

Private foundations; disqualified persons; employee stock ownership trust. An employee stock ownership trust holds 30 percent of the stock in a corporation on behalf of the corporation's participating employees, who direct the manner in which the trust votes the shares. The trust will not be considered a disqualified person with respect to a private foundation merely because the corporation is a substantial contributor to the foundation.

#### ISSUE

Is the employee stock ownership trust described below a disqualified person with respect to a private foundation, within the meaning of section 4946(a)(1)(C) of the Internal Revenue Code?

#### FACTS

M, a manufacturing corporation is a disqualified person with respect to a private foundation because it is a substantial contributor within the meaning of section 4946(a)(1)(A) of the Code.

M has established an employee stock ownership trust under an employee stock ownership plan described in section 4975(e) of the Code and the regulations thereunder, in which all of M's employees are eligible to participate. The trust holds on behalf of the participating employees 30 percent of the outstanding stock in M. The trust is administered by a bank that is not related to or controlled by M or the foundation.

All of the stock that is held by the trust has been allocated to individual participants. In accordance with the terms of the trust's governing instrument, each participant is entitled to direct the trust as to the manner in which the shares allocated to the participant are to be voted. The allocated shares are then voted by the trustee bank as directed by the participants.

#### LAW AND ANALYSIS

Section 4946(a)(1)(C) of the Code provides that the term "disqualified person" includes a person who is an owner of more than 20 percent of the total combined voting power of a corporation that is a substantial contributor to a private foundation.

Section 53.4946-1(a)(5) of the Foundation Excise Tax Regulations provides that the term "combined voting power" includes voting power represented by holdings of voting stock, actual or constructive, but does not include voting rights held only as a director or trustee.

The trust's control over the M stock is subject to the

direction of the individuals on whose behalf the shares have been allocated and to whom the beneficial interest in the shares has passed. Therefore, to the extent that the trust has any voting power with respect to the M stock, it is merely the voting power of a trustee. Thus, although the trust holds legal title to 30 percent of the total combined voting power of M, it is not treated as the owner of the stock, for purposes of section 4946(a)(1)(C) of the Code.

#### HOLDING

Because the trust is not treated as the owner of the M stock allocated to the participating employees, it is not a disqualified person within the meaning of section 4946(a)(1)(C) of the Code with respect to the private foundation.