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Reporter

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Treasury Decision 9746

Applicable Sections

[26 CFR Part 1](#)

[*1]

Payout Requirements for Type III Supporting Organizations That Are Not Functionally Integrated

Core Terms

taxable year, temporary, immediately preceding, non-exempt-use, fair market value, valuation, proposed regulation, net income, notice, register, treasury, rulemaking, aggregate, sentence, revise

Text

AGENCY:

Internal Revenue Service (IRS), Treasury.

ACTION:

Final regulations and removal of temporary regulations.

SUMMARY:

This document contains final regulations regarding the distribution requirement for non-functionally integrated Type III supporting organizations. The regulations reflect changes to the law made by the Pension Protection Act of 2006. The regulations will affect nonfunctionally integrated Type III supporting organizations and their supported organizations.

DATES:

Effective Date: These regulations are effective on December 21, 2015.

FOR FURTHER INFORMATION CONTACT:

Jonathan Carter at (202) 317-4394 or Mike Repass at (202) 317-6176 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

1. Overview

This document contains amendments to the Income Tax Regulations ([26 CFR part 1](#)) regarding organizations described in [section 509 \(a\) \(3\) of the Internal Revenue Code](#) (Code). An organization described in [section 501 \(c\) \(3\)](#) is classified as either a private foundation or a public charity. To be classified as a public charity, an organization must be described in [section 509 \(a\) \(1\)](#), [\(2\)](#), or [\(3\)](#). Organizations described in [section 509 \(a\) \(3\)](#) are known as "supporting [*2] organizations." Supporting organizations achieve their public charity status by supporting one or more organizations described in [section 509 \(a\) \(1\)](#) or [\(2\)](#), which in this context are referred to as "supported organizations."

To be described in [section 509 \(a\) \(3\)](#), an organization must satisfy (1) an organizational test, (2) an operational test, (3) a relationship test, and (4) a disqualified person control test. The organizational and operational tests require that a supporting organization be 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 supported organizations. The relationship test requires a supporting organization to establish one of three types of relationships with one or more supported organizations. Finally, the disqualified person control test requires that a supporting organization not be controlled directly or indirectly by certain disqualified persons.

Each of the described tests is a necessary requirement for an organization to establish that it qualifies as a supporting organization. These final regulations, however, focus primarily on the relationship test for supporting [*3] organizations that are "operated in connection with" their supporting organization(s), otherwise known as "Type III" supporting organizations. Specifically, the final regulations reflect statutory changes enacted by the *Pension Protection Act of 2006, P.L. 109-280 (120 Stat. 780 (2006) (PPA))*. Section 1241 (d) (1) of the PPA directed the Secretary of the Treasury to promulgate regulations under [section 509](#) that establish a new distribution requirement for Type III supporting organizations that are not "functionally integrated" to ensure that a "significant amount" is paid to supported organizations. For this purpose, the term "functionally integrated" means [*4] a Type III supporting organization that is not required under Treasury regulations to make payments to supported organizations because the supporting organization engages in activities that relate to performing the functions of, or carrying out the purposes of, its supported organization(s). These final regulations address the amount that a Type III supporting organization that is not functionally integrated (a non-functionally integrated (NFI) Type III supporting organization) must annually distribute to its supported organization(s).

2. Prior Rulemaking

On August 2, 2007, the Treasury Department and the IRS published in the [Federal Register \(72 FR 42335\)](#) an advance notice of proposed rulemaking (ANPRM) (REG-155929-06) in response to the PPA. The ANPRM described proposed rules to implement the changes made by the PPA to the Type III supporting organization requirements and solicited comments regarding those proposed rules.

On September 24, 2009, the Treasury Department and the IRS published in the [Federal Register \(74 FR 48672\)](#) a notice of proposed rulemaking (the 2009 NPRM) (REG-155929-06). The 2009 NPRM contained proposed regulations (the 2009 proposed regulations) setting forth the [*5] requirements to qualify as a Type III supporting organization under the PPA.

On December 28, 2012, the Treasury Department and the IRS published in the [Federal Register \(77 FR 76382\)](#) a Treasury decision (*TD 9605*) containing final and temporary regulations (the 2012 TD) regarding the requirements to qualify as a Type III supporting organization. Based on the comments received, the 2012 TD made certain changes to the rules proposed in the 2009 NPRM, included in the temporary regulations significant changes to the distribution requirement, and reserved certain topics for further consideration. The 2012 TD was effective and applicable on December 28, 2012. The applicability of the temporary regulations expires on or before December 21, 2015. On December 28, 2012, the Treasury Department and the IRS also published in the [Federal Register \(77 FR 76426\)](#) a notice of proposed rulemaking (the 2012 NPRM) (REG-155929-06) that incorporated the text of the

temporary regulations in the 2012 TD by cross-reference. The IRS received five comments on the 2012 NPRM. The comments were considered in developing these final regulations and are available for public inspection at www.regulations.gov or upon [*6] request. No public hearing was requested.

