NO PROTEST RECEIVED
Release to Manager, EO Determinations - Cincinnati
DATE: [redacted]
SURNAME [redacted]
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DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

EXEMPT AND
NMENT ENTITIES
DIVISION

Date: DEC - 5 2001

Contact Person: [redacted]
Identification Number: [redacted]
Contact Number: [redacted]

[redacted]

Employer Identification Number: [redacted]

Dear Applicant:

We have considered your application for recognition of exemption from federal income tax under section 501(a) of the Internal Revenue Code as an organization described in section 501(c)(3). Based on the information submitted, we have concluded that you do not qualify for exemption under section 501(c)(3). We have separately considered whether you qualify as a supporting organization under section 509(a)(3). Based on the information submitted, we have concluded that you do not qualify as a supporting organization under section 509(a)(3). The basis for our conclusion is set forth below.

Section 501(c)(3)

INTRODUCTION

You are a trust created under a trust document dated [redacted] Your application for exemption was postmarked [redacted] Your trust document states that the situs of your trust is the state of [redacted] and the trust shall be governed by the laws of that state. Your trust document's "purpose" clause provides that you were organized for the purpose of establishing an organization that is described in section 501(c)(3) and section 509(a)(3) of the Code.

Section 2.5 of your trust agreement provides that in the event that you do not obtain tax-exempt status under sections 501(c)(3) and 509(a)(3) of the Code, the assets of the trust shall go to the [redacted] family, as defined hereinin, as a contingent remainder.

Section 3.1.2 of your trust document describes the trust members of the board as consisting of two members from the class consisting of [redacted] and [redacted]

[redacted]

[redacted] and their descendants (the "[redacted] Family"). Accordingly, this provision of your trust document defines "[redacted] Family" for purposes of section 2.5.

You reported in your letter of [redacted] that in addition to an original contribution of $[redacted] in cash made in [redacted], your only other activity has been execution of a promissory note to [redacted] The Note promises that [redacted] will repay the sum of $[redacted] with interest from [redacted] on the unpaid principal at the rate of 4.5 percent per year for five years. The note was signed by [redacted], an agent for [redacted] and the brother of [redacted], one of your board members. Your governing board approved the investment with restrictions regarding the repayment of the principal in five years and payment in full upon demand if any interest payment is not paid when due.

Law:

Section 501(a) of the Code provides, in part, that organizations described in section 501(c) are exempt from federal income tax. Section 501(c)(3) of the Code describes, in part, an organization that is organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational p0urposes, no part of the net earnings of which inures to the benefit of any private shareholder or individual.

Section 1.501(c)(3)-1(a)(1) of the Income Tax Regulations provides that in order for an organization to be exempt under section 501(c)(3) of the Code it must be both organized and operated exclusively for one or more of the purposes specified in such section. If an organization fails to meet either the organizational or operational test, it is not exempt.

Section 1.501(c)(3)-1(b)(4) provides that an organization is not organized exclusively for one or more exempt purposes unless its assets are dedicated to an exempt purpose. An organization's assets will not be considered to meet the organizational test if its articles or law of the State in which it was created provide that its assets would, upon dissolution, be distributed to its members or shareholders.

Section 1.501(c)(3)-1(c)(1) of the regulations provides that an organization will be regarded as "operated exclusively" for one or more exempt purposes only if it engages primarily in activities which accomplish one or more such exempt purposes specified in section 501(c)(3). An organization will not be so regarded if more than an insubstantial part of its activities is not in furtherance of an exempt purpose.

Section 1.501(c)(3)-1(c)(2) of the regulations provides that an organization is not operated exclusively for one or more exempt purposes if its net earnings inure in whole

[redacted]

or in part to the benefit of private shareholders or individuals.

Section 1.501(c)(3)-1(d)(1)(ii) of the regulations provides that an organization is not organized exclusively for any of the purposes specified in section 501(c)(3) unless it serves public rather than private interests. Thus, to meet the requirement of this subdivision, it is necessary for an organization to establish that it is not organized or operated for the benefit of private interests such as designated individuals, the creator or his family, shareholders of the organization, or persons controlled director or indirectly, by such private interests.

