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August 17, 2009

Hon. Douglas Shulman
Commissioner
Internal Revenue Service
1111 Constitution Avenue, N.W.
Washington, DC 20224

Re: Comments Concerning Temporary and Proposed Regulations Implementing the Redesigned Form 990 for Tax-Exempt Organizations and Revising the Public Support Test Under Section 170(b)(1)(A)(vi) and 509(a)(2)

Dear Commissioner Shulman:

Enclosed are comments concerning temporary and proposed regulations implementing the redesigned Form 990 and revising the public support test. These comments represent the views of the American Bar Association Section of Taxation. They have not been approved by the Board of Governors or the House of Delegates of the American Bar Association, and should not be construed as representing the policy of the American Bar Association.

Sincerely,

Stuart M. Lewis
Chair, Section of Taxation

Enclosure

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AMERICAN BAR ASSOCIATION
SECTION OF TAXATION

COMMENTS CONCERNING TEMPORARY AND PROPOSED
REGULATIONS IMPLEMENTING THE REDESIGNED FORM 990 FOR
TAX-EXEMPT ORGANIZATIONS AND REVISING THE PUBLIC
SUPPORT TEST UNDER SECTIONS 170(b)(1)(A)(vi) AND 509(a)(2)

These comments (“Comments”) are submitted on behalf of the American Bar Association Section of Taxation and have not been approved by the House of Delegates or Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the position of the American Bar Association.

Principal responsibility for preparing these Comments was exercised by Susan D. Brown. Substantive contributions were made by Michael A. Clark, Edward H. Hein, and Celia Roady. The Comments were reviewed by Michael A. Clark, Immediate Past Chair of the Section’s Exempt Organization Committee (the “Committee”), LaVerne Woods of the Section’s Committee on Government Submissions and Andrew J. Dubroff, Council Director for the Committee.

Although the members of the Section of Taxation who participated in preparing these Comments have clients who might be affected by the federal income tax principles addressed by these Comments, no such member or the firm or organization to which such member belongs has been engaged by a client to make a government submission with respect to, or otherwise to influence the development or outcome of, the specific subject matter of these Comments.

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Date: August 17, 2009

EXECUTIVE SUMMARY

On September 9, 2008, the Department of Treasury (“Treasury”) issued temporary regulations (“Temporary Regulations”) necessary to implement the redesigned Form 990, “Return of Organization Exempt from Income Tax.”¹ At the same time, Treasury issued a notice of proposed rulemaking (“Proposed Regulations”) that incorporates by reference the text of the Temporary Regulations and requests public comments.² The Temporary Regulations amend Treasury Regulation sections 1.170A-9, 1.507-2, and 1.509(a)-3 to: change to five years the public support computation period for organizations described in sections 170(b)(1)(A)(vi)³ and 509(a)(2), consistent with the revised Schedule A to the redesigned Form 990; eliminate the advance ruling process; eliminate the special rules relating to material changes in sources of support; and require organizations to report support using the organization’s overall method of accounting. All tax-exempt organizations required under section 6033 to file annual information returns are affected by the Temporary Regulations. The Temporary Regulations are effective on September 9, 2008, and apply to taxable years beginning on or after January 1, 2008.

We commend Treasury and the Internal Revenue Service (the “Service”) for seeking to simplify the process for new publicly supported organizations by eliminating the advance ruling period and instead relying on information reported on Form 990 to determine whether an organization qualifies as publicly supported after its first five years of existence. As discussed below, however, we believe that some of the proposed changes may have unintended and undesirable consequences for organizations seeking to qualify as publicly supported. Our recommendations are as follows:

1. Elimination of Advance Ruling Period.

- To assist public charities in applying the “10 percent plus facts and circumstances test” in Temporary Regulation section 1.170A-9T(f)(3) following the elimination of the advance ruling period, the Service should add additional examples illustrating the application of this test or issue a revenue ruling providing examples of the application of the test.
- The Temporary Regulations, when finalized, should clarify the process for requesting an updated ruling or determination letter as to public charity status under sections 1.170A-9T(f)(5) and 1.509(a)-3T(e). For example, it would be helpful to clarify that such a request will not be treated as a request for a private letter ruling for which organizations must pay a filing fee. In addition,

¹ T.D. 9423, 2008-43 I.R.B. 966. The Section previously submitted comments on the instructions for the redesigned Form 990 on July 16, 2008. Those comments are available at: <http://www.abanet.org/tax/pubpolicy/2008/080716sectioncommentsconcerningtheinstructionsfortheredesignedform990.pdf>.

