(3) supporting organizations may, if they qualify for the status, obtain a determination letter that modifies their foundation classification to IRC 509(a)(1) or (2).

A supporting organization must meet an organizational test that requires it to contain provisions in its organizational document (e.g. articles of incorporation, trust instrument, articles of association, or articles of organization) that limit its purposes to operate exclusively for the benefit of, to perform the functions of, or to carry out the purposes of one or more IRC 509(a)(1) or (2) organizations. A supporting organization must also meet an operational test that requires it to engage solely in activities that support one or more publicly supported organizations. A supporting organization may not be controlled directly or indirectly by a disqualified person. Effective August 17, 2006 the PPA of 2006 provides that neither a Type I nor Type III supporting organization qualifies as a supporting organization if it accepts gifts from a person (other than a IRC 509(a)(1), (2), or (4) organization) that directly or indirectly controls (alone, or together with family members and 35 percent controlled organizations) the governing body of a supported organization.

A Type I supporting organization must be operated, supervised, or controlled by one or more publicly supported organizations. The relationship between the supported organization and the supporting organization is like a parent-subsidiary relationship. This relationship exists where one or more supported organizations (by their governing bodies, members of the governing bodies, officers acting in their official capacities, or their membership) elect or appoint a majority of the organization's officers, directors, or trustees.

A Type II supporting organization must be supervised or controlled in connection with one or more publicly supported organizations. A Type II relationship is like a brother-sister relationship. In a Type II relationship, the same persons control or manage both the supporting organization and the supported organization.

A Type III supporting organization must be operated in connection with one or more publicly supported organization. A Type III supporting organization must meet a responsiveness test and an integral part test. Changes made to the responsiveness test by the PPA of 2006 are incorporated into the guide sheet and explained below. Changes made to the integral part test by the PPA of 2006 are not incorporated into the guide sheet because they are not effective until the issuance of final regulations; however, these changes are explained below.

Responsiveness Test

The responsiveness test requires that a supporting and its supported organizations must have at least one officer, director or trustee in common or such individual(s) must maintain a close and continuous working relationship between the two organizations, such that the supported organizations have a significant voice in the investment policies and operations of the supporting organization, including in the timing and manner by which it makes grants and selects grant recipients.

Effective August 17, 2006, an alternative responsiveness test applicable to charitable trusts has been eliminated by the PPA. The alternative responsiveness test requires that (a) the supporting organization is a charitable trust, (b) the supporting organization specifies each publicly supported organization as a named beneficiary under the trust, and (c) the supported organization has the power to enforce the trust and compel an accounting. However, charitable trusts that met the operated in connection with test on August 17, 2006 can continue to rely on the alternative responsiveness test until August 17, 2007. After that date such trusts must meet the responsiveness test described above to continue to qualify as Type III supporting organizations.

Integral Part Test

There are two alternative prongs of the integral part test, one of which must be satisfied.

1) One prong of the integral part test that may generally be described as the “payout/responsiveness” part requires that the supporting organization make payments of substantially all its income to or for the use of one or more publicly supported organizations and such support must be sufficiently significant in relation to the supported organization’s programs to insure its attentiveness to the supported organization. The PPA of 2006 will change the payout requirement in a manner to be determined by the IRS and Treasury in future guidance. Pending issuance of such guidance, these organizations must meet the “payout/responsiveness requirements of current regulations.

2) Another prong of the integral part test that may generally be described as the “but for” part requires that the supporting organization performs activities that carry out the purposes or functions of one or more supported organizations. Such activities would normally be engaged in by the supported organizations themselves if the supporting organization was not doing so. Making cash distributions to a supported organization will not satisfy this prong of the integral part test.

Functionally Integrated and Non-functionally Integrated Type III Supporting Organizations

As explained in the ANPRM, it is expected that functionally integrated Type III supporting organizations will be required to meet (1) the responsiveness test, (2) the “but for” test, (3) an expenditure test that will resemble the qualifying distributions test for private operating foundations, and (4) an assets test that will resemble the alternative assets test for private operating foundations.

The following rules added by the PPA of 2006 apply now to Type III supporting organizations.

1) A Type III supporting organization must provide each supported organization information to ensure that the Type III supporting organization is responsive to the needs of each of its supported organizations. This requirement must await IRS and Treasury guidance before it can be implemented.

2) A Type III supporting organization can only support organizations organized in the United States. A transitional rule delays the effective date for Type III supporting organizations that, on August 17, 2006, were operated in connection with an organization that is not organized in the United States. The delayed effective date for such organizations is the first day of the third taxable year of the supporting organization beginning after August 17, 2006.

SPECIFIC EXPLANATION KEYED TO GUIDE SHEET

PART 1: ORGANIZATIONAL TEST UNDER IRC 509(a)(3)(A)

An organization must meet the organizational test to qualify under IRC 509(a)(3). If a supporting organization does not meet the organizational test, it is not qualified under IRC 509(a)(3). Note: A Type III supporting organization can not qualify by supporting an IRC 501(c)(4), (5) or (6) organization. See Reg. 1.509(a)-4(c)(2) and Rev. Rul. 76-401, 1976-2 C.B. 175.

Section I - Organizational Test for an organization supporting IRC 509(a)(1) or 509(a)(2) public charities

A. Is the supporting organization requesting classification as a Type III supporting organization? If “Yes,” there must be a yes answer to either question B or C below. In addition, all three components of question D must be met.

