

**Internal Revenue Service
Appeals Office**

Department of the Treasury

Number: **200949056**
Release Date: 12/4/2009

Person to Contact:

Employee ID Number:
Tel:
Fax:

Date: September 10, 2009

Refer Reply to:

AP:

In Re:

Private Foundation Modification

Form Required to be Filed:

990-PF

Tax Period(s) Ended:

**A
B
C**

**Last Day to File a Petition with the United
States Tax Court:**

Not Applicable

LEGEND:

UIL - 0509 .02-02

A =

B =

C =

CERTIFIED MAIL

Dear :

This is a final adverse determination as to your private foundation classification under section 509(a) of the Internal Revenue Code (IRC). Your foundation status as a public charity as described in IRC section 509(a)(3) has been modified to that of a private foundation as provided by IRC section 509(a) effective xxx xx xxxx. You have agreed to this modification.

Our adverse determination was made for the following reason(s):

You do not meet the tests required of a supporting organization described in section 509(a)(3). These tests include: 1) the organizational and operational tests under section 509(a)(3)(A); 2) the relationship test under section 509(a)(3)(B); and 3) the lack of disqualified person control test under section 509(a)(3)(C).

Contributions to your organization remain deductible under section 170 of the Code.

You also have the right to contact the Office of the Taxpayer Advocate. Taxpayer Advocate assistance is not a substitute for established IRS procedures, such as the formal Appeals process. The Taxpayer Advocate cannot reverse a legally correct tax determination, or extend the time fixed by law that you have to file a petition in a United States court. The Taxpayer Advocate can, however, see that a tax matter that may not have been resolved through normal channels gets prompt and proper handling. You may call toll-free, 1-877-777-4778, and ask for Taxpayer Advocate Assistance.

If you have any questions, please contact the person whose name and telephone number are shown in the heading of this letter.

Sincerely,

TEAM MANAGER

Cc:



TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

DEPARTMENT OF THE TREASURY
Internal Revenue Service

Legend

ORG= Name of organization

EIN= EIN of organization

NN= Name of individual

Taxpayer Identification Number:

EIN

Form:

Tax Year(s) Ended:

Dec xx, 200X, 200X, 200X

Person to Contact/ID Number:

ORG

Contact Number:

Telephone:

Fax:

Certified Mail - Return Receipt Requested

Dear NN:

We have enclosed a copy of our report of examination explaining why we propose modifying your private foundation status under section 509(a) of the Internal Revenue Code (Code).

Your exempt status under section 501(c)(3) of the Code is still in effect.

If you accept our findings, take no further action. We will issue a final letter modifying your private foundation status.

If you do not agree with our proposed modification of private foundation status, you may provide additional information that you would like to have considered, or you may submit a written appeal. The enclosed Publication 3498, *The Examination Process*, and Publication 892, *Exempt Organization Appeal Procedures for Unagreed Issues*, explain how to appeal an Internal Revenue Service (IRS) decision. Publication 3498 also includes information on your rights as a taxpayer and the IRS collection process.

If you request a conference with Appeals, you must submit a written protest within 30 days from the date of this letter. An Appeals officer will review your case. The Appeals Office is independent of the Director, EO Examinations. The Appeals Office resolves most disputes informally and promptly.

Letter 3620 (04-2002)
Catalog Number 34811R

You may also request that we refer this matter for technical advice as explained in Publication 892. If we issue a determination letter to you based on technical advice, no further administrative appeal is available to you within the IRS regarding the issue that was the subject of the technical advice.

If we do not hear from you within 30 days from the date of this letter, we will process your case based on the recommendations shown in the report of examination. If you do not protest this proposed determination within 30 days from the date of this letter, the IRS will consider it to be a failure to exhaust your available administrative remedies. Section 7428(b)(2) of the Code provides, in part: "A declaratory judgment or decree under this section shall not be issued in any proceeding unless the Tax Court, the Claims Court, or the District Court of the United States for the District of Columbia determines that the organization involved has exhausted its administrative remedies within the Internal Revenue Service." We will then issue a final letter.

You have the right to contact the office of the Taxpayer Advocate. Taxpayer Advocate assistance is not a substitute for established IRS procedures, such as the formal appeals process. The Taxpayer Advocate cannot reverse a legally correct tax determination, or extend the time fixed by law that you have to file a petition in a United States court. The Taxpayer Advocate can, however, see that a tax matter that may not have been resolved through normal channels gets prompt and proper handling. You may call toll-free 1-877-777-4778 and ask for Taxpayer Advocate Assistance. If you prefer, you may contact your local Taxpayer Advocate at:

If you have any questions, please call the contact person at the telephone number shown in the heading of this letter. If you write, please provide a telephone number and the most convenient time to call if we need to contact you.

Thank you for your cooperation.

