



May 30, 2008

**Via E-mail Transmission**

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Form 990 Redesign  
Internal Revenue Service  
1111 Constitution Ave, NW  
Washington, DC 20224

Dear Ms. Lerner and Mr. Schultz:

These comments are offered on behalf of the Council's community foundation and public charity members. We have generally tried to focus our comments on the revised form and instructions as they impact organizations that hold and invest endowments and carry on their charitable activities primarily by making grants to others. We anticipate that you will receive many detailed and thoughtful comments from other organizations and our omission here of some issues that others may raise should not be taken to mean that the Council disagrees with those points.

The comments that follow include discussions of key substantive areas of concern to the Council and its public charity members as well as comments and suggestions that are of a more technical nature. In general, we have tried to address these in the order in which they appear on the core form and its schedules. In summary, however, the Council's key issues are:

- Clarifications with respect to the instructions for line 9 of Part V of the core form (regarding donor advised funds), discussed below under "Comments on Core Form – Part V," and with respect to the reporting of funds that are similar to donor advised funds, discussed below under, "Comments on Schedule D Instructions, Part I"
- Clarifications with respect to the instructions for reporting travel and entertainment expenses for government officials, discussed below under, "Comments on Core Form – Part IX"
- Clarifications with respect to reporting grants and other forms of economic assistance that benefit interested persons, discussed below under, "Comments on Schedule L"

Although our substantive concern with each of these three key issues is different, the three do have some points of commonality. In each, the IRS is asking filers to report transactions that, in

general, are not prohibited, not directly regulated, and not abusive. In the Pension Protection Act of 2006, Congress acted to regulate donor advised funds – the Act did not regulate any funds that may be “similar” in some way. Public charities are not barred from paying the travel expenses of government officials, or from providing them with meals, and often such payments appropriately and significantly further the charity’s mission. The group of individuals defined as “interested persons” are not thereby barred from receiving benefits from their charitable organizations on the same basis as any other person that the charity serves. We do appreciate IRS concerns regarding abuses. Nevertheless, as these requirements are currently drafted, most transactions reported will be perfectly appropriate and will not confer improper benefits on anyone – and truly abusive transactions will be hidden in the haystack of reported transactions. Accordingly, we believe these reporting requirements should be tailored very narrowly to try to eliminate as much as possible the reporting of transactions that are not abusive.

The second area of commonality is that in each case, the required reporting is not without cost. It takes time and effort to design systems to capture the data to be reported and it takes time and effort to collect the data. We believe that time and effort will be considerable in the areas we have identified as key. Even the least burdensome – determining which funds are similar in character to donor advised funds – may require sponsoring organizations to duplicate the considerable time and effort they expended in the last quarter of 2006 to determine which of their funds did fit within the statutory definition.

The third area of commonality is that the instructions in all three key issue areas are nonexistent, vague or imprecise in key respects, or sweep unnecessarily broadly. We do not say this to demean in any way the extraordinary effort that IRS officials have made in undertaking this substantial redesign of the Form 990. We mean only to point out that these areas require significant attention before the instructions are made final.

The final area of commonality is that due to the imprecision of the instructions and the sweeping nature of the information requested, filers will respond in a wide variety of ways. The most conscientious will develop new, and costly, systems for capturing reportable information, while others will simply ignore the questions or provide superficial responses. This penalizes those trying hardest to comply completely. Those who choose not to comply or to comply in less comprehensive fashion are likely to go undetected and unsanctioned because the very reasons that make the requested information difficult to collect will also make it difficult for the IRS to audit. Finally, unless instructions are clear and precise, even conscientious organizations will reach vastly different conclusions about what must be reported, making the reports of little use either to the IRS or to those who try to draw comparisons among the organizations that file Form 990.

## Comments on Core Form Instructions

### Core Form – Part IV

**Line 6 – Maintenance of Donor Advised Funds and other accounts:** The instructions direct the filer to the Glossary for a definition of the funds and accounts to be reported, but the Glossary only defines donor advised funds. Such definition does, however, describe funds excepted by statute from the definition of donor advised fund. If the intention is for filers to answer “Yes” and complete Schedule D if they maintain any fund that either (a) meets the definition of a donor advised fund or (b) would be a donor advised fund, but for the fact that it is specifically excepted from such definition by statute, the instructions should clarify this. In addition, consider revising the question on Line 6 to refer to “donor advised funds or any **similar** accounts” both for clarity and for consistency in terminology with Schedule D. Finally, please see our comments on Schedule D, below, with regard to determining which, if any, funds should be considered “similar” to donor advised funds for reporting purposes.

**Line 29 – Non-Cash Contributions:** The instructions include the statement: “Do not include contributions of services or contributions to the capital of the organization.” Please clarify the filers to which the latter part of the instructions applies. Some charitable organizations may find the statement confusing and attempt to apply it to contributions to endowments.

**Line 37 – Conducting Exempt Activities Through Unrelated Partnerships:** Please see the Council’s comments on Schedule R, below.

### Core Form – Part V:

**Line 8 – Disclosure of Excess Business Holdings:** Neither the instructions nor the glossary defines the term “excess business holding.” In addition, the instructions direct filers to “see the Glossary to determine who is considered a disqualified person for purposes of determining the excise tax on excess business holdings for a donor advised fund.” However, the Glossary provides only the general definition of a disqualified person for purposes of section 4958, and does not explain that for purposes of applying section 4943 to donor advised funds, the term “disqualified person” is limited to donors and donor advisors, their family members, and entities 35% controlled by either of the foregoing.<sup>1</sup> The instructions should also explain the meaning of the term “disqualified person” for purposes of applying section 4943 to supporting organizations.<sup>2</sup>

**Line 9a – Section 4966 Taxable Distributions:** The instructions for Line 9a include a “Tip,” which states in part that any distribution to any individual is taxable, “whether a grant, reimbursement, payment of compensation for services, or other distribution,” unless it falls within one of two exceptions. We think this tip is inaccurate in that overstates the prohibition on

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<sup>1</sup> §4943(e)(2).