A Type III supporting organization’s organizing document must limit its purposes to supporting one or more IRC 509(a)(1) or (2) organizations that are specified by name. Its organizational document may not contain any provisions that are inconsistent with its stated purpose of supporting the specified organization(s).

B. Does the supporting organization’s organizing document specify by name the IRC 509(a)(1) or (a)(2) organization(s) it supports?

C. Do the supporting organization and the supported organization(s) have a historic and continuing relationship such that there is a substantial identity of interests between the two organizations?

B and C - A Type III supporting organization must contain provisions in its organizing document that specify the publicly supported organizations it supports. However, in situations where there has been an historic relationship between the supporting organization and the publicly supported organization and where, by reason of such relationship, a substantial identity of interests has been developed between the organizations, the identity of the supporting organization need not be made specifically.

D. To meet the organizational test, there must be a “Yes” answer to D(1) and “No” answers to D(2) and D(3).

D(1) Does the organization’s organizing document limit its purposes to provide that it is formed for the benefit of, or to perform the functions of, or to carry out the purposes of one or more specified publicly supported organizations or provide some other statement committing the supporting organization to support or benefit publicly supported organizations?

D(2) Does the organization’s organizing document expressly empower it to engage in activities which are not in furtherance of the purposes stated in D (1)?

D(3) Does the organization’s organizing document expressly empower it to operate to support or benefit any organization not specified by name in its organizing document?

D(1) through D(3) - If the supporting organization designates the specified publicly supported organization by name, it will not fail the organizational test merely because its organizing document permits the substitution of another publicly supported organization, designated by class or purpose rather than by name, as long as such substitution is conditioned upon an event beyond the control of the supporting organization, such as loss of exemption or dissolution of the publicly supported organization. Also, an organization will not fail the organizational test merely because its organizing document permits it to operate for the benefit of a non-publicly supported organization that is designated by name or by class or purpose, but only if (1) a publicly supported organization is currently being supported and (2) the possibility of operating for the benefit of other than a publicly supported organization is a remote contingency, conditioned on events outside the publicly supported organization’s control.

PART 2: OPERATIONAL TEST UNDER IRC 509(a)(3)(A)

An organization must meet the operational test to qualify under IRC 509(a)(3). If an organization does not meet the requirements of either A or B below or a combination of A and B below, it does not meet the operational test.

A. Does the organization make payments to or for the use of the specified IRC 509(a)(1) or (2) organization(s)? To meet the operational test under this section, there must be a “Yes” answer to A(1), A(2), A(3), or A(4) below. If “No,” the organization must meet B below to meet the operational test.

The specified organization(s) must be named in the organization's organizing document. Alternatively, a specified IRC 509(a)(1) or (2) organization may include an organization with which the supporting organization has an historic and continuing relationship.

A(1) Does the organization make payments only to or for the use of one or more specified IRC 509(a)(1) or (2) organizations?

A(2) Does the organization make payments to or for the use of individual members of the charitable class benefited by the specified IRC 509(a)(1) or (2) organization(s)?

A(3) Does the organization make payments indirectly through another unrelated organization to or for the use of a member of a charitable class benefited by the specified IRC 509(a)(1) or (2) organization(s), but only if the payment constitutes a grant to an individual rather than a grant to an organization?

A(4) Does the organization make payments to or for the use of another supporting organization that also supports or benefits the specified IRC 509(a)(1) or (2) organization(s)?

The organization may also make payments to or for the use of a college or university described in IRC 511(a)(2)(B).

B. Does the organization provide services or facilities to or for the use of the specified IRC 509(a)(1) or (2) organization(s)? To meet the operational test under this section, there must be a "Yes" answer to B(1), B(2), or B(3) below. If "No," the organization must meet A above to meet the operational test.

B(1) Does the organization provide services or facilities only to or for the use of one or more specified IRC 509(a)(1) or (2) organizations?

B(2) Does the organization provide services or facilities to or for the use of individual members of the charitable class benefited by the specified IRC 509(a)(1) or (2) organization(s)?

B(3) Does the organization provide services or facilities to or for the use of another supporting organization that also supports or benefits the specified IRC 509(a)(1) or (2) organization(s)?

The organization may also provide services or facilities to or for the use of a college or university described in IRC 511(a)(2)(B).

PART 3: CONTROL TEST UNDER IRC 509(a)(3)(C)

An IRC 509(a)(3) organization cannot be controlled by disqualified persons (other than foundation managers). Questions A through F require a “No” answer. Questions G through L are facts and circumstances questions that require additional scrutiny if answered “Yes.”

Persons who are in a position of serving on the governing board of the supported organization may also be directors, trustees or officers of the supporting organization in order to improve the supporting organization’s operations and exercise appropriate supervision and control.

Disqualified persons may also serve on the governing board of the supporting organization. Disqualified persons consist of all the disqualified persons defined in IRC 4946, except foundation managers who are disqualified persons solely because of their status as foundation managers. Disqualified persons include (1) a substantial contributor; (2) foundation managers (officers, directors, trustees, and persons with similar powers); (3) an individual with 20% or more voting power of a corporation (or profits interest in a partnership or beneficial interest in a trust) that is a substantial contributor; (4) a lineal descendent or ancestor of a family member of the individuals above; or (5) a corporation, partnership, or trust in which persons described in 1-4 above own more than 35% of the profit interests. IRC 509(a)(1) or (2) organizations and foundation managers who are disqualified persons only as a result of being foundation managers are not treated as disqualified persons.