Sincerely,

Marsha A. Ramirez
Director, EO Examinations

Enclosures:
Publication 3498
Publication 892
Report of Examination

Form 886A	Department of the Treasury - Internal Revenue Service Explanation of Items	Schedule No. or Exhibit
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-PRIMARY ISSUE:

Whether the xxxxxxxxxxxxxx should be reclassified as an organization that is a private foundation defined in I.R.C. § 509(a) because it is not a supporting organization under section 509(a)(3).

FACTS:

The xxxxxxxxxxxxxx was created with a Declaration of Trust (Declaration), on xxx xx xxxx, by xxx xxx (Founder and Trustee) and xxx (Founder). Pursuant to the Declaration, the Trust was created for the purpose of establishing an organization which is described in IRC § 501(c)(3) and IRC § 509(a)(3). The Declaration provides that the Founder renounces any power to determine or control, by alteration, amendment, revocation, termination or otherwise, the income or principal of the Trust estate. In addition, the Declaration also provides that the Founder renounces any interest, either vested or contingent, including any reversionary interest or possibility of reverter, in the income or principal of the Trust estate.

In xxx xxxx, xxxxxxxxxxxxxx received notification that it was recognized as exempt from federal taxation under section 501(a) because it was described in section 501(c)(3) and that it was classified as other than a private foundation because it met the requirements of section 509(a)(3).

In its Form 1023, Application for Recognition of Exemption, the Organization represented that its Board, which includes a member chosen by the Primary Charity, will meet with the governing board of the Primary Charity to establish the use of these distributions. It is intended that the distributions will be used each year to carry out or fund one of the programs or functions of the Primary Charity. Contrary to its assertions, the Organization's board did not meet with the governing board of the Primary Charity. Further, the Organization's support was not used to carry out a specific program or function of the Primary Charity.

The Declaration requires that each year the Trustee distribute 35% of the adjusted net income to the the named Primary Charity. In addition to this distribution, each year the Trustee shall distribute a total of 50% of the adjusted net income to one or more identified charitable organizations or to the Primary Charity as directed by the majority of the Board of Directors (the "Board"). Schedule A of the trust document identifies the supported charities. Schedule A has one hundred and fourteen organizations listed, including the . On December 20, 2005 the Organization added eighteen charities to its Schedule A.

Section 2.4 of the Declaration states that in the event the Trustee determines, in the Trustee's sole and complete discretion that the Trust Fund is too small to economically administer, then in such event the Trustee shall distribute the trust fund in its entirety outright and free of trust to such organization or organizations as described in section 170(c)(2) of the Code as the Trustee, in Trustee's total and complete discretion, shall determine.

The Declaration provides that the Board shall be the governing body of the Trust and that the members of the Board shall be determined as follows:

- One Board member shall be appointed by the Primary Charity.
- Two Board members shall be from the class consisting of xxxxxxxx and xxxxxxxx and their descendants. (the xxxxx Family)
- The other members of the Board shall be appointed by a majority vote by the remaining members of the Board.

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The Organization has one member of the board that is appointed by the primary charity. xxxxxxxx is the Director for Development at the xxxxxx School and has been appointed by the primary charity to sit on the Organization's board. However, she is not listed on the Trust's Forms 990 as a board member.

During 200 , the xxxxxxxxxxxx gave a \$ grant to the xxxxxx School. For the year ending August 31, 200 , the xxxxxx School had total income of \$. This income was made up of \$ public support, \$ from government grants, \$ from tuition and \$ from interest.

During 200 , the xxxxxxxxxxxx gave a \$ grant to the xxxxxx School. For the year ending August 31, 200 , the xxxxxx School had total income of \$. This income was made up of \$ from donations, \$ from tuition and \$ from interest.

xxxxxxxxxxxx does not designate that its grants be used for specific projects or programs of the xxxxxx School. According to the Charitable Gift Receipt mailed by xxxxxx School to xxxxxx the grant was put in an unrestricted fund. xxxxxxxxxxxx does not perform any services for the Primary Charity.

In 200 , xxxxxxxxxxxx gave grants to 5 different charities; \$ to xxxxxx School, \$ to xxxxxx Foundation, \$ to xxxxxx Foundation, \$ to xxxxxxxxxxxx and \$ to xxxxxxxx. Of these, only xxxxxx School and xxxxxxxxxxxx Foundation are listed on Schedule A.

In 200 the Trust gave grants to 3 different organizations; \$ to xxxxxx School, \$ to xxxxxxxxxxxx and \$ to the xxxxxx. xxxxxxxxxxxx is not specified on Schedule A.

In 200 xxxxxxxxxxxx gave grants to 4 different organizations; \$ to xxxxxxxxxxxx [per the Form 990, this grant was made to the xxxxxxxxxxxx], \$ to xxxxxx School, \$ xxxxxx, and \$ to xxxxxx School. Only the xxxxxx School was listed on Schedule A.