<sup>2</sup> See §4943(f)(4).

distributions to individuals. As drafted, it sweeps in amounts paid for goods and reasonable compensation for services, as well as legitimate reimbursement of expenses, which we do not believe are prohibited by section 4966. We believe it is important to carefully distinguish between section 4966, which prohibits “distributions” to individuals without regard to whether the recipients are related to an advised fund’s donor or advisor, and section 4958(c)(2), which bars grants, loans, compensation and similar payments to donor advisors and persons related to them. By conflating the two separate requirements, the tip imports into section 4966 the more rigorous limitations of section 4958(c)(2), a position that we believe lacks support in either the statutory language or the accompanying Technical Explanation.<sup>3</sup> In fact, this tip appears to disallow payments made to individuals pursuant to bona fide sales and leases of property which the Technical Explanation specifically states are not prohibited by section 4958. We do not believe Congress would have taken pains to ensure that organizations knew that these transactions with disqualified persons were not prohibited by section 4958 if they had forbidden them under section 4966.

In correspondence dated August 16, 2006, the Council asked Treasury and the IRS to clarify that the term “distribution,” as used in section 4966, includes only transactions that are wholly or partially gratuitous in character. Comments filed last June by the American Bar Association’s Tax Section agreed with this basic position and advanced several arguments supporting the Council’s proposed definition. These included: i) the desirability of an interpretation that is consistent with section 4945; ii) that section 4967 appears to use the term with this meaning; and, iii) the desirability of consistency between sections 4966 and 4967.<sup>4</sup>

The definitional issue concerning the meaning of “distribution” is a key issue for the Council and its members. We do not believe it should be resolved in the context of instructions to Form 990. Accordingly, we urge you to revise the tip by deleting the characterization of distribution as including compensation for services and reimbursement of expenses. As revised, the tip would state, “A distribution from a donor advised fund to an individual is subject to an excise tax under section 4966, ~~whether a grant, reimbursement, payment of compensation for services, or other distribution,~~ unless it is excepted ...”

In addition, there are a couple of technical errors in the instructions as well. In the first paragraph, filers are referred to the Glossary for a definition of “taxable distribution,” but the Glossary has no such term. Later, the Tip incorrectly states that distributions to non-charitable organizations from a donor advised fund may avoid becoming subject to tax *either* because they are made for a charitable purpose *or* because the sponsoring organization exercises expenditure responsibility for the distributions. In fact, distributions from a donor advised fund to non-charitable organizations are subject to tax under section 4966 unless the distribution has a charitable purpose *and* the sponsoring organization exercises expenditure responsibility over the distribution.<sup>5</sup> Finally, the instructions use the phrase “individual educational grant program” to

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<sup>3</sup> Staff of the Joint Committee on Taxation, *Technical Explanation of H.R. 4, the “Pension Protection Act Of 2006,” as Passed by The House On July 28, 2006, and as Considered by the Senate on August 3, 2006*, JCX 38-06, August 3, 2006 (“Technical Explanation”).

<sup>4</sup> ABA Section of Taxation, Comments in Response to IRS Notice 2006-109 on the Application of the Pension Protection Act of 2006 to Donor Advised Funds and Supporting Organizations, June 4, 2007

<sup>5</sup> See §4966(c)(1)(B).

describe the section 4966(d)(2)(B)(ii) exemption. This is unduly limiting since the exemption actually excludes grants for travel, study and similar purposes, a category that includes, for example, grants to support research. We recommend using the statutory language.

**Line 9b – Distributions to donor, donor advisor, or related person:** Line 9b inquires about payments to donor advisors and related persons. The instructions for this line also should be corrected by deleting the term “distribution” and the reference to line 9a for the meaning of that term. Instead, the instructions should state that organizations should answer “yes” if they provided a grant, loan, compensation, or similar payment to a donor advisor or a related person. This change would make the instructions track the language of section 4958(c)(2).

The “tip” for line 9b informs filers of the possible penalties under section 4967 if a donor advisor or related party receives a benefit as a result of a distribution from an advised fund. The tip should be revised to include the qualification that penalty taxes are triggered only by the receipt of benefits that are “more than incidental.” This change will make the tip accurately reflect the language used in section 4967.

We do not interpret the instructions for line 9b to require sponsoring organization filers to report benefits that might trigger section 4967 penalties and we believe this is appropriate since in most cases the sponsoring organization will not be in possession of this information.

## Core Form – Part VI

**Line 12a – Conflict of Interest Policy:** The Council believes that the instructions appropriately distinguish between true legal conflicts of interest – those where an individual may benefit financially from a decision and the competing duties that sometimes arise when an individual sits on the board of more than one organization. However, we suggest that the instructions make clear that while an organization may answer yes on line 12a if its policy does not address situations that present the appearance of a conflict, organizations may voluntarily choose to include provisions in their conflict of interest policies that do address appearance questions.

For grantmakers, the most common situation in which there is an appearance of a conflict of interest occurs when one of the grantmaker’s board members is also on the board of a prospective grantee. We suggest an additional example as follows:

**Example:** D is a volunteer member of the governing body of B, which carries out its charitable purposes primarily by making grants to other charities. D is also a volunteer member of the governing body of C, which offers tutoring and other programs to at-risk youth. Both B and C are 501(c)(3) public charities. C has applied for a grant from B, which will be discussed at an upcoming board meeting. While D may have the appearance of a conflict of interest with respect to the grant request, the conflict does not involve a material financial interest of D.

**Line 15 – Process for Determining Compensation:** Line 15b asks whether the process for determining compensation of officers other than the CEO and key employees of the organization included, inter alia, review and approval by independent persons. However, the instructions make clear that filers may answer yes with respect to this line only if they followed the full rebuttable presumption process for those positions, including review and approval by the governing body or a compensation committee. We believe that most boards delegate to the CEO decisions about compensation of most, if not all, subordinate officers and key employees. Accordingly, we recommend that the instructions for line 15b be revised to permit organizations to respond affirmatively when the CEO is independent of the persons whose salary he or she determines.

**Line 16 – Joint Venture Policy:** See the Council’s comments on Schedule R below.

### **Core Form – Part VII – Compensation of Officers, etc.**

**Directors:** Section A requires that filers report the average number of hours per week worked by members of the filer’s board even if the directors are not compensated. While this is not a change from the existing requirement, we do not understand why it is necessary to report hours worked for persons who receive no compensation. Reporting a nominal figure (e.g., 1 hour a week) apparently satisfies the requirement but directors who devote more than the nominal amount of time sometimes feel insulted, a problem that will grow worse as filers provide copies of Form 990 to boards. The result is that filers establish systems for recording or estimating actual time, an otherwise pointless exercise. We recommend allowing filers to mark the box for hours worked N/A if Boxes D, E, and F all contain a zero.

**Key employees:** The Council believes that the proposed \$150,000 threshold for reporting compensation for key employees strikes the appropriate balance for increasing the transparency of compensation reporting, without unnecessarily burdening organizations with additional reporting requirements where salaries are likely to be at reasonable.

