IRC SECTION 4945(f): Complexities and Unanswered Questions

Section 4945 imposes an excise tax on a “taxable expenditure” made by a private foundation. Taxable expenditures include “any amount paid or incurred by a private foundation…to carry on, directly or indirectly, any voter registration drive.” Foundations are, however, allowed to make grants for voter registration drives to certain organizations that meet criteria set out in IRC Section 4945(f). This provision establishes five specific criteria. Unfortunately, the Code and associated regulations leave many questions unanswered. Over the years, both funders and prospective grantees (and their legal counsel) have struggled to determine precisely how to understand some of the less than straightforward language of the provision.

To begin with, some threshold issues arise in determining whether a grant triggers the application of Section 4945(d)(2) in the first place.

Voter registration ‘drive.’

A private foundation grantor need only worry about Section 4945 if it is making a grant that is made to carry on, directly or indirectly, a voter registration drive. The obvious first question is what is meant by a voter registration drive. Both code and regulations use this term as if its definition were obvious, providing no further clarification.

“Voter registration” is easily understood as the process required in some democracies, including the United States, that eligible citizens register in advance with a government agency in order to be allowed to vote in elections. But the statute is not concerned with any activity that touches on voter registration in any way; it confines its effect to voter registration “drives.”

The word “drive” has many definitions (many relating to automobiles). The one most appropriate to the voter registration context is, “a united effort to accomplish some specific purpose, esp. to raise money, as for a charity.” An alternative formulation is, “a strong systematic group effort (“a fund-raising drive”); a sustained offensive effort (“the drive ended in a touchdown”). Each of these definitions supports the idea that a voter registration drive is a concerted effort by an organization to affirmatively get people to register to vote by completing registration forms and delivering them to the appropriate authorities.

IRS rulings on section 4945(f) support this interpretation. The Service has never issued any precedential authority defining a voter registration drive, perhaps because the understanding of the phrase seems so obvious. However, a number of private letter rulings issued to various

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1 A version of this article was originally published in the journal Taxation of Exempts, Volume 26, Number 5, MARCH/APRIL 2015.
2 IRC Section 4945(d)(2).
3 Interestingly, while Section 4945 does not limit its application to the United States, it is difficult to know how an organization conducting voter registration in foreign countries could comply with all of the requirements of Section 4945(f).
organizations all seem to contemplate an active program of encouraging or assisting potential voters to register.\textsuperscript{6}

Thus, absent a “drive” of some sort, Section 4945(f) would not be relevant. For instance, efforts to encourage third parties (such as government agencies) to comply with their legal obligations to offer voter registration assistance would not generally be considered a “drive” by the organization doing the encouragement. Simply making available to the public information that would allow people to independently obtain and submit voter registration materials would also not be a “drive.” A “drive” entails some interaction with prospective voters, encouraging or enabling them to complete a registration form.

A somewhat harder question arises when there is clearly a voter registration drive going on, but the organization itself is not directly involved in carrying out the voter registration activities. For instance, an organization might provide training on how to run a successful voter registration drive. It might provide technical assistance to groups conducting voter registration, such as information on legal requirements for voter registration in various jurisdictions, quality control services or materials to verify that registrations submitted are complete and accurate, or follow-up to ensure that people registered through the drive were properly added to the voter rolls. An organization might also provide legal representation to another group seeking to challenge unduly restrictive laws regulating the voter registration process.

Existing guidance provides no insight to help determine when any of these ancillary activities are considered part of a voter registration drive subject to Section 4945. In practice, many funders prefer to err on the side of caution and will require grantees to demonstrate Section 4945(f) qualification if they engage in any activity related to voter registration. But in the absence of guidance from the IRS, a reasonable place to draw the line might be to say that a voter registration drive includes any services that are an integral part of the process that the organization conducting the drive would have to do itself if they were not provided by a third party.\textsuperscript{7} Thus, technical assistance to an ongoing voter registration drive would be part of the drive. Creating and distributing materials used to run the drive or training its staff would also be considered part of the drive. On the other hand, challenging restrictive laws regulating voter registration activities is not necessary to conduct the drive, although a successful challenge might make the drive easier. Similarly, providing training to an organization about the best way to structure its efforts (as opposed to nuts and bolts training about how to complete and submit forms) might improve effectiveness but is not required in order to carry out the activity. One can reasonably argue that these activities should not be considered part of a voter registration drive.

