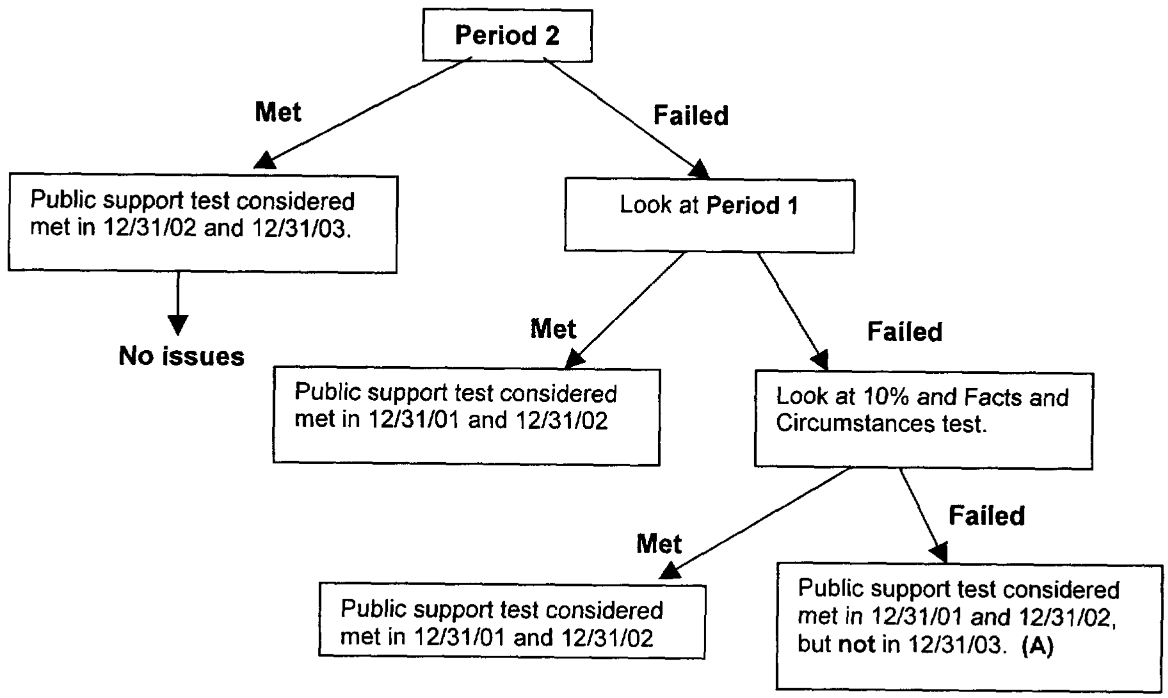
Consequences of Pass/Fail Public Support Test for 509(a)(1) & 170(b)(1)(a)(vi)

EXAMPLE 1
Examination of Organization X
Exam Year: 12/31/2002

Look at X's aggregate public support first for base years in Period 2, then if necessary, Period 1.

Period 2: 12/31/2001 12/31/2000, 12/31/1999, 12/31/1998
Period 1: 12/31/2000, 12/31/1999, 12/31/1998, 12/31/997



(A) Organization X will still qualify as an IRC § 170(b)(1)(A)(vi) organization for taxable year 12/31/02 because it is considered "normally" publicly supported on the basis of taxable years of 12/31/00,12/31/99, 12/31/98 and 12/31/97.

It will be disqualified as an IRC § 170(b)(1)(A)(vi) organization for the next taxable year of 12/31/03 because it failed to satisfy either the 33 1/3 percent or 10 percent facts and circumstances test for **two** consecutive computation periods (Periods 2 and 1). Treas. Reg. § 1.170A-9(e)(4)(iv).

Exception: Assume in taxable year ending 12/31/02, Organization X receives an unusually large contribution (not an excludible "unusual grant"). Due to material changes in sources of support, the four-year computation period now will not apply, even though it met the public support test in Periods 2 and 1. Organization X must meet an aggregate public support test(s) for a **five**-year computation period consisting of the current year (12/31/02) and the four years immediately preceding (12/31/01, 12/31/00, 12/31/99 and 12/31/98) to qualify as described in IRC § 170(b)(1)(A)(vi). Treas. Reg. § 1.170A-9(e)(4)(v).

