



Exempt Organizations Technical Guide

TG 63: Disqualified Persons - IRC Section 4946

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I. Overview

A. Background / History

- (1) The term “disqualified person” as defined in Section 4946 bears importantly on the treatment and status of private foundations in a number of situations, including (but not limited to) the following:
 - a. Whether a transaction between a private foundation and another party is a self-dealing act under Section 4941 depends on whether the other party is a disqualified person with respect to the foundation.
 - b. In determining whether a private foundation has excess business holdings under Section 4943 with respect to a business interest, the holdings of the foundation’s disqualified persons must be considered.
- (2) Identifying disqualified persons is also necessary when analyzing whether an organization qualifies for public charity status or private foundation status. The presence of contributions and patronage from disqualified persons is a factor that must be taken into account in determining whether Section 501(c)(3) organizations meet the public support test under Section 509(a)(2); this is because Section 509(a)(2) employs a test requiring a certain level of support from persons other than disqualified persons. In like manner, the presence of control by disqualified persons must be considered in determining whether an organization (including Section 4947(a)(1) non-exempt trusts) qualifies for public charity status as a supporting organization. Section 509(a)(3) employs a test precluding control of a Section 509(a)(3) organization by certain disqualified persons.

B. Relevant Terms

- (1) **Disqualified Persons:**
 - a. Substantial contributors to the foundation.
 - b. Foundation managers of the foundation.
 - c. An owner of more than 20% of the total combined voting power of a corporation, the profits interests of a partnership or the beneficial interest of a trust or unincorporated enterprise which is a substantial contributor to the foundation.
 - d. Family members of any individual described in paragraphs (a), (b) or (c) above.
 - e. A corporation of which more than 35% of the total combined voting power is owned by persons described in paragraphs (a), (b), (c) or (d) above, a partnership of which more than 35% of the profits interest is owned by persons described in paragraphs (a), (b), (c) or (d) above, a trust, estate or unincorporated enterprise of which more than 35% of the beneficial interest is owned by persons described in paragraphs (a), (b), (c) or (d) above.

- f. Only for purposes of Section 4943, a private foundation that is effectively controlled (directly or indirectly) by the same person or persons who control the private foundation in question, or substantially all of the contributions to which were made (directly or indirectly) by the same person or persons described in paragraphs (a), (b) or (c) above, or members of their families, who made (directly or indirectly) substantially all of the contributions to the private foundation in question.
- g. Only for purposes of Section 4941, government officials (defined below).
See Section 4946(a)(1); Treasury Regulations (Treas. Reg.) 53.4946-1(a)(1).
- (2) **Profits Interest:** The profits interest of a partner shall be equal to his distributive share of income of the partnership, as determined under Section 707(b)(3) and the regulations thereunder as modified by Section 4946(a)(4). See Treas. Reg. 53.4946-1(a)(2).
- (3) **Beneficial Interest (unincorporated enterprise):** The beneficial interest in an unincorporated enterprise (other than a trust or estate) includes any right to receive a portion of distributions from profits of such enterprise, and, if the portion of distributions is not fixed by an agreement among the participants, any right to receive a portion of the assets (if any) upon liquidation of the enterprise, except as a creditor or employee. See Treas. Reg. 53.4946-1(a)(3).
- (4) **Beneficial Interest (trust):** A person's beneficial interest in a trust shall be determined in proportion to the actuarial interest of such person in the trust. See Treas. Reg. 53.4946-1(a)(4).
- (5) **Combined Voting Power:** The term "combined voting power" includes voting power represented by holdings of voting stock, actual or constructive (under Section 4946(a)(3)) but does not include voting rights held only as a director or trustee. See Treas. Reg. 53.4946-1(a)(5).
- (6) **Foundation Manager:** The "foundation manager" means an officer, director, or trustee of a foundation (or a person having powers or responsibilities similar to those of officers, directors, or trustees of the foundation), and with respect to any act or failure to act, any employee of the foundation having final authority or responsibility (either officially or effectively) with respect to such act or failure to act. See Treas. Reg. 53.4946-1(f).
- (7) **Government Official:** Section 4946(c) defines "government official", with respect to an act of self-dealing described in Section 4941, as an individual who, at the time of such act, is:
 - a. An individual who holds an elective public office in the executive or legislative branch of the Government of the United States.
 - b. An individual who holds an office in the executive or judicial branch of the Government of the United States, appointment to which was made by the President.

