GRANTMAKING:
THE GOOD, THE BAD, AND
THE PROCEED WITH CAUTION

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I. INTRODUCTION

According to statistics compiled from the National Center for Charitable Statistics, there are more than 76,000 grantmaking foundations in the United States with more than 90% being classified as private non-operating foundations. *See* The Foundation Center, *Highlights of Foundations Yearbook*, 2011 Edition, December 2011. Private non-operating foundations generally do not directly perform charitable programs or services, but rather pursue their charitable purposes through their grantmaking activities. In 2010, foundations gave approximately $45.78 billion for charitable purposes (down slightly from 2009). *See id.* This $45.78 billion in giving accounted for approximately 7.3% of foundation assets in 2010. *See id.* More than 150,000 grants were awarded by foundations in 2009, continuing a steady growth in the number of grants on a year over year basis. *See id.* These grantmaking private foundations fund many diverse areas from education and health (together comprising more than 45% of the funding in 2009) to arts, the environment, public affairs, religion, and scientific research. However, these broad categories, while garnering the most grant dollars, do not constitute an exclusive list. Rather, grantmaking foundations may make grants for any purpose considered exempt under Section 501(c)(3) so long as certain rules of the road are obeyed.

In making grants, private foundations must be cautious to avoid making a grant that would constitute taxable expenditure (as defined in Section 4945 of the Internal Revenue Code (hereinafter referred to as "I.R.C." or the "Code") and must further be cognizant of which grants will be treated as qualifying distributions for purposes of the minimum distribution requirement under Section 4942 of the Code. This paper will begin with background definitions including defining taxable expenditures and qualifying distributions to set up the relevant framework important to understanding the grantmaking process and will then analyze grants to different types of grantees for various purposes to determine the level of caution a foundation should exercise in making such grants.

II. RULES AND DEFINITIONS

A. Types of Organizations

1. Foundations in General

The word "foundation" can be deceptive, as it may refer to any number of nonprofit organization types. Section 509(a) of the Code defines a private foundation as any domestic or foreign organization described in I.R.C. § 501(c)(3) other than the following types of public charities:

1. Organizations that are, by definition or by activity, public charities, I.R.C. § 509(a)(1); I.R.C. § 170(b)(1)(A)(i)-(v) ("traditional" public charities);

2. Organizations receiving a substantial amount of support from the general public or from governmental entities, I.R.C. §509(a)(1); I.R.C. §170(b)(1)(A)(vi) ("publicly supported charities");

3. Organizations receiving a substantial amount of support from the general public or from governmental entities, I.R.C. § 509(a)(2) ("gross receipts" or "service provider" publicly supported charities);

4. Organizations excluded from private foundation treatment due to their close association with public charities treated as other than private foundations, I.R.C. § 509(a)(3) (supporting organizations); and

5. Organizations organized and operated exclusively to test for public safety, I.R.C. § 509(a)(4) (beyond the scope of this outline).

In other words, a Section 501(c)(3) organization is presumed to be a private foundation unless it demonstrates that it fits one of the exceptions listed above.

2. Private Non-operating Foundation

The most common type of private foundation is the non-operating foundation. It does not directly perform any charitable programs or services. It generally receives its funding from one primary source, such as an individual, a family or a corporation. It does not generally actively raise funds or seek grants. It is required to distribute approximately 5% of its assets annually to public charities. Donors' charitable income tax deductions are more limited than when made to a public charity.

3. Private Operating Foundation

The operating foundation has a stated charitable purpose and carries out its own programs. It does not generally award grants to other charitable organizations but may receive grants. The operating foundation must expend substantially all of its net investment income directly for the purposes of its own charitable activities. Although donors receive the more liberal public charity income tax deduction limitations, this type of foundation remains subject to the private foundation restrictions because its source of funding is generally from one individual, family or corporation.

4. Community Foundation

Another type of foundation is the community foundation, which is described in I.R.C. §170(b)(1)(A)(vi). It is not a private foundation; rather it is taxed as a public charity. It does not perform any charitable programs or services. It is generally established to attract large contributions of capital or endowment for the benefit of a particular community or area. Its attractiveness is enhanced by the donor's ability to benefit multiple charities through the donor's gift to a single community foundation.

5. Supporting Organization

Another type of organization is the supporting organization, which is described in I.R.C. §509(a)(3). It is not a private foundation, but is a sub-category of public charity and is really

only indirectly public, meaning that the public that monitors this organization's operations does so through an intervening public charity. That intervening public charity is the entity to which the supporting organization must answer regarding organization and operation. Because of its "public charity" nature, its attractiveness to potential donors is enhanced because donations are allowed the more favorable tax deduction limitation of those made to public charity. However, a donor seeking control is not as likely to favor this organization as the choice for his or her donation because the organization cannot be controlled by the donor, the donor's family or other "disqualified persons" defined later in this outline.

B. Minimum Distribution Requirement/Qualifying Distributions

Pursuant to Section 4942 of the Code, a private non-operating foundation must generally distribute at least 5% of the aggregate fair market value of its assets on an annual basis in *qualifying distributions*. These assets are its investment assets (i.e. those not used in furtherance of the exempt purposes of the foundation, such as the building in which the foundation offices and where its capital equipment and fixtures are located), generally including cash, stocks, bonds, and other investment assets. This minimum distribution is required to prevent foundations from holding gifts, investing the assets and never spending the assets on charitable purposes. While many foundations think only in terms of grants to public charities as qualifying distributions, the rules are actually much broader. Qualifying distributions also include grants to non-charities for "charitable purposes" (subject to certain restrictions that will be discussed in this paper), costs of all direct charitable activities, amounts paid to acquire assets used directly in carrying out charitable purposes, certain set-asides, reasonable administrative expenses necessary for the conduct of the charitable activities of the foundation, and certain investments referred to as program-related investments. Treas. Reg. § 53.4942(a)-2(c)(3).

If a private foundation fails to meet its required payout in qualifying distributions by the close of the following taxable year, the foundation is assessed a penalty of 30% of the difference between the amount actually distributed and the amount which should have been distributed. An additional penalty of 100% of the undistributed amount is assessed if the original penalty is assessed and the distribution is not timely made. These penalties can repeat each year thereafter if the required distributions are not made. I.R.C. §§ 4942(a) and (b). The penalties apply only to the foundation and not to any foundation manager.