Exhibit 2

10% Public Support Facts and Circumstances Test

Favorable Factors	Unfavorable factors
(1) *Public support well in excess of 10 percent.* The higher the percentage of public support, the less the burden to establish the organization's publicly supported nature. Caution: The Treasury Regulations add a qualifying factor: if the percentage of the support from public or governmental sources is low because the organization receives a high percentage of total support from investment income on its endowment funds, evidence in favor of meeting the facts and circumstances test would exist if the funds originally were contributed by a governmental unit or the general public.	(1) *A percentage of public support, close to 10 percent.* The closer the percentage of public support is to ten, the greater the burden to establish that the organization is publicly supported.
(2) Does the organization receive support from a representative number of persons rather than from members of a single family? In determining what is a "representative number of persons," consideration will be given to the type of organization, the length of time of its existence, and whether it limits its activities to a particular community or region or to a special field of interest only to a limited number of persons.	(2) Lack of evidence of broad based support.
(3) Does the organization have a governing body representative of the broad interests of the public (e.g., public officials, community leaders, or persons elected by a broadly based membership)?	(3) Governing body represents the private interests of a limited number of persons.
(4) Are the facilities of the organization available to the public on a continuing basis? The Treasury Regulations give examples: libraries and museums open to the public, symphony orchestras that give public performances, an old age home providing bed care and nursing services to the public.	(4) Limited public use
(5) Is the organization an educational one or a research institution that regularly publishes scholarly journals? Are the organization's studies widely used by colleges and universities, or by members of the general public?	Non distribution of materials and no scholarly journals or publications

10% Public Support Facts and Circumstances Test

(6) Do members of the public with special knowledge or expertise, public officials, or civic or community leaders, participate in, or sponsor, programs of the organization?	(6) No participation in, or sponsorship of, the organization's programs by public officials, or civic and community leaders.
(7) Does the organization maintain a definitive program to accomplish its charitable work in the community (e.g., slum clearance or developing employment opportunities)?	(7) No definitive program of community work.
(8) Does the organization receive a significant part of its funds from a public charity or a governmental agency to which it is in some way accountable?	(8) No arrangements with public charities or governmental agencies, involving receipt of funds and accountability to such entities.
(9) With respect to membership organizations, are its solicitations designed to enroll a substantial number of members in the community? Are dues for individual (as opposed to institutional) members fixed at rates designed to make membership available to a broad cross-section of the general public? Are its activities likely to appeal to persons having some broad common interest or purpose?	(9) No attempt to enroll broad-based membership. Activities not likely to appeal to persons having some broad common interest or purpose.

Exhibit 3

Factors of Unusual Grants

Favorable Factors	Unfavorable Factors
(1) Contribution was made by a person with no connection to the organization.	
(2) Contribution was a bequest.	(2) Contribution was an inter vivos transfer.
(3) Contribution was in cash, readily marketable securities, or assets that further the exempt purposes of an organization, such as a gift of a painting to a museum.	(3) Less liquid (or less pertinent) assets that the organization may find difficult to dispose and do not contribute to the organization's exempt purpose.
(4) The organization, prior to receipt of the particular contribution, has carried on an actual program of public solicitation and has been able to attract a significant amount of public support.	(4) No program of public solicitation or the public solicitation program has been unsuccessful.
(5) The organization may reasonably be expected to attract a significant amount of public support subsequent to the particular contribution.	(5) Continued reliance on unusual grants. (May be evidence that the organization cannot reasonably be expected to attract future support from the general public.)
(6) The organization, prior to the year in which the particular contribution was received, met the 33 1/3 support test without the benefit of any exclusions for unusual grants.	(6) Organization, in year prior to receiving grant, did not meet the 33 1/3 percent support test, or only met the test because unusual grants were excluded.
(7) The organization has a representative (broadly based) governing body.	(7) Organization's governing body is not broadly based.
(8) No material restrictions are imposed in connection with the grant.	(8) Material restrictions are imposed on the grant.

Exhibit 4

Corporate Sponsorship and IRC §§ 509(a)(1) and 170(b)(1)(A)(vi) Public Support Test

Treas. Reg. §§ 170A-9(e)(6)(i) and 1.513-4

1. What is a "qualified sponsorship payment" under IRC § 513(i)?

Definition of A Qualified Sponsorship Payment
Treas. Reg. § 1.513-4(c)

✓ Made by someone engaged in a trade or business
✓ No arrangement or expectation of a substantial benefit in return
✓ Payment is in the form of:
o Money
o Transfer of property, or
o Performance of a service

2. Are there "return benefits" provided to the payor?

Not all inclusive

Payor Return Benefits
Treas. Reg. § 513-4(c)(2)(iii)

✓ Advertising
✓ Exclusive provider arrangement
✓ Goods, facilities, services, other privileges
✓ Exclusive or nonexclusive rights to use an intangible asset (e.g., organization's trademark)

YES

✓ Consider all return benefits for the organization's fiscal year.
✓ Determine each benefit's *fair market value* (including payment for services).