- c. An individual who holds a position in the executive, legislative or judicial branch of the Government of the United States which is listed in schedule C of rule VI of the Civil Service Rules, or the compensation for which is equal to or greater than the lowest rate of basic pay for the Senior Executive Service under 5 U.S.C. 5382.
 - d. An individual who holds a position under the House of Representatives or the Senate of the United States, as an employee of either of such bodies, who receives gross compensation therefrom at an annual rate of \$15,000 or more.
 - e. The holder of an elective or appointive public office in the executive, legislative, or judicial branch of the government of a state, possession of the United States, or political subdivision or other area of any of the foregoing, or of the District of Columbia, for which the gross compensation is at an annual rate of \$20,000 or more.
 - f. The holder of a position as personal or executive assistant or secretary to any of the foregoing individuals.
 - g. A member of the Internal Revenue Service Oversight Board.
- (8) **Substantial Contributor:** Any person (within the meaning of Section 7701(a)(1)), whether or not exempt from taxation under Section 501(a), who contributed or bequeathed an aggregate amount of more than \$5,000 to the private foundation, if such amount is more than 2% of the total contributions and bequests received by the private foundation before the close of the taxable year of the private foundation in which a contribution or bequest is received by the foundation from such person. In the case of a trust, the term substantial contributor also means the creator of the trust. Such term does not include a governmental unit described in Section 170(c)(1). See Treas. Reg. 1.507-6(a)(1). See below for a discussion of exceptions involving contributions from certain tax-exempt organizations.
- (9) **Family Member:** For purposes of this Section, the members of the family of an individual include only:
- a. His spouse,
 - b. His ancestors,
 - c. His lineal descendants (for such purposes, a legally adopted child of an individual shall be treated as a child of such individual by blood), and
 - d. Spouses of lineal descendants. See Treas. Reg. 53.4946-1(h).

C. Law / Authority

- (1) Section 4946 provides a list of disqualified persons with respect to a private foundation. The list includes:
 - a. Substantial contributors,

- b. Foundation Managers,
- c. Owners of more than a 20% interest in entities that are substantial contributors,
- d. Family members of (a) – (c) above,
- e. Corporations in which persons described in (a) – (d) above hold more than 35% of the total combined voting power,
- f. Partnerships in which persons described in (a) – (d) above hold more than 35% of the profits interest,
- g. Trusts or estates in which persons described in (a) – (d) above hold more than 35% of the beneficial interest,
- h. Only for purposes of Section 4943, certain private foundations effectively controlled by the person or persons in control of the private foundation in question, and
- i. Only for purposes of Section 4941, government officials.

II. Requirements

A. Substantial Contributor

- (1) A person is a disqualified person with respect to a private foundation if he or she is a substantial contributor to the foundation.
- (2) Section 507(d)(2) states that any person who contributed or bequeathed an aggregate amount in excess of \$5,000 to a private foundation is a substantial contributor to the foundation if such amount is more than 2% of the foundation's total contributions and bequests received prior to the end of its taxable year in which the contribution or bequest is received from such person.
- (3) In the case of a trust, the creator is a substantial contributor even though their contributions may not have exceeded the \$5,000 – 2% test.
- (4) The definition of “substantial contributor” does not include a governmental unit described in Section 170(c)(1).

A.1. Rules for Application of the \$5,000 – 2% Test

- (1) A person's aggregate contributions and bequests with respect to an organization shall be determined as of the last day of its taxable year. That amount is compared with the organization's total contributions and bequests received since its creation and up to such date in determining whether such person exceeded the \$5,000 – 2% limit. See Treas. Reg. 1.507-6(b)(1).
- (2) A person is considered a substantial contributor with respect to a foundation from the first day the amounts the foundation receives exceeds the \$5,000 – 2% limit. This is so even though determination of the percentage of total contributions and bequests is not made until the end of the foundation's taxable year. See Treas. Reg. 1.507-6(b)(1).