On December 20, 200 the Board voted to add eighteen charities to the list of charities on Schedule A. The charities added were the ones that had received donations in the past and that were not listed on Schedule A.

xxxxxxxxxxxx holds annual meetings in December. At each meeting the financial records are shown to the Board. They discuss how much funding for the xxxxxx School. The minutes show the Board approves the donations after the donations were already made in that year. There is no discussion on the assets or where the money should be invested.

LAW:

Section 509(a) provides that organizations described in section 501(c)(3) are private foundations unless they are described in section 509(a)(1)-(4).

Section 509(a)(3) excepts from private foundation classification organizations that are: (A) organized, and at all times thereafter operated, exclusively for the benefit of, to perform the functions of, or to carry out the purposes of one or more specified organizations described in subsections 509(a)(1) or 509(a)(2); (B) operated, supervised, or controlled by or in connection with one or more organizations described in subsections 509(a)(1) or 509(a)(2); and (C) not controlled directly or indirectly by one or more disqualified persons other than foundation managers and other than organizations described in subsections 509(a)(1) or 509(a)(2).

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Income Tax Regulations section 1.509(a)-4(c) regarding the organizational test a 509(a)(3) organization must meet provides:

(1) *In general.* —An organization is organized exclusively for one or more of the purposes specified in section 509(a)(3)(A) only if its articles of organization (as defined in §1.501(c)(3)-1(b)(2)):

- (i) Limit the purposes of such organization to one or more of the purposes set forth in section 509(a)(3)(A);
- (ii) Do not expressly empower the organization to engage in activities which are not in furtherance of the purposes referred to in subdivision (i) of this subparagraph;
- (iii) State the specified publicly supported organizations on whose behalf such organization is to be operated (within the meaning of paragraph (d) of this section); and
- (iv) Do not expressly empower the organization to operate to support or benefit any organization other than the specified publicly supported organizations referred to in subdivision (iii) of this subparagraph.

Income Tax Regulations section 1.509(a)-4(e) regarding the operational test a 509(a)(3) organization must meet provides:

(1) *Permissible beneficiaries.* —A supporting organization will be regarded as "operated exclusively" to support one or more specified publicly supported organizations (hereinafter referred to as the "operational test") only if it engages solely in activities which support or benefit the specified publicly supported organizations. Such activities may include making payments to or for the use of, or providing services or facilities for, individual members of the charitable class benefited by the specified publicly supported organization. A supporting organization may also, for example, make a payment indirectly through another unrelated organization to a member of a charitable class benefited by a specified publicly supported organization, but only if such a payment constitutes a grant to an individual rather than a grant to an organization. In determining whether a grant is indirectly to an individual rather than to an organization the same standard shall be applied as in §53.4945-4(a)(4) of this chapter. Similarly, an organization will be regarded as "operated exclusively" to support or benefit one or more specified publicly supported organizations even if it supports or benefits an organization, other than a private foundation, which is described in section 501(c)(3) and is operated, supervised, or controlled directly by or in connection with such publicly supported organizations, or which is described in section 511(a)(2)(B). However, an organization will not be regarded as operated exclusively if any part of its activities is in furtherance of a purpose other than supporting or benefiting one or more specified publicly supported organizations.

(2) *Permissible activities.* —A supporting organization is not required to pay over its income to the publicly supported organizations in order to meet the operational test. It may satisfy the test by using its income to carry on an independent activity or program which supports or benefits the specified publicly supported organizations. All such support must, however, be limited to permissible beneficiaries in accordance with subparagraph (1) of this paragraph. The supporting organization may also engage in fund raising activities, such as solicitations, fund raising dinners, and unrelated trade or business to raise funds for the publicly supported organizations, or for the permissible beneficiaries.

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Income Tax Regulations section 1.509(a)-4(f) regarding the nature of relationships required for section 509(a)(3) organizations provides:

(1) *In general.* —Section 509(a)(3)(B) describes the nature of the relationship required between a section 501(c)(3) organization and one or more publicly supported organizations in order for such section 501(c)(3) organization to qualify under the provisions of section 509(a)(3). To meet the requirements of section 509(a)(3), an organization must be operated, supervised, or controlled by or in connection with one or more publicly supported organizations. If an organization does not stand in one of such relationships (as provided in this paragraph) to one or more publicly supported organizations, it is not an organization described in section 509(a)(3).

(2) *Types of relationships.* —Section 509(a)(3)(B) sets forth three different types of relationships, one of which must be met in order to meet the requirements of subparagraph (1) of this paragraph. Thus, a supporting organization may be:

- (i) Operated, supervised, or controlled by,
- (ii) Supervised or controlled in connection with, or
- (iii) Operated in connection with, one or more publicly supported organizations.