See Question 3.

NO

"Qualified sponsorship payment" is the fair market value of *entire* payment under 513(i).

Corporate Sponsorship and IRC §§ 509(a)(1) and 170(b)(1)(A)(vi) Public Support Test

3. Are the return benefits provided to the payor "disregarded" benefits or "substantial" benefits?

Does the aggregate of return benefits exceed 2% of the total payment?

YES

Benefits are considered *substantial return benefits*. Treas. Reg. § 1.513-4(c)(2)(i), (iv).

NO

Benefits are disregarded, and "qualified sponsorship payment" is the fair market value of *entire* payment under 513(i).

Exclude: Use or acknowledgment of payor's name, logo, or product by organization. Treas. Reg. § 1.513-4(c)(2)(iv).

Total payment
(less FMV all benefits)
Qualified sponsorship payment

4. What portion of qualified sponsorship payment is included in public support?

Does the qualified sponsorship payment include the value of services performed?

YES

Qualified sponsorship payment
(fair market value of services performed)
Public support amount

Includible in numerator and denominator Treas. Reg. 170A-9(e)(6)(i)

NO

Entire amount of the qualified sponsorship payment is considered public support for purposes of IRC §§ 509(a)(1) and 170(b)(1)(a)(vi).

Note: Even if there are return benefits (e.g., advertising) to the payor in connection the payment they are disregarded to the degree their aggregate fair market value is not more than 2% of the total payment.

Exhibit 5

Support Test Computation for IRC §§ 509(a)(1) and 170(b)(1)(A)(vi) Organizations

Public Support Test results:

PUBLIC SUPPORT TEST

1 .	Gifts, grants, and contributions received...... **(DO NOT INCLUDE UNUSUAL GRANTS)**	
2 .	Membership fees received......	
3 .	Exempt function income......	
4 .	Interest, dividends, etc......	
5 .	Net income from Unrelated Business activity (UBI)......	
6 .	Tax revenues levied for organization benefit......	
7 .	Value of services or facilities furnished by governmental unit......	
8 .	Other income (Do not include gain/loss from sale...... of capital assets)	
9 .	Total of lines 1 through 8......	$
10 .	Total support revenue for 509(a)(1) calculation (Denominator): Line 9 - line 3......	$
11 .	Total of lines 1, 2, 6, and 7......	$
12 .	2% of Total support revenue for 509(a)(1), (line 10 x 2%)......	$
13 .	Amount disallowed by contributors who gave in excess of 2%......	$
14 .	Public support (Numerator): Line 11 - line 13......	$
15 .	Percentage of public support (line 14 / line 10)......	0.0%

Contributors exceeding 2% of Line 10 Total Support

	Name(s) of Contributors	Amount Contributed
1 .		
2 .		
3 .		
4 .		
5 .		
6 .		
7 .		
8 .		
9 .		
10 .		
	Total	$