C. Taxable Expenditures

Private foundations are prohibited from making taxable expenditures under Section 4945 of the Code. Taxable expenditures are expenditures not in furtherance of the foundation's exempt purposes. I.R.C. § 4945(d). Taxable expenditures include amounts paid or incurred by a private foundation to carry on propaganda or otherwise attempt to influence legislation or the outcome of any public election. Taxable expenditures also include grants to individuals for travel, study, or other similar purposes unless the grant process is preapproved. Additionally, if a private foundation makes a grant other than to a public charity, failure to monitor the grant (i.e. exercise expenditure responsibility as discussed below) will result in the grant constituting a taxable expenditure.

A foundation is subject to a 20% tax on each taxable expenditure, and any foundation manager who willingly participates in making the distribution knowing it is a taxable expenditure, without reasonable cause, is subject to a 5% tax on such taxable expenditure. I.R.C.

§ 4945(a). If the expenditure is not corrected within the taxable period, the foundation is subject to a tax of 100% of the amount of the taxable expenditure and the foundation manager is subject to a tax of 50% of the amount of the taxable expenditure, if the foundation manager refuses to correct the transaction. I.R.C. § 4945(b).

III. GRANTS TO PUBLIC CHARITIES (OTHER THAN SUPPORTING ORGANIZATIONS)

A. Qualifying Distribution Analysis

The most common type of grant made by a private foundation is a grant to a public charity, described under Section 509(a)(1) or 509(a)(2) of the Code.[1] Grants made to Section 509(a)(1) and Section 509(a)(2) public charities count as qualifying distributions under Section 4942 unless the grantee charity is controlled by the grantor foundation or persons who are disqualified persons with respect to the grantor foundation.

Where a private foundation makes a grant to a public charity that is controlled by the private foundation or by persons who are disqualified persons with respect to the private foundation, the grant will only count as a qualifying distribution if certain rules known as the "out of corpus" rules are followed. To understand this requirement, certain definitions are helpful.

A disqualified person is defined in Section 4946 of the Code as follows:

1. A substantial contributor to the foundation;[2]
2. A foundation manager, that is any officer, director, or trustee, or a person having responsibility similar to such individuals;[3]
3. An owner of more than 20% of a corporation, partnership, trust or unincorporated enterprise which is a substantial contributor to the foundation;
4. A member of the family of anyone described in (1), (2), or (3) above (a member of the family includes ancestors, decedents, and spouses, but does not include siblings); and
5. A corporation, partnership, trust, or estate in which persons listed in (1) – (4) above own more than 35% of the total combined voting power (more than 35% of the profits interest of a partnership or more than 35% of the beneficial interest of a trust).[4]

Notwithstanding the foregoing rules, for purposes of Section 4941, organizations described in Section 501(c)(3) of the Code (other than an organization described in Section 509(a)(4)—public safety organizations) are not considered disqualified persons.

For purposes of the rules regarding qualifying distributions, control is present if the foundation or disqualified persons of the foundation, may, by aggregating their votes or positions of authority, require the grantee to make an expenditure or prevent the expenditure. Treas. Reg.

[1] A less common type of grant is a grant made from a private foundation to a Section 509(a)(3) supporting organization, which will be discussed below.

[2] Section 507(d)(2) defines substantial contributor as any person who contributes an aggregate amount in excess of $5,000 to the foundation, if his or her total contributions are more than 2% of the total contributions received by the foundation (since its inception) before the close of the taxable year of the contribution.

[3] Treas. Reg. § 53.4946-1(f).

[4] Attribution rules apply in computing ownership percentages. Treas. Reg. § 53.4946-1(d)(e).

§§ 53.4942(a)-3(a)(3). However, the determination of control is based upon whether the foundation or its disqualified persons *in fact* have the ability to control the organization. That the control is or is not exercised is not relevant. Rather, the relevant issue is whether the foundation has the ability to control. Because of this, if control is an issue, the foundation may wish to work with the grantee organization to ensure that policies are in place to show that the foundation and its disqualified persons do not have the ability to control the organization. *See* e.g., PLR 200937038.

As referenced above, where a private foundation makes a grant to a public charity that is controlled by the private foundation or disqualified persons, the grant will only be treated as a qualifying distribution if certain rules known as the "out of corpus" rules are followed. Specifically, Section 4942(g)(3) provides that a grant by a private foundation to a controlled organization will be treated as a qualifying distribution in the year in which the grant is made so long as the grantee redistributes or expends for charitable, educational or similar purposes an amount equal in value to the grant by the end of the grantee's taxable year after the year in which the grant was received. Furthermore, the foundation must obtain adequate records or other evidence to show that the redistribution has been made, the names and addresses of the recipients of the redistributed amount, and the amount received by each recipient of the redistributed amount. I.R.C. § 4942(g)(3); Treas. Reg. §§ 53.4942(a)-3(c)(1).

B. Taxable Expenditure Analysis

Along with constituting qualifying distributions, grants to public charities described under Section 509(a)(1) or Section 509(a)(2) will not be taxable expenditures absent when the grant is earmarked for use in a way that causes the grant to be used for purposes that constitute taxable expenditures under Section 4945(d) of the Code. For example, if a private foundation makes a grant to a public charity that relieves a financial obligation of a disqualified person, such grant would constitute self-dealing, but may also be shown to be a grant for a purpose other than one specified in Section 170(c)(2)(B). Likewise, if a private foundation makes a grant to a public charity for the purpose of influencing legislation or influencing the outcome of a specific public election, such grant will constitute a taxable expenditure. Where a private foundation is making a grant to a public charity that is engaged in such activities, the private foundation should ensure that the grant is not earmarked for such purposes (whether by a written or oral agreement) and that, where given for a specific project to a public charity that lobbies, that the grant does not exceed the amount of the specific project.

IV. GRANTS TO SUPPORTING ORGANIZATIONS

Supporting organizations under Section 509(a)(3) are categorized as Type I, Type II, and Type III supporting organizations. Type III supporting organizations are further classified as functionally integrated supporting organizations and non-functionally integrated supported organizations. These categories are critical for a grantmaking foundation to understand to avoid the making of a taxable expenditure. Grants to Type I, Type II, and functionally integrated Type III supporting organizations will constitute qualifying distributions and in most cases, will not be taxable expenditures. Grants to non-functionally integrated Type III supporting organizations will never constitute qualifying distributions and will be taxable expenditures unless the foundation exercises expenditure responsibility. While it is permissible for a foundation to make a distribution that is not a qualifying distribution, the burden of exercising expenditure

responsibility as to a grant that will not constitute a qualifying distribution is a significant drawback. With respect to Type I, Type II, and functionally integrated Type III supporting organizations, expenditure responsibility is only required if the supporting organization (i.e. the grantee) or any of the supported organizations supported by the grantee supporting organization are controlled directly or indirectly by one or more disqualified persons of the private foundation. Such grants will be treated consistently with grants to non-functionally integrated Type III organizations—expenditure responsibility will be required to avoid taxable expenditure status and the grants will not be classified as qualifying distributions. Significantly, however, a Type I or Type III supporting organization grantee that accepts a grant from a private foundation that directly or whose disqualified persons control supported organization of the supporting organization will lose its public charity status.