(3) *Requirements of relationships.* —Although more than one type of relationship may exist in any one case, any relationship described in section 509(a)(3)(B) must insure that:

(i) The supporting organization will be responsive to the needs or demands of one or more publicly supported organizations; and

(ii) The supporting organization will constitute an integral part of, or maintain a significant involvement in, the operations of one or more publicly supported organizations.

(4) *General description of relationships.* —In the case of supporting organizations which are "operated, supervised, or controlled by" one or more publicly supported organizations, the distinguishing feature of this type of relationship is the presence of a substantial degree of direction by the publicly supported organizations over the conduct of the supporting organization, as described in paragraph (g) of this section. In the case of supporting organizations which are "supervised or controlled in connection with" one or more publicly supported organizations, the distinguishing feature is the presence of common supervision or control among the governing bodies of all organizations involved, such as the presence of common directors, as described in paragraph (h) of this section. In the case of a supporting organization which is "operated in connection with" one or more publicly supported organizations, the distinguishing feature is that the supporting organization is responsive to, and significantly involved in the operations of, the publicly supported organization, as described in paragraph (i) of this section.

Income Tax Regulations section 1.509(a)-4(g)(1) provides guidance on the meaning of "operated, supervised, or controlled by" as follows:

(i) Each of the items "operated by", "supervised by", and "controlled by", as used in section 509(a)(3)(B), presupposes a substantial degree of direction over the policies, programs, and activities of a supporting organization by one or more publicly supported organizations. The relationship required under any one of these terms is comparable to that of a parent and subsidiary, where the subsidiary is under the direction of, and accountable or responsible to, the

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parent organization. This relationship is established by the fact that a majority of the officers, directors, or trustees of the supporting organization are appointed or elected by the governing body, members of the governing body, officers acting in their official capacity, or the membership of one or more publicly supported organizations.

(ii) A supporting organization may be "operated, supervised or controlled by" one or more publicly supported organizations within the meaning of section 509(a)(3)(B) even though its governing body is not comprised of representatives of the specified publicly supported organizations for whose benefit it is operated within the meaning of section 509(a)(3)(A). A supporting organization may be "operated, supervised, or controlled by" one or more publicly supported organizations (within the meaning of section 509(a)(3)(B)) and be operated "for the benefit of" one or more different publicly supported organizations (within the meaning of section 509(a)(3)(A)) only if it can be demonstrated that the purposes of the former organizations are carried out by benefiting the latter organizations.

Income Tax Regulations section 1.509(a)-4(h) provides guidance on the meaning of "supervised or controlled in connection with" as follows:

(1) In order for a supporting organization to be "supervised or controlled in connection with" one or more publicly supported organizations, there must be common supervision or control by the persons supervising or controlling both the supporting organization and the publicly supported organizations to insure that the supporting organization will be responsive to the needs and requirements of the publicly supported organizations. Therefore, in order to meet such requirement, the control or management of the supporting organization must be vested in the same persons that control or manage the publicly supported organizations.

(2) A supporting organization will not be considered to be "supervised or controlled in connection with" one or more publicly supported organizations if such organization merely makes payments (mandatory or discretionary) to one or more named publicly supported organizations, even if the obligation to make payments to the named beneficiaries is enforceable under state law by such beneficiaries and the supporting organization's governing instrument contains provisions whose effect is described in section 509(e)(1)(A) and (B). Such arrangements do not provide a sufficient "connection" between the payor organization and the needs and requirements of the publicly supported organization to constitute supervision or control in connection with such organizations.

Income Tax Regulations section 1.509(a)-4(i) provides guidance on the meaning of "operated in connection with" as follows:

(1) *General rule*

(i) Except as provided in subdivisions (ii) and (iii) of this subparagraph and subparagraph (4) of this paragraph, a supporting organization will be considered as being operated in connection with one or more publicly supported organizations only if it meets the "responsiveness test" which is defined in subparagraph (2) of this paragraph and the "integral part test" which is defined in subparagraph (3) of this paragraph.

(2) *Responsiveness test*

(i) For purposes of this paragraph, a supporting organization will be considered to meet the "responsiveness test" if the organization is responsive to the needs or demands of the

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publicly supported organizations within the meaning of this subparagraph. In order to meet this test, either subdivision (i) or subdivision (ii) of this subparagraph must be satisfied.

(i)

(a) One or more officers, directors, or trustees of the supporting organization are elected or appointed by the officers, directors, trustees, or membership of the publicly supported organizations;

(b) One or more members of the governing bodies of the publicly supported organizations are also officers, directors or trustees of, or hold other important offices in, the supporting organizations; or

(c) The officers, directors or trustees of the supporting organization maintain a close and continuous working relationship with the officers, directors or trustees of the publicly supported organizations; and

(d) By reason of (a), (b), or (c) of this subdivision, the officers, directors or trustees of the publicly supported organizations 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.