The presence of any disqualified persons (with the exceptions noted above) on a supporting organization’s governing body is cause for close examination of whether prohibited control is present. Although control is generally present where a disqualified person can aggregate a majority of the voting power, veto power also constitutes control. In addition, control by disqualified persons may be present even in the absence of a majority of the voting power or veto power if disqualified persons control decisions based on all of the facts and circumstances. See Reg. 1.509(a)-4(j) for rules regarding control by disqualified persons.

A Is the organization controlled directly or indirectly by disqualified persons because disqualified persons on the governing board can potentially aggregate their votes together to control the operations of the supporting organization?

One example of impermissible control is where the board of directors consists of five directors, two are disqualified persons, two are appointed by the supported charity, and the final director is a so-called “independent” director appointed by the disqualified persons. Appointment of the fifth director by disqualified persons represents “indirect” control by disqualified persons.

B Is the organization controlled directly or indirectly by disqualified persons because disqualified persons on the governing board can potentially aggregate their

votes together with other board members who provide personal services to the disqualified persons, such as legal, accounting, or investment advice, to control the operations of the supporting organization?

An example of indirect control described in Rev. Rul. 80-207, 1980-2 C.B. 113 involves an IRC 501(c)(3) organization whose purpose is to make distributions to a university described in IRC 509(a)(1) and 170(b)(1)(A)(ii). The organization is controlled by a four member board of directors. One of these directors is a substantial contributor to the organization. Two other directors are employees of a business corporation of which more than 35 percent of the voting power is owned by the substantial contributor. The remaining director is chosen by the university. None of the directors has a veto power over the organization's actions. Reg. 1.509(a)-4(j) provides that all pertinent facts and circumstances will be taken into consideration in determining whether a disqualified person does in fact indirectly control an organization. One circumstance to be considered is whether a disqualified person is in a position to influence the decisions of members of the organization's governing body who are not themselves disqualified persons. In this example, employees of a disqualified person are considered to be subject to the influence of a disqualified person in determining whether one or more disqualified persons control 50 percent or more of the voting power of an organization's governing body. Since the organization was controlled by a disqualified person and the employees of a disqualified person, it was determined not to qualify as a supporting organization.

An analogous example of control is a four person board of directors made up of one disqualified person, two persons appointed by the supported charity, and a fifth director who is paid by the disqualified persons for accounting, legal, or investment advice apart from the affairs of the supporting organization. Since the disqualified person is in a position to influence the decisions of the fifth director, this factor would need to be taken into consideration as evidence of indirect control by the disqualified person.

C Do disqualified persons have the right to appoint the nominating committee or successor governing board members?

Another way that control may be exercised indirectly by disqualified persons is where two disqualified persons on a five member board of directors are authorized to select all nominees for the fifth so-called "independent" director position. Even if the two charity appointed directors then appoint the fifth director from among the list of selected nominees, control over the board resides with the disqualified persons.

D Is the organization controlled directly by disqualified persons because the disqualified persons either have 50% of the voting power on the governing board or a veto power over the supporting organization's activities?

Voting power may also be maintained through voting rights. For example, a publicly

supported organization may be entitled to appoint four out of five of the members of the board of directors. The fifth director must be a disqualified person. If the disqualified person has an 80 percent vote on all major decisions of the organization, voting power is retained through voting rights regardless of representation on the board of directors.

E Is the organization controlled directly or indirectly by disqualified persons because disqualified persons have veto power over the supporting organization's activities?

Reg. 1.509(a)-4(j) provides that a supporting organization will be considered to be controlled by one or more disqualified persons if a disqualified person has the right to exercise veto power over the action of the organization. A veto situation is also deemed to exist where a two member board of directors of a supporting organization is made up of one disqualified person board member and one appointed by the supported organization.

F Is the organization controlled directly because the disqualified persons control the primary assets of the supporting organization?

If a disqualified person does not control the board but continues to control the supporting organization's assets after the assets are transferred to the supporting organization, the disqualified person virtually controls the organization by control of the assets. This position is suggested in Reg. 1.509(a)-4(j). The following items G through K relate to various forms of control of the supporting organization's assets by a disqualified person.

G Does a disqualified person own a general partnership interest in a limited partnership in which the supporting organization owns an interest?

The general partner of a limited partnership generally is responsible for the management of the partnership and usually the general partner makes most or all important decisions for the partnership, including the distribution of income to partners. If a disqualified person holds a 1 percent general partnership interest and the supported organization holds a 99 percent limited partnership interest (in most cases received from the disqualified person), the disqualified person is able to control the partnership and thus control the supporting organization's only or primary asset.

H Does a disqualified person own an interest of 51% or more of the voting stock of a corporation in which the supporting organization is a stockholder?

If a disqualified person holds 85 percent of the stock of a closely-held corporation and transfers 5 percent of such stock to the supporting organization which constitutes the supporting organization's only or primary asset, the 80 percent ownership of the corporation allows the disqualified person to effectively influence the economic rights associated with ownership of a minority interest in the corporation such as the five percent stock held by the supporting organization.

I Does a disqualified person hold 51% or more control of a corporation through a voting trust or other voting arrangement in which the supporting organization is a stockholder?

Control of a closely held corporation may also be maintained through a voting trust or voting rights. Thus, if the supporting organization owns 90 percent of the stock of a closely held corporation and the disqualified person holds only five percent of the stock, the disqualified person may still be entitled to maintain voting control of such corporation through a voting trust arrangement or other voting rights.