In Better Business Bureau v. United States, 326 U.S. 279 (1945), the Supreme Court stated that the presence of a single nonexempt purpose, if substantial in nature, will preclude exemption under section 501(c)(3) of the Code, regardless of the number or importance of statutorily exempt purposes. Thus, the operational test standard prohibiting a substantial nonexempt purpose is broad enough to include inurement, private benefit, and operations that further nonprofit goals outside the scope of section 501(c)(3).

Rev. Rul. 68-489, 1968-2 C.B. 210, holds that an organization will not jeopardize its exemption under section 501(c)(3) of the Code, even though it distributes funds to nonexempt organizations, provided it retains control and discretion over use of the funds for section 501(c)(3) purposes. The revenue ruling states that the exempt organization ensures use of the funds for section 501(c)(3) purposes by limiting distributions to specific projects that are in furtherance of is own exempt purposes. It retains control and discretion as to the use of the funds and maintains records establishing that the funds were used for section 501(c)(3) purposes.

In Best Lock Corporation v. Commissioner, 31 T.C. 620 (1959), the court upheld the denial of an organization that loaned funds to members of the founder's family, even though the loans were repaid. The court determined that loans to family members and unsecured loans to friends of the founder and his family promoted private rather than charitable purposes.

In P.L.L. Scholarship v. Commissioner, 82 T.C. (1984), an organization operated bingo at a bar for the avowed purpose of raising money for scholarships. The board included the bar owners, the bar's accountant, also a director of the bar, as well as two players. The board was self-perpetuating. The Court reasoned that since the bar owners controlled the organization and appointed the organization's directors, the activities of the organization could be used to the advantage of the bar owners. The organization claimed that it was independent because there was separate accounting and no payments were going to the bar. The Court was not persuaded.

[redacted]

A realistic look at the operations of these two entities, however, shows that the activities of the taxpayer and the Pastime Lounge were so interrelated as to be functionally inseparable. Separate accountings of receipts and disbursements do not change that fact.

An organization is not operated exclusively for charitable purposes, and thus will not qualify for exemption under section 501(c)(3), if it has a single non-charitable purpose that is substantial in nature. This is true regardless of the number or importance of the organization's charitable purposes. Better Business Bureau v. United States, 326 U.S. 278 (1945); Stevens Bros. Foundation, Inc. v. Commissioner, 324 F.2d 633 (8th Cir. 1963), aff'g. 39 T.C. 93 (1962), cert. denied, 376 U.S. 969 (1964). Operating for the benefit of private parties who are not members of a charitable class constitutes such a substantial nonexempt purpose. Old Dominion Box Co., Inc. v. United States, 477 F.2d 340 (4th Cir. 1973), cert. denied, 413 U.S. 910 (1973).

Analysis and Conclusion:

In order to qualify for exemption under section 501(c)(3) of the Code, you must establish that you are organized and operated exclusively for religious, charitable, or educational purposes and that no part of your net earnings inure to the benefit of a private individual or shareholder. An organization will not be regarded as being operated exclusively for exempt purposes if more than an insubstantial part of its activities is not in furtherance of an exempt purpose.

Private benefit has both qualitative and quantitative connotations. In the qualitative sense, to be incidental, the private benefit must be a necessary concomitant of the activity that benefits the public at large, i.e., the benefit to the public cannot be achieved without necessarily benefiting private individuals. See, e.g., Rev. Rul. 70- 186, 1970-1 C.B. 128, in which it was found that it would be impossible to accomplish the organization's charitable purposes of cleaning and maintaining a lake without providing benefits to certain private property owners. In the quantitative sense, to be incidental, the benefit to private interests must not be substantial in the context of the overall public benefit conferred by the activity.

To be qualitatively incidental, the private benefit to the [redacted] must be a necessary concomitant of the activity that benefits the public at large. On [redacted] you made an unsecured loan of $[redacted] to [redacted] at 4.5 percent interest. The file does not indicate how you arrived at the interest amounts on the loan. There was no collateral on the loan other than a promise to pay, and the interest rate does not seem to reflect the degree of risk inherent in loaning funds to unsecured entities. Your trustee and your board, two of whom are donors and at least one other person over whom they had influence due to friendship or common business interests, authorized the loan. All these factors indicate that the loan was not made at an arm's length basis. As indicated in Best Lock Corporation v. Commissioner, supra, unsecured

loans to other entities might also be considered as being made for the personal purposes of the founder. Therefore, the private benefit has been shown to be a necessary concomitant of the activity benefiting the public at large, and the private benefit is not qualitatively incidental.