(ii)

(a) The supporting organization is a charitable trust under State law;

(b) Each specified publicly supported organization is a named beneficiary under such charitable trust's governing instrument; and

(c) The beneficiary organization has the power to enforce the trust and compel an accounting under State law.

(3) Integral part test; general rule

(i) For purposes of this paragraph, a supporting organization will be considered to meet the "integral part test" if it maintains a significant involvement in the operations of one or more publicly supported organizations and such publicly supported organizations are in turn dependent upon the supporting organization for the type of support which it provides. In order to meet this test, either subdivision (i) or subdivision (ii) of this subparagraph must be satisfied.

(ii) The activities engaged in for or on behalf of the publicly supported organizations are activities to perform the functions of, or to carry out the purposes of, such organizations, and, but for the involvement of the supporting organization, would normally be engaged in by the publicly supported organizations themselves.

(iii)

(a) The supporting organization makes payments of substantially all of its income to or for the use of one or more publicly supported organizations, and the amount of support received by one or more of such publicly supported organizations is sufficient to insure the attentiveness of such organizations to the operations of the supporting organization. In addition, a substantial amount of the total support of the supporting organization must go to those publicly supported organizations which meet the attentiveness requirement of this subdivision with respect to such supporting organization. Except as provided in (b)

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of this subdivision, the amount of support received by a publicly supported organization must represent a sufficient part of the organization's total support so as to insure such attentiveness. In applying the preceding sentence, if such supporting organization makes payments to, or for the use of, a particular department or school of a university, hospital or church, the total support of the department or school shall be substituted for the total support of the beneficiary organization.

(b) Even where the amount of support received by a publicly supported beneficiary organization does not represent a sufficient part of the beneficiary organization's total support, the amount of support received from a supporting organization may be sufficient to meet the requirements of this subdivision if it can be demonstrated that in order to avoid the interruption of the carrying on of a particular function or activity, the beneficiary organization will be sufficiently attentive to the operations of the supporting organization. This may be the case where either the supporting organization or the beneficiary organization earmarks the support received from the supporting organization for a particular program or activity, even if such program or activity is not the beneficiary organization's primary program or activity so long as such program or activity is a substantial one.

(c) All pertinent factors, including the number of beneficiaries, the length and nature of the relationship between the beneficiary and supporting organization and the purpose to which the funds are put (as illustrated by subdivision (ii)(b) and (c) of this subparagraph), will be considered in determining whether the amount of support received by a publicly supported beneficiary organization is sufficient to insure the attentiveness of such organization to the operations of the supporting organization. Normally the attentiveness of a beneficiary organization is motivated by reason of the amounts received from the supporting organization. Thus, the more substantial the amount involved, in terms of a percentage of the publicly supported organization's total support the greater the likelihood that the required degree of attentiveness will be present. However, in determining whether the amount received from the supporting organization is sufficient to insure the attentiveness of the beneficiary organization to the operations of the supporting organization (including attentiveness to the nature and yield of such supporting organization's investments), evidence of actual attentiveness by the beneficiary organization is of almost equal importance. An example of acceptable evidence of actual attentiveness is the imposition of a requirement that the supporting organization furnish reports at least annually for taxable years beginning after December 31, 1971, to the beneficiary organization to assist such beneficiary organization in insuring that the supporting organization has invested its endowment in assets productive of a reasonable rate of return (taking appreciation into account) and has not engaged in any activity which would give rise to liability for a tax imposed under sections 4941, 4943, 4944, or 4945 if such organization were a private foundation. The imposition of such requirement within 120 days after October 18, 1972, will be deemed to have retroactive effect to January 1, 1970, for purposes of determining whether a supporting organization has met the requirements of this subdivision for its first two taxable years beginning after December 31, 1969. The imposition of such requirement is, however, merely one of the factors in determining whether a supporting organization is complying with this subdivision and the absence of such requirement will not preclude an organization from classification as a supporting organization based on other factors.

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(e) However, where none of the beneficiary organizations is dependent upon the supporting organization for a sufficient amount of the beneficiary organization's support within the meaning of this subdivision, the requirements of this subparagraph will not be satisfied, even though such beneficiary organizations have enforceable rights against such organization under State law.

Rev. Rul. 76-208, 1976-1 C.B. 161, held that a charitable trust described in section 501(c)(3) did not satisfy the "substantially all" requirement of the integral part test set forth in section 1.509(a)-4(i)(3)(ii)(A) of the regulations and was therefore not a supporting organization. The trust instrument provided that 75 percent of the trust income was to be distributed annually to a specified church with the remaining 25 percent to accumulate until the original corpus doubled, at which time the entire annual income was to be distributed to the church. The Service stated that for purposes of the integral part test, the term "substantially all" means 85 percent or more.