**Health benefits:** We found the direction to report the “value” of health benefits provided by the employer to be confusing. Value is subjective and would vary depending on an employee’s medical history and current needs. However, the remainder of the paragraph suggests that the amount to be reported is the total of employer contributions and employee contributions (if excluded from taxable income). We suggest modifying this instruction accordingly.

### **Core Form – Part IX – Statement of Functional Expenses**

**Line 11d and 11g – Lobbying Fees and Other Fees for Services:** The instructions to line 11g state that fees paid for advocacy services that are not lobbying should be reported on line 11g. This information should also appear in the instruction for line 11d as well. In addition, the instructions for line 11d indicate that fees paid for “legislative liaison services” should be reported on this line together with fees paid for lobbying. The term “legislative liaison services” is undefined, but appears to cover fees paid for services that are not lobbying since otherwise the

inclusion of the term would be extraneous. However, the inclusion of non-lobbying fees together with lobbying fees on line 11d will make it impossible for the Service to determine what amount was spent on lobbying activity. Therefore, we recommend that legislative liaison services, like non-lobbying advocacy services, be reported on line 11g and the instructions for both lines be revised to reflect this. Amounts reported for lobbying activity on Schedule C could also be cross referenced to line 11d. Finally, the instructions should clearly state that organizations that have made the section 501(h) election may rely on the definitions in section 4911 and its implementing regulations in determining whether a payment is for lobbying or for advocacy that is not lobbying.

**Line 18 – Payments of Travel or Entertainment Expenses for any Federal, State or Local**

**Official:** The Council is aware that the IRS modified the instructions for line 43 (Other Expenses) in the 2006 990 by adding a reporting requirement for reporting travel and entertainment expenses paid to government officials and that this instruction also appeared in the instructions for the 2007 990. We are uncertain how many organizations paid attention to the new requirement, however, since there was not a new line added to the form and “What’s New” for 2006 simply referred to changes in the instructions for line 43. In any case, for the reasons we will now discuss, we believe the IRS should substantially revise the instruction for new line 18 to narrow the group of public officials with respect to whom reporting is required.

Absent significant modifications, the reporting required by the instructions on this line creates very burdensome recordkeeping requirements for filers. This burden stems from three factors: 1) the adoption of section 4946(d) as the standard for determining who is a government official; 2) the fact that organizations may pay travel or entertainment expenses for persons who are government officials for reasons unrelated to their public office and without the knowledge that the persons in question are government officials; and 3) the inclusion of family members, as defined in section 4946(d) in the reporting requirements

Use of Section 4946(c) to Define Government Officials Covered by the Reporting Requirements:

Private foundations have struggled for many years with some aspects of the section 4946(c) definition. Subparagraphs (1) (2), (3), and (7) of the definition are clear and precise:

- All persons holding elective public office in the executive and legislative branches of the federal government (section 4946(c)(1))
- All persons in the executive and judicial branches of the federal government who were appointed to their office by the President (section 4946(c)(2))
- All persons holding positions in the executive, legislative, and judicial branches of the federal government who are either Schedule C or who are paid at a rate equal to the lowest rate of basic pay for the Senior Executive Service (section 4946(c)(3))
- Any member of the Internal Revenue Service Oversight Board (section 4946(c)(7))

The remaining three subparagraphs defining a covered official, however, all pose problems due to the application of salary thresholds that either have not been adjusted for inflation since 1969 or received an adjustment that did not reflect inflation. In addition, to decide whether a state or

local government official is covered by the definition, filers must make a somewhat subjective determination of whether the person occupies a public office.

- All employees of the House of Representatives or the Senate of the United States are government officials if they receive compensation at an annual rate equal to \$15,000 a year (section 4946(c)(4)).
- All elected and appointed officials of the executive, legislative, and judicial branches of state governments, their political subdivisions, US possessions, and the District of Columbia are government officials if they are compensated at an annual rate of \$20,000 or more (section 4946(c)(5)).
- All persons who are personal or executive assistants or secretaries to any government official are also government officials (section 4946(c)(6)).

Congress established the salary threshold for subparagraphs (4) and (5) at \$15,000 in 1969. Although Congress increased the original \$15,000 threshold for subparagraph (5) to \$20,000 in the 1986 Tax Reform Act, this increase did not account for inflation between 1969 and 1986. A simple inflation adjustment from the 1969 threshold would increase it to approximately \$88,000 today and would come closer to differentiating between employees who are in positions where they are likely to have substantial influence over policy decisions from those who are performing administrative, clerical or maintenance functions. However, as things stand, nearly anyone employed by the House or the Senate must be considered a government official.

The section 4946 regulations mitigate the otherwise sweeping coverage of section 4946(c)(5) – state and local officials – by providing that a person must also hold a “public office” before he or she will be considered to be an elected official. While this is a helpful adjustment that narrows the class of covered officials, whether a position is a public office is a facts and circumstances test that is necessarily somewhat subjective as the “essential element” is “whether a significant part of the activities of a public employee is the independent performance of policymaking functions.”<sup>6</sup> The difficulties that can arise in applying this test were illustrated recently by the Service’s own difficulty in properly classifying an elected state district court judge as a government official.<sup>7</sup>

As the foregoing demonstrates, a very large group of individuals must be considered to be government officials under section 4946(c). The class currently includes many persons, such as low-level clerical staff employed by the House or the Senate, that most persons would not think of as government officials. The same is true for state and local officials and is further complicated by the fact that many state and local officials serve as such on a part-time basis.<sup>8</sup> As

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<sup>6</sup> Treas. Reg. 53.4946-1(g)(2)(i).

<sup>7</sup> PLR 200604034 withdrawing the determination in PLR 200542037 that an elected state district court judge was not a government official under section 4946(c)(5) (PLR 200604034, apparently incorrectly, describes the judge in question as a federal district court judge, perhaps another indication of the confusion surrounding the definition of a government official).

<sup>8</sup>The salary threshold is expressed as a rate rather than an absolute dollar amount. Accordingly, compensation paid to part-time officials must be multiplied out to determine whether it exceeds the \$20,000 threshold.

a consequence, the individuals in question usually have another job and often that job is one that is full time increasing the probability that speaking invitations, for example, will be based on the person's day job and may be extended in ignorance of the fact that the person also holds a part-time government post.