In order to be quantitatively incidental, the private benefit must be insubstantial in the context of the overall public benefit. The [redacted] Family has the benefit of dominion and control over the trust, which loaned money to a for-profit professional business at below market interest rate and provided little or no benefit to the public at large. When measured in the context of the overall public benefit conferred, this private benefit is not insubstantial.

Furthermore, unlike the organization in Rev. Rul. 68-489, you did not distribute funds to a nonexempt entity to carry on 501(c)(3) purposes. You loaned $[redacted] of your cash assets to a nonexempt entity to promote the private interests of your donors. Similar to the organization in P.L.L. Scholarship v. Commissioner, supra, you are formed by your donors, controlled by your donors with a board of directors selected by your donors and your activities can be used to the advantage of your donors. You do not have a community-based board of directors nor conflict of interest provisions in your bylaws that will supervise or safeguard your program and ensure that you are operated for charitable purposes. By making the unsecured loan of your assets, your directors allowed your net earnings to inure to the benefit of your founders and other persons. Therefore, you are not operated exclusively for exempt purposes under the regulations.

In addition, we are unable to rule that you qualify for exemption from tax under section 501(c)(3) of the Code based on the pertinent language in Article 2.5 of your trust document providing a "contingent remainder" in favor of the [redacted] Family.

Article 2.5 of your trust document violoates the dedication of assets requirement in section 1.501(c)(3)-1(b)(4) of the regulations since the "contingent remainder" in favor of the [redacted] Family will occur if you are not recognized under both section 501(c)(3) and 509(a)(3) of the Code. Thus, you are not organized exclusively for charitable purposes.

Further, the contingent reversion contained in Article 2.5 constitutes evidence of private inurement to the [redacted] Family. Section 1.501(c)(3)-1(c)(2) provides that an organization is not operated exclusively for one or more exempt purposes if its net earnings inure in whole or in part to the benefit of private shareholders or individuals. [redacted] and [redacted] are both directors of your organization. All of the funds of your organization, the principal and income, can be returned to the [redacted] Family under Article 2.5 by virtue of the contingent reversion. You have not established that your net earnings will not inure in whole or in part to the benefit of private shareholders

or individuals. Thus, you are not operated exclusively for charitable purposes.

Section 509(a)(3)

INTRODUCTION

We have also considered your application for supporting organization status (non-private foundation status) under section 509(a)(3) of the Code.

Section 509(a)(3)(A), in effect, describes as a public charity, an organization which is organized and at all times thereafter is operated, exclusively for the benefit of, to perform the functions of, or to carry out the purposes of one or more specified organizations described in paragraph (1) and (2). The Trust is asserting qualification under section 509(a)(3) under the "operated in connection with" relationship provided in section 1.509(a)-4(l)(1) of the Income Tax Regulations. The "operated, supervised or controlled by" or the "supervised or controlled in connection with" relationship tests are not asserted by you and are not discussed in this letter. In order to be described as an "operated in connection with" section 509(a)(3) organization, an applicant must satisfy a number of tests including (1) an Integral Part Test, a subpart of which is an attentiveness test, (2) a nondisqualified person control test, and (3) an organization test. You fail these specific tests for the reasons that follow.

ATTENTIVENESS TEST:

FACTS:

The purpose of your organization is to distribute substantially all of your income to and for the use of various public charities. In your trust document you state that you will help the [redacted] the "primary charity", carry out its purposes and perform its functions. Each year at least 35 percent of the net income of your organization will be distributed to the primary charity. This distribution to the primary charity will not represent a substantial part of the primary charity's total support. Your "board", which includes a member appointed by the primary charity, will meet with governing board to establish the use of these distributions. You have proposed to support the primary charity's Horseback Riding Project, which is part of the "sport programs" budget.

In addition, each year 50 percent of the net income of your organization will be distributed among designated charities listed on Schedule A of your trust document, as determined by your organization. Finally, your organization may make distributions of net income and of principal to such of the designated charities as your organization may determine.

