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Dear Sir or Madam:

This letter addresses selected aspects of the IRS's Advance Notice of Proposed Rulemaking ("ANPR") with regard to Payout Requirements for Type III Supporting Organizations that are not Functionally Integrated. In particular, we address the aspects of the ANPR which pertain to the statutory and regulatory responsiveness tests for certain Type III supporting organizations.

Information Requirement (Responsiveness under the Statute).

*Background.* Type III supporting organizations are required to provide "each supported organization such information as the Secretary may require to ensure that [the supporting] organization is responsive to the needs or demands of the supported organization." IRC § 509(f)(1)(A). The ANPR states that the Treasury Department and IRS are "solicit[ing] comments as to what information the Secretary should require a Type III supporting organization to provide to each of its supported organizations" in order to meet the new standard. ANPR at 20.

*Proposal.* We propose that the final Regulations list the particular documents that must be disclosed, and we propose the following:

- (a) A copy of the supporting organization's organizational document (Certificate of Incorporation, Articles of Incorporation or governing instrument if it is a trust); its Bylaws, if any; its Conflict of Interest Policy, if any; its Mission Statement, if any; its IRS Form 1023; and its IRS determination letter.
- (b) A copy of any amendments or modifications made from time to time of the supporting organization's organizational document; its Bylaws, if any; its Conflict of Interest Policy, if any; its Mission Statement, if any; and its IRS determination letter.

- (c) A copy of the supporting organization's financial statements (audited, if available).
- (d) A copy of the supporting organization's annual information return (IRS Form 990) (other than Schedule B) and its return for unrelated business taxable income (IRS Form 990T).
- (e) An annual report detailing the amount and nature of the support provided to each of the supported organizations, how the amount and nature of the support were determined, and the amount and nature of support projected for the next year.<sup>1</sup>

It will also be necessary to stipulate reasonable time-frames for providing this information. In the case of item (c) (financial statements), we would suggest that disclosure be required no earlier than 210 days (seven months) after the end of each fiscal year.<sup>2</sup> In the case of item (d) (IRS Form 990), we would suggest that disclosure be required no earlier than thirty (30) days after the filing of the organization's annual information return with the IRS *unless* earlier disclosure is required under IRC § 6104(b) on account of a request made by the supported organization. On account of the variability of state law and the variability of practice among organizations, we anticipate that the exempt organizations community will have comments on whatever disclosure requirements and time-frames are initially proposed.

#### Relationship Requirement (Responsiveness under the Regulations).

##### *Background.*

Generally. Under the Pension Protection Act of 2006 (the "PPA"), Type III supporting organizations may no longer satisfy the responsiveness test under Treas. Reg. § 1.509(a)-4(i)(2) by being charitable trusts that are accountable to the supported organization(s) under state law (as previously permitted under Treas. Reg. § 1.509(a)-4(i)(2)(iii)). P.L. 109-280, § 1241(c). The ANPR states that the proposed regulations will provide that non-functionally integrated Type III supporting organizations structured as charitable trusts must instead satisfy the responsiveness test under Treas. Reg. § 1.509(a)-4(i)(2)(ii). "Thus, for instance, a trust would be expected to show that its trustees have a close, continuous relationship with the officers, directors, or trustees of the publicly supported organization(s) it supports and that through such relationship the officers, directors or trustees of its publicly supported

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<sup>1</sup> See Joint Comm. 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).

<sup>2</sup> See N.Y. Not-for-Profit Corporation Law § 519, which requires that an audited or unaudited financial report be presented at the annual meeting of the board or the corporation membership and that the report cover a "twelve month fiscal period terminating not more than six months prior to said meeting."

organization(s) have a significant voice in the operations of the supporting organizations.” ANPR at 20.