\textsuperscript{6}See PLR 8421053 (“You have provided a description of your organization’s capacity and plans to conduct a voter registration drive that meets section 4945(f)”; PLR 9540044 (“The Fund proposes to implement a comprehensive voter education and registration project. The purpose of the project is to educate large numbers of female voters, particularly in minority communities, about the importance of registering to vote, to provide information to such voters about how to register to vote, and to provide assistance in registering to those individuals who request it”); PLR 9640021 (“Specifically, A is involved in registering voters at churches, community centers, work places, and residences”).

\textsuperscript{7}These supporting activities might also be captured as “indirect” support for conducting a voter registration drive.
When is a grant “for” a voter registration drive?

Section 4945(f) only comes into play if a grant is made for a voter registration drive. The regulations regarding voter registration drives explicitly cross-reference an earlier section which addresses non-earmarked grants to public charities. A grant by a private foundation to a public charity is not a taxable expenditure if it is not given pursuant to an oral or written agreement that it will be used for specific purposes (i.e. a voter registration drive), and there is no agreement, oral or written, whereby the grantor may cause the grantee to engage in such activity. Thus, a general support grant to a public charity that conducts a range of activities would not be earmarked for any specific activity and thus not a taxable expenditure by the grantor; the grant agreement need not include a prohibition on the use of the funds for voter registration. Of course, if voter registration is the only activity of the grantee, then a general support grant may be at risk of being considered an expenditure for voter registration.

But moving beyond general support, what about the project grant rule? In the lobbying context, this approach allows a private foundation to treat a grant as not a taxable expenditure even if it is made for a specific project that includes a lobbying component so long as the grant amount does not exceed the non-lobbying portion of the project budget. At first blush, the fact that this rule is explicitly included in the regulations on lobbying but not in those governing grants for voter registration might suggest its application is limited. After all, the Service knew how to write such a rule into its regulations but did not do so for voter registration. Upon closer examination, however, it emerges that this conclusion is not supported by the drafting history of the regulations.

The current language regarding earmarking has been in the section 4945 regulations since they were first finalized in 1972. In 1977 the Service issued a ruling to the McIntosh foundation that allowed it to treat a grant for a project as not a taxable expenditure so long as the non-lobbying portion of the project budget was at least as much as the grant amount. When the foundation regulations on lobbying were amended in 1990 to harmonize them with the newly-issued regulations implementing Code sections 501(h) and 4911, this rule was explicitly included. It was not included in the provisions on voter registration because those regulations were not being updated at that time. Nonetheless, the reasoning of the 1977 ruling should apply equally to determining whether any activity is “earmarked” for any activity within the meaning of Section 4945.

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9 This discussion focuses only on the application of these rules to grants for voter registration drives. The actual regulation is more detailed and applies to grants for other purposes restricted under Sections 4945(d)(1), (3), and (4) as well.
10 This result is contrary to the usual treatment of a general support grant to a public charity when the question is whether it is earmarked for lobbying. However, because lobbying by a public charity is limited, the analogous situation would never arise where the grantee’s entire program consists of the restricted activity.
12 PLR 7810041.
More complicated scenarios may also arise, of course. A grant proposal might indicate that the funds will be used for a set of activities which include a voter registration drive. Or the funded program may possibly include voter registration with the final decision on that point not yet made. So long as the grantee has the discretion to make the ultimate decision without getting further approval from the funder, the grant should not be considered earmarked for a specific activity. Thus, a grant that indicates it can be used for voter registration or voter education and get-out-the-vote activities (assuming all are conducted in a 501(c)(3)-compliant manner) should not be a taxable expenditure. On the other hand, a grant to be used for voter registration and getting out the vote would be earmarked in part for voter registration and thus a taxable expenditure.

In other contexts, nonprofit organizations rely on the fact that a mere request is not generally legally binding and thus does not constitute earmarking. Does this work in the context of voter registration if it appears that the foundation funder has made such a request? Given the wording of the regulations, it should. A request that is explicitly nonbinding does not constitute an agreement about the use of the funds in question, nor does it allow the donor to cause the grantee to engage in any specific activity. Not all private foundations will be comfortable with this approach, but based on principles of general applicability, there is a strong argument that a mere statement that the funder would be pleased if the grantee conducted voter registration should not cause a grant to be a taxable expenditure. Of course, care must be taken in drafting any such grant agreement. It would be wise to include an explicit statement that the expressed desire is not binding and the grantee remains free to decide how to use the funds. And of course, the parties’ subsequent course of conduct should be consistent with this posture.