A.2. Persistence of Substantial Contributor Status

- (1) With one exception, once a person becomes a substantial contributor with respect to a private foundation, they remain a substantial contributor even though they might not be so classified if the determination were made at some later date. The aggregate contributions and bequests of a person to a foundation may become less than 2% of the total received by the foundation by reason of additional contributions and bequests made by others, yet such person remains a substantial contributor with respect to the foundation. See Treas. Reg. 1.507-6(b)(1).

Example: On September 16, 1970, C, an individual, gave \$10,000 to P, a private foundation on a calendar year basis. Throughout its existence, and through December 31, 1970, the close of its taxable year, P had received a total of \$100,000 in contributions and bequests. On January 3, 1971, P received two bequests totaling \$1 million. C is a substantial contributor as of September 16, 1970, and therefore remains one even though C no longer meets the 2% test

on a later date after the end of the taxable year of the foundation in which C first became a substantial contributor. See Treas. Reg. 1.507-6(b)(2) Example 4.

A.3. Cessation of Substantial Contributor Status

- (1) A person's status as a substantial contributor may terminate, however, if certain requirements set forth in Section 507(d)(2)(C) are met. Section 507(d)(2)(C), which is effective for taxable years beginning after December 31, 1984, provides that a substantial contributor will cease to be treated as such if, as of the close of a taxable year of a private foundation, each of the following three requirements are satisfied:
 - a. Neither the substantial contributor nor any "related person" contributed to the foundation at any time within the ten-year period ending at the close of the taxable year,
 - b. Neither the substantial contributor nor any related person was a foundation manager of the private foundation during the ten-year period, and
 - c. The IRS determines that the aggregate contributions made by the substantial contributor and all "related persons" are "insignificant" when compared to the aggregate amount of contributions made to the private foundation by one other person.
- (2) The term "related person" for this purpose means any other person who would be a disqualified person (within the meaning of Section 4946) by reason of that person's relationship to the substantial contributor. If the substantial contributor is a corporation, the term "related person" also includes any officer or director of the corporation.
- (3) For purposes of the IRS's determination, the aggregate contributions must be adjusted for their appreciation while held by the foundation. Congress intended that, as a general rule, contributions from the substantial contributor and all related persons are to be treated as "insignificant" if, in the aggregate, such contributions (adjusted for appreciation) equal less than 1% of the contributions by the other person. See H.R. Rep. No. 98-432, pt. 2, at 1484 (1984); General Explanation of the Revenue Provisions of the Deficit Reduction Act of 1984 prepared by the Staff of the Joint Committee on Taxation (Joint Committee Print, p. 701).
- (4) If a substantial contributor ceases to be treated as such because the requirements of Section 507(d)(2)(C) are met, then any other person who is treated as a disqualified person solely because of that person's relationship (such as a family member) to the substantial contributor also ceases to be treated as a disqualified person.

A.4. Rules of Contributions and Bequests

- (1) Treas. Reg. 1.507-6(c)(1) provides a very broad definition of "contribution." It says that for purposes of Section 507(d)(2), the term shall have the same meaning as it does in Section 170(c). The term thus includes bequests,

legacies, devises and transfers within the meaning of Section 2055 or Section 2106(a)(2).

- (2) It follows that any payment of money or transfer of property without adequate consideration shall be considered a “contribution” for Section 507 purposes, both in determining what are the contributions of a person with respect to a private foundation, and what are the total contributions of the foundation. Where payment is made or property transferred as consideration for admissions, sales of merchandise, performance of services, or furnishing of facilities to the donor, the qualification of all or any part of such payment or transfer as a contribution under Section 170(c) shall determine whether and to what extent such payment or transfer constitutes a “contribution” under Section 507(d)(2).

A.5. Valuation of Contributions and Bequests

- (1) Each contribution or bequest to a private foundation shall be valued at the fair market value of such contribution or bequest when received by the private foundation. See Treas. Reg. 1.507-6(c)(2).
- (2) An individual shall be considered to have made all contributions and bequests made by their spouse during the period of their marriage. See Section 507(d)(2)(B)(iii).