[redacted]

LAW:

Section 1.509(a)-4(i)(3)(iii)(a) of the Regulations provides that a supporting organization coming under the "operated in connection with" status make payments of substantially all of its income to or for the use of one or more publicly supported organizations, and the amount of support received by one or more of such publicly supported organizations is sufficient to assure the attentiveness of such organizations to the operations of the supporting organizations. In addition, a substantial amount of the total support of the supporting organization must go to those publicly supported organizations that meet the attentiveness requirement of this subdivision with respect to such supporting organization. Except as provided in (b) of this subdivision, the amount of support received by a publicly supported organization must represent a sufficient part of the organization's total support so as to assure such attentiveness.

Section 1.509(a)-4(i)(3)(iii)(b) of the regulations provides that even where the amount of support received by a publicly supported beneficiary organization does not represent a sufficient part of the beneficiary's total support, the amount of support received from a supporting organization may be sufficient to meet the requirements of this subdivision if it can be demonstrated that in order to avoid the interruption of the carrying on of a particular function or activity, the beneficiary organization will be sufficiently attentive to the operations of the supporting organization. This may be the case where either the supporting organization or the beneficiary organization earmarks support received from the supporting organization for a particular program or activity, even if such program or activity is not the beneficiary organization's primary program or activity so long as such program or activity is a substantial one.

Example (1) of section 1.509(a)-4(i)(3)(iii)(c) of the regulations demonstrates the meaning of section 1.509(a)-4(i)(3)(iii)(b) of the regulations as follows:

> X, an organization described in section 501(c)(3), pays over all of it annual net income to Y, a museum described in section 509(a)(2). X meets the responsiveness test described in subparagraph (2) of this paragraph. In recent years, Y has earmarked the income received from X to underwrite the cost of carrying on a chamber music series consisting of 12 performances a year which are performed for the general public free of charge at its premises. Because of the expense involved in carrying on these recitals, Y is dependent upon the income from X for their continuation. Under these circumstances, X will be treated as providing Y with a sufficient portion of Y's total support to assure Y's attentiveness to X's operations, even though the music series is not the primary part of Y's activities.

[redacted]

Example (2) of that same regulation provides a very similar situation where a supporting organization paid over to the supported organization, a law school, the funds necessary to endow a chair in International law at the law school. Without such funds, the law school might not continue to maintain the chair.

ANALYSIS:

You will support the "Primary Charity" by virtue of an earmarked gift which you assert falls within the parameters of section 1.509(a)-4(i)(3)(iii)(b) of the regulations. The earmarked gift described to benefit [redacted] is a donation of funds each year to the Horseback Riding Project. For fiscal years [redacted] and [redacted] it appears that the primary charity had total income of $[redacted] and $[redacted], respectively. In a letter dated [redacted], you state that the Horseback Riding Project had total receipts of [redacted] in [redacted] and $[redacted] in [redacted] You assert that you will donate least $[redacted] in [redacted] and $[redacted] in [redacted] to support the Horseback Riding Project.

Section 1.509(a)-4(i)(3)(iii)(b) of the regulations contemplates a substantial ongoing program or substantial activity of long-term duration. Both examples cited above suggest that the programs using earmarked funds be for extended periods of time and show that the supported organization is dependent on the continuous funding of the supporting organization. We believe that the total amount of money that you will donate is insufficient to show that the supported organization is dependent on your continuous funding of the Horseback Riding Project. Although it appears that you provide about ten percent of the total support of the Horseback Riding Project, it is not clear whether the activities of the organization would be discontinued without your support. Thus, you have not established that you maintain a significant involvement in the operations of the primary charity and that the primary charity is dependent upon you for the type of support that you provide.

The third way of determining whether the amount of support received by a publicly supported beneficiary organization is sufficient to ensure the attentiveness of such organization to the operations of the supporting organization is to consider all the pertinent factors, including the number of beneficiaries, the length and nature of the relationship between the beneficiary and supporting organization and the purpose to which the funds are put. In this case, there is no evidence or history demonstrating that [redacted] has shown attentiveness.

[redacted]

CONTROL AND ORGANIZATIONAL TESTS:

FACTS:

In a letter dated [redacted], you state that you did not exist until [redacted] when a contribution of $[redacted] in cash was made to open a bank account. An additional contribution of $[redacted] was made in [redacted] of which $[redacted] was cash and the remainder was non-publicly traded stock ($[redacted], [redacted] shares of [redacted] at $[redacted] per share, the donor's purchase price). In a letter dated [redacted] you state that neither [redacted] nor any of his family members were a creator or founder nor are otherwise involved with [redacted] You submitted information from the primary charity that it had income of $[redacted] in [redacted] and $[redacted] in [redacted].