Section 4945(f) Specifics.

Assuming the preliminary questions about whether a grant is for a voter registration drive are answered in the affirmative, there are five specific elements to the test an organization must meet in order to qualify as described in Section 4945(f). Let us look at them in turn.

1. Exempt Status

   The organization must be described in section 501(c)(3) and exempt from taxation under section 501(a).13

This first requirement is fairly straightforward. It is certainly easy to determine whether an organization has obtained a determination of its 501(c)(3) status from the IRS. Of course, technically an organization may be “described in” section 501(c)(3) and not have obtained a ruling letter – or perhaps not yet. As a practical matter, few funders are likely to want to take the risk that a grantee will receive a favorable determination – or to want to do the work necessary to assure themselves that the grantee qualifies under Section 501(c)(3).

13 IRC Section 4945(f)(1); Treas. Reg. Section 53.4945-3(b)(1)(i).
2. **Five of More States; More Than One Election Period**

The organization’s activities must be nonpartisan, not confined to one specific election period, and carried on in five or more states. ¹⁴

Which “activities”?

Both the statute and the regulations refer to “its activities” as being subject to this requirement. Neither specifies whether the intended reference is to the organization’s voter registration activities, or its overall activities. Of course, if voter registration is conducted in more than one election period and five or more states, then the organization’s activities when viewed as a whole must necessarily meet those criteria.

One could argue from a strict textual perspective that an organization could qualify under Section 4945(f) if it carries out some activities in more than five states even if its voter registration work is limited to a smaller number of jurisdictions. This reading is not, however, consistent with the intent underlying the provision. It is unlikely the IRS would agree with such an approach. The better reading is probably that “its activities” in the context of regulations regarding voter registration means “its voter registration activities.”

**What is an “election period”?**

Initially this may sound like a silly question. We all know that general elections are held in November of even years, with primaries occurring earlier in the same year. Because the primary and general election are, together, a contest for a single office, the two (plus any runoff, if applicable) would constitute an election cycle, or period. Unless, of course, we are in a state or locality that holds elections in odd years. And does the “election period” end the day after the general election (assuming no runoff)? Does the next election period commence the following morning? Listening to pundits in the media it certainly seems so. Absent guidance, it seems that an election period in a given jurisdiction lasts from the day after one general election through the day of the next one. Of course, this would mean that every even year spans across two different election periods: up until the first Tuesday in November is part of one federal election cycle, and from then until the end of the year begins another one.

In practice these questions may be of more theoretical than practical import. Any organization that plans an ongoing existence can easily demonstrate that its activities will (or are intended to) continue through multiple election cycles. Whether one of those periods is an odd-year gubernatorial race will likely not be determinative. This is not a difficult criterion to meet. The intent seems to be to prevent foundations from directing their funds for use in a specific election – a goal also promoted by the requirement that an organization described in Section 4945(f) may not accept funds earmarked for use in a specific election period (discussed below).

**Does the five states requirement apply to each tax year?**

¹⁴ IRC Section 4945(f)(2); Treas. Reg. Section 53.4945-3(b)(1)(ii).
In general, whether an exempt organization meets the various criteria that govern its status is measured on a tax year basis, absent statutory authority to the contrary, such as under the Section 501(h) expenditure test for lobbying. Thus, the lobbying of a charity that has not elected the expenditure test (i.e., that is under the statutory “no substantial part” test) is assessed each year. The amount of political activity of a 501(c)(4) organization is compared to its qualifying social welfare work with respect to each tax year. Is it accurate to conclude, then, that the Section 4945(f) requirement to carry on voter registration activities in five or more states must be met in each of the organization’s tax years? Of course, that would be a safe approach, but since few jurisdictions in the country conduct elections in odd-numbered years it may pose practical challenges to carry out a meaningful voter registration in five states each and every year. True, there is no requirement that voter registration occur in the year when an election is being held, but public interest in the voting process is certainly likely to be much higher in those years. Off-year efforts are likely to be unproductive, perhaps only pro forma efforts to meet the five states requirement.