Income Tax Regulations section 1.509(a)-4(j) regarding control by disqualified persons provides:

- (1) *In general.* —Under the provisions of section 509(a)(3)(C) a supporting organization may not be controlled directly or indirectly by one or more disqualified persons (as defined in section 4946) other than foundation managers and other than one or more publicly supported organizations. If a person who is a disqualified person with respect to a supporting organization, such as a substantial contributor to the supporting organization, is appointed or designated as a foundation manager of the supporting organization by a publicly supported beneficiary organization to serve as the representative of such publicly supported organization, then for purposes of this paragraph such person will be regarded as a disqualified person, rather than as a representative of the publicly supported organization. An organization will be considered "controlled", for purposes of section 509(a)(3)(C), if the disqualified persons, by aggregating their votes or positions of authority, may require such organization to perform any act which significantly affects its operations or may prevent such organization from performing such act. This includes, but is not limited to, the right of any substantial contributor or his spouse to designate annually the recipients, from among the publicly supported organizations of the income attributable to his contribution to the supporting organization. Except as provided in subparagraph (2) of this paragraph, a supporting organization will be considered to be controlled directly or indirectly by one or more disqualified persons if the voting power of such persons is 50 percent or more of the total voting power of the organization's governing body or if one or more of the total voting power of the organization's governing body or if one or more of such persons have the right to exercise veto power over the actions of the organization. Thus, if the governing body of a foundation is composed of five trustees, none of whom has a veto power over the actions of the foundation, and no more than two trustees are at any time disqualified persons, such foundation will not be considered to be controlled directly or indirectly by one or more disqualified persons by reason of this fact alone. However, all pertinent facts and circumstances including the nature, diversity, and income yield of an organization's holdings, the length of time particular stocks, securities, or other assets are retained, and its manner of exercising its voting rights with respect to stocks in which members of its governing body also have some interest, will be taken into consideration in determining whether a disqualified person does in fact indirectly control an organization.

GOVERNMENT'S POSITION:

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It is the government's position that the xxxxxxxxxxxx should be re-classified as a private foundation.

Due to Congressional concerns about wide-spread abuses of their tax-exempt status by private foundations, private foundations were defined and subjected to significant regulations and controls by the Tax Reform Act of 1969. The definition of a private foundation is intentionally inclusive so that all organizations exempted from tax by IRC § 501(c)(3) are private foundations except for those specified in IRC § 509(a)(1) through (4). Roe Foundation Charitable Trust v. Commissioner, T.C. Memo. 1989-568; Quarrie Charitable Fund v. Commissioner, 603 F.2d 1274, 1277 (7th Cir. 1979).

The Organization claims it is exempted from private foundation status and not subject to Chapter 42 rules because it meets the requirements of IRC § 509(a)(3), which defines supporting organizations.

Public charities [organizations described in section 501(c)(3) that meet the requirements of sections 509(a)(1) and (2)] are exempted from private foundation status on the theory that their exposure to public scrutiny and their dependence on public support keep them from the abuses to which private foundations are subject. Supporting organizations are similarly exempted from private foundation status. Supporting organizations are exempted if they are subject to the scrutiny of public charities that provide sufficient oversight to keep such supporting organizations from the types of abuses to which private foundations are prone. Quarrie, 603 F.2d at 1277-78.

To be classified as a supporting organization under section 509(a)(3), an organization must meet all three of the following tests:

- 1) **Organizational and Operational Tests** under I.R.C. § 509(a)(3)(A). The organization must be organized and operated exclusively for the benefit of, to perform the functions of, or to carry out the purposes of one or more public charities.
- 2) **Relationship Test** under I.R.C. § 509(a)(3)(B). The organization must be operated, supervised or controlled, by or in connection with, one or more public charities.
- 3) **Lack of Disqualified Person Control Test** under I.R.C. § 509(a)(3)(C). The organization cannot be controlled directly or indirectly by one or more disqualified persons. A disqualified person is described in I.R.C. § 4948; it includes a substantial contributor, an officer, director, or trustee of the organization or a family member of the substantial contributor, officer, director or trustee. A family member is defined as spouses, or ancestors, or lineal descendants and their spouses.

Overall, these tests are meant to ensure that a supporting organization is responsive to the needs of a public charity and intimately involved in its operations and that the public charity (or publicly supported organization) is motivated to be attentive to the operations of the supporting organization and that it is not controlled, directly or indirectly, by disqualified persons. Because the Organization has not established that it satisfied the organizational, operational, relationship and the disqualified person control tests, it is not a supporting organization under section 509(a)(3).