You also reported in your letter of [redacted] that the only activity that you have conducted is execution of a promissory note. On [redacted] you made a short term unsecured demand note at 4.5 percent interest per year in the amount of $[redacted] to [redacted]

Furthermore, disqualified persons (DPs) within the meaning of section 4946 of the Code exercise control over your organization in a number of different ways. Consider the following items regarding your trust document:

The minutes of your first meeting provide that board members are appointed for life. Your trust document does not contain this provision.

Article 2.2.2. of the Trust document provides that if the Board makes no directions to the "Trustee" as to distributions to the designated charities, the Trustee shall make such distributions as in his "sole and absolute discretion shall determine."

Article 2.4. provides that in the event the Trustee determines, in Trustee's sole and complete discretion, that the Trust fund is too small to economically administer, then, in such event, the Trustee shall distribute the Trust Fund in its entirety outright and free of trust to such organization or organizations as described in Section 170(c)(2) of the Code as the Trustee, in Trustee's total and complete discretion, shall determine.

Article III of your trust document establishes two members of the Board as consisting of family members of the substantial contributors, who are DPs. One Board member is appointed by the primary charity. The other two members are initially named in Article 3.1.3., but when a vacancy shall occur with respect to these two named members, the vacancy is filled by majority vote of the remaining Board.

Finally, the initial Board of Directors includes [redacted] and his daughter,

[redacted]

[redacted] who as substantial contributors, are disqualified persons under section 4946(a)(1)(A) of the Code. Also included is [redacted] a member of the financial planning/law firm that is assisting you to obtain exemption from federal income tax under section 501(c)(3).

LAW:

Section 509(a)(3)(C), in effect, provides that public charity status under section 509(a)(3) is precluded for an organization that is controlled directly or indirectly by one or more disqualified persons (as defined in section 4946) other than foundation managers and other than one or more organizations described in paragraph (1) and (2).

Section 1.509(a)-4(j)(1) of the regulations provides:

That if a person who is a disqualified person with respect to a supporting organization, such as a substantial contributor to the supporting organization, is appointed or designated as a foundation manager of the supporting organization by a publicly supported beneficiary organization to serve as the representative of such publicly supported organization, then for purposes of this paragraph, such person will be regarded as a disqualified person rather than as a representative of the publicly supported organization.

An organization will be considered "controlled," for purposes of section 509(a)(3), if the disqualified persons, by aggregating their votes or positions of authority, may require such organization to perform any act which significantly affects its operations or may prevent such organization from performing such act. This includes, but is not limited to, the right of a substantial contributor or his spouse to designate annually the recipients, from among the publicly supported organizations of the income attributable to his contribution to the supporting organization.

Thus, if the governing body of a foundation is composed of five trustees, none of whom has veto power over the actions of the foundation, and no more than two trustees are at any time disqualified persons, such foundation will not be considered controlled, directly or indirectly, by one or more disqualified persons by reason of this fact alone. However, all pertinent facts and circumstances including the nature, diversity, and income yield of an organization's holdings, the length of time particular stocks, securities, or other assets are retained, and its manner of exercising its voting right with respect to stocks in which members of the governing body also have some interest, will be taken into consideration in determining whether a disqualified person does in fact indirectly control an organization.

[redacted]

Section 1.509(a)-4(d)(4)(i) of the regulations provides in part that an organization "operated in connection with" must designate the "specified" supported organizations by name. A supporting organization which has one or more "specified" organizations designated by name in its articles will not be considered as failing the test of being organized for the benefit of "specified" organizations solely because its articles . . . (a) Permit a publicly supported organization which is designated by class or purpose, rather than by name, to be substituted for the publicly supported organization or organizations designated by name in the articles, but only if such substitution is conditioned upon the occurrence of an event which is beyond the control of the supporting organization, such as loss of exemption, substantial failure or abandonment of operations, or dissolution of the publicly supported organization or organizations designated in the articles.

Rev. Rul. 80-207, 1980-2 C.B. 193, held that for purposes of classification as a supporting organization under section 509(a)(3) of the Code, an employee of a corporation owned (over 35 percent) by a substantial contributor, a disqualified person, will be considered under the indirect control of a disqualified person for purposes of the control test.