Because grants to certain supporting organizations do not count as qualifying distributions, it is important for the grantmaking foundation to first determine the type of supporting organization with which it is dealing. The foundation can rely upon the IRS Business Master File and the supporting organization's determination letter to determine that it is a supporting organization and with respect to the type of supporting organization can rely upon a written representation signed by an officer, director or trustee of the supporting organization that describes a process for selecting the foundation managers and describes the relationship to the supported organizations. In addition, it may be helpful for the grantmaking foundation to review copies of the governing documents of the supporting organization. Alternatively, a private foundation may rely upon a reasoned written opinion of counsel (of either the grantmaking foundation or the supporting organization) as to the type of supporting organization. With respect to whether the organization is functionally integrated or non-functionally integrated, the private foundation should obtain a written representation identifying the organizations that the supporting organization supports. Grantmakers should review the grantee supporting organization's governing documents as well as obtain a written representation signed by an officer, director or trustee of each supported organization stating that the supporting organization is functionally integrated and that but for the involvement of the supporting organization, the supported organization would engage in the activities carried out by the supporting organization itself. As with the classification of supporting organizations referenced above, a grantmaking foundation may also rely on a reasoned opinion of counsel as to this issue.

Finally, because of the consequences flowing from a private foundation making a grant to a supporting organization that supports an organization that is controlled by the private foundation or any of its disqualified persons, the private foundation must know who its disqualified persons are (see III.A. above) and must know what other organizations those persons control. A private foundation must diligently keep track of this information on an up to date basis.

V. GRANTS TO GOVERNMENTAL ENTITIES

A. Domestic

While they do not apply for or receive recognition of Section 501(c)(3) status, domestic governmental units are treated as public charities regardless of their source of support. I.R.C. § 170(b)(1)(A)(v). This category of organizations includes the federal government, the government of the District of Columbia, state governments, possessions of the United States, and their

political subdivisions. I.R.C. § 170(c)(1). A rule of thumb for determining whether an entity is a governmental unit is to look at whether the entity has sovereign powers such as the right to tax, the right to eminent domain, and the right to police its citizens. A private foundation grant to a governmental unit will be treated as a grant to a public charity qualifying as a qualifying distribution and not a taxable expenditure with no further action required on the part of the private foundation. In essence, the governmental unit's responsiveness to the public in general is ensured by the very nature of the entity being a part of the government.

B. Foreign

Grants to foreign governments (or agencies or instrumentalities of foreign governments) are treated slightly differently than grants to domestic governmental units. Foreign governments are treated as Section 509(a)(1) organizations (i.e. public charities) even if the foreign government is not described in Section 501(c)(3); however, a grant to a foreign government must be made exclusively for Section 170(c)(2)(B) purposes to constitute a qualifying distribution and avoid being a taxable expenditure. See § 53.4945-5(a)(4)(iii). For example, where a private foundation makes a grant to a foreign government to be used by the foreign government to improve healthcare (a charitable purpose), the grant will be a qualifying distribution and not a taxable expenditure. However, if a private foundation were to make a grant to a foreign government for political purposes, the grant would not constitute a qualifying distribution and at the same time would constitute a taxable expenditure. As such, it is important for a private foundation making grants to foreign governments to document the purposes of the grant.

VI. GRANTS TO OTHER PRIVATE FOUNDATIONS

A. Grants to Private Non-Operating Foundations

1. Qualifying Distribution Analysis

Grants from a private non-operating foundation to another private non-operating foundation generally do not constitute qualifying distributions. This result is intended to discourage the "parking" of charitable assets and removing them from the flow of charitable dollars. For example, if private non-operating foundations could satisfy its minimum distribution requirement with grants to other private non-operating foundations, with respect to those dollars, the minimum distribution requirement would become meaningless as the dollars would never enter into charitable use.

Notwithstanding the general rule, the out of corpus rules described above with respect to grants to controlled public charities provide a limited exception to this result. Where the out of corpus rules are followed by a private non-operating foundation making a grant to another private non-operating foundation, such grant will be treated as a qualifying distribution. I.R.C. § 4942(g)(3). To satisfy the out of corpus rules in this context, the grantor foundation must ensure that the grantee foundation redistributes the grant funds by the end of the grantee foundation's taxable year after the year in which the grant was received (the same rule as with controlled public charities), and the grantee organization must also distribute its own qualifying distributions within that same time period. *See id.* In other words, for a grant from a private non-operating foundation to another private non-operating foundation to be treated as a qualifying distribution, the grantee foundation must be able to show that it satisfied its own minimum distribution requirement as well as redistributing out those grant funds received. This allows the goals of ensuring that those dollars are put into charitable use to be accomplished. A

grantor foundation making a grant to another non-operating foundation wishing those grant funds to be counted as a qualifying distribution should execute a grant agreement with the grantee organization requiring the redistribution in addition to the grantee's distribution of its own minimum distribution requirement as well as the provision of records from the grantee organization to show that these steps have been accomplished.[5] Only the amounts actually redistributed as qualifying distributions will be treated as qualifying distributions for the original grantor foundation.

2. Taxable Expenditure Analysis

Regardless of whether the grant constitutes a taxable expenditure, a grant by a private non-operating foundation to another private non-operating foundation will be treated as a taxable expenditure unless the grantor foundation exercises expenditure responsibility. I.R.C. § 4945(d)(4). Expenditure responsibility is intended to ensure that foundation dollars intended for charitable purposes are not diverted from those purposes. To exercise expenditure responsibility, a private foundation is required to use all reasonable efforts and establish adequate procedures to see that grant dollars are spent solely for the purposes for which they are given, full and complete reports on how the funds are used are provided to the grantor foundation from the grantee, and the grantor foundation makes full and detailed reports on its annual information return. I.R.C. § 4945(h). Exercise of expenditure responsibility requires (1) the conducting the of a pre-grant inquiry concerning the grantee's management and programs; (2) obtaining a written agreement from the grantee foundation prior to making the grant with specific requirements concerning use of the grant, reporting, and follow up; (3) obtaining regular written status reports from the grantee foundation regarding its progress in using the grant; and (4) filing reports regarding the grant's status with the private foundation's annual information return. In addition, the private foundation should keep proper documentation of all of the above. Treas. Reg. § 53-4945-5(b). If the foundation fails to exercise its expenditure responsibility (by failing in any of the aforementioned steps), the grant will constitute a taxable expenditure giving rise to the excise tax scheme addressed above.