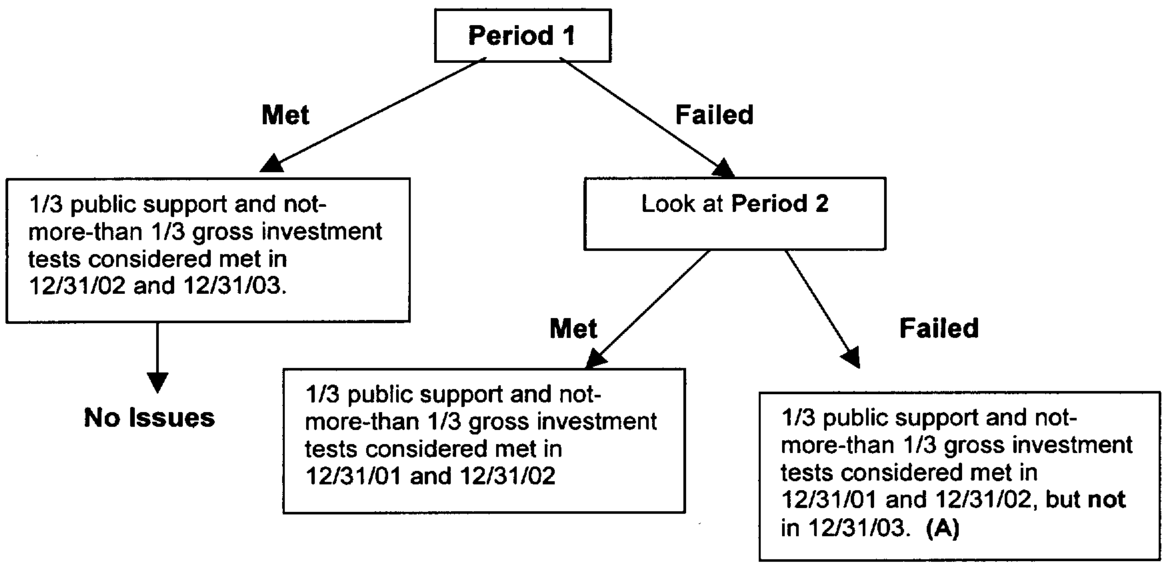
Exhibit 6

Consequences of Pass/Fail Public Support Test for 509(a)(2)

EXAMPLE 1
Examination of Organization Y
Exam Year: 12/31/2002

Look at Y's aggregate support first for base years in Period 1, then if necessary, Period 2.

Period 1: 12/31/2001 12/31/2000, 12/31/1999, 12/31/1998
Period 2: 12/31/2000, 12/31/1999, 12/31/1998, 12/31/997



(A) Organization Y will still qualify as a broadly, publicly supported organization described in IRC § 509(a)(2) organization for taxable year 12/31/02 because it is considered "normally" publicly supported on the basis of taxable years of 12/31/00, 12/31/99, 12/31/98 and 12/31/97.

It will be disqualified as an IRC § 509(a)(2) organization for the next taxable year (12/31/03) because it failed to satisfy the one-third percent support test and not-more-than-one-third support test for **two** consecutive computation periods (Periods 1 and 2). Treas. Reg. § 1.509(a)-3(c).

Exception: Assume in taxable year ending 12/31/02, Organization Y receives an unusually large contribution (but not an excludible "unusual grant"). Due to material changes in sources of support, the four-year computation period will not apply, even though it met it met the public support test in Periods 1 and 2. Organization Y must meet the aggregate support and test(s) for a **five**-year computation period consisting of the current year (12/31/02) and the four years immediately preceding (12/31/01, 12/31/00, 12/31/99 and 12/31/98) to qualify as an organization described in IRC § 509(a)(2). Treas. Reg. § 1.509(a)-3(c)(ii).

Exhibit 7

Public Support Test results:

Gross Investment Test results:

Both tests must be passed to qualify for IRC 509(a)(2).

PUBLIC SUPPORT TEST

1 .	Gifts, grants, and contributions received (DO NOT INCLUDE UNUSUAL GRANTS)	$
2 .	Membership fees received	
3 .	Exempt function income	
4 .	Interest, dividends, etc	
5 .	Net income from Unrelated Business activity (UBI)	
6 .	Tax revenues levied for organization benefit	
7 .	Value of services or facilities furnished by governmental unit	
8 .	Other income (Do not include gain/loss from sale of capital assets)	
9 .	Total of lines 1 through 8	$
10 .	Add lines 1,2,3,6 and 7	$
11 .	Deduct: a. Income from disqualified persons See details on Schedule A	
	b. Excess exempt function income See details on Schedule B	
12 .	Line 10 less lines 11a & 11b = public support (numerator)	$
13 .	Total support from line 9 (denominator)	$
14 .	**Public support percentage (line 12/13)**	0.0%

Gross Investment Test

15 .	Investment Income from line 4	-
16 .	Unrelated business income on line 5 less tax paid	-
17 .	Total of lines 15 and 16 (numerator)	-
18 .	Total support from line 9 (denominator)	-
19 .	**Gross investment percentage (line 17/line 18)**	0.0%

Exhibit 8

Public Support Tests IRC §§ 509(a)(1) and 170(b)(1)(A)(vi) versus IRC § 509(a)(2)