Organizational and Operational Tests

The Organization is not organized to benefit one or more specified publicly supported organizations. Pursuant to Treas. Reg. § 1.509(a)-4(c)(1)(iii) and (iv), an organization's governing instrument must state the specified publicly supported organization(s) on whose behalf the organization is to be operated and cannot expressly empower the organization to support or benefit any organizations other than the

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specified publicly supported organization(s). The Organization's dissolution clause allows distributions to organizations other than the specified publicly supported organizations upon termination of the Organization. The possible beneficiaries are not limited to the xxxxxxxx School or to the organizations specified on Schedule A of the xxxxxxxxxxxx Declaration of Trust. Therefore, the organizational test is not met. See Quarig, supra (holding that the organizational test was not satisfied where the trustee had the power to substitute beneficiaries when, in the judgment of the trustee, the uses of the named beneficiaries became unnecessary, undesirable, impracticable, impossible or no longer adapted to the needs of the public).

Additionally, the operational test is not satisfied. In the years under examination, the organization contributed to charities not listed on Schedule A. Xxxxxxxx, xxxxxxxx, xxxxxxxx, xxxxxxxx, xxxxxxxx, xxxxx School, and xxxxxxxxxx were not listed on the Schedule A of the Trust document when the grants were made to them. Because the Organization gives grants to organizations that are not specified on Schedule A and because the Trustee can give the remaining assets at dissolution to any public charity, the xxxxxxxxxxxx is not organized and operated exclusively to benefit one or more publicly supported charities specified in the Organization's Declaration of Trust.

Relationship Test

As set forth in Treas. Reg. § 1.509(a)-4(f)(2), there are three permissible relationships: (a) operated, supervised, or controlled by; (b) supervised or controlled in connection with; and (c) operated in connection with one or more publicly supported organizations.

In order to establish the first type of relationship the governing body, officers or members of the publicly supported charity have to appoint the majority of the board members, officers or trustees of the supporting organization. To establish the second type of relationship the supporting organization and supported organization have to have common supervision or be controlled by the same persons. In this case only one member of the supporting organization's board is appointed by the supported organization. That person is not even listed as a board member on the Forms 990 filed by the Trust. Therefore, neither of these two relationships are established.

The third and final relationship possible for section 509(a)(3) organizations is the "operated in connection with" relationship which requires that the supporting organization be responsive to the needs or demands of the publicly supported organization and constitute an integral part of, or maintain a significant involvement in the affairs of the publicly supported organization. This relationship is satisfied where the supporting organization meets both the "responsiveness" and "integral part" tests.

In order to meet the responsiveness test, either Treas. Reg. § 1.509(a)-4(l)(2)(ii) or (iii) must be satisfied. Treas. Reg. § 1.509(a)-4(l)(2)(iii) requires that the board member appointed by the supported organization have a significant voice in the operations of the supporting organization. There were annual meetings of the Board held in December of each year. There are five members of the board; two are from the family, one is the Trustee's accountant, one is appointed by the xxxxx School and there is one other. The minutes of the meetings of the Organization, indicate there are no discussion on the investments of the organization and the Board votes on the donations after they have been made. Thus, there is no indication that the board member appointed by the supported organization (who is not even recognized as a board member on the Forms 990) had a significant voice in the investment policies of the supported organization or in the timing of grants or the selection of recipients. See Roe Foundation Charitable Trust v. Commissioner; T.C. Memo 1989-586.

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Alternatively, the supporting organization must be a charitable trust under state law and each specified publicly supported organization must be a named beneficiary under the charitable trust's governing instrument and the beneficiary organization must have the power to enforce the trust and compel an accounting under state law. Treas. Reg. § 1.509(a)-4(i)(2)(ii). Section 2.2.1 of the trust states, "the trustee shall distribute 35% of the net income of this trust to the xxxxx School". Section 2.2.2 states, "a total of 50% of the net income shall be distributed to one or more the organizations listed on schedule A". In 200 , 200 and 200 there were one hundred and fourteen organizations listed on Schedule A. Only one, the xxxxx School, is entitled to receive a portion of the Organization's net income. The Organization is not required to make any payments to the other one hundred and thirteen organizations. Therefore, the other one hundred and thirteen specified publicly supported organizations cannot realistically be considered named beneficiaries because the Trust does not require the Trustees to make any distributions to these organizations and the organizations cannot compel the Trustee to make distributions to them under state law. Furthermore, the Trust gave grants to organizations that were not named beneficiaries under the governing instrument at the time the grants were made.

Therefore, the Organization does not meet either of the "responsiveness" tests.

While the responsiveness test guarantees that the publicly supported organization can influence the activities of the supporting organization, the integral part test ensures that the publicly supported organization will be motivated to attend to the operations of the supporting organization. The integral part test is considered to have been satisfied if the supporting organization maintains a significant involvement in the operations of one or more publicly supported organizations and the publicly supported organizations are in turn dependent upon the supporting organization for the type of support which it provides. Treas. Reg. § 1.509(a)-4(i)(3)(i). In order to meet the integral part test either Treas. Reg. § 1.509-4(i)(3)(ii) or (iii) must be satisfied.