B. Grants to Private Operating Foundations

Private operating foundations are private foundations with their own stated charitable purpose that generally carry out their own programs. These types of foundations generally seek grants rather than awarding grants to other charitable organizations and must expend substantially all of their net investment income directly for the purpose of their own charitable activities. To qualify as a private operating foundation, an organization must meet an "income text" and any one of the following three tests: (1) the "assets test", (2) the "endowment test", and (3) the "support test." *See* § 53.4942(b)-1(a)(1). Foundations that qualify as private operating foundations are given some of the advantages of being treated as a public charity. While operating foundations continue to be subject to most of the foundation prohibited transaction rules (the exception is the minimum distribution requirement), donors receive more favorable tax deductions to public charities. Private non-operating foundation grants to private operating foundations will constitute qualifying distributions unless the private operating foundation is a controlled organization as discussed in Section III.A. above. I.R.C. §

[5] From a technical standpoint the redistributed dollars must be distributed as qualifying distributions. This allows for some portion of those dollars to be used for charitable administrative expenses which would otherwise constitute qualifying distributions in accordance with §§ 53.4942(a)-3(c)(3) or as a qualified set-aside.

4942(g)(1)(A)(ii). However, unlike grants to public charities described in Sections 509(a)(1) or (2), expenditure responsibility is required in order to avoid taxable expenditure status.

VII. GRANTS TO NON-(c)(3)'S

A. Domestic Organizations

1. Qualifying Distribution Analysis

While the majority of the grants by grantmaking foundations are made to Section 509(a)(1) or Section 509(a)(2) public charities, a private foundation may make a grant to any organization regardless of the tax classification of that organization so long as the grant is paid to accomplish one or more purposes described in Section 170(c)(2)(B) of the Code. I.R.C. § 4942(g)(1)(A). In making a grant to an organization that is not recognized as exempt under Section 501(c)(3), the private foundation must ensure that the purpose of the grant constitutes a charitable purpose under Section 501(c)(3) of the Code. Where the grant is for a charitable purpose, the grant will constitute a qualifying distribution under Section 4942. For example, a private non-operating foundation may make a grant to a Section 501(c)(6) business league to allow the business league to put on an educational forum. The grant will constitute a qualifying distribution. Notwithstanding the foregoing rule, if the recipient entity is an entity that is controlled by the private foundation or one or more of its disqualified persons, the grant will not be a qualifying distribution. This is true regardless of whether the recipient organization uses the grant funds for a charitable purpose or redistributes the grant under the out of corpus rules due to the fact that the out of corpus rules only apply with respect to grants made to other Section 501(c)(3) organizations.

2. Taxable Expenditure Analysis

A grant to a domestic organization that is not recognized as exempt under Section 501(c)(3) where it constitutes a qualifying distribution (i.e. because it is for a charitable purpose) will not be a taxable expenditure so long as the private foundation exercises expenditure responsibility over the grant. I.R.C. § 4945(d)(5). The required expenditure responsibility is discussed at Section VI.A.2. above with the additional requirement that the funds be maintained in a separate, segregated account dedicated to the charitable purpose for which the grant was made. Treas. Reg. § 53.4945-6(c)(2). If the grant is for a charitable purpose but the expenditure responsibility is not exercised, the grant may count as a qualifying distribution, but also as a taxable expenditure. If the grant is not for a charitable purpose, it will not count as a qualifying distribution, and will be a taxable expenditure.

B. International Organizations

Recognition of exempt status under Section 501(c)(3) of the Code does not require that an organization be formed under the laws of the United States. Rather, where an organization is organized and operated exclusively for charitable purposes and meets the other requirements for recognition of exemption under Section 501(c)(3) the organization can apply to be so recognized regardless of its place of origin. Grants by private non-operating foundations to foreign organizations that have applied for and been recognized as exempt under Section 501(c)(3) of the Code will be treated consistent with grants by private non-operating foundations to other Section 501(c)(3) organizations as discussed above. However, where the foreign organization has not applied for and been recognized as exempt under Section 501(c)(3) (which is the more common occurrence), private foundation grants to foreign organizations will be treated consistently with

the rules for grants to domestic non-(c)(3)'s set forth above except that a private foundation, in seeking to avoid taxable expenditure status may choose between exercising expenditure responsibility and making a determination that the foreign organization is equivalent to a United States public charity.

Private foundations have several options from which to choose when undertaking international grantmaking: (1) make the grant to a domestic public charity (being mindful of the earmarking rules addressed above); (2) make a grant to a foreign organization qualifying as a public charity; (3) make a grant to a foreign organization based on an equivalency determination; or (4) make a grant to a foreign organization and thereafter exercise expenditure responsibility.

1. Grants to Domestic Organizations for International Work

If the contribution is made to a domestic organization which is to be used for a charitable activity in a foreign country, the domestic organization will be considered the recipient of the contribution and, subject to the rules set out above, the contribution will be a qualifying distribution if the use of the contribution is subject to the domestic organization's discretion and control. Rev. Rul. 66-79, 1966-1 C.B. 48. However, the donating foundation must not earmark the contribution to the domestic organization directly for the use of the foreign organization. If it does, the grantmaking foundation will be deemed to have made a grant directly to the foreign organization and the foreign organization must meet the qualifications of a public charity in order for the distribution to be a qualifying distribution. As long as the donating foundation does not earmark the use of its grant for any named secondary donee, it will not be deemed to have made a contribution to the secondary donee. Treas. Reg. 53.49429(a)-3(c)(4).

2. Grants to Foreign Charities Recognized as Exempt

A private foundation can make a contribution to a foreign organization and it not be deemed a taxable expenditure if the foreign organization has received a tax exempt determination letter from the Internal Revenue Service that it is a public charity or it qualifies as the equivalent of a 501(c)(3) organization and a public charity under Section 509(a)(1) or (2); Treas. Reg. § 53.4945-6(c)(1), IRC § 4945(d)(4)(A). In such instance, the analysis is the same as grants to Section 509(a)(1) and (2) public charities.