J Does a disqualified person have a controlling interest in a limited liability corporation (LLC) in which the supporting organization has an interest?

Control of a limited liability company may be maintained by a disqualified person in a manner similar to the corporate and partnership examples described above.

K Does a disqualified person have an ownership interest in assets such as real estate, insurance, art work, collectibles, intellectual property, promissory notes, or other assets in which the supporting organization also has an interest?

A disqualified person may also maintain control of real property or tangible or intangible personal property through joint ownership arrangements. For real or tangible personal property, the control may also be facilitated by the possession of the property by the disqualified person through lease or custody arrangements. The real or personal property may also be used in the business of the disqualified person.

Also, consider a situation where the disqualified person donated a valuable collection of antique automobiles to a supporting organization, the collection is maintained in a warehouse at the country residence of the disqualified person, and the warehouse is leased to the supporting organization. In this situation, the disqualified person still controls the collection by controlling access.

L Do donors or their family members have the right to provide advice to the supporting organization regarding investments or grant making?

(a) Consider what safeguards are in place to ensure that disqualified persons are not in control of investment or grant making decisions of the supporting organization.

(b) For example, determine if there is an “advisory committee” or similar arrangement created in the trust agreement or other organizing documents conferring on the donor or members of the family the right to select grant recipients which must be accepted by the supporting organization.

M Taking into account all of the facts and circumstances, including information described in questions G through L, are disqualified persons in a position to directly or indirectly control the decisions made by the supporting organization?

Consider any number of ways that the disqualified person may control the use or enjoyment of assets transferred to and held by the supporting organization.

PART 4: GENERAL RULES AND RELATIONSHIP REQUIREMENT UNDER IRC 509(a)(3)(B)

To meet the general rules and relationship requirement as a Type III Supporting Organization, an organization must answer “Yes” to all three questions below.

- A. Does the organization meet Section I below (General Rules)?**
- B. Does the organization meet either Section II or Section III below (Responsiveness Test)?**
- C. Does the organization meet Section IV (Integral Part Test) or Section V (Functionally Integrated Test) below?**

Section I – Type III “Operated in Connection With”- General Rules

A Type III supporting organization is operated in connection with one or more public charities (supported organizations) described in IRC 509(a)(1) or (2). IRC 509(a)(3)(B)(iii).

A Does the supporting organization accept gifts or contributions from any person (other than a public charity described in IRC 509(a)(1), (2), or (4)) who directly or indirectly controls the governing body of a supported organization (alone, or together with family members or a 35% controlled organization)? If “No,” proceed to the next question. If “Yes,” the organization does not meet this requirement.

A supporting organization will fail to qualify as a Type III supporting organization if a donor to the supporting organization controls directly or indirectly an IRC 509(a)(1) or (2) supported organization that the Type III supporting organization supports. It will also fail to qualify if the organization accepts a gift or contribution from a member of that donor’s family (as defined in IRC 4958(f)(4)) or from the donor’s 35% controlled entity. Direct or indirect control of a supported organization is determined through any combination of the donor, the donor’s family members, and the donor’s 35% controlled entity. See IRC 509(f)(2)(A)(i) and (f)(2)(B). This rule does not apply to donors that are themselves IRC 509(a)(1), (2) or (4) organizations.

B Does the organization support organizations that are not organized in the United States? If “No,” proceed to Section II. If “Yes,” complete the questions below. Questions B(1) through B(3) must be “Yes” answers. There must also be a “Yes” answer to either B(4) or B(5).

B(1) Was the organization formed on or before August 17, 2006?

B(2) Was the organization operating in connection with an organization not organized in the United States on or before August 17, 2006?

B(3) Has the organization ceased its support to the organization not organized in the United States as of the first day of its third taxable year after August 17, 2006?

B(4) Is the foreign supported organization recognized by the IRS as exempt under IRC 501(c)(3) and a public charity under IRC 509(A)(1) or (2)? OR

B(5) Is the foreign supported organization described in IRC 501(a)(3) and a public charity described under IRC 509(a)(1) or (2)?

A Type III supporting organization is specifically precluded from supporting a foreign charity. However, there is a transitional rule provided by IRC 509(f) that permits supporting organization to continue to support foreign public charities for a three-year period after August 17, 2006.

C. Has the organization represented that it will provide information when regulations are finalized under IRC 509(f) to inform its supported organizations about how it can be responsive to its needs or demands?

Until regulations are finalized that provide rules explaining how a supporting organization will inform its supported organizations about how the supporting organization must be responsive to the supporting organizations' needs or demands, this question is intended to alert supporting organizations to this requirement.

Section II – Type III “Operated in Connection With” Responsiveness Test

To meet the responsiveness test, there must be a "Yes" answer to A, B or C as well as a "Yes" answer to D (significant voice test). Alternatively, to meet the responsiveness test, there must be a “Yes” answer to E (historic and continuing relationship test).

A. Do the officers, directors, trustees, or membership of the supported organization(s) elect or appoint one or more of the supporting organization’s officers, directors, or trustees?

B. Are one or more members of the governing bodies of the supporting organization also officers, directors, or trustees or hold other important offices in the supported organization(s)?

C. Do the officers, directors, or trustees of the supporting organization maintain a close and continuous working relationship with the officers, directors or trustees of the supported organization(s)?

D. By reason of the relationship described above in (a), (b) or (c), does the supported organization(s) have a significant voice in the supporting organization's investment policies, the timing of grants, the manner of making grants, and the selection of recipients of grants?