Under the 2012 TD, an NFI Type III supporting organization must annually distribute to or for the use of one or more supported organizations an amount equaling or exceeding the supporting organization's "distributable amount" for the taxable year. See [§ 1.509 \(a\)-4 \(i\) \(5\) \(ii\)](#). The temporary regulations contained in the 2012 TD defined an NFI Type III supporting organization's "distributable amount" as equal to the greater of (1) 85 percent of the supporting organization's adjusted net income or (2) its "minimum asset amount," in each case for the immediately preceding taxable year. The temporary regulations defined "minimum asset amount" as 3.5 percent of the excess of the aggregate fair market value of the supporting organization's non-exempt-use assets over the acquisition indebtedness with respect to such nonexempt use assets. Additionally, the temporary regulations provided that the determination of the aggregate fair market value of an NFI Type III supporting organization's nonexempt-use assets would be made using the valuation methods generally applicable to private foundations under [§ 53.4942 \(a\)-2 \(c\)](#). The temporary regulations also [*7] provided that, consistent with the private foundation rules, the "non-exempt use" assets of a supporting organization do not include certain investment assets described in [§ 53.4942 \(a\)-2 \(c\) \(2\)](#) or assets used (or held for use) to carry out the exempt purposes of the supported organization(s) (as determined by applying the principles described in [§ 53.4942 \(a\)-2 \(c\) \(3\)](#)).

After consideration of all the comments received in response to the 2012 NPRM, this Treasury decision adopts the 2012 NPRM without change, except to (1) conform the provision regarding the valuation of non-exempt-use assets to the [section 4942](#) regulation provision that it cross-references ([§ 53.4942 \(a\)-2 \(c\) \(2\)](#)), and (2) replace references in [§ 1.509 \(a\)-4](#) to the temporary regulations with references to these final regulations. Thus, other than the change conforming the provision in the final regulations regarding the valuation of non-exempt-use assets to the provision in the [section 4942](#) regulations, these [*8] final regulations are the same as the temporary regulations that have been applicable to Type III supporting organizations since December 28, 2012. Additionally, this Treasury decision removes the temporary regulations.

The Treasury Department and the IRS intend to publish a notice of proposed rulemaking for Type III supporting organizations in the near future. Among other proposals, the new proposed regulations would make one change to these final regulations. Specifically, the new proposed regulations will propose removal of the provision in these final regulations that reduces the distributable amount by the amount of taxes [subtitle A of the Code](#) imposes on a supporting organization during the immediately preceding taxable year. In addition, the new proposed regulations will propose specific rules regarding the requirements for Type III supporting organizations that support governmental supported organizations to be treated as functionally integrated Type III supporting organizations. In addition, the new proposed regulations would provide transition relief beyond the period provided in [Notice 2014-4, 2014-2 IRB 274](#). Supporting organizations may continue to rely on the transitional [*9] rule described in Section 3.01 of [Notice 2014-4](#) until the date that the notice of proposed rulemaking prescribing the new proposed regulations under [§ 1.509 \(a\)-4 \(i\) \(4\) \(iv\)](#) is published in the Federal Register. In the notice of proposed rulemaking publishing the new proposed regulations, the Treasury Department and the IRS will request comments on all proposed changes.

Explanation of Provisions and Summary of Comments

This section discusses the comments received in response to the 2012 NPRM.

1. Distributable Amount

The PPA directed the promulgation of Treasury regulations requiring NFI Type III supporting organizations to make distributions of a percentage of either income or assets to their supported organizations to ensure that a significant amount is paid to those supported organizations. Under the Treasury regulations in effect when PPA was enacted, certain Type III supporting organizations were required to distribute "substantially all" of their income to one or more

publicly supported organizations. For this purpose, "substantially all" had the same meaning of 85 percent or more that it had in [§ 53.4942 \(b\)-1 \(c\)](#) (defining "substantially all" for purposes of the income test for **[*10]** private operating foundations). See [Rev. Rul. 76-208, 1976-1 C.B. 161](#).