IRC §§ 509(a)(1) and 170(b)(1)(A)(vi)		Source of Support	IRC § 509(a)(2)	
Numerator	Denominator		Numerator	Denominator
Include [1]	Include	Gifts, bequests and contributions from: ▪ Individual, trust, corporation	Include [2]	Include
Include	Include	▪ Governmental unit	Include	Include
Include [5]	Include	▪ 170(b)(1)(A)(vi) organization	Include [3]	Include
Include	Include	Ordinary Grants	Include	Include
Exclude	Exclude	Unusual Grants (approved)	Exclude	Exclude
Exclude	Exclude	Membership Fees: ▪ To obtain merchandise, admissions, etc.	Include [4, 2]	Include
Include	Include	▪ To provide support	Include	Include
Exclude	Include	Dividends and Interest	Exclude	Include
Exclude	Exclude	Rents: ▪ Related activity	Include [4, 2]	Include
Exclude	Include	▪ Other	Include	Include
Exclude	Exclude	Gross receipts from related activity: Admissions, sale of merchandise, services rendered, fundraising not UBI (e.g., charitable gaming), facilities furnished, etc.	Include [4, 2]	Include
Exclude	Include	Net income from unrelated activity	Exclude	Include
Include	Include	Value of services received from Governmental units without charge	Include	Include
Include	Include	Governmental units under contracts or grants: ▪ For services rendered for benefit of the Government	Include [4, 2]	Include
Exclude	Exclude	▪ For carrying out related activity	Include [4, 2]	Include
Include	Include	▪ For direct benefit of public	Include	Include
Include	Include	Taxes levied for benefit of organization	Include	Include
Exclude	Exclude	Capital gains	Exclude	Exclude
Exclude	Exclude	Contributions of non-deductible services	Exclude	Exclude
Exclude	Exclude	Amounts borrowed	Exclude	Exclude

[1] To the extent that the total amount of the contributions by any individual, trust, or corporation during the period involved does not exceed 2% of the organization's total support for each period.

[2] Does not include amounts received from disqualified persons. For purposes of this computation, IRC section 509(a)(2) and 509(a)(3) organizations may be considered disqualified persons. IRC 509(a)(1) organizations and 170(c) governmental units are not considered disqualified persons.

[3] Does not include amounts received from donor to contributing organization if donor is a disqualified person (substantial contributor) to recipient organization.

[4] To the extent that receipts from any person, governmental bureau, or governmental agency do not exceed the greater of $5,000 of 1% of the organization's support in any taxable year.

[5] Subject to 2% limitation described in footnote [1] above if contributions represent amounts that have been specifically earmarked for recipient organization.

