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IRS Issues Interim Guidance on Supporting Organizations.

The IRS has issued interim guidance (Notice 2014-4) for Type III supporting organizations seeking to qualify as functionally integrated by supporting a governmental supported organization.

The guidance also provides interim guidance to some grantors to determine whether a potential grantee is a Type I, Type II, or functionally integrated Type III supporting organization for purposes of the excise taxes imposed under sections 4942, 4945, and 4966. Notice 2006-109 is modified. Comments are due by March 7.

T.D. 9605, published in December 2012, established the requirements to qualify as a functionally integrated Type III supporting organization but reserved on reg. section 1.509(a)-4(i)(4)(iv) to provide future guidance on the specific requirements for qualifying as functionally integrated by supporting a governmental supported organization. Notice 2006-109, issued in December 2006, provided interim guidance on the rules for grants to supporting organizations that maintain donor-advised funds and provided procedures under which the grantors, acting in good faith, could rely on written representations or reasoned written opinions of counsel in determining whether a grantee is a Type I, Type II, or functionally integrated Type III supporting organization for purposes of imposing excise taxes.

Notice 2014-4 provides a transitional rule for qualifying as functionally integrated by supporting a governmental supported organization. Until the earlier of the date final regs are published under reg. section 1.509(a)-4(i)(4)(iv) or the first day of the organization's third tax year beginning after December 31, 2013, a Type III supporting organization will be treated as meeting the requirements of reg. section 1.509(a)-4(i)(4), and hence will be treated as functionally integrated, if it (1) supports at least one supported organization that is a governmental entity to which the supporting organization is responsive within the meaning of reg. section 1.509(a)-4(i)(3), and (2) engages in activities for or on behalf of the governmental supported organization that perform the functions of, or carry out the purposes of, that governmental supported organization and that, but for the involvement of the supporting organization, would normally be engaged in by the governmental supported organization itself. The transitional rule is not intended to signal what future proposed regulations will require regarding qualifying as functionally integrated by supporting a governmental entity. No Type III supporting organization will qualify as functionally integrated by satisfying this transitional rule once final regulations under reg. section 1.509(a)-4(i)(4)(iv) are published, the IRS stated.

Until further guidance addresses the reliance standards of Notice 2006-109, private foundations and sponsoring organizations that maintain donor-advised funds may continue to rely on the grantor reliance standards of Notice 2006-109, as modified by Rev. Proc. 2011-33 and Notice 2014-4. For grants made after December 28, 2012, a Type III supporting organization must meet the requirements described in current reg. section 1.509(a)-4(i)(4) or Notice 2014-4 to be considered functionally integrated for purposes of a representation or opinion of counsel on which a grantor may rely. The notice is effective December 23, 2013, except as described in the notice.

Interim Guidance Regarding Supporting Organizations

Part III — Administrative, Procedural, and Miscellaneous

SECTION 1. PURPOSE

This notice provides interim guidance for Type III supporting organizations seeking to qualify as functionally integrated by supporting a governmental supported organization. It also modifies section 3 of Notice 2006-109, 2006-2 C.B. 1121, by providing interim guidance to certain grantors in determining whether a potential grantee is a Type I, Type II, or functionally integrated Type III supporting organization for purposes of the excise taxes imposed under §§ 4942, 4945, and 4966 of the Internal Revenue Code (Code).

SECTION 2. BACKGROUND

.01 Qualifying as a Functionally Integrated Type III Supporting Organization

An organization described in § 501(c)(3) of the Code is classified as either a private foundation or a public charity. To be classified as a public charity, an organization must be described in § 509(a)(1), (2), (3), or (4). Organizations described in § 509(a)(3) are known as “supporting organizations” because their non-private foundation status is based on their provision of support to one or more organizations described in § 509(a)(1) or (2), which in this context are referred to as “supported organizations.” Supporting organizations that are “operated in connection with” their supported organization(s) are called “Type III supporting organizations.” The Pension Protection Act of 2006, Public Law 109-280 (120 Stat. 780) (PPA), divided Type III supporting organizations into two categories — those that are “functionally integrated” and those that are not.