The responsiveness test under Treas. Reg. § 1.509(a)-4(i)(2)(ii) requires that the supporting organization meet one of the following subtests:

- (1) one or more of its officers, directors or trustees are elected or appointed by the officers or directors of the supported organization;
- (2) one or more of its officers, directors or trustees are in common with the members of the governing body of the supported organization; or
- (2) its officers, directors or trustees maintain a close and continuous working relationship with the officers, directors or trustees of the supported organization.

Treas. Reg. §§ 1.509(a)-4(i)(2)(ii)(a)-(c). In this letter, we refer to the three responsiveness subtests collectively as the “Responsiveness Subtests,” and we refer to the third Responsiveness Subtest as the “Close and Continuous Working Relationship Test.” Ultimately, the supporting organization must show that by reason of one of the three Responsiveness Subtests, the officers, directors or trustees of the supported organization have a “significant voice in the investment policies of the supporting organization, the timing of grants, the manner of making them, and the selection of recipients of such supporting organization, and in otherwise directing the use of the income or assets of such supporting organization” (the “Significant Voice Test”). Treas. Reg. § 1.509(a)-4(i)(2)(ii)(d). In essence, the responsiveness test under Treas. Reg. § 1.509(a)-4(i)(2)(ii) is designed to ensure that the supported organization has the power to influence the activities of the supporting organization. *Roe Found. v. Comm’r*, T.C.M. 1989-566 (1989); *Cockerline Memorial Fund v. Comm’r*, 86 T.C. 53 (1986); *Nellie Callahan Scholarship Fund v. Comm’r*, 73 T.C. 626 (1980).

A more detailed discussion of the Close and Continuous Working Relationship Test and the Significant Voice Test (and the interplay of the two tests) is included in Appendix A to this letter.

Accountability and the Significant Voice Test. One issue that the available rulings and cases (see annexed Appendix) do not appear to address is whether a trustee’s accountability to the trust beneficiaries could contribute to the fulfillment of the Significant Voice Test by a non-functionally integrated Type III supporting organization structured as a charitable trust. Obviously, Congress has acted, in the PPA, to say that the beneficiaries’ power to enforce the trust and compel an accounting under state law is not alone sufficient to enable a charitable trust to meet the responsiveness test under Treas. Reg. §§ 1.509(a)-4(i)(2). However, the PPA does not preclude the possibility that trustee accountability under state law – at least in appropriate cases – can contribute to an organization’s fulfillment of the Significant Voice Test. We submit that the role of trustee accountability should figure prominently in the analysis of whether the Significant Voice Test has been met.

The concept of trustee accountability is a state-law rather than a federal tax law concept. Although the rules may differ from state to state, there are certain fundamental notions of accountability that appear to be consistent throughout the United States. First, the trustee has a duty to act in accordance with the terms of the trust instrument, which would mean in accordance with the trust's purposes and any other limitations imposed by the trust's creator (e.g., on the manner of appointing successor trustees, selecting grantees or incurring expenses). See George Gleason Bogert et al., *Bogert's Trusts and Trustees* § 541 (Thomson/West, 3d ed., 2007 supp.). Second, a trustee is accountable to the beneficiaries for other violations of the duties of care and loyalty. *Id.* at §§ 541 and 543. A trustee who breaches the trust instrument or otherwise violates the trustee's fiduciary duties may be surcharged (i.e., held financially liable) in order to make the trust whole for harm suffered as a consequence of the trustee's breaches. In appropriate cases, a trustee may be removed by the court having oversight. *Id.* at § 541. Ordinarily, assertions of a violation of the trust instrument or other breaches of fiduciary duty arise after a trustee has presented the trustee's account.

A judicial accounting, whether compelled by the beneficiaries or voluntarily commenced by the trustee, is a proceeding in which the trustee is required to present a detailed statement of the transactions that have occurred during the administration of the trust. *Id.* at §§ 395 and 963; Austin Wakeman Scott et al., *Scott on Trusts* § 17.4 (Aspen Publishers, 4th ed., 2007). In an account submitted for judicial settlement, the trustee of a charitable trust ordinarily would be required to disclose to the court, the beneficiaries and the state Attorney General

- (1) all assets received from the funder(s) of the trust,
- (2) all gains or losses on the sale or other disposition of assets,
- (3) all items of interest, dividends, or other types of trust income,
- (4) all expenses including trustee commissions, legal fees, investment management fees, and accounting fees, and
- (5) all grants or other disbursements made in furtherance of charitable purposes.