**Example:** Mary Jones is the dynamic young leader of a human services organization. The organization's innovative programs for young offenders have substantially reduced the rate at which these young persons commit new crimes. A national organization invites Ms. Jones to speak at its conference so that others may learn more about her programs and how they can be replicated. The national organization pays Ms. Jones' travel costs to and from the conference and provides meals while at the conference. The total exceeds the reporting threshold. The national organization is not aware that Ms. Jones is also a member of the school board in her local community for which she receives a modest stipend that nonetheless exceeds an annual rate of \$20,000 a year.

The inclusion of family members is a further substantial broadening of the class of persons for whom reporting would be required. Although the instructions reference the definition of family member found in section 4946(d), family members of government officials are not treated as disqualified persons with respect to a private foundation. Only the officials themselves are disqualified. Consequently, private foundations have never had to face the task of trying to track family member relationships. Including family members in the class for which reporting would be required also substantially increases the number of persons who may, for example, be asked to provide consulting services or speak at conferences based only on their individual skills and talents, with the tax-exempt organization not knowing or having any reason to know that they are related to a government official.

**Example:** The facts are as above except that Ms. Jones is not a member of the school board, but her mother is the mayor's secretary.

It may be possible for smaller organizations to keep track of travel and entertainment expenses for government officials that the organization knows are government officials and to include reporting for the official's spouse or another family member if he or she is accompanying the official. Larger organizations may find even this a challenge, however, given the breadth of the definition of government official and the number of employees who may be interacting with them. Instituting systems that would identify persons as government officials or members of an official's family would be considerably more burdensome, requiring, as it would, a lengthy explanation of what is a government official (see above) that would need to be administered to any individual for whom an organization may pay travel expenses or provide.<sup>9</sup>

We recommend that the IRS revise the instruction to adopt a much narrower definition of government official than the one presently found in section 4946 by:

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<sup>9</sup> The instructions require the maintenance of records concerning all meals and transportation provided to government officials even if the expenditure is below the threshold for reporting on Form 990.

- Limiting state officials to those holding elective office
- Eliminating local government officials entirely
- Also eliminating the category of secretaries, personal assistants and executive assistants
- Establishing realistic salary thresholds that reflect 2008 compensation levels (which the IRS should then adjust periodically).

We also recommend eliminating any requirement to report with respect to family members unless they accompany the official on the trip or at the meal.

We believe these recommendations strike a reasonable balance between the interest of the IRS in increasing reporting about travel and entertainment provided to government officials with the burden the instructions otherwise place on organizations to track and determine whether individuals are government officials or members of the family of a government official.

### **Comments on the Draft Instructions for the Schedules**

#### **Schedule A – Public Charity Status and Public Support**

**Part I – Line 8:** Most community foundations now are structured as a single nonprofit corporation. It would reduce reporting confusion if the instructions for line 8 added that community foundations in corporate form should check box 7 rather than box 8.

**Part I – Lines 11a to 11d:** We urge the IRS to make the voluntary redetermination process described in the Tip mandatory and to establish a date certain by which supporting organizations must seek a redetermination of their status.

**Part I – Lines 11f – Type of Supporting Organization:** The tip appears inaccurate in that it indicates that organizations may request a determination letter that describes it as a Type III – Functionally Integrated organization, but does not state that the IRS is only issuing such determination letters if the organization meets the additional standards set forth in Announcement 2007-87, the Advance Notice of Proposed Rulemaking and Request for Public Comment on Proposed Payout Requirement for Type III Supporting Organizations that are not Functionally Integrated, 2007-40 I.R.B. 753 (Aug. 2, 2007).

#### **Schedule D – Supplemental Financial Statements**

##### **Part I – Organizations Maintaining Donor Advised Funds or Other Similar Funds or Accounts**

Beginning with the 2006 Form 990, the form has included a question asking filers not just whether they maintain donor advised funds but also whether they maintain, “any accounts where donors have the right to provide advice on the distribution or investment of amounts in such funds or accounts.” Neither the instructions to the 2006 990 nor the draft instructions for the

revised 990 include any explanation of the standard an organization should use to determine when a fund that does not meet the definition of an advised fund should nonetheless be reported in lines 1-4 of box b.

Staff of the Joint Committee on Taxation devoted considerable thought to crafting a definition of donor advised fund. Section 4966(d)(2)(A) provides that a fund is a donor advised fund if it is separately identified by reference to contributions of a donor or donors; owned and controlled by a sponsoring organization; and a donor (or any person appointed or designated by the donor) has, or reasonably expects to have, advisory privileges with respect to distributions or investment by reason of the donor's status as a donor. Component parts of the definition included two statutory exemptions. The first exempts funds that make distributions only to a single identified organization or governmental entity. As the Joint Committee staff's technical explanation makes clear, such funds may be named for a donor and the donor may have advisory privileges regarding distributions without the fund being classified as donor advised.<sup>10</sup> The second exception is for funds that make grants to individuals for travel, study and similar purposes as long as the fund's advisor provides advice only as a member of a committee that is appointed by the sponsoring organization, the donor does not control the committee, and the committee follows procedures that have been preapproved by the sponsoring organization's board and which are consistent with the requirements of section 4945. The legislation also authorized Treasury to grant additional exemptions in appropriate circumstances.

The Joint Committee Staff's Technical Explanation supplemented the definition of donor advised fund with examples of funds that are not donor advised because they do not meet the statutory definition. Chief among these are an organization's general fund and funds that pool contributions of many donors and do not provide individualized accounting for any individual donor. These funds are not donor advised funds because they lack one or more of the basic characteristics of an advised fund – a fund created by a gift from an individual donor (including funds created by a family or a business) for which the donor, or someone the donor appoints, is the advisor.

We believe the instructions should follow this basic line of demarcation. Funds that should be reported as "other" are funds that would be classified as donor advised but for the fact that they fall within one of the statutory exceptions (or an exception granted by the Secretary). Thus funds that make distributions to a single charity would be reported as "other" if the fund's donor provides advice with respect to investments or distributions. Similarly, scholarship funds that meet the exemption requirements would be reported as "other" if the fund's donor or a person the donor appoints serves on the selection committee. The instructions should then provide that funds that do not meet the basic definitional requirement to be an advised fund are not required to be reported in lines 1-4, box b. This would be the case even though there may be instances when sponsoring organizations make use of volunteer committees in advising about distributions and the committees include some donors.

In the absence of clarification in the instructions, we will continue to advise our members to categorize funds as we have described above. However, without clarity in the instructions, there

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<sup>10</sup> Technical Explanation at 345.

is little reason to believe that the IRS will receive useful information with respect to the second part of the question because organizations are reaching differing conclusions about what should be reported. We also urge the IRS to move forward promptly in addressing definitional issues raised in the many comments that have been filed on donor advised fund issues arising from the enactment of the Pension Protection Act of 2006.