² REG-142333-07, 73 Fed. Reg. 52,218 (Sept. 8, 2008), 2008-43 I.R.B. 1008. The language of the Proposed Regulations and the Temporary Regulations is identical. For ease of reference, these Comments refer to provisions of the Temporary Regulations.

³ References to a “section” are to a section of the Internal Revenue Code of 1986, as amended (the “Code”), unless otherwise indicated, and references to Regulations are to the Treasury Regulations promulgated thereunder.

consistent with former Regulation sections 1.170A-9(e)(5)(vi)(a) and 1.509(a)-3(e)(4)(ii), the Temporary Regulations, when finalized, should clarify that in appropriate cases an organization may seek reclassification as a public charity from its inception and a refund of any Chapter 42 taxes imposed.

- Given that a new organization that fails to qualify as publicly supported after its first five years of existence will not be treated as a private foundation for any purpose during its first five years, the Temporary Regulations, when finalized, should clarify whether, for purposes of Chapter 42, the identity of substantial contributors to the organization will be determined by taking into account contributions received while the organization was a public charity, or only contributions received after the date the organization is reclassified as a private foundation.
2. **Change to a Five Year Computation Period for Determining “Public Support.”** To avoid unfair results, the Temporary Regulations, when finalized, should treat organizations that fail the public support test for two consecutive years as private foundations as of the beginning of the second test year only for purposes of section 507 (termination of private foundation status) and section 4940 (excise tax on net investment income). Consistent with the former Regulations, such an organization should be treated as a private foundation for all purposes as of the beginning of its next taxable year.
 3. **Donor reliance.** The Temporary Regulations, when finalized, should incorporate a safe harbor under which a grantor or contributor will not be considered responsible for, or aware of, an act or failure to act that resulted in a loss of public charity status solely by reason of having made a grant or a contribution or the amount thereof. At a minimum, the Temporary Regulations, when finalized, should incorporate the standards set forth in Rev. Proc. 1989-23 and Rev. Proc. 1981-6.
 4. **Change to Require Reporting of Support Based on Organization’s Overall Method of Accounting.** The transition rule in Temporary Regulation sections 1.170A-9T(f)(14)(iii) and 1.509(a)-3T(n)(iii) should be extended for one or two additional years and revised to expressly permit organizations to use the cash method of accounting for purposes of applying the transition rule.
 5. **Effect on Foreign Equivalency Determinations.** Because of the central importance of Rev. Proc. 1992-94 to international grant making by private foundations, the Service should issue an announcement notifying private foundations that they now must obtain five years of financial data from prospective foreign grantees.
 6. **Observations Regarding Effect of Temporary Regulations on “Tipping” Problem.** The Temporary Regulations, when finalized, should expand the unusual grant rules in sections 1.170A-9T(f)(6) and 1.509(a)-3T(c)(3) to add a

new factor giving favorable consideration to certain types of multi-year private foundation grants. In the alternative, the Temporary Regulations, when finalized, should permit public charities to elect, for purposes of the public support test, to accrue multi-year grants ratably over the period to which they relate.

7. **Private Foundation Terminations.** The Temporary Regulations, when finalized, should simplify the process for terminating private foundation status by operation as a public charity by eliminating the requirement in sections 1.507-2T(b)(4) and 1.507-2T(c) that an organization file certain information with the Service within 90 days after completing the 60 month termination period. As in the case of the elimination of Form 8734, we believe the information reported on the recently revised Form 990, Schedule A, will enable the Service to determine whether an organization has successfully terminated its private foundation status, without need for the special 90-day filing. At a minimum, such a filing should be unnecessary in the case of an organization that received an advance ruling from the Service that it can reasonably be expected to meet the requirements of section 509(a)(3), because such status does not depend on the sources of the organization's financial support.