Bogert et al., *supra*, at § 970.

Due to the cost of judicially settling an account, it is common for trustees, beneficiaries and state Attorneys General to opt for some less formal procedure. *Id.* at § 963. In some cases, an account in judicial format is submitted to the beneficiaries for review and approval and to the state Attorney General for review. In other cases, a simplified account (perhaps consisting only of monthly statements from the trust's brokerage and checking accounts) is presented. If there are no objections to the account, or if any objections can be resolved through negotiations and agreements among the interested parties, the matter can be resolved without resort to the courts. *Id.* In all events, when the trustee's account is presented, it provides the beneficiary and possibly the state Attorney General with a significant quantity of highly detailed information about the trust's investments, expenses and grantmaking. In turn, the

beneficiaries and the state Attorney General have the opportunity to raise objections to the trustee's account, either formally or informally, and the result of the process can be a judicial proceeding resulting in monetary surcharge of the trustee or even the trustee's removal or a settlement agreement in which the trustee agrees to resign and/or pay an amount back into the trust in settlement of the beneficiaries' claims. *Id.* at § 970. Generally speaking, there is no statute of limitations on a trustee's duty to account or the trustee's liability for breaches of the governing instrument or other violations of the trustee's fiduciary duties. *Id.* at §§ 411 and 951. Hence, subject to the equity powers of the supervising court, a trustee may have essentially open-ended liability insofar as the trustee elects not to account or fails to obtain either a release of claims or judicial settlement of the trustee's account. Furthermore, depending on state law and the terms of the governing instrument, a successor trustee may have liability to the beneficiaries even for the breaches of prior trustees. *See* Restatement (Second) of Trusts § 223(2) cmt. a (1959).

The concept of the trustee's account to the beneficiaries is one attribute of charitable trusts that distinguishes them from not-for-profit corporations. Even in the cases where a not-for-profit corporation is established solely to support another organization, there is no clear or established procedure whereby the supported organization has an open-ended power to compel an accounting of the type described above, seek personal surcharge of the directors, and/or seek their removal.

We urge the IRS and Treasury to take into account the "significant voice" of named trust beneficiaries. If under state law an organization supported by a charitable trust is named as a beneficiary in the governing instrument, has the right to compel an accounting, and is entitled under state law to hold the trustee to account (i.e., seek surcharge and/or removal of the trustees for breach of the trust instrument or other violation of fiduciary duties), and if the supported organization receives periodic written notification of its rights as beneficiary, we submit that the supported organization has a *substantial* power to influence the activities of the supporting organization and as such ordinarily should be deemed to have a "significant voice" with respect to the trust's investments and expenses and, to some degree, its selection of grantees.<sup>3</sup> We submit, further, that the existence of the right to compel the accounting and the supported organization's notification of the existence of that right are generally sufficient to ensure substantial influence over a trust. Hence, whether and how an account is presented ordinarily should be left to the particular organizations involved and should not be mandated by Federal tax law.

*Proposal.* Because of the limited guidance about the proper application of the Close and Continuous Working Relationship Test and the Significant Voice Test, non-functionally integrated Type III face significant uncertainty about whether they have fulfilled the requirements of the responsiveness test under Treas. Reg. § 1.509(a)-4(i)(2)(ii). That is true whether they are structured as corporations or as charitable trusts. Accordingly, as the IRS and

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<sup>3</sup> The power to compel an accounting and seek surcharge or removal of the trustees would ordinarily provide beneficiaries with protection against (a) the trustee's selection of grantees who are outside the trust's charitable purposes and (b) the trustee's selection of grantees whose selection constitutes an abuse of the trustee's discretion.