**Part I, Line 3:** The instructions are to report total “grants” from donor advised and similar funds. Some advised funds make expenditures for charitable purposes that are not grants. The instructions should be revised to include any expenditure for the charitable purposes of the fund.

### **Part III – Organizations Maintaining Collections of Art, Historical Treasures or Other Similar Assets**

Organizations that do not normally “maintain” collections of art or similar assets, but which do accept such items as gifts, may be confused by line 5 of Part III, which asks whether an organization solicits or receives art to be sold. Based on the wording of the checklist question (Line 8 of Part IV of the core form), we believe that the maintenance of a collection is a predicate to filling out Part III and our understanding is bolstered by the fact that line 30 of the checklist specifically asks about whether an organization receives such gifts and directs filers to Schedule M to supply additional information. We think the instructions for Part III could be strengthened, however, by a clear statement that it is required only for museums and similar organizations that maintain collections of art and that organizations that accept gifts of art, but do not maintain them in a collection, should not complete Part III, but should report those gifts on Schedule M.

### **Part V – Endowment Funds**

**Lines 1 – 4 – Definition of Endowment:** The new reporting requirements with respect to endowments should give the IRS a more complete picture of the magnitude of endowments held by public charity and of their policies with respect to using distributions from endowment to support current activities. However, we are concerned that use of the definitions found in FASB 117 will lead to a significant understatement of the size of endowments and may generate unnecessary audits when organizations thought to hold endowments report that they do not. For example, although community foundations typically hold endowments, some of them very substantial, most of their accountants classify all of their funds as unrestricted either because the community foundation’s organizing documents give it a limited power to invade corpus or because the variance power gives it the right to alter a fund’s purpose in certain limited circumstances.

We recommend, instead, that the instructions use the definition found in section 2(2) of the Uniform Prudent Management of Institutional Funds Act (UPMIFA).

‘Endowment fund’ means an institutional fund or part thereof that, under the terms of a gift instrument, is not wholly expendable by the institution on a current

basis. The term does not include assets that an institution designates as an endowment fund for its own use.

This definition is now the governing law in 22 states and the District of Columbia and is under consideration in another 10. We believe that it should be the basis for reporting endowments on Form 990.

**Line 1f – Administrative Expenses:** Please clarify what is to be reported here. Are these overhead costs, such as investment management fees, that are directly attributable to the endowment or is the number on this line supposed to reflect distributions from the endowment to support expenses reported on the core form in Part IX column (C) (Management and General)? If the latter, should administrative expenses also include any support from the endowment for fundraising expenses (column (D))? If line 1f reports only costs directly attributable to the endowment, should amounts reported on lines 1d and 1e include associated management, general, and fundraising costs?

**Line 3a – Endowment funds held and administered by related and unrelated organizations.** Community foundations typically hold two types of funds for the benefit of another charitable organization. Funds referred to as “agency endowments” are created by transfer of assets from a charitable organization that names itself as the fund’s beneficiary. Pursuant to the Financial Accounting Standards Board’s Statement of Financial Accounting Standards No. 136, these funds are classified as assets with a corresponding liability in the community foundation’s audited financials. The transferring charity, if following GAAP, will report the present value of its expected future income stream as an asset on its books. Despite this accounting treatment, the transaction in which the funds are transferred is a completed gift and, as a matter of law, the transferred assets are the property of the community foundation and are included in assets on the community foundation’s Form 990. For purposes of Form 990 reporting, the community foundation reports distributions to the transferor charity as a grant and we believe the charity should be recording the grant as contributions income. The instructions should confirm that this is how these transactions should be reported, as the accounting treatment has led to considerable confusion among charities that are the designated beneficiaries of agency endowments.

Community foundations also hold funds created by gifts from a donor or donors who have designated a particular public charity or charities as the beneficiaries of the fund. In these cases, the accounting treatment is the same as the funds’ legal status – they are reported in audited financials as assets of the community foundation solely (assuming there has been adequate disclosure of the community foundation’s variance power) and do not appear on the books of the designated charity. There has been less confusion about the proper recording of distributions as grants by the community foundation and contributions income by the recipient, but the instructions could also note that this is the correct way in which to report these distributions as well.

## Schedule F – Statement of Activities outside the United States

In general, the Council has few comments on the revised Schedule F and its instructions. We appreciate the changes that the Service has made in response to comments by us and others on this form.

**Part II, Line 1, Columns (e) and (f) – Cash Grants:** It is unclear whether these two columns require reporting on a cash basis even if the organization is otherwise completing the form on an accrual basis. The instructions should clarify this.

**Part II, Line 2:** This line reports the number of foreign grantees in three categories:

- Those that have IRS determination letters recognizing that they are described in section 501(c)(3)
- Those “that are recognized as a charity by a foreign country”
- Those for which “the grantee or counsel” has provided a section 501(c)(3) equivalency letter

Assuming the second category above was intended to encompass only those foreign determinations of charity status that are recognized by the US under a tax treaty, we recommend modifying the instruction to so state, noting that, at present, such treaties exist only for Canada, Mexico and Israel. If grantees recognized by other countries are to be included here, the instructions should be modified to provide standards for determining which countries should be included and, keeping in mind that charity is a common-law concept, should state whether grantees recognized as nongovernmental organizations should be included in the total.

The instruction summarized in the third bullet above should be modified to reflect the requirements of Rev. Proc. 92-94. We suggest this wording: “for which the grantmaker has made a good faith determination, based on an affidavit from the grantee or the opinion of counsel, that the grantee is the equivalent of a public charity.”

We also recommend adding two additional categories to this line with the proviso that grants must further a charitable purpose:

- International organizations designated as public charity equivalents by Executive Order pursuant to 22 USC 288
- Foreign governments, agencies and instrumentalities

**Part III – Grants to Individuals:** The instructions should clarify reporting obligations in two common situations:

- Grants to US residents to support an activity that will be carried on outside the United States, such as scholarships for students to study at a foreign university or a grant to enable an academic to attend an international conference in his field of study

- Grants to foreign individuals to support an activity that will be carried on inside the United States, such as scholarships to enable a foreign resident to attend a US university

Should both reported on Schedule F, both on Schedule I, or one on Schedule F and one on Schedule I?