DISCUSSION

1. Elimination of Advance Ruling Period

Under the Temporary Regulations, new organizations will no longer receive a five year advance ruling and will not have to file Form 8734, "Support Schedule for Advance Ruling Period." If on the basis of its Form 1023, "Application for Recognition of Exemption under Section 501(c)(3) of the Internal Revenue Code," a new organization can reasonably be expected to meet a public support test during its first five taxable years, the Service will issue a definitive public charity ruling. Organizations that have an existing advance ruling expiring after June 9, 2008 also will be considered to have a definitive ruling and will not need to file Form 8734.⁴ The Service will use information reported annually on Form 990, Schedule A, to monitor and verify compliance with the public support tests.

After the end of its first five taxable years, a new organization with a definitive public charity ruling will be treated as a public charity if it meets the public support test based on support received either during its first five taxable years or during its second through sixth taxable years.⁵ Thus, it must fail the public support test for both its fifth and sixth taxable years to be reclassified as a private foundation. An organization that fails the test for its fifth and sixth taxable years will be reclassified as a private foundation as of the beginning of the organization's sixth taxable year. Under the Temporary Regulations, such an organization will not owe any section 4940 tax or section 507 termination tax with respect to its first five taxable years.

As described below, the elimination of the advance ruling period and the "second look" offered by Form 8734 creates uncertainty for at least two types of organizations: (1) new organizations with less than one-third public support and (2) private foundations seeking reclassification as public charities. Previously, new organizations with less than one-third public support could request a definitive public charity ruling on the basis of "10% plus facts and circumstances" at the time they filed Form 8734. As long as the facts and circumstances presented to the Service remained unchanged, those organizations had some assurance that the Service would not seek to reclassify them as private foundations. Similarly, under the former Regulation sections 1.170A-9(e)(5)(vi)(a) and 1.509(a)-3(e)(4)(ii), an organization that originally and mistakenly applied (on Form 1023) for recognition of exemption as a private foundation but consistently met the public support test could file Form 8734 to seek reclassification from its inception as a public charity and a refund of any Chapter 42 taxes previously imposed. Although Temporary Regulation sections 1.170A-9T(f)(5) and 1.509(a)-3T(e) contemplate that an organization may seek a ruling or determination letter regarding public charity status at any time, neither provision describes the process for requesting such a ruling or determination letter.

To provide more guidance for organizations that do not qualify as publicly supported under the one-third public support test after their first five years of existence,

⁴ Temp. Reg. §§ 1.170A-9T(f)(14), 1.509(a)-3T(n).

⁵ Temp. Reg. §§ 1.170A-9T(f)(4)(v), 1.509(a)-3T(d).

we recommend revising Temporary Regulation section 1.170A-9T(f)(4) to add a few helpful examples illustrating the application of the “10 percent plus facts and circumstances” test or issuing a revenue ruling providing examples of the application of that test. In addition, we recommend that the Service clarify the process for obtaining an updated ruling or determination letter as to publicly supported status under Temporary Regulation sections 1.170A-9T(f)(5) and 1.509(a)-3T(e) now that Form 8734 has been eliminated. In particular, it would be helpful to clarify that organizations seeking such a determination will not be required to submit a formal private letter ruling request and pay a substantial user fee. In addition, we recommend revising Temporary Regulation sections 1.170A-9T(f)(5) and 1.509(a)-3T(e) to clarify (consistent with the former Regulation sections 1.170A-9(e)(5)(vi)(a) and 1.509(a)-3(e)(4)(ii)) that a private foundation may seek reclassification as a public charity from its inception and a refund of any Chapter 42 taxes imposed.

Finally, we recommend clarifying some practical aspects of rules that apply under the Temporary Regulations if a new organization is reclassified as a private foundation at the beginning of its sixth taxable year. Under former Regulation sections 1.170A-9(e)(5)(iii) and 1.509(a)-3(e)(2), an organization that was determined to be a private foundation at the end of the advance ruling period was subject to section 4940 and section 507 from its inception. Under the Temporary Regulations, however, a new organization that receives a determination that it is a public charity is treated for all purposes as a public charity during its first five years, regardless of whether it later is reclassified as a private foundation.⁶ This change may create confusion about how to determine the identity of “substantial contributors” to an organization that is reclassified as a private foundation beginning in its sixth year. Is a person who made a \$5000 contribution to the organization in its first year of existence, but made no additional contributions, a substantial contributor for purposes of Chapter 42? Or is substantial contributor status determined based on contributions made on or after the date the organization is reclassified as a private foundation? The lack of a clear rule creates a potential trap for the unwary. Accordingly, we recommend amending Temporary Regulation sections 1.170A-9T(f)(5) and 1.509(a)-3T(e) to address how substantial contributors (within the meaning of sections 4946(a)(2) and 507(d)(2)) to an organization are determined if the organization is newly classified as a private foundation beginning in its sixth (or a later) year.