The 2009 NPRM had proposed to replace the income-based distribution requirement with an asset-based distribution requirement of 5 percent of the fair market value of an organization's non-exempt-use assets. In response to comments, the 2012 NPRM instead proposed to keep the historic income-based distribution requirement, and proposed to combine it with a reduced percentage-of-assets distribution requirement. Therefore, the temporary and proposed distributable amount for NFI Type III supporting organizations was the greater of 85 percent of adjusted net income or 3.5 percent of the net fair market value of non-exempt-use assets, in each case as determined for the immediately preceding taxable year.

One commenter stated that a distribution requirement based on 3.5 percent of assets is sufficient to achieve the goals of Congress and that the distribution requirement based on 85 percent of income should be removed. The commenter stated that a distribution requirement based on income would prevent a supporting organization from smoothing its returns in high-earning years with low-earning years, and could result in organizations **[*11]** shifting investments away from income-producing assets toward appreciating assets to avoid erosion of an endowment even if that investment strategy results in forgoing higher returns. The commenter also said that having two tests increases administrative costs for a supporting organization by requiring it to make two calculations rather than one to determine its distributable amount, thus reducing the amount distributed for true charitable purposes. Another commenter suggested that organizations that were not previously identified as avoiding the prior substantially-all-of-income distribution requirement should be exempted from the asset-based distribution requirement because it potentially harms entities that are invested primarily in non-liquid assets.

The Treasury Department and the IRS believe that a distribution requirement equal to the greater of 85 percent of adjusted net income or 3.5 percent of the net fair market value of an organization's non-exempt-use assets strikes an appropriate balance. It ensures that NFI Type III supporting organizations distribute significant amounts to their supported organizations, as Congress directed in the PPA. Further, the 85 percent of income **[*12]** test will make it more likely that supported organizations will timely benefit from higher returns received by their supporting organizations. Conversely, in years with lower returns or for organizations that invest in assets that produce largely appreciation rather than income, a 3.5-percent of assets distribution requirement will apply, which is less than the 5-percent of assets distribution requirement that applies to private non-operating foundations. With respect to the suggestion that certain organizations be permitted to comply only with the income-based distribution requirement, the Treasury Department and the IRS believe it would be inequitable and administratively difficult to apply one requirement to some NFI Type III supporting organizations but another requirement to others.

Therefore, the final regulations adopt the annual distributable amount rule of the 2012 NPRM without changes.

2. Income from Distributions from Subsidiary

The 2012 NPRM provided that, for purposes of the calculation of the annual distributable amount, a supporting organization's adjusted net income would be determined using the principles of [section 4942 \(f\)](#) and [§ 53.4942 \(a\)-2 \(d\)](#). These provisions apply **[*13]** the principles of [subtitle A of the Code](#).

One commenter requested that the definition of adjusted net income exclude dividend income resulting from a distribution of long-term capital gain property to a supporting organization by a corporate subsidiary. The commenter noted that without this exclusion, the receipt of distributed property could result in a much higher distribution requirement for that one year, but without producing any liquid assets to satisfy the higher distribution requirement.

The 2012 NPRM provided that adjusted net income be determined by applying the principles that apply in calculating the adjusted net income of private operating foundations under [sections 4942 \(d\)](#) and [4942 \(j\) \(3\)](#) and are generally based on long-standing principles under [subtitle A of the Code](#). The Treasury Department and the IRS believe that the rules for calculating adjusted net income should be applied consistently for all taxpayers and do not

believe that there is a justification for the rules to be altered solely for supporting organizations. Therefore, the final regulations do not adopt this comment.

3. Real Property Valuations

The 2012 NPRM provided that for purposes of determining the distributable [*14] amount for a taxable year, non-exempt-use assets would be valued using the principles generally applicable to private foundations under [§ 53.4942 \(a\)-2 \(c\)](#). One commenter suggested allowing the use of state property tax valuations for purposes of valuing real property under [§ 53.4942 \(a\)-2 \(c\)](#).

[Section 53.4942 \(a\)-2 \(c\)](#) applies the principles of regulations under [section 2031](#), which generally apply for estate tax purposes, to the valuation of real property. [Section 20.2031-1 \(b\)](#) provides that the value at which property is assessed for local tax purposes may be considered only if that value represents the fair market value as of the valuation date. [Section 20.2031-3](#) further provides that if real property is leased or otherwise used in a business, special valuation rules may apply. The Treasury Department and the IRS continue to believe that the same valuation principles that apply to private foundations should apply to NFI Type III supporting organizations. Therefore, the final regulations do not adopt this comment.