A.6. Special Rules for Certain Organizations Described in Section 501(c)(3)

- (1) A substantial contributor does not include an entity that is described in Section 509(a)(1), (2), or (3) or any organization wholly owned by such an entity. In addition, only for purposes of Section 4941 excise taxes on self-dealing, a substantial contributor does not include any other organization described in Section 501(c)(3) (other than an organization with Section 509(a)(4) status). See Treas. Reg. 1.507-6(a)(2). This exception also applies to organizations that are nonexempt charitable trusts described in Section 4947(a)(1). See Revenue Ruling (Rev. Rul.) 73-455, 1973-2 C.B.187.
- (2) The regulations state that Section 4941 was not intended to restrict the charitable grants of one Section 501(c)(3) organization to another. Thus, if one private foundation makes a large grant to another private foundation, the grant would not prevent the latter foundation from ever making other grants or otherwise dealing with the former foundation. See Treas. Reg. 1.507-6(a)(2).

B. Foundation Manager

- (1) A person is a disqualified person with respect to a private foundation if the person is a foundation manager of the foundation.
- (2) An officer, director or trustee of a private foundation (or a person having similar powers or responsibilities) is a foundation manager with respect to the private foundation. See Section 4946(b)(1) and (2). However, a person who is a foundation manager under Section 4946(b)(2) is not solely for that reason a disqualified person. See Treas. Reg. 53.4946-1(f)(4).

- (3) Under Treas. Reg. 53.4946-1(f)(2), a person is considered an officer of a foundation if the person is specifically so designated under the certificate of incorporation, bylaws, or other constitutive documents of the foundation. An individual is also considered an officer under the regulations if they regularly exercise general authority to make administrative or policy decisions on behalf of the foundation. Persons acting in the capacity of independent contractors are not “officers” and therefore are not considered as foundation managers.
- (4) Rev. Rul. 74-287, 1974-1 C.B. 327, provides that employees of a bank that is designated as the trustee of a private foundation, who have been delegated fiduciary responsibility for the day-to-day administration and distribution of the trust, are disqualified persons, even though they are ultimately responsible to the bank directors and officers for their actions with respect to the trust.

C. Owners of More Than 20% Interest in Entities that are Substantial Contributors to a Foundation

- (1) A person is a disqualified person if they own more than 20% of the total combined voting power of a corporation, the profits interest of a partnership, or the beneficial interest of a trust or unincorporated enterprise, which is a substantial contributor to the foundation in question. See Treas. Reg. 53.4946-1(a)(iii).
- (2) The profits interest of a partner in a partnership shall be equal to the partner’s distributive share of income of the partnership as determined by using the regulations under Section 707(b)(3), modified by Section 4946(a)(4). See Treas. Reg. 53.4946-1(a)(2).
- (3) An individual’s beneficial interest in an unincorporated enterprise (other than a trust or estate) should be stated in terms of their distributive share of profits. If the individual’s share of distributions from profits are not fixed in an agreement among the participants, the individual’s beneficial interest should be stated in terms of the individual’s proportionate share of assets upon dissolution. If there is no agreement fixing the individual’s distributive share of assets upon dissolution, the individual’s beneficial interest should be stated as a fraction resulting from the amount of their investment divided by the total investment of all participants. See Treas. Reg. 53.4946-1(a)(3).
- (4) In the determination of an individual’s beneficial interest in a trust, the individual’s beneficial interest should be stated according to the individual’s actuarial interest in the trust. If the resulting percentage exceeds 20% and the trust is a substantial contributor, the beneficiary of such trust will be a disqualified person. See Treas. Reg. 53.4946-1(a)(4).

C.1. Attribution Rules

- (1) The rules for constructive ownership of corporate stock under Section 267(c) shall apply, except that the “family of an individual” shall be as defined in Section 4946(d). See Treas. Reg. 53.4946-1(d)(1).

- (2) "Voting Power" generally corresponds to the outstanding power of corporate stock. It does not include voting power that is "obtainable but not obtained" such as the potential voting power that would result if a holder of convertible securities were to convert their holdings into voting stock. Of course, any potential voting power converted into outstanding voting power would be considered "voting power" for purposes of Section 4946(a)(1). See Treas. Reg. 53.4946-1(a)(6). The term does not include voting power that a person controls only in a fiduciary capacity (such as a director or trustee). See Treas. Reg. 53.4946-1(a)(5).
- (3) Regarding the ownership of profits or beneficial interests in/of partnerships, trusts and unincorporated enterprises, the rules for constructive ownership under Section 267(c) (other than Section 267(c)(3)) shall apply as though such ownership related to stockholdings. In applying Section 267(c), the "family of an individual" in Section 267(c)(4) shall be as defined in Section 4946(d). See Treas. Reg. 53.4946-1(e)(1).