2. Change to a Five Year Computation Period for Determining “Public Support”

The Temporary Regulations provide that organizations must calculate their public support over a five year period including the current and four preceding years, rather than over a four year period including only the four preceding years.⁷ As under the former Regulations, the organization must fail a public support test for two years in a row to be

⁶ Temp. Reg. §§ 1.170A-9T(f)(4)(v), 1.509(a)-3T(d).

⁷ Temp. Reg. §§ 1.170A-9T(f)(4), 1.509(a)-3T(c).

reclassified as a private foundation.⁸ However, reclassification will be effective as of the beginning of the second test year. Because organizations facing reclassification as a private foundation will no longer have advance notice of their change in status, the preamble to the Temporary Regulations provides that the Service has authority to waive imposition of private foundation excise taxes for all or part of the first year in which an organization is reclassified as a private foundation in cases where such imposition would lead to unfair or inequitable results.⁹ The preamble requests comments on the specific circumstances that may warrant relief.

Under a “transition rule,” an organization that fails to meet the public support test for its first tax year beginning on or after January 1, 2008 will continue to qualify as a public charity for tax year 2008 if it satisfied the public support test for tax year 2007 under the former Regulations.¹⁰ As discussed above, an organization normally has to fail the public charity test for two years in a row to be reclassified as a private foundation. Although this rule is referred to as a “transition rule,” it appears designed simply to bridge the gap between the former Regulations (which used a four year base period) and the Temporary Regulations (which use a five year base period) and not to offer an additional year of protection beyond what is normally available.¹¹

The inclusion of the current tax year in the public support calculation raises concern that charities may be retroactively classified as private foundations. Under the Temporary Regulations, unlike the former Regulations, the base period includes the current tax year. For example, assume that Charity X failed the public support test for 2008 due to a large drop off in support in the fourth quarter of 2008. Depending on the actual support it receives during 2009 (which cannot be known with certainty until the end of 2009) Charity X may be reclassified as a private foundation retroactive to the beginning of 2009. Unfortunately, one fact highlighted by the current economic downturn is that organizations cannot necessarily predict the amount of support that will be received from year to year. The rule in the Temporary Regulations may create operational problems if an organization engages in transactions during the current year that are permitted for a public charity but would be prohibited for a private foundation (such as a fair market rental of property between the organization and one of its Board members). The risk is that the support that the organization expects to receive in the current year will not materialize and, as a result, the organization (and potentially its disqualified persons) will be subject to excise taxes under Chapter 42. As noted above,

⁸ Under the Temporary Regulations, as in the former Regulations, an organization that fails the one-third public support test may continue to qualify as a public charity if it meets the 10% plus facts and circumstances test. Temp. Reg. § 1.170A-9T(f)(4)(iii).

⁹ The preamble to the Temporary Regulations (2008-43 I.R.B. 966, 969) describes a procedure by which organizations may apply for relief from the imposition of private foundation excise taxes, penalties against them, or both, but does not indicate whether the same relief would be available for their disqualified persons.

¹⁰ Temp. Reg. §§ 1.170A-9T(f)(14)(iii), 1.509(a)-3T(n)(iii).

¹¹ It is unclear whether this provision is intended to permit organizations also to use the old cash basis methodology. The transition rule refers to Treasury Regulation section 1.170A-9(e)(4)(i) and (ii) as previously in effect. Those subparagraphs refer to the old four year computation period, but not the method of accounting.

the preamble to the Temporary Regulation acknowledges this potential trap for the unwary.