Treasury adapt Treas. Reg. § 1.509(a)-4(i)(2)(ii) for the charitable trust context, we propose that efforts be made to clarify the Close and Continuous Working Relationship Test and the Significant Voice Test through the development of examples and rebuttable presumptions that can guide supporting organizations – whether trusts or corporations – as they seek to meet the responsiveness standard under Treas. Reg. § 1.509(a)-4(i)(2)(ii).

Example of “Close and Continuous Working Relationship.” The first two Relationship Subtests (i.e., the subtests premised on the ability of a supported organization to elect or appoint officers, directors or trustees of the supporting organization or on an overlapping officer, director or trustee relationship between the supported and supporting organization) are quantitative. As such, an organization relying on one of the first two Relationship Subtests may readily know whether one of those subtests has been met. However the third Relationship Subtest, the Close and Continuous Working Relationship Test, is *qualitative* and as such dependent on particular facts and circumstances. Many supporting organizations are effectively forced to rely on this test, ordinarily because of irrevocable limitations in their governing instrument (e.g., because they are testamentary trusts created under Wills that mandate a single corporate trustee) or because of the potential for conflicts of interest if one of the first two Relationship Subtests were adopted (in which event a supported organization with an officer, director or trustee position within the supporting organization would have a conflict of interest as regards the other supported organizations). It is critical that organizations relying on the Close and Continuous Working Relationship Test receive clear guidance about how to meet the test. Based on the available rulings and case law (see annexed Appendix), we propose the following example of the fulfillment of the Close and Continuous Working Relationship Test:

Organization O is a non-functionally integrated Type III supporting organization that supports five organizations. Organization O invites a representative of each supported organization to attend at least one meeting annually of O’s governing body. The meeting addresses both retrospective and prospective issues related to O’s investment policy, investment performance, grantmaking, and budgeting. Accordingly, an officer or a member of O’s governing body makes a detailed presentation of the following information with respect to O’s activities during the preceding 12 calendar months: investment holdings at the end of the 12-month period, investment performance, the amount, purpose and timing of each grant made by O, and O’s expenses. The presentation also includes a detailed explanation of O’s procedures for accepting, reviewing and voting on grant proposals submitted by the supported organizations and a presentation on O’s current-year budget for grants and expenses. Whether or not its representative attends the meeting, each supported organization also receives a written copy of the materials presented at the meeting. The presentation concludes with a question-and-answer period during which representatives of the supported organizations may ask O’s officers and/or the members of its governing body

questions about O's investment policy, investment performance, grantmaking, and budgeting. The supported organizations have a close and continuous working relationship with the officers and directors of O.

Rebuttable Presumption of Significant Voice for Organizations that Meet One of the First Two Responsiveness Subtests. In the case of non-functionally integrated Type III supporting organizations that meet one of the first two Responsiveness Subtests (i.e., the subtests premised on the ability of a supported organization to elect or appoint officers, directors or trustees of the supporting organization or on an overlapping officer, director or trustee relationship between the supported and supporting organization), we note that members of a governing board are customarily involved in all the matters as to which a "significant voice" is required under Treas. Reg. § 1.509(a)-4(i)(2)(ii)(d): investment policies, the timing of grants, the manner of making them, the selection of grant recipients, and otherwise directing the use of income or assets. (We refer to the officer, director or trustee who serves by designation of a supported organization or who serves also on the governing board of the supported organization as the "Designated Person.") Accordingly, we propose that the IRS adopt a rule that if one of the first two Responsiveness Subtests is met *and* the statutory responsiveness test under IRC § 509(f)(1)(A) is met, the Significant Voice Test will be rebuttably presumed to have been met if the Designated Person receives timely notice of all meetings of the governing body of the supporting organization and attends a majority of those meetings. In those cases where the Designated Person is an officer but not a director or trustee of the supported organization, the rebuttable presumption would be available only if the Designated Person has the opportunity to participate in the deliberations and discussions at the meeting. The presumption could be rebutted, however, if it could be demonstrated that the governing body of the supporting organization does not exercise oversight with respect to the supporting organization's investment policies, the timing of its grants, the manner of making them, the selection of its grant recipients, or otherwise directing the use of the income or assets of the supporting organization. Such an approach is consistent, we submit, with the approach of the IRS in those rulings (see attached Appendix) that appear to treat fulfillment of one of the first two Responsiveness Subtests as *de facto* fulfillment of the Significant Voice Test.