On December 28, 2012, the Department of the Treasury (the Treasury Department) and the Internal Revenue Service (IRS) published a Treasury Decision in the Federal Register (TD 9605, 2013-11 I.R.B. 587 [77 FR 76382]) containing final and temporary regulations (the “2012 regulations”) that, among other things, set forth the requirements to qualify as a functionally integrated Type III supporting organization. To qualify as functionally integrated, the 2012 regulations provide that a Type III supporting organization must meet one of three tests. It must:

(1) Engage in activities substantially all of which directly further the exempt purposes of one or more of the supported organizations to which the supporting organization is responsive¹ by performing the functions of, or carrying out the purposes of, such supported organization(s) and that, but for the involvement of the supporting organization, would normally be engaged in by the supported organization(s);

(2) Be the parent of each of its supported organizations; or

(3) Support a governmental supported organization and otherwise meet the requirements described in § 1.509(a)-4(i)(4)(iv).

The 2012 regulations reserved § 1.509(a)-4(i)(4)(iv) to provide future guidance on the specific requirements relating to qualifying as functionally integrated by supporting a governmental supported organization.

The 2012 regulations also contained transition relief under which a Type III supporting organization in existence on December 28, 2012, that met and continued to meet the requirements of the “but for” test under former § 1.509(a)-4(i)(3)(ii), as in effect prior to December 28, 2012, would be treated as functionally integrated until the first day of its second taxable year beginning after December 28, 2012. See § 1.509(a)-4(i)(11)(ii)(A). A Type III supporting organization met the “but for” test under former § 1.509(a)-4(i)(3)(ii) if the activities it engaged in for or on behalf of its supported

organization(s) performed the functions of, or carried out the purposes of, such supported organization(s), and, but for the involvement of the supporting organization, would normally be engaged in by the supported organization(s).

.02 Reliance for Grantors

On December 18, 2006, the Treasury Department and the IRS issued Notice 2006-109 to provide interim guidance on the PPA rules regarding grants to supporting organizations by private foundations and sponsoring organizations that maintain donor advised funds. Section 3.01 of Notice 2006-109 provides procedures under which these grantors, acting in good faith, may rely on written representations and/or reasoned written opinions of counsel in determining whether a grantee is a Type I, Type II, or functionally integrated Type III supporting organization for purposes of §§ 4942, 4945 and 4966. Section 3.02 of Notice 2006-109 states that, solely for purposes of a representation or opinion of counsel on which a grantor may rely, an organization will be considered a functionally integrated Type III supporting organization if it would meet the “but for” test set forth in former 1.509(a)-4(i)(3)(ii), as in effect at the time that notice was published. Notice 2006-109 states that the reliance criteria in section 3.01 are in effect “until further guidance is issued” and that the “functionally integrated” definition in section 3.02 is in effect until the issuance of regulations defining the term.

In 2011, the Treasury Department and the IRS issued Rev. Proc. 2011-33, 2011-1 C.B. 887, which provides general rules for reliance by grantors and contributors to organizations described in §§ 509(a)(1), (2), and (3) for purposes of §§ 4942, 4945, and 4966. Rev. Proc. 2011-33 modified Notice 2006-109 by specifying that grantors may rely on any Type I, Type II, Type III, or Type III functionally integrated supporting organization classifications that are listed in the IRS Business Master File (“BMF”) extract and former Publication 78, Cumulative List of Organizations Described in § 170(c) of the Internal Revenue Code (now part of Exempt Organizations Select Check) and providing that a grantor or contributor may rely on information about an organization from the BMF extract that is obtained from a third party, so long as certain specified requirements are met.

SECTION 3. INTERIM GUIDANCE FOR TYPE III SUPPORTING ORGANIZATIONS

.01 Transitional Rule for Qualifying as Functionally Integrated by Supporting a Governmental Supported Organization

Until the earlier of the date final regulations are published under § 1.509(a)-4(i)(4)(iv) or the first day of the organization’s third taxable year beginning after December 31, 2013, a Type III supporting organization will be treated as meeting the requirements of § 1.509(a)-4(i)(4), and hence will be treated as functionally integrated, if it:

(1) Supports at least one supported organization that is a governmental entity to which the supporting organization is responsive within the meaning of § 1.509(a)-4(i)(3); and

(2) Engages in activities for or on behalf of the governmental supported organization described in paragraph (1) that perform the functions of, or carry out the purposes of, that governmental supported organization and that, but for the involvement of the supporting organization, would normally be engaged in by the governmental supported organization itself.