3. Grants Made Based on an Equivalency Determination

Further, if in the reasonable judgment of a foundation manager, it is determined that the foreign organization will be treated as the equivalent of a 501(c)(3) organization and a public charity under Sections 509(a)(1) or (2), Section 53.4945-6(c)(2)(ii), and a good faith determination is made based upon an affidavit of the foreign organization or an opinion of counsel by either the foreign organization's or the foundation's counsel, setting forth sufficient facts concerning the operation and support of the organization to enable the Internal Revenue Service on audit to determine that the grantee organization would likely qualify as a public charity under Section 509(a)(1) or (2). Treas. Reg. § 53.4945-5(a)(5).

Based on a 2001 letter from the IRS to the Council on Foundations, it is clear that the grantmaking private foundation may choose between equivalency determination and expenditure

responsibility.[6] Should the private foundation choose to follow the path of equivalency determination, the foundation will require documentation from the potential recipient sufficient to make the determination that the foreign entity is the equivalent of a public charity under U.S. law. Because the foundation must make a "good faith determination," it should require documentation that would in large part be required by the IRS if the foreign organization were making application by way for Form 1023. Revenue Procedure 92-94 provides guidance related to information to be addressed in a written affidavit from the foreign grantee. Should a foundation choose to make an equivalency determination, Revenue Procedure 92-94 should be consulted as a guide for what information should be obtained.

The affidavit must contain current facts (i.e. be "currently qualified") concerning the organization's qualification as "equivalent" to a public charity (e.g. accounting for support tests or facts for traditional public charities).[7] Although financial information may be given in foreign currency, the affidavit itself must be in English and must be attested by an officer of the foreign organization. The affidavit must include a statement of being operated exclusively for charitable purposes, a narrative of past, current and proposed activities, copies of governing/organizational documents, an explanation based on the organizational documents, or the laws and customs of the foreign country to ensure assets are not permitted to inure to or benefit a private person either during operation or upon dissolution, and a statement that either the laws and customs of the foreign country, or the organization's governing documents do not permit excessive lobbying, intervention in political campaigns or other noncharitable activities.[8]

As an alternative to the grantee affidavit procedure, private foundations may continue to obtain opinions of counsel with respect to the equivalency determination. While an opinion letter will require largely the same documentation as support, the foundation managers, by relying on such an opinion letter will have acted with reasonable cause. See § 4945(a)(2); Treas. Reg. § 53.4945-1(a)(2)(vi).

4. Grants Made with the Exercise of Expenditure Responsibility

Finally, a private foundation can make a grant to a foreign organization if the foundation exercises expenditure responsibility as to the grant.[9] The expenditure responsibility requirements, as they relate to grants to foreign organizations, are largely the same as with domestic organizations. Specifically, as with domestic expenditure responsibility, exercising expenditure responsibility with respect to foreign grants includes the conducting of a pre-grant inquiry concerning the grantee's management and programs, obtaining a written agreement from the grantee prior to making the grant, obtaining regular written status reports from the grantee regarding its progress in using the grant, and filing reports regarding the grant's status with the private foundation's annual information return and checking the appropriate box. In addition to

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[6] For an excellent discussion regarding factors that may influence or guide the decision to use either an equivalency determination or expenditure responsibility, see B. Buchalter Adler and S. Petit, "Equivalency or Expenditure Responsibility? A Guide in Plain English," *International Dateline*, Spring 2005.

[7] Obviously, to stay "currently qualified," the affidavit will need to be updated with attested statements to show continued satisfaction of the support tests.

[8] Additional information must be included for educational institutions. *See* Rev. Proc. 92-94.

[9] Grants to foreign organizations that are the equivalent of a private non-operating foundation require expenditure responsibility to avoid being taxable expenditures and may not be counted as a qualifying distribution unless the "out of corpus" requirements are met by the foreign organization. Treas. Reg. § 53.4942(a)-3(a)(6).

these standard requirements, a grant to a foreign organization with respect to which the private foundation will exercise expenditure responsibility requires that all grant funds be maintained in a separate segregated account dedicated to one or more charitable purposes. Treas. Reg. § 53.4945-6(c)(2).

5. Compliance with Anti-terrorism Measures

No current discussion of international grantmaking would be complete without addressing the need to ensure that charitable funds are not diverted to terrorist purposes. Specifically, private foundations should be familiar with Executive Order 13224 which blocks the property of and prohibits transactions with individuals and organizations (1) specifically listed in the Annex to the Executive Order, (2) who are determined by the Secretary of State to have committed or to pose a risk of committing acts of terrorism, or (3) who are determined by the Secretary of Treasury to be owned or controlled by, or associated with terrorists. Because the Executive Order can be violated even where the grantmaking foundation lacks knowledge that it is engaging in a prohibited transaction, it is important for the grantmaking foundation to follow adequate vetting procedures to ensure grant recipients do not fall into one of the covered categories. In addition to Executive Order 13224, grantmaking foundations should be familiar with provisions of the Patriot Act which prohibit an organization from willfully providing or collecting funds with the intention or knowledge that such funds will be used to carry out acts of terrorism. As with compliance with Executive Order 13224, it is important for a tax-exempt organization operating internationally to check the Specially Designated Nationals List maintained by the Office of Foreign Assets Control and the Terrorist Exclusion List maintained by the Department of Justice. Finally, in 2006 the Department of Treasury issued a revised version of its Anti-terrorist Financing Guidelines; Voluntary Best Practices for U.S.-Based Charities. While the Guidelines are "best practices" as determined by the Department of Treasury and not legal obligations, foundations making international grants should have some level of familiarity with the Guidelines to determine which of those best practices it may choose to implement.

VIII. GRANTS TO INDIVIDUALS

Private non-operating foundations may make grants to individuals as well as to organizations. Grants to individuals can be broken down into grants made for travel, study and related purposes, grants made to assist needy persons who lack the basic necessities of life as a result of poverty or temporary distress, and grants that constitute awards for past achievement. Grants to individuals for any of the aforementioned purposes will constitute qualifying distributions; however, certain rules must be followed to ensure that such grants do not constitute taxable expenditures.