A supporting organization must meet the responsiveness test with respect to at least one of its supported organizations. By meeting the requirements of question 1(a), (b), or (c), and question 1(d), an organization will satisfy the responsiveness test. For question 1(d), the supporting organization will need to supply relevant documents, (e.g., correspondence, board meeting minutes) or a detailed description to explain how the supporting organization and its supported organization(s) interact, or have arranged to interact, to demonstrate that the supported organization(s) has a significant voice in the operations of the supporting organization. An annual report from the supporting organization to the supported organization(s) would not satisfy the responsiveness test. *Note: The existing responsiveness test regulations remain valid except the alternative responsiveness test applicable to certain trusts was eliminated by the PPA of 2006. Thus, Reg. 1.509(a)-4(i)(2)(iii) is no longer effective. Trusts in existence on August 17, 2006 can continue to rely on Reg. 1.509(a)-4(i)(2)(iii) until August 17, 2007. See Notice 2008-6, 2008-3 I.R.B. 275.*

E. Is the organization a trust that was (1) in existence on November 20, 1970, (2) continuously supported an IRC 509(a)(1) or (2) organization on November 20, 1970 and, thereafter, and (3) has maintained an historic and continuing relationship with the IRC 509(a)(1) or (2) organization?

Section III – Type III “Operated in Connection With” Alternative Responsiveness Test for Trusts in existence on August 17, 2006

A. Did the trust meet the alternative responsiveness test of Reg. 1.509(a)-4(i)(2)(iii) prior to August 17, 2006?

A(1) Was the trust considered a charitable trust under state law?

A(2) Did the trust name each publicly supported organization that it supports as a beneficiary under its governing instrument?

A(3) Did each beneficiary have the power to enforce the trust and compel an accounting under State law?

B. As of August 17, 2007, does the trust meet the responsiveness test described in Section II above? If "No", the organization will be deemed to be a private foundation as of August 17, 2007. However, the organization may file Form 990 rather than Form 990-PF for 2007 pursuant to Notice 2008-6, 2008-3 I.R.B. 275. If the organization otherwise qualifies as a Type III Supporting Organization for the

period prior to August 17, 2006, its determination letter will include a caveat explaining this aspect.

**Section IV – Type III “Operated in Connection With” Integral Part Test
[Organizations that Choose NOT to meet the guidelines of the Advanced Notice of Proposed Rulemaking (ANPRM) 72 Fed. Reg. 42335 (August 2, 2007) for a Functionally Integrated Type III Supporting Organizations]**

If an organization chooses not to meet the guidelines of the ANPRM, it may qualify as a Type III supporting organization based on meeting the existing integral part test. To meet the integral part test, an organization must meet Item A or Item B below. If an organization meets the integral part test, its determination letter will classify it as a Type III supporting organization without further designating it as functionally integrated or non-functionally integrated. Notice 2006-109, 2006-51 I.R.B. 1121 provides interim guidance by which private foundations may obtain reliance that grants are made to functionally integrated Type III supporting organizations.

Item A - Payout/Attentiveness Requirement

A. Is the organization seeking to be a Type III supporting organization that meets the “payout/attentiveness” part of the integral part test of Reg. 1.509(a)-4(i)(3)(iii)? If “Yes,” there must be yes answers to A(1) and A(2) below. If “No,” skip to question B below.

A(1) The Payout Requirement

Does the supporting organization pay substantially all (85%) of its adjusted net income to or for the use of the supported organization(s)? If “Yes,” proceed to Item A(2). If “No,” the organization does not meet the payout requirement.

A supporting organization must meet the integral part test with respect to at least one of its supported organizations. The requirement that substantially all the supported organization’s income must be paid to or for the use of the supported organization is an annual requirement. Revenue Ruling 76-208, 1976-1 C.B. 161 defines “substantially all” for purpose of the integral part tests as at least 85% of income distributed to or for the use of the supported organization(s) and prohibits counting accumulated income even if it must be paid to the supported organization(s). Relatively minor payout delays that can be explained in terms of timing should not disqualify an otherwise qualified organization from meeting the substantially all requirement. *Note: this is an area in which new guidance may be issued as a result of the Pension Protection Act. The above requirement remains in effect until the effective date of any new guidance.*

A(2) The Attentiveness Requirement

Does the organization meet the Attentiveness Requirement by answering “Yes” to Group 1, Group 2, Group 3, or Group 4 below?

This is an area which may or may not be impacted by regulations on the payout requirement for Type III organizations that are not functionally integrated. These requirements remain in effect until final or temporary regulations are issued.

The answer here will depend on facts and circumstances. But the amount of the support should be sufficient to ensure that the supported organization will have strong reason to be attentive to the supporting organization either because a significant part of its total support comes from the supporting organization, or because a significant part of an important activity or department is funded by the supporting organization. The percentage amounts listed in Group 1 and 2 are provided as an administrative safe harbor.

Group 1 - To meet Group 1, the answers must be “Yes” to A and B.

A. Is the payout to one or more of the supported organizations large enough to ensure the attentiveness of the organization(s) to the operations of the supporting organization (equals 10% or more of the supported organization’s (1) total support for the year, or (2) support for the year received by a department where the supported organization is a school, hospital, or church)?

B. Does a substantial amount of the supporting organization’s total support (one third of the supporting organization’s income for the year) go to those publicly supported organizations that meet the attentiveness requirement described in (a) above?

