

## Legal Alert: Private Foundations – Grants to Supporting Organizations

From prior memos and presentations you have heard, you are well aware of the challenges facing private foundations that want to make grants to supporting organizations now that the Pension Protection Act of 2006 is effective. Supporting organizations – those section 501(c)(3) organizations that are classified as public charities because of their supporting relationship to other public charities – were a major target of the Senate Finance Committee's wrath in the new legislation.

Yesterday, the Treasury Department provided to the public a 23-page Notice dated December 1, 2006 (Notice 2006-109) that represents an effort by the Treasury to lessen the anxiety about grants by non-operating private foundations to supporting organizations. While a commendable objective, the Treasury's effort falls quite short of achieving the desired result.

The good news about the Notice is that the Treasury has taken the position, effective until it proposes actual Regulations, that a private foundation can rely on either a legal opinion or a certificate from the grantee as to certain elements of the required due diligence in making a grant to a supporting organization. The bad news is that the Notice leaves the burden on the grantor foundation to address other, very difficult issues that are now inherent in making a grant to a supporting organization.

Under the Notice, a private foundation can obtain and rely on a legal opinion, from the foundation's lawyer or the proposed grantee's lawyer, or a certificate from an officer, director or trustee of the proposed grantee as to the type of supporting organization – Type I, II or III – the proposed grantee is and whether, if the proposed grantee is a Type III, it is "functionally integrated" with its supported organization. This is fine, so far as it goes. Unfortunately, the Treasury, under the Notice, also requires that the foundation obtain the organizational documents (typically articles of incorporation or a trust instrument) of the proposed grantee and an analysis of them from the proposed grantee. The Notice does not expressly state what the foundation is supposed to do with the organizational documents or analysis, but it imposes a "good faith" obligation which requires that the foundation review the organizational documents to determine whether the legal opinion or certificate it receives is consistent with them. Thus, the foundation cannot fully rely on the legal opinion or certificate by itself.

Moreover, the Treasury has left on the foundation the burden of determining whether the prohibited "control" exists. The foundation will be at risk if a disqualified person of the foundation directly or indirectly controls the supporting organization or a supported organization of the supporting organization. The Notice does tell us that the definition of "control" that is to be used is the one in the existing private foundation qualifying distribution regulations – whether the person, alone or by aggregating votes or positions of authority with others similarly situated, can cause the organization to make an expenditure or prevent it from doing so. Logically, the Treasury should have placed this burden on the party that has the best access to the facts – the proposed grantee. Instead, the grantor foundation is still obligated to make this determination.

For those foundations that are willing to continue making grants to supporting organizations, the Notice is a modest help. Unfortunately, the Treasury did not find itself able to undo the real objective of the legislators – creating an effective impediment to the making of grants to supporting organizations by private foundations. Because supporting organizations are important tools for philanthropic giving, one can only hope that the Treasury can be persuaded to improve upon the guidelines it has provided in the Notice when it does issue Proposed Regulations (or better yet, that the new Congress can be persuaded that the former Congress made serious mistakes in the enacted legislation).

Attached for those of you who have not seen it is a "[Beta Test](#)" version of a decision tree for making grants to supporting organizations. We prepared this for our presentation to the Annual Meeting of the Southeastern Council of Foundations, and it still carries the "warning label" that it has not been fully tested for accuracy or completeness. It is intended to spur interest on the part of foundations that want to continue to make grants to supporting organizations, so all comments and suggestions for improvement are welcomed. We will be reviewing this in light of the Notice, to determine if any clarifications based on the Notice might be useful.



*If you have any questions about the Notice discussed above or any other aspect of foundation grant-making, please contact one of our exempt organization experts listed below:*

NAME	TELEPHONE	EMAIL
James K. Hasson, Jr.	404.853.8083	<a href="mailto:jim.hasson@sablaw.com">jim.hasson@sablaw.com</a>
Herbert N. Beller	202.383.0120	<a href="mailto:herb.beller@sablaw.com">herb.beller@sablaw.com</a>
Matthew J. Gries	404.853.8619	<a href="mailto:matthew.gries@sablaw.com">matthew.gries@sablaw.com</a>
Robert B. Smith	404.853.8221	<a href="mailto:robert.smith@sablaw.com">robert.smith@sablaw.com</a>
Leslie Y. Park	404.853.8320	<a href="mailto:leslie.park@sablaw.com">leslie.park@sablaw.com</a>
Amanda B. Scott	404.853.8479	<a href="mailto:mandy.scott@sablaw.com">mandy.scott@sablaw.com</a>
Karim H. Hanafy	404.853.8070	<a href="mailto:karim.hanafy@sablaw.com">karim.hanafy@sablaw.com</a>
Daniel M. Buchner	202.383.0869	<a href="mailto:daniel.buchner@sablaw.com">daniel.buchner@sablaw.com</a>

The information included in this memorandum is for your general information only and is not intended as legal advice. You should always consult with your own legal advisor concerning the application of any of the information mentioned above to your particular situation.

**CIRCULAR 230 DISCLOSURE:** To comply with Treasury Department regulations, we inform you that, unless otherwise expressly indicated, any tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties that may be imposed under the Internal Revenue Code or any other applicable tax law, or (ii) promoting, marketing or recommending to another party any transaction, arrangement, or other matter.