D. Family Members Within the Meaning of Section 4946(d)

- (1) A person is a disqualified person if they are a member of the family of any individual described in Section 4946(a)(1)(A), (B), or (C).
- (2) Section 4946(d) provides that the family of any individual shall include only their spouse, ancestors, children, grandchildren, great grandchildren and the spouses of children, grandchildren, and great grandchildren. A person's brother, sister, aunt or uncle is not a family member for Section 4946.
- (3) Treas. Reg. 53.4946-1(h) provides that the legally adopted child of an individual is their child within the meaning of Section 4946.
- (4) The surviving spouse of a child, grandchild or great grandchild of a substantial contributor to a private foundation is a member of the family of the substantial contributor and is, thus, a disqualified person with respect to the foundation until remarriage.
- (5) In *Rockefeller v. U.S.*, 572 F. Supp. 9 (E.D. Ark. 1982), aff'd, 718 F.2d 290 (8th Cir. 1983), a taxpayer was the lineal descendant (in other words, a family member) of a deceased substantial contributor. The court ruled that he is a "disqualified person" with respect to the private foundation on account of this connection.

E. Entities (Corporations, Partnerships and Trusts or Estates) in Which a Disqualified Person Holds More Than a 35% Interest

- (1) A corporation is a disqualified person if more than 35% of the total combined voting power of its corporate stock is owned by persons described in Section 4946(a)(1)(A), (B), (C) or (D). See Section 4946(a)(1)(E). Determination of such ownership is made in the same manner as provided for the determination of ownership for persons having more than 20% of the voting power of a corporation. See Treas. Reg. 53.4946-1(a)(2)-(6).

- (2) A partnership is a disqualified person if more than 35% of its profits interest is owned by persons described in Section 4946(a)(1)(A), (B), (C) or (D). See Section 4946(a)(1)(F).
- (3) Similarly, a trust or estate is a disqualified person if more than 35% of the beneficial interest is owned by persons described in Section 4946(a)(1)(A), (B), (C) or (D). See Section 4946(a)(1)(G).

E.1. Attribution Rules

- (1) With respect to stock ownership of a corporation, generally, the rules for constructive ownership of corporate stock under Section 267(c) (other than Section 267(c)(3)) shall apply except that the “family of an individual” shall be as defined in Section 4946(d). See Treas. Reg. 53.4946-1(d)(1)(i).
- (2) Any stockholdings that have been counted once, whether by reason of actual or constructive ownership, shall not be counted a second time. See Treas. Reg. 53.4946-1(d)(1)(ii).

Example: D is a substantial contributor to private foundation Y. D owns 20% of the outstanding stock of corporation P. E, D's wife, owns none of the outstanding stock of P. F, E's father, owns 10% of the outstanding stock of P. E is treated under Section 507(d)(2) as a substantial contributor to Y. E is also treated under Section 267(c)(2) as owning both D's 20% and F's 10% of P, but E is treated as owning nothing for purposes of Section 4946(a)(1)(E) because D's 20% and F's 10% have already been taken into account once (because of their actual ownership of the stock of P) for such purposes. Hence, corporation P is not a disqualified person under Section 4946(a)(1)(E) with respect to private foundation Y because persons described in Section 4946(a)(1) (A), (B), (C) and (D) own only 30% of the stock of P. See Treas. Reg. 53.4946-1(d)(2) Example 1.

Example: I, a substantial contributor to private foundation X, is the son of J. I owns 100% of the stock of corporation R, which in turn owns 18% of the stock of corporation S. J owns 18% of the stock of S. I constructively owns 36% of the stock of S (J's 18% plus R's 18%). Both J's actual holdings and R's actual holdings are counted in determining I's constructive holdings because this does not result in counting either of the holdings more than once for purposes of Section 4946(a)(1)(E). Therefore, S is a disqualified person with respect to private foundation X, since I, a substantial contributor, constructively owns more than 35% of S's stock. See Treas. Reg. 53.4946-1(d)(2) Example 2.