It is worth noting that the five states requirement is set out in the same sentence as the requirement that activities not be confined to one specific election period, a criterion which on its face cannot be met in a single tax year – unless, that is, it is read to require a 4945(f) organization to continue its voter registration efforts in November and December after a general election, an almost certainly fruitless undertaking. In context, it seems reasonable to read these requirements as applying over time and not to a specific tax year. Perhaps it is fair to read the two elements together, so an organization would have to undertake voter registration activities in more than one (two-year federal) election cycle, and in at least five states per election cycle.

What does “nonpartisan” mean?

In colloquial speech, “nonpartisan” can take on different meanings. It may mean that an activity is, for instance, 501(c)(3)-permissible voter education and not political campaign intervention. In other contexts, it may mean that an activity is carried out without regard to party affiliation, so for instance an issue-based political advocacy group’s endorsement process may be described as nonpartisan. And an election such as for judicial office may be described as nonpartisan if candidates are not identified on the ballot as members of a political party.

The IRS has never issued precedential guidance interpreting “nonpartisan” for this purpose. In a key Revenue Ruling, it has indicated some of the factors what would be considered in evaluating whether a 501(c)(3) organization’s voter registration, education, or get-out-the-vote drive would be considered nonpartisan and therefore permissible. Although this is not directly interpreting section 4945, it is probable that the word “nonpartisan” would be understood to mean “permissible for a 501(c)(3) organization.” Indeed, the ruling describes the permissible activity as “conducted in a nonpartisan manner.” Unfortunately, neither of the examples in this ruling provide much insight into the question of permissible targeting criteria for these activities. In one, an organization sets up a booth at a state fair. There is no indication that this decision has

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been made in order to reach any particular population. In the other example, the organization calls a list of registered voters, and then impermissibly screens the people who answer the call, only offering voting information and rides to the polls to those who agree with a candidate’s position on environmental issues.

The Service has also stated (in a non-precedential ruling) that “nonpartisan” does not require the organization never to take a position on an issue. Rather, “although the legislative history is somewhat ambiguous on this point, it suggests that Congress was mainly concerned about organizations that favor particular political candidates or parties.”

The legislative history of Section 4945 also clearly demonstrates that efforts targeted to historically under-represented groups and particularly to African Americans will be permissible, despite the fact that certain demographic groups may as a whole have a known propensity to support candidates of one party. Section 4945 was added to the Code by the Tax Reform Act of 1969. This provision was subject to a number of changes through the legislative process. Although the legislative history does not provide detailed information about the intent of some of the technical requirements of 4945(f), it does shed light on the Congressional intent behind the “nonpartisan” requirement. The House Report on the bill states:

An organization of this type may engage in nonpartisan political activities that are otherwise permissible (under sec. 501(c)(3)), including voter registration drives, so long as they do not favor particular candidates for public office. . . For example, if an organization engages primarily in registering previously disenfranchised voters in a major section of the country on a nonpartisan basis, and the organization is exempt under section 501(c)(3), then a private foundation may make contributions to such an organization whether or not it knows that the organization will probably use the bulk of such contributions for voter registration drives. . .

Two examples of existing private foundations which, based upon the committee’s information as their activities, are expected to be permitted to engage in such activities and receive other private foundation support are the League of Women Voters Education Fund and the Southern Regional Council.

Setting aside the Committee’s apparent confusion about the foundation status of these two organizations, this passage makes a number of things clear. First, targeting voter registration efforts at previously disenfranchised groups was considered permissible, for 501(c)(3)s generally and for foundation funding under 4945(f), so long as the geographic region was not too narrowly targeted. Second, the two identified organizations were expressly intended to be permissible foundation funding recipients. The Southern Regional Council is a civil rights organization founded in 1919 as the Commission on Interracial Cooperation. In the 1960s, it founded the Voter Education Project, which in the following years successfully registered more than two million black voters. Thus, Congress expressly intended to permit 4945(f)-qualified organizations to target their voter registration drives to African Americans.

17 PLR 9751029.
We also have evidence that the IRS accepts this analysis. A series of private letter rulings have allowed voter registration programs under section 4945(f) to target low-income, young, and minority women,\textsuperscript{20} female voters, particularly in minority communities,\textsuperscript{21} and communities whose residents are under-registered in comparison with the voting-age population of the region.\textsuperscript{22} While these rulings cannot be relied on, they do demonstrate a consistent IRS practice of allowing 4945(f)-qualified registration drives to be targeted to populations that are under-represented.