The percentages represent an administrative rule of thumb since a supporting organization would be hard pressed to demonstrate attentiveness on the part of a supported organization where a payment is not significant in terms of a supported organization’s budget and the supporting organization’s payout amount. In certain cases, the level of support can be measured against the total amount of support received by a department of an organization rather than the organization’s total support. These cases usually involve schools, universities, hospitals and churches.

Group 2 - To meet Group 2, the answers must be “Yes” to A through E below.

Some applicants intend to qualify by meeting this test for only a few years with the idea that they will meet attentiveness in the future in some other way or with some other earmarked program. To qualify, the applicant’s intentions to the earmarked program should indicate a long term relationship.

A. Are the payments sufficiently significant to ensure the attentiveness of the supported organization(s) because they are earmarked for a particular substantial program or activity of the supported organization(s) that would not exist or would be interrupted without the payment?

If the supported organization would fund an earmarked program no matter what funding it receives from the supporting organization, the supporting organization is not providing

the support required to demonstrate attentiveness. In this circumstance, the loss of the supported organization's support would not cause an interruption in the supported organization's program.

B. Does the supporting organization provide 50% or more of the funding of the earmarked program or activity?

The percentage represents an administrative safe harbor that helps demonstrate that the supporting organization's payout represents a significant part of the total funding of an earmarked program.

C. Is the supporting organization funding the same earmarked program continuously year after year?

To qualify the applicant's intentions to the earmarked program should indicate a long term relationship.

D. Is the earmarked program a substantial program?

An earmarked program or activity does not have to be the supported organization's primary program provided that it represents a substantial program or activity conducted by the supported organization.

E. Does a substantial amount of the supporting organization's total support (one third of the supporting organization's income for the year) go to those publicly supported organizations that meet this earmarked attentiveness requirement?

The percentages represent an administrative rule of thumb since a supporting organization would be hard pressed to demonstrate attentiveness on the part of a supported organization where a payment is not significant in terms of a supported organization's budget and the supporting organization's payout amount. In certain cases, the level of support can be measured against the total amount of support received by a department of an organization rather than the organization's total support. These cases usually involve schools, universities, hospitals and churches.

Group 3 - To meet Group 3, there must be a "Yes" to A below.

A. Is/are the supported organization(s)' attentive to the supporting organization based on all the pertinent facts and circumstances, including the length and nature of the relationship; the number of other supported organizations the supporting organization supports; the percentage of support contributed by the supporting organization to the supported organization's total support; evidence of actual attentiveness; and a substantial identity of interests between the supporting organizations and its supported organizations?

This provision is intended for situations where there is an historic and continuing

relationship between the supporting and a supported organization such that there is a substantial identity of interests between the two organizations.

Group 4 - To meet Group 4, the answers must be “Yes” to A and B, “Yes” to C, E and H, and “No” to D, F and G below.

The integral part test provides for a transitional rule applicable to (1) charitable trusts created before November 20, 1970, and (2) split-interest trusts described in IRC 4947(a)(2) that were irrevocable on November 20, 1970 and that subsequently became charitable trusts described in IRC 4947(a)(1). This transitional rule is provided at Reg. 1.509(a)-4(i)(4). It generally has application to charitable trusts that seek supporting organization status without having applied for exemption as provided by Rev. Proc. 72-50.

A. Was the supporting organization a trust whether or not exempt from taxation under IRC 501(a) on November 20, 1970?

B. Was the supporting organization an irrevocable split-interest trust described in IRC 4947(a)(2) before November 20, 1970, and that subsequently became a charitable trust described in IRC 4947(a)(1)?

C. Are all of the unexpired interests in the trust devoted to one or more charitable purposes for which a deduction was allowed with respect to such interest under IRC 170, 545(b)(2), 556, 642(c), 2055, 2106(a)(2), 2522 or corresponding provisions of prior law?

D. Did the trust receive any grant, contribution, bequest or other transfer on or after November 20, 1970?

E. Is all of the supporting organization’s net income distributed to benefit the supported organization(s)?

F. Do the supporting organization’s trustees have a right to vary beneficiaries or amounts?

G. Do disqualified persons described in IRC 4946 (other than foundation managers) serve as trustees?

H. Do the trustees of the supporting organization provide annual written reports to the supported organization(s) describing the supporting organization’s assets and income?

Item B - “But For” Requirement

B. Is the organization seeking to be a Type III supporting organization that meets the “but for” part of the integral part test of Reg. 1.509(a)-4(i)(3)(ii)? If “Yes,” there must be yes answers to B(1) and B(2).

B(1) Does the supporting organization engage in activities, not including grant making, for or on behalf of supported organization(s) that perform the functions of or carry on the purposes or programs of the supported organization(s)? If Yes, proceed to question B(2).

B(2) Would the publicly supported organization(s) normally undertake such activity but for the involvement of the supporting organization?

Current regulations for the “but for” test remain valid for Type III supporting organizations until superseded by new regulations that will define functionally integrated organizations pursuant to IRC 4943(f)(5) and 509(d) that were enacted by sections 1241 and 1243 of the PPA.

The following discussion and questions may be helpful in determining whether an organization satisfies the “but for” test.

Reg. 1.509(a)-4(i)(3) provides that a supporting organization will meet the integral part test if it maintains a significant involvement in the operations of one or more publicly supported organizations and such publicly supported organizations are in turn dependent upon the supporting organization for the type of support which it provides services or payments to or on behalf of, one or more publicly supported organizations.