A. Grants for Travel, Study, and Other Similar Purposes

Grants to individuals for travel, study, or other similar purposes must be made pursuant to a procedure approved by the IRS in advance of any grant to an individual for such purpose or will otherwise constitute taxable expenditures. I.R.C. §§ 4945(d)(3), (g). This does not require the organization to seek pre-approval on every occasion it desires to make a grant for such purposes; rather, the IRS evaluates on a one-time basis (usually when the organization applies for tax-exempt status, if such grantmaking procedures are provided at that time) the foundation's entire system of standards, procedures, and follow-up for the making of such grants. The IRS

focuses on whether the grantmaking procedure utilizes an objective and nondiscriminatory selection process, whether the procedure is reasonably calculated to result in performance by grantees of the activities that the grants are intended to finance, and whether the foundation will obtain reports to ensure the grantees have performed the activities that the grants were intended to finance. Treas. Reg. § 53.4945-4(c).

The IRS has suggested the following criteria for making a grant on an objective and nondiscriminatory basis: prior academic performance; performance on tests designed to measure ability and aptitude for college work; recommendations from instructors; financial need; and the conclusions which the selection committee might draw from a personal interview as to the individual's motivation, character, ability and potential. In selecting any recipient of a scholarship grant, the Foundation should adhere to such criteria and document in its records that such criteria was used in selecting all recipients. Such documentation will help support the position that it is sufficiently clear that the selection of the particular individual is calculated to accomplish a charitable purpose rather than benefit a particular person or class of persons. The IRS has stated that a scholarship program must be consistent with the disinterested purpose of enabling individuals to obtain an education solely for their personal benefit. Rev. Proc. 76-47 at § 4.07.

If a foundation makes a distribution to an individual for travel, study or similar purposes, it must monitor the grant in order to avoid a penalty. The Treasury Regulations provide that foundations must arrange to receive a "verified" report from the appropriate educational institution at least once for each year in which the grantee of a scholarship takes courses and receives grades. The foundation must receive a final report upon completion of the grantee's studies. Treas. Reg. § 53.4945-4(c)(2). The foundation must be able to ensure that the grantees have not diverted funds away from the original purpose of the grant. If the foundation fails to investigate or correct grant misuse the grant may become a taxable expenditure. § 53.4945-4(c)(4).

The foundation must retain records pertaining to all grants to individuals for travel, study or other similar purposes. The records must include:

(1) all information the foundation secures to evaluate the qualifications of potential grantees
(2) the identification of grantees. This should include any relationship of any grantee to:

    a. members, officers or trustees/directors of the organizations
    b. a grantor or substantial contributor to the organization or a member of the family of either, and
    c. a corporation controlled by a grantor or substantial contributor (Rev. Rul. 56-304).

(3) Specification of the amount and purposes of each grant
(4) Any follow-up information which the foundation obtains regarding possible misuse of funds.

Treas. Reg. § 53.4945-4(d).

Grants made pursuant to pre-approved procedures will count as qualifying distributions for the foundation and will not count as taxable expenditures. However, if a foundation makes a grant to an individual for study, travel or related purposes without having had its procedures approved by the IRS in advance, such grant will be considered a taxable expenditure. *See* §§ 4945(d), (g). Accordingly, it is imperative that the organization seek pre-approval and understand the difference between granting scholarships directly (i.e. choosing the recipient of the award) and making grants to academic institutions in order to provide for scholarships with the recipients chosen by the academic institution (simply a gift to an public charity that does not require pre-approval).

B. Hardship Grants

Because qualifying distributions include any amount paid to accomplish one or more purposes described in Section 170(c)(2)(B) of the Code, grants to individuals for charitable purposes will constitute qualifying distributions. Section 1.501(c)(3)-1(d)(2) of the Treasury Regulations provides, in relevant part, that the term "charitable" is used in section 501(c)(3) of the Code (and, thus, in section 170(c)(2)(B)) in its generally accepted legal sense. PLR 199917079 (April 30, 1999). Such term includes, among other things, relief of the poor and distressed or of the underprivileged. *Id.* Section 1.170A-4A(b)(2)(ii)(D) of the Treasury Regulations defines needy as being a person who lacks the necessities of life, involving physical, mental, or emotional well-being, as a result of poverty or temporary distress. *Id.* Therefore it follows, for example, that grants can be made to individuals who cannot afford basic health care or whose health insurance or financial resources are insufficient to cover all of the individual's medical expenses.[10] Such grants do not have to be made according to a technical procedure, approved by the IRS in advance, as is the case with grants to individuals for travel or study. The Treasury Regulations provide the further example of a foundation makes grants to indigent individuals to enable them to purchase furniture; such grants are not taxable expenditures within the meaning of Section 4945(d)(3). Treas. Reg. § 53.4945-4(a)(3)(ii).

Grants to individuals to provide for basic needs, while not needing preapproval from the IRS, must nevertheless be made pursuant to an objective and non-discriminatory practice. This requires that the potential pool of eligible applicants be a charitable class (i.e. a class of persons lacking the basic necessities as opposed to one individual who has some significant hardship). Where the need is a short term need in response to an emergency hardship situation, less information will be required to be obtained and maintained by the private foundation to demonstrate the charitable purpose of the grant as opposed to instances where the need is a more long term need that requires larger expenditures. The IRS has published a helpful resource on disaster relief which can be found on the IRS website as Publication 3833, *Disaster Relief: Providing Assistance Through Charitable Organizations*. While the Publication applies to both public charities and private foundations, the Publication gives an excellent overview of the rules for determining a charitable class, making an assessment that the recipient of aid is "needy or distressed" and determining the type of information that should obtained and maintained with

[10] Grants made to individuals to defray health care expenses are treated as furthering charitable purposes. PLR 199917079 (April 30, 1999); PLR 9237043 (June 19, 1992).

respect to documentation and reporting. Any private foundation that seeks to undertake disaster relief should be familiar with Publication 3833.

C. Achievement Awards

In addition to grants for travel, study, or other similar purposes and hardship-type grants, foundations may make grants to individuals that constitute awards. These awards must be awards for past achievements with no strings attached. In other words, the award cannot require that the recipient perform some service in the future or expend any monetary award for a specific purpose. Where an award is granted that requires service in the future or that the amounts be spent for a specific purpose, the awards are treated as grants for travel, study, or similar purposes and are subject to the preapproval process discussed above.