Effective Date

These regulations are effective on December 21, 2015.

Statement of Availability of IRS Documents

The [IRS Notice 2014-4](#) cited in this preamble is published in [*15] the Internal Revenue Bulletin and is available from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, or by visiting the IRS Web site at <http://www.irs.gov>.

Special Analyses

Certain IRS regulations, including this one, are exempt from the requirements of [Executive Order 12866](#), as supplemented and reaffirmed by Executive Order 13563. Therefore, a regulatory impact assessment is not required. It has also been determined that [section 553 \(b\) of the Administrative Procedure Act \(5 U.S.C. chapter 5\)](#) does not apply to these regulations, and because these regulations do not impose a collection of information on small entities, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act ([5 U.S.C. chapter 6](#)) is not required. Pursuant to [section 7805 \(f\) of the Code](#), the temporary and proposed regulations preceding these final regulations were submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business, and no comments were received.

Drafting Information

The principal authors of these regulations are Mike Repass and Jonathan Carter, Office of Associate Chief Counsel (Tax-Exempt and [*16] Government Entities). However, other personnel from the Treasury Department and the IRS participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, [26 CFR part 1](#) is amended as follows:

PART 1-INCOME TAXES

Paragraph 1. The authority citation for [part 1](#) continues to read in part as follows:

Authority: [26 U.S.C. 7805](#) * * *

Par. 2. [Section 1.509 \(a\)-4](#) is amended by:

1. Amending the second sentence of [paragraph \(i\) \(4\) \(ii\) \(C\)](#) to remove the language "§ 1.509 (a)-4T (i) (8) (ii)" and adding "paragraph (i) (8) (ii) of this section" in its place.
2. Amending [paragraph \(i\) \(5\) \(ii\) \(A\)](#) to remove the language "§ 1.509 (a)- 4T (i) (5) (ii) (B)" and adding "paragraph (i) (5) (ii) (B) of this section" in its place.
3. Revising [paragraph \(i\) \(5\) \(ii\) \(B\)](#).
4. Revising [paragraph \(i\) \(5\) \(ii\) \(C\)](#).
5. Amending the last sentence of [paragraph \(i\) \(5\) \(ii\) \(D\)](#) to remove the language "§ 1.509 (a)-4T (i) (5) (ii) (B)" and adding "paragraph (i) (5) (ii) (B) of this section" in its place.am
6. Amending the first sentence of [Example 1 of paragraph \(i\) \(5\) \(iii\) \(D\)](#) to remove the language "§ 1.509 (a)-4T (i) (5) (ii) (B)" **[*17]** and adding "paragraph (i) (5) (ii) (B) of this section" in its place.
7. Amending the first sentence of [Example 2 of paragraph \(i\) \(5\) \(iii\) \(D\)](#) to remove the language "§ 1.509 (a)-4T (i) (5) (ii) (B)" and adding "paragraph (i) (5) (ii) (B) of this section" in its place.
8. Amending the third sentence of [Example 3 of paragraph \(i\) \(5\) \(iii\) \(D\)](#) to remove the language "§ 1.509 (a)-4T (i) (5) (ii) (B)" and adding "paragraph (i) (5) (ii) (B) of this section" in its place.
9. Amending the fourth sentence of [Example 4 of paragraph \(i\) \(5\) \(iii\) \(D\)](#) to remove the language "§ 1.509 (a)-4T (i) (5) (ii) (B)" and adding "paragraph (i) (5) (ii) (B) of this section" in its place.
10. Amending [paragraph \(i\) \(6\) \(iv\)](#) to remove the language "§ 1.509 (a)-4T (i) (8) (ii)" and adding "paragraph (i) (8) (ii) of this section" in its place.
11. Amending [paragraph \(i\) \(7\) \(ii\)](#) to remove the language "§ 1.509 (a)-4T (i) (5) (ii) (B)" and adding "paragraph (i) (5) (ii) (B) of this section" in its place.
12. Revising [paragraph \(i\) \(8\)](#).
13. Revising [paragraph \(l\)](#).

The revisions and additions read as follows:

[§ 1.509 \(a\)-4](#) *Supporting organizations.*

* * *

(i) * * *

(5) * * *

(ii) * * *

(B) *Distributable amount.* Except as provided **[*18]** in paragraphs (i) (5) (ii) (D) and (E) of this section, the distributable amount for a taxable year is an amount equal to the greater of 85 percent of the supporting organization's adjusted net income (as determined by applying the principles of section 4942 (f) and [§ 53.4942 \(a\)-2](#)

(d) of this chapter) for the taxable year immediately preceding the taxable year of the required distribution (immediately preceding taxable year) or its minimum asset amount (as defined in paragraph (i) (5) (ii) (C) of this section) for the immediately preceding taxable year, reduced by the amount of taxes imposed on the supporting organization under subtitle A of the Internal Revenue Code during the immediately preceding taxable year.