3. **Purpose of expenditures.**

Substantially all (at least 85%) of its income is expended directly for the active conduct of the activities constituting the purpose or function for which it is organized and operated.\textsuperscript{23}

**What is the measurement period?**

In contrast to the support requirements of the next criterion (below), neither the Code nor the regulations indicate clearly whether this 85% test should be applied using a multi-year analysis or applied strictly to compare each individual year’s income and expenditures. As mentioned above, it is customary to apply tax requirements on a year-by-year basis absent direction to the contrary. This could create significant hardships for some organizations. In particular, newer nonprofits may well take in a little more than they spend in the earlier years in order to build some level of reserves. If nothing else, cash flow needs combined with the GAAP requirement that revenue be recognized when the funding commitment is made rather than when funds received can mount a challenge to meeting this test. The regulations, however, cross-reference IRC Section 4942(j)(3) “and the regulations thereunder” in defining “active conduct.”\textsuperscript{24} The regulations under that Code section allow a foundation to satisfy the test if it qualifies for any three out of four tax years (the current year and three preceding years), or on an aggregate basis for the four-year period.\textsuperscript{25} It is not clear whether the parenthetical that defines active conduct with respect to the Section 4942 regulations is intended also to import this multi-year measurement period. But as ever, in the absence of clarity, the argument can be made.

**What is “income”?**

The term used in this part of the Code and regulations is “income,” not “revenue” or “receipts” or “support.” For tax purposes, these are not the same things. Unfortunately, the regulations do not elaborate, and no known ruling addresses the question. But where the specific word

\begin{itemize}
  \item \textsuperscript{20} PLR 9751029.
  \item \textsuperscript{21} PLR 9540044.
  \item \textsuperscript{22} PLR 8822056.
  \item \textsuperscript{23} IRC Section 4945(f)(3); Treas. Reg. 53.4945-3(b)(1).
  \item \textsuperscript{24} Treas. Section Reg. 53.4945-3(b)(1)(iii).
  \item \textsuperscript{25} Treas. Section Reg. 53.4942(b)-3(a).
\end{itemize}
“income” is used it is fair to read it as having a different meaning from other words that could have been used – and that are used in other related provisions.

Indeed, this requirement is very similar to one imposed on private operating foundations, which must expend substantially all of their adjusted net income (or minimum investment return, whichever is less) for the active conduct of activities constituting the purpose or function for which they are organized.26 Private operating foundations are relieved of some of the burdens of foundation status, just as are 4945(f)-qualifying organizations (which may themselves be private foundations, see discussion below). It should not be surprising then that similar criteria are used to define each type of organization, and to the extent consistent with the statutory language it makes sense to read them in parallel. And for purposes of Section 4942(j), “adjusted net income” is gross income with certain modifications, less certain allowable deductions.

Most significantly, as a general tax matter, gifts are excluded from “income.”27 This does not necessarily mean that all revenue classed as gifts, grants, and contributions can be safely deemed not income. Rather, it requires an analysis of funds received to determine whether contributions were genuinely made with donative intent and not with the expectation of future benefit. However, to the extent revenue is in the form of unrestricted gifts given to support the organization’s overall charitable program, the funds may well be classed as gifts and not “income.” The 85% expenditure test would thus only be applied to funds properly treated as income – investment income, grants for which specific deliverables are required, or fee for service revenue.

How should overhead and fundraising costs be treated in this calculation?

The Section 4942 regulations (cross-referenced to define “active conduct” as discussed above) explicitly include reasonable administrative and operating expenses associated with program activities as expenditures for the active conduct of activities constituting the organization’s exempt purpose.28 Those regulations, which were written with private foundations in mind, do not address the treatment of fundraising expenses, a question that may prove critical for public charities seeking to qualify under Section 4945(f).