IX. PROGRAM RELATED INVESTMENTS

A. Law Related to PRIs.

Program-related investments ("PRI"), a hybrid of grants and investments, constitute qualifying distributions. The term "program-related investment" appears in the Internal Revenue Code at section 4944(c) as an exception to the general prohibition against private foundations investing in such a manner as to jeopardize the carrying out of their exempt purposes. Section 4944(c) provides as follows:

> (c) Exception For Program-Related Investments. – For purposes of this section, investments, the primary purpose of which is to accomplish one or more of the purposes described in Section 170(c)(2)(B), and no significant purpose of which is the production of income or the appreciation of property, shall not be considered as investments which jeopardize the carrying out of exempt purposes.

Treasury Regulation Section 53.4944-3 provides additional specificity as to what constitutes a PRI.

> A "program-related investment" is an investment which possesses the following characteristics:
>
> (i) The primary purpose of the investment is to accomplish one or more of the purposes described in section 170(c)(2)(B);
> (ii) No significant purpose of the investment is the production of income or the appreciation of property; and
> (iii) No purpose of the investment is to accomplish one or more of the purposes described in section 170(c)(B)(2)(D) [political purposes].

As a result of the definitions set forth in the above cited Treasury Regulation, PRIs are said to be subject to three tests: (1) the primary purpose test; (2) the no significant investment purpose test; and (3) the no political purpose test. Satisfaction of these tests further demonstrates that PRIs are qualifying distributions as amounts paid to accomplish one or more purposes described in Section 170(c)(2)(B).

1. The Primary Purpose Test

Section 53.4944-3(a)(2)(i) provides that an investment is made primarily to accomplish one or more of the purposes described in Section 170(c)(2)(B) (i.e. charitable or other exempt purposes) if it *significantly furthers* the accomplishment of the private foundation's exempt activities and if the investment would not have been made *but for* the investment's relationship to the foundation's exempt activities.

A determination of whether the investment significantly furthers the accomplishment of the private foundation's exempt activities requires an initial examination of the foundation's own governing documents to determine the scope of the foundation's exempt purposes (i.e. are those purposes broad—"charitable, religious, and educational purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code," or are those purposes more narrow, such as limiting the exempt purposes to medical research). If a proposed investment is consistent with general charitable or other exempt purposes under sections 501(c)(3) and 170(c)(2)(B), but is inconsistent with more restrictive purposes in the foundation's own governing documents, the foundation should either pass on the investment or take steps to expand its purposes.

Determining whether the proposed investment is made to further an exempt purpose should be focused on the exempt purpose (such as relief of the poor and distressed or underprivileged) and not on whether or not the organization that is going to carry out that purpose is itself an exempt organization. Specifically, Section 53.4944-3(a)(2)(i) provides that "[f]or purposes of section 4944 and §§ 53.4944-1 through 53.4944-6 the term "purposes described in section 170(c)(2)(B)" shall be treated as including purposes described in section 170(c)(2)(B) whether or not carried out by organizations described in section 170(c)." It is this clarification that allows private foundations to make program-related investments to non-exempt organizations. Put simply, it is not the recipient of the funds that is most significant, but rather the use of the funds and how that use of the funds furthers one or more exempt purposes *of the foundation*.[11] Accordingly, each investment must be separately analyzed to determine that the investment does, in fact, significantly further the foundation's charitable purposes, and that but for such relationship between the investment and the accomplishment of the foundation's exempt activities, the investment would not have been made. Foundations may find it useful to have contemporaneous documentation showing the purposes of the investment and how the investment is intended to further the foundation's exempt purposes. This type of documentation strengthens the foundation's position that the investment would not have been made but for its relationship to the foundation's exempt purposes.

2. No Significant Investment Purpose Test

To qualify an investment as a program-related investment, the private foundation must show that no significant purpose of the investment is the production of income or the appreciation of property. Pursuant to the regulations, the IRS will consider it relevant whether investors solely engaged in for profit investment activities would be likely to make the investment on the same terms as the private foundation. Treas. Reg. § 53.4944-3(a)(2)(iii). Similarly, where a foundation has an investment policy (which prudent foundations should have), analyzing whether such investment policy would allow for the proposed investment with

[11] Nine of the ten examples provided in the Treasury Regulations deal with PRIs made to entities other than public charities.

the terms being considered is also a relevant factor in showing that the foundation is making the investment without a significant purpose of producing income or causing the appreciation of property. The regulations point out, however, that the fact that the investment produces income or capital appreciation, even where significant will not, standing alone, be conclusive evidence of a significant purpose involving the production of income or appreciation of property. *See id.* Rather, the analysis is at the front end of the investment, whether the terms (interest rate, risk level, level of security, etc.) would be attractive to for profit investors and commercial lenders.[12]

The majority of PRIs that are the subject of private letter rulings are made as loans or guarantees. These can be, and are, typically made at below-market interest rates thereby allowing the foundation to demonstrate that the loan is one whose terms would not be attractive to for profit investors or commercial lenders. Again, however, the interest rate is not the only factor to be considered. Loans may be made with inadequate security, to recipients with no credit history or poor credit, or with other terms that cause the loan to carry higher risk. In these cases, the foundation can show that the loan would not be attractive to a for profit investor. Where PRIs take other forms (equity investments, loan guarantees, linked deposits, etc.) the terms of the proposed investment must be closely analyzed to determine whether such terms demonstrate a lack of a for profit motive. There are myriad private letter rulings discussing PRIs and considering this second test. Those rulings are not precedential authority, but do provide a helpful look at other situations that the IRS has found to demonstrate a lack of a production of income/appreciation of property motive. Where the investment terms are not clearly outside of the scope of what a for profit investor would consider, a foundation should review such private letter rulings and consider obtaining a private letter ruling or opinion of counsel letter related to this issue.

While the regulations provide that no significant purpose of the investment is the production of income and appreciation of property, regulations do not prohibit the foundation from making PRIs that produce income or result in the appreciation of property or even making PRIs where the production of income or the appreciation of property is a purpose—it must merely refrain from making such investments where these goals are a *significant* purpose. PRIs are, by definition, not grants. In setting up these types of investments, foundations generally build in interest along with a return of the principal. It is this ability to get a return on investment that makes PRIs an attractive alternative to grants, allowing foundations to recycle their philanthropic dollars over and over again. A foundation is willing to accept terms that would not be acceptable to for profit investors and commercial lenders of the relationship between the investment and the accomplishment of the foundation's exempt purposes. In this way, the foundation is receiving (in the event that there is no default) a monetary return on its investment as well as social return on this same investment.