Reg. 1.509(a)-4(i)(3)(ii) provides that the activities engaged in for or on behalf of the publicly supported organizations are activities to perform the functions of, or to carry out the purposes of, such organizations, and “but for” the involvement of the supporting organizations, would normally be engaged in by the publicly supported organizations themselves.

Thus, this part of the “integral part test” applies in those situations in which the supporting organization actually engages in activities which benefit the publicly supported organizations (e.g., performing publishing and printing functions for a college), as opposed to simply making grants to support the publicly supported organizations. The following examples taken from Reg. 1.509(a)-4(i)(5) demonstrate application of the “but for” test.

Example (1) states that N, a nonprofit publishing organization, performs all the publishing and printing that would otherwise be undertaken by churches of a particular denomination. Under these circumstances, N satisfies the “but for”

requirement of the integral part test because it provides services that would normally be engaged in by the churches.

Example (2) states that O, an alumni association, provides certain functions that would be performed by Y University, such as maintaining alumni records and publishing a bulletin to keep alumni aware of the activities of the university. Under these circumstances, O satisfies the “but for” requirement of the integral part test because it provides services that would normally be engaged in by the university.

The following questions are intended to help determine whether an organization satisfies the “but for” test.

1. List all activities in which you engage.
2. Explain how each activity listed above is related to your supported organizations’ exempt purposes.
3. Were the supported organizations undertaking this activity before you became engaged in the activity?
4. Explain how each activity listed above performs the functions of, or carries out the purposes of your supported organizations, and “but for” your involvement would normally be engaged in by the supported organizations themselves.. Note: An activity is not considered to perform the functions of, or carry out the purposes of, your supported organizations if you are simply funding the supported organization with cash, cash equivalents, or other property.
5. Explain how the supported organizations benefit from the services, facilities or goods that you provide.
6. Are you an organization that oversees or facilitates the operation of an integrated system that includes one or more charities and that can not meet the expenditure or assets tests, such as a supporting organization that oversees a hospital system? If so, provide information to explain this circumstance.

Section V – Organizations that choose to meet the ANPRM guidelines for a Functionally Integrated Type III Supporting Organization

If an organization chooses to meet the guidelines of the ANPRM, it may qualify as a Functionally Integrated Type III Supporting Organization. To meet the guidelines of the ANPRM, an organization must currently meet Question A(1) and A(2) below and represent that it will meet Questions B and C below. If an organization meets these guidelines, its determination letter will include a caveat explaining that its continued classification as a Functionally Integrated Type III Supporting Organization is dependent upon its meeting the requirements of final guidance. Because organizations have not previously been afforded an opportunity to satisfy the expenditure and asset tests part of

qualifying as a Functionally Integrated Type III Supporting Organization, a representation from an organization that it will satisfy these tests as set forth in Section V, Parts B and C, below, is acceptable. The functionally integrated determination letter will then classify the organization as a Functionally Integrated Type III Supporting Organization. An organization must currently meet the "But For" test in Section V, Part A, below. An organization may represent that it will meet the expenditure and asset tests for its first tax year immediately succeeding the determination letter, at the end of its first and second tax years in the aggregate, at the end of its first, second and third tax years in the aggregate, and at the end of its first four tax years and thereafter on a rolling basis either (1) in the aggregate based on its most recently completed four tax years, or (2) for any three tax years during its most recently completed four tax years.

A. "But For" Test - Is the organization seeking to be classified as a Functionally Integrated Type III supporting organization? If "Yes," there must be "Yes" answers to A(1) and A(2).

A(1) Does the supporting organization engage in activities, other than grant making, for or on behalf of supported organization(s) that perform the functions of or carry on the purposes or programs of the supported organization(s)?

A(2) Would the supported organization(s) normally undertake such activity but for the involvement of the supporting organization?

B. Expenditure Test - Does the organization use substantially all of the lesser of (a) its adjusted net income or (b) five percent of the aggregate fair market value of all its assets (other than assets that are used, or held for use, directly in supporting the charitable programs of the supported organizations) directly for the active conduct of activities that directly further the exempt purposes of the organizations it supports? If "No", does the organization meet the exception to this requirement by answering "Yes" to Items B(1), B(2) and B(3) below?

B(1) Does the organization oversee or facilitate the operation of an integrated system that includes one or more charities (such as certain hospital systems)?

B(2) Is the organization unable to satisfy the "direct active conduct" and "directly further" requirements of the expenditure test as a result?

B(3) Does the organization still meet the "But For" Test in Item A above?

C. Asset Test - Does the organization devote at least 65% of the aggregate fair market value of all its assets directly for the active conduct of activities that directly further the exempt purposes of the organizations it supports? If "No", does the organization meet the exception to this requirement by answering "Yes" to Items C(1), C(2) and C(3) below?

C(1) Does the organization oversee or facilitate the operation of an integrated system that includes one or more charities (such as certain hospital systems)?

C(2) Is the organization unable to satisfy the "direct active conduct" and "directly further" requirements of the expenditure test as a result?

C(3) Does the organization still meet the "But For" Test in Item A above?

PART 5: ORGANIZATIONS REQUIRING HEIGHTENED SCRUTINY

Most supporting organizations further legitimate charitable purposes. However, some taxpayers may seek to shield assets inappropriately through supporting organizations. This has resulted in the need for heightened scrutiny of supporting organizations generally to screen for those where there is a significant potential for abuse. The typical Type I or II supporting organization that supports a hospital, university, or other large charitable institution generally does not raise the private benefit concerns that require heightened scrutiny. The questions below are aimed at identifying situations that raise potential for impermissible private benefit. Additional questions needed to develop an issue should be tailored to the organization's specific situation.