In all likelihood, an organization will discover for the first time that it has failed the public support test for two years in a row when the organization is preparing its Form 990 after the close of the second test year. The situation is analogous to the situation that arose under the former Regulations when an organization reached the end of its advance ruling period. Under the former Regulations, an organization that failed to qualify as publicly supported nonetheless was treated as a public charity for all purposes (other than sections 507 and 4940) until 90 days after the end of its advance ruling period or, if a timely Form 8734 was submitted, until its status was finally determined by the Service.¹² That rule avoided the prospect of retroactive application of other Chapter 42 taxes and the need for organizations to seek discretionary relief from the Service

To avoid unfair results while minimizing the burden on the Service of processing requests for relief from Chapter 42 taxes, we recommend revising the Temporary Regulations to treat organizations as private foundations as of the beginning of the second test year only for purposes of section 507 (termination of private foundation status) and section 4940 (excise tax on net investment income). Consistent with the former Regulations, an organization would be subject to the other provisions of Chapter 42 as of the beginning of its next tax year. Thus, if an organization failed the public support test for 2008 and 2009, the organization would be subject to sections 4940 and 507 beginning in 2009¹³ and to all Chapter 42 provisions beginning in 2010.

3. Donor reliance

The Temporary Regulations, like the former Regulations, provide that grantors and contributors can rely on an organization's public charity status until notice of a change in status is provided to the public (such as by publication in the Internal Revenue Bulletin) unless the grantor or contributor was "responsible for, or aware of, the act or failure to act" that resulted in the organization's loss of public charity status.¹⁴ Revenue procedures issued under the former Regulations provided helpful guidance to grantors. Rev. Proc. 1981-6¹⁵ sets forth guidelines under which a grantor or contributor will not be considered "responsible for" a substantial and material change in an organization's support under the former Regulations. Because this revenue procedure proved cumbersome to apply in practice, the Service later issued Rev. Proc. 1989-23,¹⁶ which sets forth a simpler and more straightforward test for determining when a private foundation will not be deemed "responsible for, or aware of" the change in support that causes a grantee to lose its public charity status. In addition, Rev. Proc. 1989-23 provides that all grantors and contributors may continue to rely on Rev. Proc. 1981-6. The

¹² Temp. Reg. §§ 1.170A-9(e)(5)(iii), 1.509(a)-3(e)(2).

¹³ The Form 990 instructions could direct the organization to complete those portions of Form 990-PF required to determine the amount of the section 4940 tax due for that year on the organization's net investment income.

¹⁴ Temp. Reg. §§ 1.170A-9T(f)(5), 1.509(a)-3T(e)(2).

¹⁵ 1981-1 C.B. 620.

¹⁶ 1989-1 C.B. 844.

Temporary Regulations do not incorporate these standards, even though Rev. Proc. 1989-23 explicitly contemplates that its provisions will be incorporated in revised Regulations.

We recommend revising Temporary Regulation sections 1.170A-9T(f)(5) and 1.509(a)-3T(e)(2) to incorporate safe harbor guidelines for grantors and contributors. Consistent with the goal of simplifying the rules regarding public support, we recommend the adoption of a straightforward rule that a grantor or contributor will not be considered responsible for, or aware of, an act or failure to act that resulted in a loss of public charity status solely by reason of having made a grant or a contribution or the amount thereof. At a minimum, we recommend that the Temporary Regulations be revised to incorporate standards set forth in Rev. Proc. 1989-23 and Rev. Proc. 1981-6.

4. Change to Require Reporting of Support Based on Organization's Overall Method of Accounting

The Temporary Regulations provide that organizations must calculate their public support using their normal method of accounting rather than the cash method.¹⁷ Like the other provisions of the Temporary Regulations, this change is effective for years beginning on or after January 1, 2008. Because public support is determined over a five year period consisting of the current year and the prior four years, this change requires accrual method organizations to recalculate and report their public support for prior years 2004 through 2007 on the accrual method when they file their 2008 Forms 990. This change can be expected to affect the ability of some small and mid-sized charitable organizations to qualify as publicly supported, particularly in the short term.

Use of the accrual method is not limited to large and well-established organizations. Many nonprofit organizations that receive grant funding from foundations and government agencies use the accrual method of accounting for the simple reason that foundations and government agencies often require their grantees to submit audited financial statements. Because the cash method of accounting is not consistent with generally accepted accounting principles, auditors will not issue an unqualified opinion to organizations that use the cash method.