In 1997, the IRS issued a 4945(f) ruling to an organization that would have failed the 85% expenditure requirement if its fundraising costs were treated as expenditures not for the active conduct of exempt activities.29 The ruling provides a thoughtful analysis of this question, and ultimately concludes that fundraising expenses should be treated as an offset against the gross income of which 85% must be spend for active conduct of exempt activities. Of course, it would

26 IRC Section 4942(j)(3)(A).
27 IRC Section 102; see Comm. v. Duberstein, 363 U.S. 278 (1960) (transfer made with donative intent and not out of moral or legal duty or with anticipated benefit is a gift excluded from taxable income); see also Gen. Couns. Mem. 39813 (discussing in depth taxation of income of organization whose exemption has been revoked, including contribution revenue).
29 PLR 9751029, September 19, 1997. This outcome also depended on finding that “income” consisted of total support. The Service did not have to resolve that issue in this ruling but it may signal a reluctance to adopt the reading of “income” suggested above.
be more helpful to organizations seeking Section 4945(f) status if these costs were treated as qualifying active conduct expenditures. The fact that the IRS did not agree with this position in a single ruling does not foreclose the possibility of making the argument, but it probably signals that it will not be favorably received by the Service.

**What is “active conduct”?**

A critical question for Section 4945(f) qualification is what counts as the active conduct of exempt purpose activities. The relevant regulations tell us that active conduct is to be understood “within the meaning of section 4942(j)(3) and the regulations thereunder.” Those regulations provide that “active conduct” expenditures are those “used by the organization itself, rather than by or through one or more grantee organizations.” However, payments to individuals such as awards or scholarships may be considered active conduct expenditures if, in addition to awarding the grant, the foundation otherwise maintains significant involvement in active programs in support of the awards or scholarships. “Significant involvement” is described in detailed regulations and will be found where the foundation in question has developed specialized skills or expertise, maintains a salaried staff who supervise or conduct programs and the foundation awards payments to individuals to encourage their involvement in the foundation’s program.

In the context of voter registration, it is not uncommon for Section 4945(f) organizations to work with other groups to which they provide funding. Often, local organizations have helpful knowledge of the situation on the ground that can be invaluable in structuring an effective program. In order for those payments to qualify as active conduct expenses, the Section 4945(f) organization must be significantly involved in the conduct of the program and not just serve as a grantor.

In a 2011 ruling the IRS explicitly addressed this approach. The organization in that case indicated that it intended to work with local organizations to which it would provide funding while maintaining an active role in the program operations:

> It is expected that you will enter into agreements with local organizations to carry out voter registration activities. These organizations will agree to and be subject to your (C [agreement]) which spells out goals, committed resources, compliance requirements, training and supervision, quality control measures, performance standards and general contractual obligations.

> Organizations operating under the (C) will be funded and trained to carry out registration activities. They will also be provided with a copy of your (B [field manual]), a comprehensive [redacted text] with detailed procedural guidance for opening an office, operating that office, managing staff, ensuring quality results, measuring and accounting for those results and overall compliant processes as a representative of your organization…

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31 Treas. Reg. Section 53.4943(b)-1(b)(1).
In making these distributions for operations you expect to maintain close contact and control so as to establish an agent relationship with said funded entity governed by the aforementioned (C).\textsuperscript{33}

The ruling is written in familiar IRS style, reciting facts then regulations and stating a conclusion without explicitly indicating how the facts and law relate. But it does appear that the relationship described above was critical to the finding that this organization met the 85% active conduct requirement. Although the ruling cannot be relied on by other organizations, it provides a useful roadmap of a set of procedures that the Service found acceptable in at least one instance.

4. Support.

First, substantially all (at least 85%) of its support (other than gross investment income as defined in section 509(e)) is received from exempt organizations, the general public, governmental units described in section 170(c)(1), or any combination of the foregoing. Second, not more than 25 percent of such support is received from any one exempt organization.\textsuperscript{34} Third, not more than half of its support is received from gross investment income. In determining whether the organization meets this requirement for any taxable year of such organization, there shall be taken into account the support received by such organization during such taxable year and during the immediately preceding 4 taxable years of such organization.\textsuperscript{35}

What is “support” from the general public?

This fourth requirement includes three sub-parts, indicated above with numerals. The second and third are fairly straightforward and do not raise unanswered questions of interpretation. The first, the “85% of support” requirement, is less clear. Total support is defined in the regulations describing the two different public support tests for Section 509(a)(1)\textsuperscript{36} and Section 509(a)(2) organizations. Of course, in each case the definition is somewhat different, so that for the former groups fee for service revenue is entirely disregarded. That exclusion is rooted in the statutory language, however, so presumably without any such exclusion support can be understood to mean in essence all funding received. Of course, in Section 4945(f) gross investment income is explicitly excluded with respect to the first of these three support requirements.