Treas. Reg. § 1.509(a)-4(i)(3)(ii) provides that the activities engaged in for or on behalf of the publicly supported organizations must be activities to perform the functions of, or to carry out the purposes of, such organizations and, but for the involvement of the supporting organization, would normally be engaged in by the publicly supported organizations themselves. Thus, this part of the integral part test applies in those situations in which the supporting organization actually engages in activities on behalf of, or for the benefit of, the publicly supported organizations as opposed to simply making grants to the publicly supported organizations. Compare to Treas. Reg. § 1.509(a)-4(i)(3)(iii) (which sets forth the rules of the integral part test applicable to supporting organizations that make payments to or for the use of publicly supported organizations), see also Roe Foundation, T. C. Memo. 1989-506; Cuddeback Memorial Fund v. Commissioner, T. C. Memo. 2002-300. The Organization does not meet this test, because it does not perform any activities for or on behalf of the publicly supported organizations. The Organization only makes grants to publicly supported organizations.

Because the Organization only makes grants to publicly supported organizations the applicable rules for satisfying the integral part test are in Treas. Reg. § 1.509(a)-4(i)(3)(iii). This section of the regulation has the following 3 basic requirements: 1) payment of substantially all of its income to publicly supported organizations; 2) the amount received by one publicly supported organization must be sufficient to motivate it to pay attention to the operations of the supporting organization; and 3) a substantial amount of the total support of the organization must go to those publicly supported organizations that meet the attentiveness requirement.

In the present situation, the Organization does distribute substantially all of its net income. However, Treas. Reg. § 1.509(a)-4(i)(3)(iii)(a) provides that the amount of support received by a publicly supported

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organization must represent a sufficient part of the organization's total support so as to insure attentiveness. Treas. Reg. § 1.509(a)-4(i)(3)(ii)(b) provides that a supporting organization can meet the attentiveness requirement, even where the amount of support received by the publicly supported organization does not represent a sufficient part of the publicly supported organization's total support, if it can be demonstrated that support is earmarked for a substantial program of the publicly supported organization that would be interrupted without the supporting organization's support. And finally, Treas. Reg. § 1.509(a)-4(i)(3)(d) provides that "[all] pertinent factors. . . will be considered in determining whether the amount of support received by a publicly supported organization is sufficient to insure the attentiveness of such organization to the operations of the supporting organization." It goes on to note the importance of the percentage of the income received from the supporting organization is in determining if the publicly supported organization will have the requisite degree of attentiveness and concludes that evidence of actual attentiveness is almost as important.

During the years ending August 31, 200 and 200 the xxxox School had support of \$ and \$, respectively. The Organization gave grants of \$ in 200 \$ in 200 and \$ in 200 The Organization provided less than 1% of the xxxox School's total support. This level of support is not sufficient to insure the attentiveness of See, e.g., Latham Foundation Inc. v. Commissioner, T.C. Memo. 2002-293, aff'd, 359 F.3d 606 (8th Cir.2004).

Another way to meet the integral part test is for the supporting organization to earmark the donation for a particular program or activity of the supported organization and the program is a substantial one. In this case the donations are not earmarked for a specific program. The amounts were put into the general savings account of the supported organization, which had the discretion over when and how the support was used. See Guddeback Memorial Fund v. Commissioner, T.C. Memo. 2002-300.

Finally, in considering all pertinent factors, there is no evidence that the xxxox School was attentive to the Organization's operations. There is no evidence that the individual appointed by the Primary Charity was involved in the decisions regarding investments and/or operations of the Organization.

Accordingly, the xxxox does not meet the relationship test because it has not met the responsiveness test or the integral part test.

Control

Treas. Reg. § 1.509(a)-4(j)(1) provides that for purposes of section 509(a)(3)(C), an organization will be considered "controlled" if the person, by reason of his position or authority, may require the organization to perform any act which significantly affects its operations or prevents such organization from performing such act. All facts and circumstances are taken into consideration in determining whether a disqualified person controls an organization. *Id.* As founder, substantial contributor, trustee and board member of the organization, xxxox is a disqualified person. Although other individuals were listed as board members, they do not appear to have been involved in any way with the governance of the Organization, in either its investments or operations. The other individuals were listed in name only as board members. Accordingly, the control test has not been satisfied.

CONCLUSION

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The xxxxxxxxxxxx cannot be classified as a supporting organization because it has not established that it has met the requirements set forth in Treasury Regulation Section 1.509(a)-4(c) through (j). Therefore, it is the government's position that the xxxxxxxxxxxx should be reclassified as a private foundation.

This determination is effective beginning xxxxx xx xxxxx.

Form 990 PF Return of Private Foundation should be filed for the tax years ending xxxxxxxxxxxxxxxxxxxx. Subsequent returns are due no later than the 15th day of the 5th month following the close of the foundation's accounting period. For tax year ending xxxxx Form 990 PF is due xxxxx.

Note:

Form 990 PF is required for each tax year until Private Foundation Status is terminated under IRC § 507.