Rebuttable Presumption of Significant Voice for Organizations that Meet the Close and Continuous Working Relationship Test. In the case of non-functionally integrated Type III supporting organizations that meet the third Responsiveness Subtest (the Close and Continuous Working Relationship Test) *and* the statutory responsiveness test under IRC § 509(f)(1)(A), we propose a rule that the Significant Voice Test will be rebuttably presumed to have been met if:

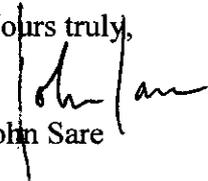
- (1) Each supported organization is invited not less frequently than once per year to meet with the directors, officers or trustees of the supporting organization (or to make a written submission to them) for the purpose of presenting its grant proposal(s), including its proposals for the timing of the grant(s), the selection of grantees, and the manner in which the grant(s) will be made, and

- (2) A. At least one member of the committee(s) of the supporting organization charged with oversight of finance and investments is either designated by a supported organization *or* is an officer or a member of the governing body or corresponding committee of a supported organization, or
- B. If the supporting organization is a charitable trust under state law,
- (i) each supported organization is a named beneficiary under the trust's governing instrument,
  - (ii) each beneficiary organization has the power to enforce the trust, compel an accounting, and hold the trustees to account for breach of the terms of the trust's governing instrument and other violations of their fiduciary duties of care and loyalty, and
  - (iii) each beneficiary is provided with written notice not less frequently than once every five (5) years of such power.

The presumption could be rebutted, however, if it could be shown, for example, that the committee(s) on finance and investment do not receive sufficient information or have sufficient opportunity to communicate with the governing board of the supporting organization in order to be treated as exercising actual oversight with respect to finance and investments. In the case of trusts, the presumption could be rebutted, for example, if it could be shown that all of the supported organizations are controlled by the same persons who control the supporting organization, in which case the rebuttable presumption would be available only if it also could be shown that a trust accounting is in fact presented at least every five (5) years for review by an independent committee of each supported organization and that the information included in the accounting provides an adequate basis for a diligent review by the supported organizations.

Transition Relief. The ANPR requests comments with respect to "potential transition relief given that the statute [the PPA] directs that [the new regulatory responsiveness test for non-functionally integrated Type III supporting organizations structured as charitable trusts] apply as of August 17, 2007 to trusts already in existence on the date of enactment of the PPA." We believe that the approach outlined above could be structured so as to cover any transition issues if the initial annual meeting described in the example provided above for the Close and Continuous Working Relationship Test included information going back at least to August 17, 2007.

We hope that our comments are useful, and we would welcome the opportunity to discuss them with you further if you have questions.

Yours truly,  
  
John Sare

## Appendix

### An Overview of the Close and Continuous Working Relationship Test And the Significant Voice Test

As explained in the letter to which this Appendix is annexed, the responsiveness test under Treas. Reg. § 1.509(a)-4(i)(2)(ii) requires that the supporting organization meet one of the following subtests:

- (1) one or more of its officers, directors or trustees are elected or appointed by the officers or directors of the supported organization;
- (2) one or more of its officers, directors or trustees are in common with the members of the governing body of the supported organization; or
- (3) its officers, directors or trustees maintain a close and continuous working relationship with the officers, directors or trustees of the supported organization.