- (3) Regarding the ownership of profits or beneficial interests of partnerships, trusts and unincorporated enterprises generally, the rules for constructive ownership under Section 267(c) (other than Section 267(c)(3)) shall apply as though such ownership related to stockholdings. In the application of such rules, the “family of an individual” in Section 267(c)(4) shall be as defined in Section 4946(d). See Treas. Reg. 53.4946-1(e)(1).

- (4) Any profit or beneficial interest that has been counted once, whether by reason of actual or constructive ownership, shall not be counted a second time. See Treas. Reg. 53.4946-1(e)(1)(ii).

Example: Partnership S is a substantial contributor to private foundation X. Trust T, of which G is sole beneficiary, owns 12% of the profits interest of S. G's husband, H, owns 10% of the profits interest of S. H is a disqualified person with respect to X (under Section 4946(a)(1)(C)) because he is considered to own 22% of the profits interest of S (10% actual ownership, plus G's 12% constructively under Section 267(c)(2)). G is a disqualified person with respect to X (under Section 4946(a)(1)(C)) because she is considered to own 22% of the profits interest of S (12% constructively by reason of her beneficial interest in trust T, plus 10% constructively under Section 267(c)(2) by reason of being a member of the family of H). See Treas. Reg. 53.4946-1(e)(2).

F. Disqualified Person for Purposes of Section 4943

- (1) For purposes of Section 4943 only, a private foundation is a disqualified person with respect to the foundation in question if:
- It is effectively controlled (directly or indirectly) by the same people who control the foundation in question, or
 - Substantially all the contributions to it were made (directly or indirectly) by the people who made (directly or indirectly) substantially all the contributions to the foundation in question and these people are described in Section 4946(a)(1)(A), (B), (C) or (D) with respect to the foundation in question. See Treas. Reg. 53.4946-1(b)(i) and (ii).
- (2) Persons will be considered to have made substantially all of the contributions to a private foundation if they have contributed or bequeathed at least 85% of the total of contributions and bequests received by the foundation. Only persons who have contributed or bequeathed at least 2% of a foundation's total contributions and bequests may be included among the persons considered to have made substantially all of the contributions to the foundation. See Treas. Reg. 53.4946-1(b)(2).

Example: A, a private foundation, has a board of directors made up of X, Y, Z, M, N and O. Foundation B's board of directors is made up of Y, M, N and O. The board of directors in each case has plenary power to determine the way the foundation is operated. For purposes of Section 4943, foundation A is a disqualified person with respect to foundation B, and foundation B, is a disqualified person with respect to foundation A. See Treas. Reg. 53.4946-1(b)(3) Example 1.

Example: Private foundation A has received contributions of \$100,000 throughout its existence: \$35,000 from X, \$51,000 from Y (who is X's father), and \$14,000 from Z (an unrelated person). Private foundation B has received \$100,000 in contributions during its existence: \$50,000 from X and \$50,000 from W, X's wife. For purposes of Section 4943, private foundation A is a

disqualified person with respect to private foundation B, and private foundation B is a disqualified person with respect to private foundation A. See Treas. Reg. 53.4946-1(b)(3) Example 2.

G. Government Officials

- (1) Government officials may be a disqualified person with respect to a private foundation, but only for the self-dealing rules in Section 4941 (not for purposes of other private foundation restrictions). The term government official means an individual who at the time of the act of self-dealing holds any of the following offices or positions:
 - a. Holds an elective public office in the executive or legislative branch of the U.S. Government,
 - b. Is appointed by the President to an office in the executive or judicial branch of the U.S. Government,
 - c. Holds a position in the executive, legislative or judicial branch of the U.S. Government that is listed in schedule C of rule VI of the Civil Service Rules, or for which compensation is equal to or greater than the lowest rate of basic pay for the Senior Executive Service under Section 5382 of Title 5 of the United States Code,
 - d. Holds a position under the U.S. House of Representatives or U.S. Senate as an employee with gross annual compensation at a rate of \$15,000 or more,
 - e. Holds an elective or appointive public office in the executive, legislative or judicial branch of a State, possession of the United States, any political subdivision of such State or possession or the District of Columbia and whose gross annual compensation is at a rate of \$20,000 (P.L. 99-514 changed the rate of compensation from \$15,000 to \$20,000 for compensation received after December 31, 1985) or more,
 - f. Holds a position as personal or executive assistant or secretary to any of the above described government officials, or
 - g. A member of the IRS Oversight Board per Section 4946(c)(7). See Section 4946(c); Treas. Reg. 53.4946-1(g)(1).