### **Schedule G – Fundraising or Gaming Activities**

**Part I, Line 2a – Fundraising Activities:** The instructions appear not to match the form with respect to the inclusion or exclusion of officers, directors, trustees or key employees on line 2a. If the intent is to require reporting on line 2a for contractual relationships with officers, directors, trustees or key employees that are in addition to the compensation they receive for the performance of their normal job functions, the instructions should clearly state this.

We also recommend that the instructions make clear that reporting is not required for agreements with volunteers.

**Part I, Line 3 – State Registration:** It is our understanding that state registration requirements apply in 39 states and the District of Columbia. The instruction with respect to multistate filers should be revised to state that they may answer “All States and the District of Columbia” instead of “All 50 States.”

### **Schedule I – Grants and Other Assistance to Organizations, Governments and Individuals in the United States**

**Part I, Line 2 – Process for Monitoring Grant Funds in the United States:** The instructions for line 2 imply that grantmakers must have processes in place for monitoring the use of grants even when those grants are made to domestic public charities. Grantmakers that award significant grants to support a particular project activity of the grantee’s generally will have monitoring systems in place to document that the grant was used for the purpose specified in the grant agreement. However, many grantmakers make grants for the general support of the grantee organization, or small grants for a particular purpose, and do not monitor the use of those funds, relying, instead, on the grantee’s independent obligation to expend grant funds only for charitable purposes. Many general support grants are quite small in amount and would be uneconomical for both grantmaker and grantee if monitoring was necessary. The instructions should ask grantmakers to describe their monitoring systems, but should also acknowledge that monitoring is not required for grants to domestic public charities.

**Part II, Column (h) – Purpose of the Grant:** Paralleling the comment above, the instructions should permit the use of the phrase “general support” for grants made for the general support of a public charity. We are aware that the language used in the instruction is largely unchanged from the current instructions. However, in our experience, the current instructions are often ignored or

grantmakers construct a general purpose for the general support grant by reference to the general activities the grantee undertakes.

## **Schedule L – Transactions with Interested Persons**

**Part III – Grants or Assistance Benefiting Interested Persons:** While we appreciate the modifications made to this section in response to our earlier comments, we continue to believe that the information sought will be extremely burdensome for filers to obtain and in most cases will describe transactions that are not abusive in any way. In addition, as discussed further below, we are concerned that the broad scope of the requirement as currently drafted would invade the privacy of persons needing charitable services or force them to forego services in order to keep their needs confidential. Thus, the administrative and possible human costs required to comply with this disclosure requirement may vastly outweigh any potentially useful information to be gained from it. We recommend, therefore, that the scope of the required disclosure be narrowed, in order to reduce the costs of compliance and to better focus reporting on transactions most likely to be abusive. Specifically, we recommend that the IRS (a) limit the definition of “interested person” with respect to whom reporting is required, (b) establish a threshold benefit level, below which reporting is not required; and (c) not require reporting of any benefits received by an “interested person” solely as a member of the charitable class the organization serves if it is provided on the same terms as provided to others in the class.

**Reporting Requirements:** The instructions require filers to report: “each grant or similar assistance (including provision of goods, services, or use of facilities) provided by the organization to an interested person,” unless the interested person provides consideration in return. The instructions also exclude services provided in furtherance of the purpose of a grant from being treated as consideration for the grant.

Interested persons are:

- Officers, directors, trustees, and key employees
- Substantial contributors
- Members of the organization’s selection committee
- Family members of any of the above
- 35 percent controlled entities of the above
- All employees of all substantial contributors, and their children
- All employees of all entities 35 percent controlled by substantial contributors, and their children

Excluded from reporting are:

- Transactions reported elsewhere on Schedule L (excess benefit transactions and loans)
- Business transactions with interested persons for full and fair consideration (also reported elsewhere on Schedule L)
- Section 132 fringe benefits

- Grants to a substantial contributor's employees (and their children) awarded on an objective and nondiscriminatory basis, using pre-established criteria and review by a selection committee, and generally conforming to the requirements of section 53.4945-4(b) of the Regulations

Broad Scope of Disclosure: The instructions provide that filers must disclose all forms of assistance to those the organization identifies as interested persons. For the Council's membership, this will generally take the form of cash assistance in the form of grants, awards, prizes and assistance provided to alleviate hardship and economic need. However, the disclosure requirement clearly also applies to the broad range of charitable organizations for which the provision of services is the focus of their charitable activities. We are concerned that many charitable organizations may not realize that these reporting requirements apply to them. The relocation of the requirement to Schedule L may help in this regard, but we recommend that the instructions provide some examples of how this reporting requirement might apply to a charity that is not a grantmaker.

In this connection, we urge the IRS to reconsider these sweeping disclosure requirements that will reveal information about interested persons that is a substantial invasion of their privacy and that may cause them, in some cases, to forego receiving services they need in order not to have the fact that they received them disclosed to the public. For example, someone who has been raped may decide not to seek needed counseling from a rape crisis center – a service the center provides free of charge to all rape victims – if the fact that she received the services, and, therefore, the fact that she has been raped, must be reported on Form 990 due to her status as a granddaughter of one of the center's board members. Given the sensitive personal nature of many of the services offered by charitable organizations, it is not difficult to imagine many other examples where the harm done to individuals will far outweigh any possible benefit from reporting transactions the vast bulk of which will not violate any law nor confer an impermissible private benefit on anyone.

In considering the burden this new reporting requirement will impose on filers it is important to keep in mind that section 4958 already prohibits excess benefit transactions with those persons who have substantial influence with respect to an organization and that, at a minimum, this includes officers, directors, trustees, the organization's CEO and its CFO. Key employees and substantial contributors may also be substantial influence persons, depending on a facts and circumstances analysis. Recognizing, however, that substantial influence persons may be drawn from the organization's charitable class, the section 4958 regulations provide that economic benefits provided to substantial influence persons solely because they are members of the charitable class that the organization serves will not constitute an excess benefit transaction.<sup>11</sup>

The new reporting requirement, then, does two things:

- It requires reporting transactions with substantial influence persons that are exempted from the sanctions provided by section 4958 because the benefits were based solely on membership in the charitable class

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<sup>11</sup> Treas. Reg. § 53.4958-4(a)(iv)(4).

- It creates a new group of persons, who are not substantial influence persons, but for whom reporting will be required

It is not clear from the instructions whether persons in the second group are persons that the IRS believes may have substantial influence on the organization as a whole despite their not being so classified by the organization itself or whether the IRS is attempting to define a group of persons who might have substantial influence in connection with a particular transaction because the person (or a relative) provided the financial resources used in the transaction or is a member of a committee that makes recommendations or decisions with respect to a particular transaction or set of transactions. We think the latter makes more sense and this interpretation would help to narrow the group of transactions required to be reported.