Rev. Rul. 80-207 provides the following analysis:

> Because one of the organization's directors is a disqualified person and neither the disqualified person nor any other director has a veto power over the organization's actions, the organization is not directly controlled by a disqualified person under section 1.509(a)-4(j) of the regulations. However, in determining whether an organization is indirectly controlled by one or more disqualified persons, one circumstance to be considered is whether a disqualified person is in a position to influence the decisions of members of the organization's governing body who are not themselves disqualified persons.

Rev. Rul. 79-197, 1979-1 C.B. 204, holds that a newly created organization did not qualify for status as a supporting organization under section 509(a)(3); rather it was classified as a private foundation. The facts of the Ruling provide, in part, that the organization will pay its future income, until a specific dollar amount has been paid, to specified public charities coming under section 509(a)(1) or (a)(2) of the Code named in its articles of organization. After payment of a specific amount to specified public charities, the organization will dissolve and distribute the remaining assets to such public charities that a contributor to the organization named in the organization's articles of organization selects. Rev. Rul. 79-197 concludes that the subject organization, after payment of the specific amount, was not required by its articles of organization to support public charities that are designated by name. Because the organization was not organized to support specified organizations, it was not a supporting organization.

[redacted]

ANALYSIS:

Your Trust document, under Article III, establishes a "Board" consisting of five persons, one of whom is appointed by the primary charity and two of whom are members of the [redacted] family. In addition to the "Board", the Trust document names a "Trustee" who is a substantial contributor and thus a disqualified person under section 4946(a)(1)(A) of the Code. The "Trustee" is granted significant and substantial authority as to distributions and even as to Trust administration.

As indicated in the facts, Article 2.2.2. of the Trust document provides that if the Board makes no directions to the "Trustee" as to distributions to designated charities, the Trustee shall make such distributions as in his "sole and absolute discretion shall determine." In other words, by not acting, the Board is allowed to turn over control of the Trust to the "Trustee." Since the "Trustee" is a DP, this is a clear violation of the control prohibition under section 1.509(a)-4(j) of the regulations. The same problem appears again in Article 2.2.3. Further examples of the control exercised by the "Trustee" at the expense of the Trust's Board are the powers granted to the "Trustee" under Articles 2.6, 2.11, and 2.12 of the trust document. While the Board would appear to have the authority to override the Trustee with respect to the powers granted in Article 2.6, such power and authority is exercised only if the Board chooses to override the Trustee. The language of Article 2.6., providing that such powers "may" be exercised by the Board, suggests that the powers, as a practical matter, will mostly be exercised by the Trustee.

As set forth in the facts, the Trustee has the power under Article 2.4 to determine, in the Trustee's sole and complete discretion, that if the Trust is too small to economically administer, the Trustee shall distribute the Trust Fund in its entirety outright and free of trust to such organization or organizations as described in section 170(c)(2) as the Trustee shall determine. The power of the Trustee in paragraph 2.4 is a clear and unambiguous violation of the requirements imposed on supporting organizations. There is no proviso as to a Board direction, and the Trustee's discretion as to charitable recipients is not limited to the designated charities. This is not only a violation of the control prohibition by disqualified persons as discussed in the preceding paragraphs (see section 1.509(a)-4(j)(1) of the regulations), but it is a clear violation of the organization test under section 1.509(a)-4(d) of the regulations limiting support to specified designated charities.

This kind and amount of discretion in the Trustee, a disqualified party, is exactly the kind of discretion the Service held was disqualifying in Rev. Rul. 79-197, supra. The facts of that ruling indicate that a newly created organization will pay its future income until a specific amount has been paid to specified organizations that are named in its

[redacted]

articles of organization. After the organization has paid out the specific amount to the supported organization, the supporting organization will dissolve and it will distribute its assets to such charitable organizations that a contributor named in its articles selects. Rev. Rul. 79-197 holds that the organization is not required by its articles to be operated to support organizations designated by name. This is precisely the case with your organization by virtue of Article 2.4. You are not required by your articles to support organizations designated by name at any time that the Trustee determines that the trust shall be terminated.