Exempt organizations and governmental units are not difficult to identify. But what is meant by the “general public” for this purpose? In the 509(a)(1) and (a)(2) public support regulations there are detailed rules (that are different for each type of publicly supported organization) about sources of support that are not considered public. These are either excluded from the public

\textsuperscript{33} PLR 201137012 (September 16, 2011).
\textsuperscript{34} For this purpose, private foundations which are described in Section 4946 (a)(1)(H) with respect to each other are treated as one exempt organization.
\textsuperscript{35} IRC Section 4945(f)(4); Treas. Reg. Section 53.4945-3(b)(1)(iv). For new organizations with three or fewer preceding taxable years, this test looks at the current year and each preceding taxable year for which it was in existence. Treas. Reg. Section 53.4945-3(b)(3)(iii).
\textsuperscript{36} Specifically, those described in IRC Section 170(b)(1)(A)(vi).
support calculation or included only to a limited extent. The underlying concept is that support from major donors or corporate insiders such as officers and directors is not from the “public” for public support purposes. However, the Section 4945 regulations address support, not public support. They do not import any definition of “public” that would exclude or limit funds from any particular source.

A very similar provision governs private operating foundations, which must (among other requirements) meet one of an assets test, an endowment test, or a support test. The latter states:

[S]ubstantially all of the support (other than gross investment income as defined in section 509(e)) of which is normally received from the general public and from 5 or more exempt organizations which are not described in section 4945(a)(1)(H) with respect to each other or the recipient foundation; not more than 25 percent of the support (other than gross investment income) of which is normally received from any one such exempt organization; and not more than half of the support of which is normally received from gross investment income.37

The Section 4942 regulations, unlike their counterparts under Section 4945, go on to describe what is meant by support from the general public. Contributions from an individual, or from a trust or corporation (other than an exempt organization) are taken into account only to the extent that the total support from that source during the measurement period does not exceed one percent of the organization’s total support (excluding gross investment income). Contributions from governmental units are considered from the general public and are not subject to this one percent limitation.38 Although the Section 4945 regulations do not explicitly cross-reference this portion of the Section 4942 regulations, they do interpret an identical term in a very similar provision. It is certainly plausible that the Section 4942 definition of contributions from the general public should be read into Section 4945(f).

This result is consistent with the fact that elsewhere the 4945(f) regulations seem to assume that a qualifying organization could itself be a private foundation.39 Such a foundation could receive up to half its total support from gross investment income. The rest must be from a sufficiently narrow range of sources that the it does not qualify as publicly supported under either 170(b)(1)(A)(vi) or 509(a)(2), but it still might achieve the level of 85% of (non-investment income) support from qualifying types of sources. The math involved suggests that those sources could be few in number, consistent with (but not mandated by) reading contributions from the “general public” to include the entire amount given by an exempt organization, whether private foundation or public charity, while imposing a one percent limitation on individual donors and non-exempt corporations and trusts.

5. Restrictions on use.

37 Section 4942(j)(3)(B)(iii). The added italics highlight substantive points of difference from the Section 4945(f) language; that provision also includes governmental units and “any combination of the foregoing.”
38 Treas. Reg. Section 53.4942(b)-2(c)(2)(iv).
39 Section 53.4945-3(b)(2) (“whether or not such grantee is a private foundation as defined in section 509(a)”).
Contributions to the organization for voter registration drives may not be “subject to conditions” that they may be used only in specified states, U.S. possessions, political subdivisions, or other areas of any of either, or the District of Columbia. They also may not be subject to conditions that they may be used in only one specific election period.40

As a preliminary note, it is worth emphasizing a point often misunderstood by affected organizations: this prohibition on earmarking applies not only to grants from private foundations subject to Section 4945, but to any contributions received by the organization. Even if the donor is not concerned with Section 4945(f), a single improperly restricted grant jeopardizes the recipient’s overall qualification and therefore its ability to receive other grants from private foundations.

Can this be reconciled with grants intended to be used in the year in which they are made?

This provision creates a potential trap for the unwary. Private foundations often pay out grants on a year-by-year basis. Even if a grant is intended to be used over a multi-year period, it is common for a funder to require receipt of reports on the first year’s use of funds before disbursing funds for the second year. Where the grant is for voter registration efforts, careful drafting is necessary to avoid having the grant be considered to be subject to the condition that it be used in only one specific election period.41

What time period does this apply?