The requirement that accrual basis charities must calculate their public support on the accrual rather than cash basis may have an adverse effect on the ability of some charities to qualify as publicly supported, particularly small and mid-sized organizations that received large multi-year private foundation grants during their base period.¹⁸ Under the cash method, multi-year grants are counted as public support as the funds are received

¹⁷ Temp. Reg. §§ 1.170A-9T(f)(13), 1.509(a)-3T(k).

¹⁸ Under the accrual method, the present value of a large multi-year grant is counted as public support in the year the grant commitment is made. For example, assume that in tax year 2009 an organization receives a ten-year grant commitment having a present value of \$5 million. The entire \$5 million grant will be reflected in the organization's support for tax year 2009 and will continue to affect the organization's public support calculation in tax years 2009 through 2013. This large multi-year grant will stop affecting the organization's public support calculation only beginning in 2014, when the tax year 2009 drops out of the base period. Thus, calculating public support using the accrual method could make it hard for organizations to qualify as publicly supported during the first five years after receiving a large multi-year commitment.

rather than in the year in which the grant commitment is made. This allows organizations and funders to plan the timing of grant installments to minimize any adverse effect on continued public charity status. Because the Temporary Regulations require organizations to convert to the accrual method retroactively for base period years prior to 2008, there may be an adverse effect on some charities that had planned carefully to maintain their public charity status under the former rules. It is possible that some of these public charities may be forced into private foundation status with an insufficient opportunity to adjust their fundraising strategies.

To address the problem of organizations that would fail the public support test on the accrual method but meet it using the cash method, we recommend extending the transition rule in Temporary Regulation sections 1.170A-9T(f)(14)(iii) and 1.509(a)-3T(n)(iii) for one or two additional years and expressly permitting organizations to continue to use the cash method for purposes of applying the transition rule. An expanded transition rule would let these organizations make a smooth transition from using the cash to accrual method by giving them an opportunity to plan their future fundraising strategies in light of the change in accounting methodology.

5. Effect on Foreign Equivalency Determinations

Private foundations involved in international grant making have long relied upon the simplified procedure set forth in Rev. Proc. 1992-94¹⁹ as the basis for making foreign public charity equivalency determinations. Currently, this revenue procedure provides that if a grantee's status under section 509 depends on its financial support, the grantor must obtain from the grantee financial data for the grantee's four most recently completed taxable years. Presumably private foundations now need to apply the provisions of the Temporary Regulations when making foreign equivalency determinations. Because of the central importance of this revenue procedure to international grant making, we recommend that the Service issue an announcement notifying private foundations that they now must obtain five years of financial data and clarifying the degree to which a private foundation may rely on information provided by the grantee for prior years.²⁰

6. Observations Regarding Effect of Temporary Regulations on "Tipping" Problem

Private foundations are concerned about making grants that will cause the grantee to lose public charity status (the so-called "tipping" problem) for two reasons, the second

¹⁹ 1992-2 C.B. 507.

²⁰ Section 4.05 of Rev. Proc. 1992-94 provides that a grantee affidavit does not need to include financial data from the grantee's latest accounting year. Because the five-year computation period in the Temporary Regulations includes the current year, that may no longer be the case. However, as discussed in Section 2 of these Comments, we recommend revising the Temporary Regulations to provide that an organization that fails to meet a public support test for two consecutive years will be reclassified as a private foundation as of the beginning of its next taxable year. If our recommendation is adopted, then a private foundation grantor that receives financial data from a foreign organization sufficient to demonstrate that the foreign organization satisfies the public support test for the five-year period 2004-2008 could continue to rely on that data for 2009 and 2010.

of which is sometimes overlooked. The first reason is obvious – foundations want to make sure they are in compliance with section 4945, which requires them to exercise expenditure responsibility on grants to organizations that are not public charities. The issuance of Rev. Proc. 1989-23 provided important protection for foundations and largely addressed this concern. As previously noted, we recommend revising the Temporary Regulations to incorporate similar protection for grantors and contributors.²¹

The second – and probably most important – reason foundations care about the tipping problem is out of concern for their grantees. Many public charities, understandably eager to receive large private foundation grants that are needed immediately for mission purposes, are quick to overlook the potential that such grants may jeopardize their continued public charity status in the future. Private foundations tend to have more of a long-term perspective and recognize the importance of continued public charity status to the grantees’ future fundraising abilities and ultimate mission success.