Ambiguity Regarding Transactions that Must Be Reported: It is not clear from the instructions whether, and to what extent, organizations must report assistance provided to interested persons when the organization charges recipients a fee for the services or goods provided. This will be a key issue for filers who are service providers because there is almost always some element of subsidy when a charitable organization provides services in furtherance of its mission.

There are at least three possibilities for the transactions that must be reported. First, the filer must report all transactions in which the return consideration is less than the fair market value of what is provided. In that case, the organization would, we presume, report the amount of the subsidy provided to the interested person in column (c). Second, the filer reports only when the interested person pays an amount that is less than what the organization customarily charges other beneficiaries, or other beneficiaries like the interested person, with the difference reported in column (c). Third, the organization is not required to report if the interested person pays any amount, including a nominal sum, for the benefit he or she receives. This last, that organizations report only if the interested person pays nothing in exchange for the benefit, is how we interpret the existing instructions, but we suspect this may not have been the intent. This should be clarified in the final instructions.

Inappropriate Disclosure of the Identity of Substantial Contributors: The information reported in Part III must include the name of the interested person, the nature of the relationship between the interested person and the organization, and the amount of the grant or type of assistance. Thus, reportable assistance provided to a person who is a substantial contributor must name the individual and identify him or her as a substantial contributor. However, sections 6104(b) of the Code bars the Secretary from disclosing the name and address of any contributor to an organization (other than a private foundation) and section 6104(d)(3) exempts the names and addresses of contributors from the otherwise applicable disclosure requirements. Accordingly, if the final instructions continue to include substantial contributors in the list of interested persons, the Service will need to provide for appropriate redaction of Part III. We would interpret redaction in this case as also applying to the names of family members of a substantial contributor since the substantial contributor's identity could often be inferred from the disclosure of the person's relationship to the organization that is required in column (b). For example, assistance to the son of a substantial contributor presumably would require naming the son in column (a) and, in column (b), identifying his relationship as "son of substantial contributor."

This problem could be eliminated by dropping substantial contributors from the list of interested persons.

Inappropriate Definition of Substantial Contributor: The instructions refer filers to section 507(d)(2) for the definition of substantial contributor. Under section 507(d)(2), a substantial contributor is any person who contributed more than the greater of \$5,000 or 2 percent of the total contributions the organization received in a year. Under section 509(d)(2)(B)(iv), anyone who is a substantial contributor retains that status permanently.<sup>12</sup> However, organizations described in section 170(b)(1)(A)(vi) have never been required to maintain historical records of their substantial contributors and it would be difficult or impossible to try to recreate those lists.

If the IRS decides to retain substantial contributors in the group of interested persons with respect to which transactions must be reported in Schedule III, we recommend that for organizations described in section 170(b)(1)(A)(vi), the instructions limit the definition of substantial contributor to current contributors – those individuals who appear on the list compiled in determining the amount to be reported on line 5, Part II, Schedule A. Limiting the list to current substantial contributors would be consistent with their treatment in determining public support and would be consistent with their treatment in the regulations implementing section 4958. Under those regulations, substantial contributor status is a fact tending to show that a person has substantial influence over the organization, but in determining who is a substantial contributor, the regulations direct the organization to take into account only contributions received during the current year and the four previous years.<sup>13</sup>

Presumably, organizations (e.g., hospitals and universities) not presently required to complete the support schedule in Schedule A will need to follow an equivalent process in order to determine their substantial contributors and the instructions should direct them on how to accomplish this.

Employees of a Substantial Contributor or 35-percent Controlled Entity: The instructions state that all of the employees and the children of employees of a substantial contributor must be considered to be interested persons. We recommend that the instructions limit the group that must be so considered to only employees, and children of employees, who receive a reportable benefit from a program or a fund established to provide benefits to the substantial contributor's employees and dependents. If filers must also track this entire group of persons with respect to whether they receive benefits under other programs and funds, the paperwork burden will increase exponentially even though there would seem to be little reason to be concerned with improprieties in programs over which the employer has no particular influence.

The instructions exclude from reporting grants to a substantial contributor's employees (and their children) awarded on an objective and nondiscriminatory basis, using pre-established criteria and review by a selection committee, and generally conforming to the requirements of section 53.4945-4(b) of the Regulations. There is no comparable exclusion for employees of 35 percent

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<sup>12</sup> While section 509(d)(2)(C) offers a process by which a substantial contributor to a private foundation can shed that status, there is no similar process for public charities.

<sup>13</sup> Treas. Reg. § 53.4958-3(e)(2)(ii) and Example 13.

controlled entities. We don't see any reason why the exclusion should not also include this group of employees.

Related Party Status of Committee Members: We recommend revising the instructions to make clear that committee members are interested persons only with respect to awards that the committee makes or recommends. Although the instruction apparently assumes that a charity would have only a single selection committee, many community foundations have numerous committees that evaluate applicants for scholarships, for prizes and awards, and, in some cases, for assistance to alleviate hardship and distress. There doesn't seem to be any reason why a committee member should be treated as an interested person for purposes of awards made or recommended by other committees.

Three Ways to Limit Reporting and Make It Meaningful: The first and most obvious way is to establish a threshold below which reporting is not required. Part IV of the schedule, for example, establishes a \$10,000 per transaction threshold below which reporting is not required for business transactions involving interested persons. Schedules I and F use a \$5,000 threshold for reporting grants. Payments or receipts exceeding \$15,000 are required to trigger reporting on Schedule G. A \$10,000 floor would be consistent within the form, would sharply reduce the reporting burden, and would focus the attention of the IRS and anyone interested in the organization on large transactions with persons who are insiders (or are deemed to be so by the reporting requirement).

Second, as we have noted in several places above, limit the number of "interested persons" with respect to which reporting is required. We think reporting should be limited solely to those persons who are substantial influence persons with respect to the organization. This is a much smaller class than will result if the reporting requirement includes all substantial contributors and members of their families, all committee members and members of their families, and the two groups of employees and their children. The instructions could make clear that the direction on the form to report with respect to substantial contributors applies only with respect to substantial contributors who are substantial influence persons.

Third, do not require reporting when the benefit the interested person receives is provided to the interested person solely as a member of the charitable class the organization serves and is provided on the same terms, or no more favorable terms, than as provided to others. Consider also excluding all grants for travel, study and similar purposes that are awarded using an objective and nondiscriminatory process that has been approved in advance by the organization's board of directors and that generally conforms to the process outlined in section 53.4945-4 of the regulations.