G.1. Meaning of Public Office

- (1) "Public office" for purposes of Section 4946(c)(5) must be distinguished from mere public employment. Not every position in the employ of a state, a governmental subdivision thereof, a U.S. possession, or the District of Columbia, is a "public office." Under Treas. Reg. 53.4946-1(g)(2), what constitutes public office, as distinguished from mere public employment, depends on the facts and circumstances of the case. However, the essential element is whether a significant part of the employee's activities consist of the independent performance of policymaking functions. Another factor is whether the position in question is created and its powers defined by the Congress, a

state constitution, a state legislature or by a municipality or other governing body pursuant to authority conferred by the Congress, state constitution or state legislature.

- (2) An example of public employees who generally are not public officials would be the members of municipal police and fire departments. However, the heads of those departments who have the independent performance of policymaking functions as a significant part of their activities would be public officials. Other examples of public employment not involving policymaking within the meaning of the regulations would be the professors of a state educational institution and the physicians employed at a state hospital. See Treas. Reg. 53.4946-1(g)(2)(ii).

III. Other Considerations

- (1) Taxes on excess benefit transactions as defined in Section 4958, includes a definition of disqualified persons in Section 4958(f).

Note: The definition of disqualified persons for excess benefit transactions applicable to certain tax-exempt organizations described in Section 4958(e) is different from the definition of disqualified persons applicable to private foundations as defined in Section 4946.

- (2) To understand the difference, the term disqualified person as applied to excess benefit transactions and as defined in Section 4958(f) means, with respect to any transaction:
- a. Any person who was, at any time during the 5-year period ending on the date of such transaction, in a position to exercise substantial influence over the affairs of the organization,
 - b. A member of the family of an individual described in subparagraph (a),
 - c. A 35% controlled entity,
 - d. Any person who is described in subparagraph (a), (b) or (c) with respect to an organization described in Section 509(a)(3) and organized and operated exclusively for the benefit of, to perform the functions of, or to carry out the purposes of the applicable tax-exempt organization,
 - e. Which involves a donor advised fund (as defined in Section 4966(d)(2)), any person who is described in Section 4958(f)(7) with respect to such donor advised fund, and
 - f. Which involves a sponsoring organization (as defined in Section 4966(d)(1)), any person who is described in Section 4958(f)(8) with respect to such sponsoring organization.

Note: Section 4958(f)(4) family members includes brothers and sisters (by whole or half-blood) of the individual and their spouses. Treas. Reg. 53.4958-3(b)(1)(i)-(viii) defines family member for purposes of Section 4958 as limited to the person's spouse, siblings (by whole or half-blood), spouses of siblings (by whole or half-blood), ancestors, children, grandchildren, great grandchildren, and spouses of children, grandchildren, and great grandchildren.

- (3) For purposes of Section 4958 excess benefit transactions, the term "applicable tax-exempt organization" shall not include a private foundation, as defined in Section 509(a). See Section 4958(e).

IV. Examination Techniques

- (1) Determine relationships to the private foundation before undertaking a Chapter 42 analysis to determine which persons are the disqualified persons of the private foundation being examined. This involves identifying the contributors to the private foundation.
- (2) Look closely at transactions between the organization and private individuals, corporations, partnerships and other potential disqualified persons. Transactions could include:
 - a. Sale or exchange, or leasing of property,
 - b. Lending of money or other extension of credit,
 - c. Furnishing of goods, services or facilities,
 - d. Payment of compensation (or payment or reimbursement of expenses), and
 - e. Transfer to, or use by or for the benefit of, the income or assets of an organization.
- (3) There are situations in which transactions with disqualified persons may be allowed. The Code and Regulations provide many exceptions and should be researched when issues are identified.