Unlike the rules for calculating support under the previous criterion, no time frame is provided for this analysis. Contributions to the organization simply must not be subject to the problematic conditions. The Code and regulations employ present tense: “are not.” So how to read this? Is it sufficient that the organization does not accept such contributions in the year in question? Perhaps it applies to contributions to be used in the year under consideration whenever they were received. Or must the organization look back to ensure it has never accepted inappropriately restricted contributions? The regulations provide no guidance on this question, merely restating the statutory requirements. One can certainly argue that the analysis should be limited to contributions received during the year(s) under consideration. If qualification for a given tax treatment is assessed on a tax year basis, absent a clear indication to the contrary, the relevant criteria would apply only to the year under consideration. On the other hand, in assessing which contributions “are not subject to conditions” it might be reasonable to include contributions either held or expended in the tax year under consideration.

There is no basis for any other measurement period, and no indication of Congressional intent to exclude any organization from Section 4945(f) qualification permanently if it has ever (since enactment of the statute) accepted inappropriately conditioned contributions. Perhaps the best reading would be that any contributions held by the organization in the year in which it seeks to qualify must not be subject to disqualifying conditions. Thus, if an organization does accept

40 IRC Section 4945(f)(5); Treas. Reg. Section 53.4945-3(b)(1)(v).
41 As discussed above in connection with the requirement that the organization’s activities may not be limited to one specific election period, if the grant year is a calendar year, one may be able to argue that it inherently covers more than one election period, at least for even years.
improperly restricted contributions, it would not qualify under Section 4945(f) until the funds have been fully expended. In general this should be relatively straightforward to demonstrate given the nature of the restrictions in question, but if there is any ambiguity it might be reasonable to adopt a first-in, first-out approach to determine when particular contributions have been spent.

**When is a contribution subject to conditions?**

The answer to this question may seem obvious – surely everyone knows when a gift\(^\text{42}\) is subject to a condition. But unlike the related context of earmarked grants, in which regulations provide a definition to determine when a grant is or is not earmarked for a given purpose, here the statute and regulations merely state “not subject to conditions.” In the context of Code section 170, regulations do address in more detail gifts subject to conditions.\(^\text{43}\) Although there is not a definition per se, it is clear that a condition is a legally enforceable limitation – if X occurs, the gift is to be returned, for instance. When the term is used in Section 4945(f), it presumably also refers to a binding obligation.

Thus, if a funder requests that a grantee give special consideration to certain geographic regions, it is not imposing an enforceable condition and the grant would not jeopardize the grantee’s Section 4945(f) status. An implicit assumption that funds will be used in a specific time period, if not made an enforceable condition of the grant, is similarly not problematic.\(^\text{44}\) If a grant states that funds will be used in at least five of a list of ten states, but the grantee is free to select from that list, it would not be subject to a condition that it be used in any specified states. Language that the donor “requests but does not require” should also not be found to establish a prohibited condition.

**Conclusion**

In addition to being riddled with many problematic ambiguities, Section 4945(f) at least arguably serves as a policy matter to make the funding of voter registration more difficult than it should be under the general 501(c)(3) requirements of nonpartisanship and no campaign intervention. It is a remnant of a time when voter registration was a divisive political issue. True, debates over voter registration and voting rights continue today, but not many years before enactment of this provision volunteers on voter registration drives in some parts of the country were literally putting their lives at risk. It is understandable that some practitioners choose to read Section 4945(f) narrowly and technically, honoring the letter but not the spirit of a law that was intended to restrict voter registration efforts at the peak of the civil rights movement.

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\(^{42}\) This discussion assumes that “contributions” includes all receipts reportable on Form 990 as gifts, grants, and contributions and that the term is not intended to exclude grants, even though in popular terminology “contributions” are usually received from individuals. On the other hand, “contributions” certainly does not include any fee for service revenue, which is not plausibly described as a gift, grant, or contribution

\(^{43}\) E.g., Treas. Reg. 1.170A(1)(e).

\(^{44}\) Nonetheless, it is still probably a good idea to draft grants for voter registration made to Section 4945(f)-qualified organizations with an explicit statement that nothing in the agreement requires funds to be expended in a specific election period and the grantee remains free to use funds when and where it deems best.