Treas. Reg. §§ 1.509(a)-4(i)(2)(ii)(a)-(c). In this Appendix and the letter to which it is annexed, we refer to the three responsiveness subtests collectively as the “Responsiveness Subtests,” and we refer to the third Responsiveness Subtest as the “Close and Continuous Working Relationship Test.” Ultimately, the supporting organization must show that by reason of one of the three Responsiveness Subtests, the officers, directors or trustees of the supported organization have a “significant voice in the investment policies of the supporting organization, the timing of grants, the manner of making them, and the selection of recipients of such supporting organization, and in otherwise directing the use of the income or assets of such supporting organization” (the “Significant Voice Test”). Treas. Reg. § 1.509(a)-4(i)(2)(ii)(d). In essence, the responsiveness test under Treas. Reg. §§ 1.509(a)-4(i)(2)(ii) is designed to ensure that the supported organization has the power to influence the activities of the supporting organization. *Roe Found. v. Comm’r*, T.C.M. 1989-566 (1989); *Cockerline Memorial Fund v. Comm’r*, 86 T.C. 53 (1986); *Nellie Callahan Scholarship Fund v. Comm’r*, 73 T.C. 626 (1980).

Close and Continuous Working Relationship Test. The available guidance on how an organization can meet the Close and Continuous Working Relationship Test is limited. One ruling that addresses this subtest clearly is Priv. Ltr. Rul. 8725056 (Mar. 25, 1987),<sup>1</sup> in which the IRS determined that the officers and directors of the supporting organization maintained a close and continuous working relationship with the officers and directors of the supported organization (“M”) because the annual meetings of both organizations were held at the same time and place and M’s highest officers attended the supporting organization’s board meetings in order to advise as to M’s need for funds from the supporting organization. The IRS went on to find that, as a result of this close relationship, the officers and directors of M met the Significant Voice Test.

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<sup>1</sup> We recognize that private letter rulings may not be used or cited as precedent. Accordingly, we reference them here for informational and discussion purposes only.

In other situations, the IRS has hinted at the presence of a close and continuous working relationship without conclusively addressing the issue. Rev. Rul. 75-437, 1975-2 C.B. 218 (1975), dealt with a trust established to provide college scholarships to graduates of county high schools, which had a bank as its trustee. The trustee was completely independent from the supported schools and governmental unit, and therefore the first and second Responsiveness Subtests were not met. However, scholarship recipients were *selected* by a committee made up of the superintendents of schools of two counties. The IRS found that, as a result, the Close and Continuous Working Relationship Test “may” be satisfied because the trustee worked closely with the school representatives on the selection committee. Similarly, in Gen. Couns. Mem. 36043 (Oct. 9, 1974), the scholarship recipients were chosen by a selection committee composed of several officers of the trustee bank, based on *recommendations* from committees from each college involved. In that situation (which was possibly a prelude to the issuance of the Revenue Ruling described earlier in this paragraph), the IRS found that the trustee of the trust “appeared” to maintain a close and continuous working relationship with the officials of the colleges. However, in both situations, it was determined that the trusts failed to qualify as supporting organizations because the Significant Voice Test was not met.

Significant Voice Test. In a number of IRS rulings, the Significant Voice Test is mentioned and applied, but without explanation of the underlying substantive criteria supporting its application. *See, e.g.*, Priv. Ltr. Rul. 9751020 (Dec. 19, 1997) (stating that a majority of the supported organizations’ directors will also serve as directors of the supporting organizations and concluding that “[t]his degree of representation of A and B on D and F’s board of directors is sufficient to insure that A and B will have a significant voice in the operations of D and F”); Priv. Ltr. Rul. 9425009 (March 21, 1994) (concluding that the overlap in officers and trustees between the supported organizations and its supporting organizations ensures that there will be a close and continuous working relationship between them and that, by virtue of the overlap, the Significant Voice Test is met).