3. No Political Purpose Test

The final test that must be met for a foundation to demonstrate that an investment qualifies as a program-related investment is a showing that no purpose of the investment is to accomplish one or more of the purposes described in Section 170(c)(2)(D), such purposes

[12] Because the analysis is done at the front end of the investment, the contemporaneous documentation addressed above regarding the foundation's purposes at the outset can further prove useful in showing that the foundation did not have a significant purpose involving the production of income or the appreciation of property.

including attempting to influence legislation and participating in, or intervening in political campaigns on behalf of or in opposition to a candidate for elective public office.[13] This is an absolute prohibition for PRIs as compared to a private foundation being allowed to seek to influence legislation so long as it does so to an insubstantial degree.

Satisfaction of this test is most often accomplished through the inclusion of commitments on the part of the recipient or representations and warranties on the part of the recipient that the funds will not be used for such purposes. These types of commitments, representations and warranties can easily be included in loan documentation, guarantee documentation, etc. Where the foundation is making an equity investment, the foundation must take care to obtain a representation that the recipient will not engage in such practices or will otherwise segregate the foundation's funds to ensure that such funds are not used to accomplish such prohibited purposes. Such a representation can be handled in a side agreement which can also serve as a useful place to recite and memorialize the foundation's purposes in making the PRI at the outset of the investment, showing from the outset that the purpose is furtherance of the foundation's exempt purposes and not production of income or appreciation of property.

4. Changes in Terms

Terms of investments often change over time. This can be true of program-related investments as well. Because the determination of whether an investment qualifies as a PRI is made at the outset of the investment, care should be given as to whether changes in the terms of the investment will cause the investment to cease to qualify as a PRI. Section 53.4944-3(a)(3)(i) answers this question. That section provides that a PRI does not cease to qualify as such "provided the changes, if any, in the form or terms of the investment are made primarily for exempt purposes and not for any significant purpose involving the production of income or the appreciation of property." Where changes are "made in the form or terms of a program-related investment for the prudent protection of the foundation's investment," such changes will not ordinarily cause the investment to no longer qualify as a PRI. *See id.* Where a change is made other than for the prudent protection of the foundation's investment, the foundation should analyze the need for such change and document that the change is made primarily for exempt purposes and not for any significant purpose involving the production of income or the appreciation of property. The foundation may wish to obtain a written legal opinion regarding such issue.

If a change is determined to be a "critical change in circumstances," the investment will cease to be program-related. *See id.* As an example of a "critical change of circumstances," the regulations point to an investment that is shown to be serving an illegal purpose or the private purpose of the foundation or its managers; however, these are not the only types of "critical changes" and each proposed change must be independently examined. Where the change is considered a "critical change" which causes the investment to cease to be program-related, the foundation and the foundation managers will be subject to the excise tax on jeopardizing investments unless the investment is terminated within thirty (30) days after the date on which

[13] There is a limited exception related to a PRI recipient appearing before or communicating with legislative body with respect to legislation or proposed legislation of direct interest to the recipient where the expense of engaging in such activities would qualify as a business deduction under Section 162 of the Code. However, PRI funds cannot be earmarked for such use.

the foundation (or any of its managers) obtains actual knowledge of the critical change in circumstances.

B. Minimum Distribution Requirement

Because program-related investments count as qualifying distributions in the year made and thus count "against" the five percent (5%) requirement, some foundations view this as a "built-in" five percent (5%) return in addition to what other rate of return the foundation generates from the PRI. In other words, if a private foundation makes a $500,000.00 PRI, that PRI counts as a qualifying distribution in the year made (i.e. it counts as a part of the 5%). Additionally, the PRI reduces the foundation's asset base upon which the five percent (5%) annual distribution requirement is applied by $500,000.00 for each year that the PRI is outstanding. Thus if the foundation is earning two percent (2%) interest on a $500,000.00 loan that is outstanding for five (5) years, the foundation treats the $500,000.00 as a qualifying distribution in the year made and applies the five percent (5%) payout requirement against the foundation's assets after the asset base has been reduced by the principal amount over the remaining term of the loan. In the year in which the loan is repaid, there is a "recapture" which operates as an income modification under Section 4942(f)(2)(c) of the Code, with the principal repayment effectively being added to the minimum distribution requirement of the year in which the recapture is made.

C. Taxable Expenditures

As addressed above, when an investment qualifies as a PRI, it constitutes a qualifying distribution and not a taxable expenditure. However, this is only true where the foundation provides appropriate oversight. Section 4945(h) provides for expenditure responsibility related to grants. Section 4945-5(b)(3) of the Regulations provides for expenditure responsibility related to grants. Section 53.4945-5(b)(4) provides for expenditure responsibility related to PRIs. PRIs made to organizations other than public charities (or exempt operating foundations) including other private foundations, other types of exempt organizations that are not public charities, for profit organizations or foreign organizations require that the foundation comply with the expenditure responsibility requirements under Section 53.4945-5(b)(4) to avoid having the expenditure treated as a taxable expenditure thereby resulting in the imposition of an excise tax.

That section provides that when making a program-related investment, in order to satisfy the expenditure responsibility requirements of Section 4945(h) of the Code, the private foundation must require that each such investment (where expenditure responsibility must be exercised) must be made subject to a written commitment signed by an appropriate officer, director or trustee of the recipient organization specifying the purpose of the investment and including the following agreements on behalf of the organization:

(i) To use all of the funds received from the private foundation (as determined under paragraph (c) of this section) only for the purposes of the investment and to repay any portion not used for such purposes, provided that, with respect to equity investments, such repayment shall be made only to the extent permitted by applicable law concerning distributions to holders of equity interests;

(ii) At least once a year during the existence of the program-related investment, to submit full and complete financial reports of the type ordinarily required by commercial investors under similar circumstances and a statement that it has complied with the terms of the investment;

(iii) To maintain books and records adequate to provide information ordinarily required by commercial investors under similar circumstances and to make such books and records available to the private foundation at reasonable times; and

(iv) Not to use any of the funds—

(a) To carry on propaganda, or otherwise attempt, to influence legislation (within the meaning of Section 4945(d)(1));

(b) To influence the outcome of any specific public election, or to carry on, directly or indirectly, any voter registration drive (within the meaning of Section 4945(d)(2)); or

With respect to any recipient which is a private foundation (as defined in Section 509(a)) to make any grant which does not comply with the requirements of Section 4945(d)(3) or (4).

X. CONCLUSION

Grantmaking foundations have many options in choosing how to support causes for which they were created. By understanding the rules highlighted in this paper, foundations can, if they choose, expand their grantmaking (and PRI) portfolios to include diverse recipients working in areas of concern to the grantmakers.