This transitional rule is not intended to signal what future proposed regulations will require with respect to qualifying as functionally integrated by supporting a governmental entity. No Type III supporting organization will qualify as functionally integrated by reason of satisfying this transitional rule once final regulations under § 1.509(a)-4(i)(4)(iv) are published.

.02 Reliance on Notice 2006-109 for Grantors

Until further guidance is issued addressing the reliance standards of Notice 2006-109, private foundations and sponsoring organizations that maintain donor-advised funds may continue to rely on the grantor reliance standards of section 3 of Notice 2006-109, as modified by Rev. Proc. 2011-33 and this notice. For grants made after December 28, 2012, a Type III supporting organization must meet the requirements described in current § 1.509(a)-4(i)(4) or section 3.01 of this notice to be considered functionally integrated for purposes of a representation or opinion of counsel on which a grantor may rely. Accordingly, in order to determine that a Type III supporting organization is functionally integrated based on a written representation, a grantor must collect and review a written representation and documents that demonstrate the grantee meets the requirements described in current § 1.509(a)-4(i)(4) or section 3.01 of this notice.

SECTION 4. EFFECTIVE DATE

This notice is effective December 23, 2013. However, a supporting organization may rely on the transitional rule described in Section 3.01 of this notice beginning on December 28, 2012, and until the earlier of the date final regulations are published under § 1.509(a)-4(i)(4)(iv) or the first day of the organization's third taxable year beginning after December 31, 2013. Grantors to a supporting organization may rely on the interim guidance provided in section 3.02 of this notice for grants made after December 28, 2012 and before the date further guidance is issued addressing the reliance standards of Notice 2006-109.

SECTION 5. REQUEST FOR COMMENTS

The IRS and the Department of Treasury request comments regarding this notice. Comments should refer to Notice 2014-4 and be submitted by March 7, 2014, to:

CC:PA:LPD:PR (Notice 2014-4)

Room 5203

Internal Revenue Service

P.O. Box 7604

Ben Franklin Station

Washington, DC 20044

Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 4:00 p.m. to:

CC:PA:LPD:PR (Notice 2014-4)

Courier's Desk

Internal Revenue Service

1111 Constitution Ave., N.W.

Washington, DC 20224

Alternatively, taxpayers may submit comments electronically to notice:

comments@irscounsel.treas.gov

Please include "Notice 2014-4" in the subject line of any electronic communications.

All comments will be available for public inspection and copying.

SECTION 6. PAPERWORK REDUCTION ACT

The collection of information contained in this notice has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) under control number 1545-2050.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

The collection of information is in section 3 of Notice 2006-109, as modified by section 3.02 of this notice. Collecting the required information may provide private foundations and sponsoring organizations of donor advised funds with relief from excise taxes imposed by §§ 4942, 4945, and 4966 of the Code.

The estimated total annual reporting and/or recordkeeping burden is 612,294 hours.

The estimated annual burden per respondent/recordkeeper varies from 7 hours, 53 minutes to 9 hours, 48 minutes, depending on individual circumstances, with an estimated average of 8 1/2 hours. The estimated total number of respondents and/or recordkeepers is 65,000.

The estimated frequency of collection of such information is occasional.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. § 6103.

SECTION 7. EFFECT ON OTHER DOCUMENTS

This notice modifies Notice 2006-109.

SECTION 8. DRAFTING INFORMATION

The principal author of this notice is Mike Repass of the Exempt Organizations, Tax Exempt and Government Entities Division. For further information regarding this notice, contact Mike Repass at (202) 317-8536 (not a toll-free call).

FOOTNOTE

1 Treas. Reg. § 1.509(a)-4(i)(3) requires a Type III supported organization to demonstrate "responsiveness" to a supported organization by having one of three specified relationships with its supported organization(s) that results in the officers, directors, or trustees of the supported organization(s) having a "significant voice" in the operations of the supporting organization.

Citations: Notice 2014-4; 2014-2 IRB 1