Because IRS rulings like the two cited in the prior paragraph provide little guidance about how the Significant Voice Test is being applied, they could be interpreted to imply that fulfillment of a Responsiveness Subtest can constitute *de facto* fulfillment of the Significant Voice Test, at least in some circumstances. *See* Priv. Ltr. Rul. 9426040 (Apr. 4, 1994) (concluding that “[t]he officers and directors of N and the other public charities in the system maintain a close and continuous relationship with M’s officers and directors which provides them with a significant voice in M’s policies”). As the IRS said in Priv. Ltr. Rul. 9347032 (Aug. 31, 1993):

An organization may satisfy the responsiveness test if the supported organizations have a significant voice in the supporting organization’s policies by reason of being represented in that organization. One way this required representation can occur is for one or more of the members of the governing bodies of the supported organization to be directors of the supporting organization..... L’s bylaws will be amended to provide that one seat on its board of directors will be filled by an individual nominated by the board of R and one seat on its board will be filled by an individual nominated by the board of S. This will be

sufficient to insure that the publicly supported organizations will have a significant voice in the operations of L....

However, other case law and other IRS guidance treat the Significant Voice Test as an independent test, which imposes additional requirements and may be satisfied only by looking to facts and circumstances other than those relevant to the Responsiveness Subtests. In Priv. Ltr. Rul. 8106075 (Nov. 17, 1980), the IRS found that a supporting organization satisfied the responsiveness test because its trustee was appointed by the supported organization (therefore meeting the first Responsiveness Subtest). The IRS then stated that “as required in section 1.509(a)-4(i)(2)(ii)(d) you have a significant voice in the investment policies of the X Foundation, the timing of grants and the manner of making them. The trustee of X Foundation may disburse income or corpus only in response to written requests by you.” Therefore, in Priv. Ltr. Rul. 8106075, the first Responsiveness Subtest was met because the trustee was appointed by the supported organization, and the Significant Voice Test was met because the trustee could disburse income or corpus only in response to a written request by the supported organization. Similarly, in Priv. Ltr. Rul. 9112025 (Dec. 26, 1990), the IRS found that a supporting organization satisfied the second Responsiveness Subtest and then stated as follows:

In addition to the commonality between the two boards, M responds to the needs of each of the supported organizations by reviewing and discussing such supported organizations’ operating and capital budgets. As part of the discussions and review, the Chief Executive Officer of each supported organization, who attends each meeting of the board of M, and the representative of the supported organizations who is a member of the board of trustees of M, are able to explain the annual budget of each supported organization and to describe the amount and the timing of any grants or aid which the supported organization requires from M. As such, each of the supported organizations maintains a significant voice in the investment policies of the supporting organization, the timing of grants, the manner of making them, and the selection of recipients by such organization, and in otherwise directing the use of the income or assets of such supporting organization....

The quoted paragraph indicates that the IRS looked to additional facts outside the Responsiveness Subtests to determine whether the organization satisfied the Significant Voice Test. However, there does not appear to have been a consistent approach as to how the Significant Voice Test has been applied.

Nor is it clear what degree of involvement a supported organization must have in the supporting organization’s use of income and assets in order to meet the Significant Voice Test (in those cases where it is clearly treated as a separate standard). The available guidance indicates that the inquiry and analysis are fact-specific. Courts have found that a significant voice does not necessarily mean control; rather, the phrase has been held to mean “likely to have influence”. *Cockerline Memorial Fund v. Comm’r, supra*. In *Cockerline*, the supporting organization satisfied the second Responsiveness Subtest by virtue of an overlapping board member and the court found that, because the board had complete power over all facets of the

supporting organization's activities, the overlapping board member had the opportunity to exercise a significant voice. *Id.* Additional facts cited in support of this finding included the supported organization's domination of the scholarship selection committee, the fact that the overlapping board member proposed replacement members for the committee for approval by the board of trustees, the fact that the committee's meetings were held on the supported organization's campus, and the fact that the supported organization received an average of 2/3 (and in later years 90%) of the funds distributed by the supporting organization. *Id.*

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