As discussed, the Trustee's powers also violate the section 509(a)(3) organization test. In Quarrie Charitable Fund v. U.S., 603 F.2d 1274 (7th Cir. 1979) the trust document allowed the trustee to transfer the income to a charity other than the designated charity when, in the trustee's discretion, the charitable uses shall become unnecessary, undesirable, impracticable or no longer adapted to the needs of the public. The court found that such language failed the organizational requirement of section 1.509(a)-4(d)(4)(i)(a) of the regulations. Just as discretion of the trustee was a crucial factor in the court's decision in the Quarrie case, the discretion of the Trustee in article 2.4 violates the organizational test as to your organization.

Section 1.509(a)-4(d)(4)(i)(a) of the regulations allow a change of support of specified designated charities only under certain situations and only when the trust document contains specific language allowing for such discretion. Your Trust contains no such language.

Returning to the control test, disqualified persons are in a position to control the Board, directly or indirectly, for several additional reasons. The initial Board of Directors is controlled by disqualified persons. Two of your trustees are DPs and a third, [redacted] is managing director of the financial planning firm that is assisting you in the application process for 501(c)(3) exemption. This relationship puts him in a position to be under the influence of the Drexlers similar to the situation described in Rev. Rul. 80-207, supra. Under the facts, three of the five members of the Board are either disqualified persons or under the influence of disqualified persons.

Finally, under the control test, there is the additional problem of selecting new members of the Board. Under Article 3.1.3., one Board member is appointed by the primary charity and two Board members consist of family members of the Drexler Family. The other two Board members are named in Article 3.1.3. but when a vacancy shall occur with respect to these two named members, the vacancy is filled by a majority vote of the remaining Board. Since the remaining Board consists of two DP Board members, these DP members may either exercise majority control of the selection of the vacant Board members (if they hold a two to one majority) or they may exercise control by having a veto power in that their two votes offset the two votes of the

[redacted]

non-DP Board members. Section 1.509(a)-4(j)(1) of the regulations, supra.

A further indication that you are controlled by your donors is that a substantial amount of your assets are tied up in an unsecured loan. In addition, your donors and other members of your board are appointed for life.

Conclusion:

Accordingly, your organization is controlled by disqualified persons within the meaning of section 509(a)(3)(C) of the Code, and fails the section 509(a)(3) organization test.

In summary, your organization fails to qualify under section 509(a)(3) of the Code in that it fails to qualify under the "attentiveness test", the organizational test, and the control test.

Determinations

In summary, you do not qualify for tax exemption as an organization described in section 501(c)(3) of the Code. Nor, separately, are you excluded from private foundation status under section 509(a)(3) of the Code. You must file federal income tax returns.

Contributions to you are not deductible under section 170 of the Code.

You have the right to protest this ruling if you believe it is incorrect. To protest, you should submit a statement of your views to this office, with a full explanation of your reasoning. This statement, signed by one of your officers, must be submitted within 30 days from the date of this letter. You also have a right to a conference in this office after your statement is submitted. You must request the conference, if you want one, when you file your protest statement. If you are to be represented by someone who is not one of your officers, that person will need to file a proper power of attorney and otherwise qualify under our Conference and Practices Requirements.

If you do not protest this ruling in a timely manner, it will be considered by the Internal Revenue Service as a failure to exhaust available administrative remedies. Section 7428(b)(2) of the Code provides, in part, that a declaratory judgement or decree under this section shall not be issued in any proceeding unless the Tax Court, the United States Court of Federal Claims, or the District Court of the United States for the District of Columbia determines that the organization involved has exhausted administrative remedies available to it within the Internal Revenue Service.

[redacted]

If we do not hear from you within 30 days, this ruling will become final and a copy will be forwarded to the Ohio Tax Exempt and Government Entities (TE/GE) office. Thereafter, any questions about your federal income tax status should be directed to that office, either by calling 877-829-5500 (a toll free number) or sending correspondence to: Internal Revenue Service, TE/GE Customer Service, P.O. Box 2508, Cincinnati, OH 45201. The appropriate State Officials will be notified of this action in accordance with Code section 6104(c).

When sending additional letters to us with respect to this case, you will expedite their receipt by using the following address:

Internal Revenue Service
[redacted], T:EO:RA:T:4
1111 Constitution Ave, N.W.
Washington, D.C. 20224

If you have any questions, please contact the person whose name and telephone number are shown in the heading of this letter.

Sincerely,

(signed) Gerald V. Sack
Gerald V. Sack
Manager, Exempt Organizations
Technical Group 4

[redacted]