Under the former Regulations, private foundations were able to make substantial multi-year grant commitments to grantees without adversely affecting their public charity status by extending the payment over a period of years. Grantees could have the security of future funding commitments without endangering their future public charity status. This may not be possible under the Temporary Regulations in the case of grantees that use the accrual method of accounting.²² The effect may be a change in the grant-making practices of private foundations, at least in the context of substantial multi-year grant commitments to smaller organizations that are on the accrual method of accounting.

By requiring organizations to calculate public support using their regular method of accounting, accrual basis organizations will now have to include the present value of multi-year grants as public support in the year the grant commitment is made. Private foundations concerned about the possibility that such support will “tip” the organizations into private foundation status may be less inclined to make large multi-year commitments, offering instead one-year renewable grants, for example. This will, in turn, leave grantees with less assurance of future funding.

We believe it is unlikely that the Temporary Regulations were intended to change the grant-making practices of private foundations by discouraging the making of substantial multi-year grant commitments, although this may be the practical effect in some cases. We recommend revising the Temporary Regulations to expand the unusual grant rules in sections 1.170A-9T(f)(6) and 1.509(a)-3T(c)(3) to add a new factor giving favorable consideration to certain types of multi-year private foundation grants. In the alternative, we recommend allowing public charities to elect, for purposes of the public support test, to accrue multi-year grants ratably over the period to which they relate.

²¹ This recommendation is discussed in Section 3 of these Comments.

²² See the example in note 18 above.

7. Private Foundation Terminations

The Temporary Regulations make certain conforming changes to the Regulations under section 507(b)(1) relating to termination of private foundation status by transfer to, or operation as, a public charity. Because Temporary Regulation sections 1.170A-9T(f)(4) and 1.509(a)-3T(c) now provide for a five year public support computation period, the Temporary Regulations delete the references in the former Regulations to a shorter computation period.²³ However, the Temporary Regulations do not simplify the procedure for terminating private foundation status under section 507(b)(1)(B).

Section 507(b)(1)(B) permits an organization to terminate its private foundation status if it meets the requirements of section 509(a)(1), (2), or (3) for a continuous period of at least 60 calendar months beginning with the first day of any taxable year. The Temporary Regulations continue to permit an organization to seek an advance ruling that it can reasonably be expected to meet the requirements of section 509(a)(1), (2), or (3) during the 60-month termination period. The Temporary Regulations retain a provision of the former Regulations that requires an organization that is terminating its private foundation status by operation as a public charity to file information with the Service within 90 days after the expiration of the 60-month termination period to permit the Service to make a determination as to the organization's status as an organization described in section 509(a)(1), (2), or (3).²⁴ The retention of this 90-day filing requirement is noteworthy given that elsewhere in the Temporary Regulations the Service eliminated the Form 8734 filing requirement, indicating that it would rely instead on information reported on Form 990 to monitor public charity status.

According to the final instructions to the 2008 Form 990, an organization that successfully terminates its private foundation status by becoming a public charity files Form 990 for the final year of the 60-month termination period.²⁵ In light of the expanded reporting on Form 990, Schedule A, with regard to public charity status, we recommend that the Service reconsider the need for organizations to make a special filing at the end of the 60-month termination period, as required by Temporary Regulation sections 1.507-2T(b)(4) and 1.507-2T(c). At a minimum, we recommend that the Service reconsider the need for the special 90-day filing in the case of an organization that received an advance ruling that it can reasonably be expected to qualify under section 509(a)(3), because such organization's status does not depend on its sources of financial support. Finally, we recommend revising the Temporary Regulations to delete certain obsolete references to Section 6050, which has been repealed.²⁶

²³ Temp. Reg. § 1.507-2T(c)(1)(ii), (iii).

²⁴ Temp. Reg. §§ 1.507-2T(b)(4), 1.507-2T(c).

²⁵ See page 5 of the 2008 Instructions for Form 990, Return of Organization Exempt From Income Tax, General Instruction B., paragraph 12. The instructions are available at: <http://www.irs.gov/pub/irs-pdf/i990.pdf>.

²⁶ See, e.g., Temp. Reg. §§ 1.507-2T(5)(i), 1.507-2T(b)(6). Section 6050 was repealed in 1979 by Pub. L. No. 96-167, § 5(a), 1980-1 C.B. 483.