The following examples illustrate the types of transactions requiring heightened scrutiny.

1. A donor contributes cash to a supporting organization. The supporting organization "loans" the money back to the donor's for-profit business. The supporting organization receives an unsecured promissory note for the loan and the donor takes a deduction for a contribution to the supporting organization.

In this example, there is no collateral on the loan other than a promise to pay which places the supported organization's assets at risk. In addition, the donor is receiving impermissible private benefit that also amounts to inurement since the donor is an insider and because the loan is made to a for-profit business that is owned by the donor. **Much of the abuse in the supported organization area relates to unreasonable compensation and loans to disqualified persons, their family members, and their businesses.** Control is an important factor in determining whether an organization operates for the benefit of private interests. If disqualified persons have some position of substantial influence over the supporting organization, unreasonable compensation or loan activity may be present. See *Best Lock Corporation v. Commissioner*, 31 T.C. 620 (1959); *Orange County Agricultural Society, Inc. v. Commissioner*, 893 F.2d 529, 534 (2d Cir. 1990); and *Lowry Hospital Association v. Commissioner*, 66 T.C. 850 (1976).

2. A donor contributes cash to the supporting organization. No payments are scheduled or made to or on behalf of any publicly supported organizations.

In this situation, the supporting organization has not demonstrated that it operates for IRC

501(c)(3) purposes or meets the IRC 509(a)(3) operational test. In addition, the donor may be in a position to exercise control over the supporting organization because after having taken a charitable contribution deduction, no distributions have either been made or are scheduled to be made to any supported organizations.

3. A donor contributes cash to the supporting organization. The supporting organization uses its assets to pay college tuition in the form of a “scholarship” to the donor’s child. In this situation, the donor receives a private benefit/inurement because the supporting organization’s assets are used to pay the school tuition of the donor’s child.

4. The donor makes a “contribution” of a historic façade easement to a supporting organization and takes a deduction.

In this situation, careful scrutiny is required to ensure that an inappropriate contribution deduction was obtained where local historic preservation laws already prohibit alteration of the home’s façade. In this situation, the contributed easement is superfluous to achieving a charitable purpose. Even if the façade could be altered, the deduction claimed for the easement contribution may far exceed the easement’s impact on the value of the property. (See IRM 7.20.6.2.1)

5. A donor contributes an interest in a partnership, or limited liability company, closely held business, real estate, intellectual property, art work, or conservation easements to a supporting organization.

In this situation, the assets may not be geared to generate significant income. Therefore, the payout by the Type III supporting organization that is not functionally integrated may not be sufficient to ensure attentiveness by the supported organization to the operations of the supporting organization(s). Thus, the supporting organization may fail the integral part test unless other facts and circumstances evidence attentiveness by the supported organization.

Further, a situation in which donor(s) contribute nonproductive assets to a Type III supporting organization that is not functionally integrated may raise concerns under IRC 501(3) regarding whether an organization is operated for a substantial nonexempt purpose as well as an issue under IRC 509(a)(3) regarding whether there is indirect control of the supporting organization by disqualified persons.

Section I – Potential Promoters

For purposes of completing this guide sheet, the term “promoter” refers to a person who organizes or assists in the organization of a partnership, trust, investment plan, or any other entity or arrangement that is to be sold to a third party. The concern is that the partnership, trust, etc., is designed to be used or is actually used by that third party to obtain tax benefits not allowable by the Internal Revenue Code.

A. Are any promoters identified with the establishment or operation of the supporting organization?

B. Does the supporting organization benefit a list of more than five supported organizations?

Section II - Unreasonable Compensation /Loans

A. Are goods, services, or cash provided to donors or their family members or persons with whom they have business relationships?

B. Are the goods, services, or cash provided to donors or their family members or persons with whom they have business relationships part of reasonable compensation arrangements?

C. Are goods, services, or cash provided to officers, directors, or trustees?

D. Are the goods, services, or cash provided to officers, directors, or trustees part of reasonable compensation arrangements?

E. Are the goods, services or cash provided to the five highest compensated employees or independent contractors part of reasonable compensation arrangements?

F. Is there evidence of any loan activity?

G. Are loans made to donors or their family members or persons with whom they have a business relationship, to officers, directors, or trustees, or to the five highest compensated employees or independent contractors?

H. Are the loans made to donors or their family members or persons with whom they have a business relationship, to officers, directors, or trustees, or to the five highest compensated employees or independent contractors part of reasonable compensation arrangements?

Section III - Closely Held Stock/Non-liquid Investments/Assets That Do Not Produce Current Income

A. Does the supporting organization hold closely held stock?

B. Does the supporting organization hold an interest in a partnership or limited liability company in which the donor retains an interest as a general partner or member?

C. Does the supporting organization own significant other investments (\$100,000 or more) that are not explained in detail?

- D. Does the supporting organization own significant land (\$100,000 or more).**
- E. Does the supporting organization own significant other property (\$100,000 or more) that does not produce current income?**
- F. Does the supporting organization own life insurance on the donor's life or the life of the donor's family member?**
- G. Does the supporting organization own more than 20% of the stock of a corporation, partnership interest, or beneficial interest of an estate?**