### **Schedule M – Non-Cash Contributions**

**Line 32a – Use of Third Parties to Solicit, Process or Sell Non-Cash Contributions:** We urge the IRS to target this question more narrowly to avoid requiring filers to describe routine, arms-length arrangements in Part II, such as arrangements with securities brokers to dispose of gifts of publicly traded securities or agreements with real estate brokers to dispose of gifts of real

property. In the alternative, the instructions should make clear that these arrangements can be described in summary form, as there seems to be little benefit gained by reporting details of these ordinary, and perfectly legitimate, transactions.

## **Schedule R – Related Organizations and Unrelated Partnerships**

### **Part VI - Reporting with Respect to Investments in Entities Taxed as Partnerships:**

These comments address four inter-related pieces of the draft instructions for Form 990:

- Core Form Part IV, line 39, which inquires about the conduct of exempt activities through unrelated partnerships;
- Schedule R, Part VI, where information about those partnerships is disclosed;
- Schedule D, Part VII (which feeds Core Form Part X, line 12), reporting investments in securities that are not publicly traded
- Core Form Part V, line 16 which inquires about a filer’s joint venture policy

Part IV, line 39 and Schedule R – Reporting Certain Partnership Activities: For Part IV, line 39 and Schedule R, Part VI, it is unclear whether the Service is requesting information only about joint ventures and partnerships, such as hospital joint ventures, engaged in by a filer to carry on the activities for which it has received tax exemption, or whether some investments in partnerships must be reported on Schedule R as well as on Schedule D. Line 39 of Core Form Part IV asks, “Did the organization conduct more than 5 percent of its exempt activities through an entity that is not a related organization and that is taxed as a partnership? If yes, complete Schedule R, Part VI” (emphasis supplied). This appears to mean that supplemental information is required on Schedule R only if the return filer is participating in an unrelated partnership in order to carry on its charitable purposes. Similarly, some of the instructions for line 16 in Part VI of the Core Form, which inquires whether the filer invested or participated in a joint venture with a taxable entity, imply the same result in asking whether the filer has a policy that requires negotiation with other members of the partnership to secure terms that will protect the exempt party’s tax exemption, giving examples, such as that the venture will give primacy to exempt purposes over maximizing profits and will not engage in activities that will jeopardize the exempt partner’s tax status. These safeguards are among those that have been put in place in hospital joint venture arrangements, but would not be appropriate (or needed) in an investment partnership where the exempt entity is not a general partner (or a managing director of an LLC).

The Part IV line 39 instructions, however, as well as those for Part V line 16 and Schedule R part VI appear to require reporting some investments in partnership-type structures on Schedule R. Thus, the Part IV line 39 instructions tell filers that they need not report unrelated partnerships whose sole purpose is passive investments, implying that partnerships that receive income from trade or business activities must be reported. The Schedule R instructions also seem to lead to this result. The Part VI instructions first establish an activities test – reporting is required for any partnership if the filer conducts more than 5 percent of its activities (measured by either revenue or assets) through an unrelated partnership. Unlike the question on line 39, the Schedule R instructions do not state that these activities must be exempt activities. The instructions then tell

filers that they may disregard partnerships where at least 95 percent of the income the filer receives from the partnership is passive in character – interest, dividends, royalties, rents and capital gains (disregarding the debt-financing rules). Again, apparently investments in entities taxed as partnerships that receive 5 percent or more of their income from an active trade or business are reportable even if the filer holds only a limited partnership interest in the venture (or a similar interest in an LLC) and has entered into the arrangement purely for investment purposes.

The number of such entities required to be reported is likely to be small. Partnerships are reportable only if income from the partnership is five percent or more of the filer’s total revenue or assets invested in the partnership are 5 percent or more of the filer’s total assets and income from such a venture would be subject to the unrelated business income tax. Nonetheless, we think the Service should revise the instructions for line 39 and the schedule to exclude all investments in entities taxed as partnerships where the interest held is a limited partnership (or similar interest in an LLC) and the arrangement is entered into solely for investment purposes. Excluding these partnership interests from Schedule R does not mean that they will not be reported. Partnership interests held for investment purposes must be reported in Part VII of Schedule D if the interest is 5 percent or more of total assets. While Schedule D reporting is based solely on an asset test, we don’t think the additional income test applied in Schedule R is particularly relevant as a measurement of investment activity.

Part VI, line 16 – Joint Venture Policy: As noted above, this line asks filers whether they engage or invest in joint ventures or similar arrangements with taxable entities and, if they do, whether they have a written policy that safeguards their exempt status with respect to such arrangements. This question seems to us to be even more clearly directed at arrangements where a tax-exempt entity is partnering with one that is taxable to accomplish a charitable purpose of the tax-exempt. However, the instructions incorporate the same “passive income” test used in the instructions to Schedule R. This raises the question whether a tax-exempt organization that acquires limited partnership or similar interests in entities taxed as partnerships that carry on an active trade or business must have a policy of the type described even though as a limited partner the tax-exempt investor is not actively engaged in the underlying trade or business and the suggested safeguards make little sense. We recommend that the instructions for line 16 be revised to make clear that the question should be answered yes only when the filer engages in the arrangement in order to accomplish one or more of its charitable purposes or if the filer is a general partner or managing director for the venture.

S corporations: Although S corporations are passthrough entities, they are not partnerships for federal tax purposes. Accordingly, we read the instructions as not requiring reporting for interests in S corporations. The instructions should make this explicit.

Timing of measurement: In the example, the filer uses information from the K-1 supplied by the partnership as the numerator and total revenue and assets “for its tax year” as the denominator. The instructions should specifically state that the organization should use this methodology in making the calculation and should also inform filers whether this methodology may be followed when the partnership and the filer have different tax years (or should address how to make the calculation when tax years are different).

Filers must make both calculations: Reporting apparently is required if an interest in a partnership exceeds either the income threshold or the assets threshold. However, this is clearly stated only in the example. It should be incorporated in the instruction, although, as noted, we question the utility of an income measurement for partnership interests acquired for investment purposes.

As a final comment, we noted numerous places in the instructions that refer the reader to a particular section of the Code for more information. Please consider reproducing those sections or provide links to them.

Thank you for the opportunity to comment on the draft instructions.

Respectfully submitted,

A handwritten signature in black ink, reading "Janne Gallagher", followed by a long horizontal flourish line extending to the right.

Janne G. Gallagher  
Vice President and General Counsel