(C) *Minimum asset amount.* For purposes of this paragraph (i) (5), a supporting organization's minimum asset amount for the immediately preceding taxable year is 3.5 percent of the excess of the aggregate fair market value of all of the supporting organization's non-exempt-use assets (determined under paragraph (i) (8) of this section) in that immediately preceding taxable year over the acquisition indebtedness with respect to such non-exempt-use assets (determined under section 514 (c) (1) [*19] without regard to the taxable year in which the indebtedness was incurred), increased by-

(1) Amounts received or accrued during the immediately preceding taxable year as repayments of amounts which were taken into account by the organization to meet the distribution requirement imposed in this paragraph (i) (5) (ii) for any taxable year;

(2) Amounts received or accrued during the immediately preceding taxable year from the sale or other disposition of property to the extent that the acquisition of such property was taken into account by the organization to meet the distribution requirement imposed in this paragraph (i) (5) (ii) for any taxable year; and

(3) Any amount set aside under paragraph (i) (6) (v) of this section to the extent it is determined during the immediately preceding taxable year that such amount is not necessary for the purposes for which it was set aside and such amount was taken into account by the organization to meet the distribution requirement imposed in this paragraph (i) (5) (ii) for any taxable year.

* * *

(8) *Valuation of non-exempt-use assets.* For purposes of determining its distributable amount for a taxable year, a supporting organization determines its minimum [*20] asset amount, as defined in paragraph (i) (5) (ii) (C) of this section, by determining the aggregate fair market value of all of its non-exempt-use assets in the immediately preceding taxable year. For these purposes, the determination of the aggregate fair market value of all nonexempt-use assets shall be made using the valuation methods described in [§ 53.4942 \(a\)-2 \(c\)](#) of this chapter. The aggregate fair market value of the supporting organization's non-exempt-use assets shall not be reduced by any amount that is set aside under paragraph (i) (6) (v) of this section. For these purposes, the nonexempt use assets of the supporting organization are all assets of the supporting organization other than-

(i) Assets described in [§ 53.4942 \(a\)-2 \(c\) \(2\) \(i\) through \(iv\)](#) of this chapter (with the term "supporting organization" being substituted for "foundation" or "private foundation" and the date "August 17, 2006" being substituted for "December 31, 1969"); and

(ii) Exempt-use assets, which are assets that are used (or held for use) directly in carrying out the exempt purposes of the supporting organization's supported organization(s) (determined by applying the principles described in [§ 53.4942 \(a\)- \[*21\] 2 \(c\) \(3\)](#) of this chapter) by either-

(A) The supporting organization; or

(B) One or more supported organizations, but only if the supporting organization makes the asset available to the supported organization(s) at no cost (or nominal rent) to the supported organization(s).

* * *

(l) *Effective/applicability dates.* Paragraphs (a) (6), (f) (5), (i) (1) through (i) (4) (ii) (B), (i) (4) (ii) (D) through (i) (5) (i), (i) (5) (ii) (E) through (i) (5) (iii) (C), (i) (6) (i) through (iii), (i) (6) (v) through (i) (7) (i), and (i) (9) through (11) of this section are applicable on December 28, 2012. Paragraphs (i) (4) (ii) (C), (i) (5) (ii) (A) through (i) (5) (ii) (D), (i) (5) (iii) (D), (i) (6) (iv), (i) (7) (ii) and (i) (8) of this section are applicable on December 21, 2015. See paragraphs (i) (5) (ii) (B), (i) (5) (ii) (C), and (i) (8) of [§ 1.509 \(a\)-4T](#) contained in [26 CFR part 1](#), revised as of April 1, 2015, for certain rules regarding nonfunctionally integrated Type III supporting organizations effective before December 21, 2015.

* * *

[Section 1.509 \(a\)-4T](#) [Removed].

Par. 3. [Section 1.509 \(a\)-4T](#) is removed.

John Dalrymple

Deputy Commissioner for

Services and Enforcement.

Approved: December 14, [*22] 2015.

Mark J. Mazur

Assistant Secretary of the

Treasury (Tax Policy).

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DEPARTMENT OF THE TREASURY

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