Exhibit 9

Basic Steps in Making an IRC § 509(a)(3) Determination

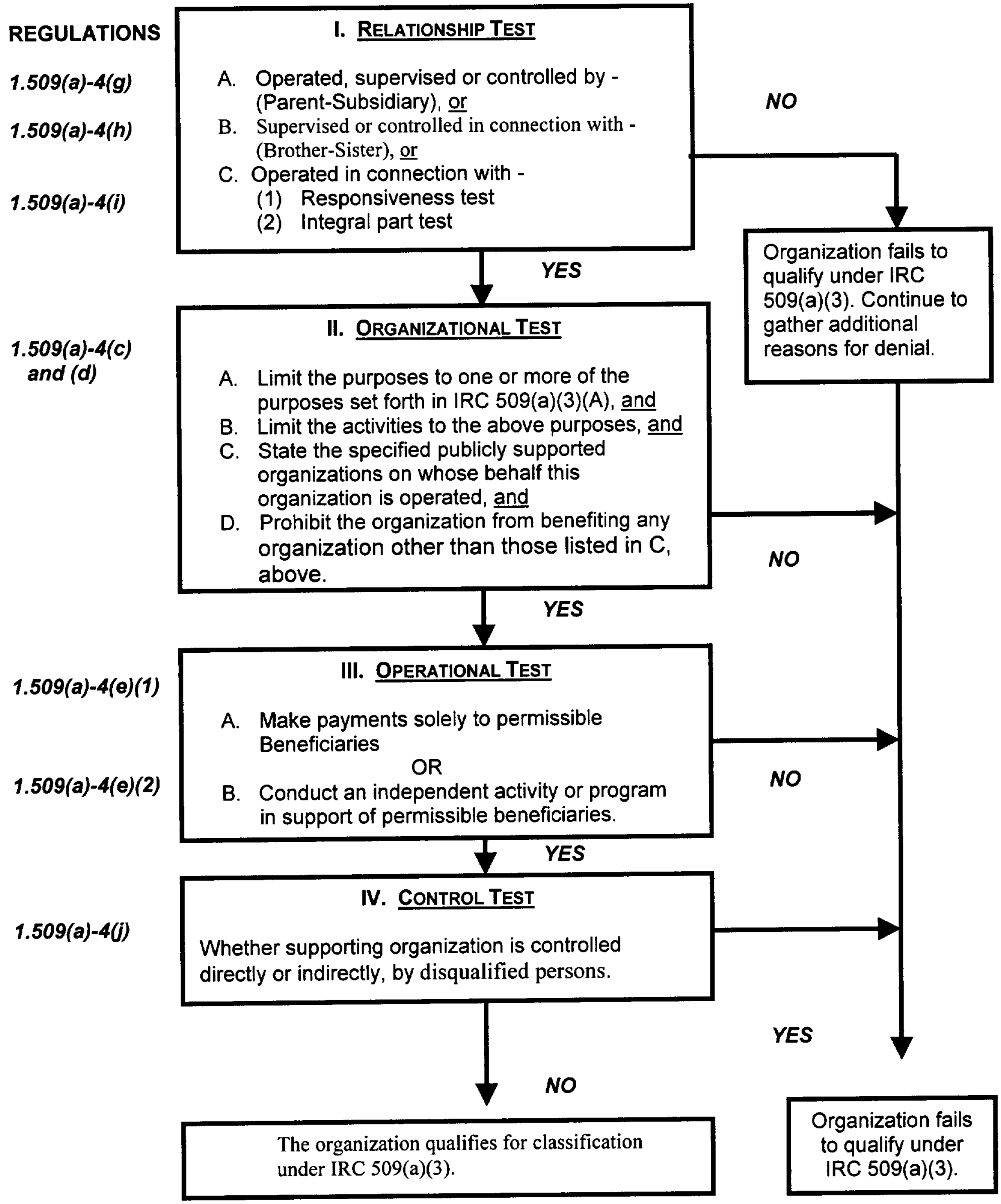


Exhibit 10

Form 990 Line Items To Consider for Possible IRC § 4958 Issues

Part I
Line 8a
Gross amount from sales of assets other than inventory.

Part II
Line 25
Column (A)
Compensation of officers, directors, etc. is a significant percentage of total expenses on line 44.

Part II
Line 28
Column (A)
Other employee benefits is a significant percentage of total expenses on line 44.

Part V
Col. (C)
Note compensation for persons listed.

Part V
Col. (D)
Contributions to employee benefit plans and deferred compensation listed in Part V exceeds compensation in Col. (C).

Part V
Col. (E)
Expense account and other allowances listed in Part V exceeds compensation in Col. (C).

Part V
Line 75
Question is answered “Yes.”

Part VI
Question 89
Question 89b is answered “Yes” or left blank.
Question 89c – Any amount is reported
Question 89d – Any amount is reported

Form 990 Line Items To Consider for Possible IRC § 4958 Issues

Schedule A
Part I
Col. (c)
For a person listed in Part I, the amount in Col. (c) exceeds amount included on Form 990, Part II, Line 25 (compensation of officers) or Line 26 (other salaries and wages), Col. A.

Schedule A
Part I
Col. (d)
For a person listed in Part I, the amount in Col. (d) exceeds amount included on Form 990, Part II, Line 25 (compensation of officers) or Line 26 (other salaries and wages), Col. A.

Schedule A
Part I
Col. (e)
For a person listed in Part I, the amount in Col. (e) exceeds amount included on Form 990, Part II, Line 25 (compensation of officers) or Line 26 (other salaries and wages), Col. A.

Exhibit 11

Checklist For Identification and Analysis of Excess Benefit Transactions Under IRC § 4958

Step 1 – Determine if the organization is an *applicable tax-exempt organization*

- ✓ Include organizations that were applicable tax-exempt organizations at any time in the five-year Lookback Period.
- ✓ Eliminate private foundations.
- ✓ Eliminate governmental entities. Treas. Reg. § 53.4958-2.

  ❖ If organization is not an applicable tax-exempt organization, IRC § 4958 does not apply.

Step 2 – Determine if the applicable tax-exempt organization is a church

- ✓ For churches, follow the procedures of IRC § 7611. Treas. Reg. § 53.4958-8(b).

Step 3 – Identify the *disqualified persons (DP's)*

- ✓ Statutory disqualified persons. Treas. Reg. § 53.4958-3(b).
- ✓ Persons having substantial influence. Treas. Reg. § 53.4958-3(c).
- ✓ Entities controlled by a disqualified person. Treas. Reg. § 53.4958-3(b).
- ✓ Determine if there are facts and circumstances tending to show that the person has substantial influence over the affairs of the applicable tax-exempt organization. Treas. Reg. § 53.4958-3(e).
- ✓ *Eliminate:* Persons deemed not to have substantial influence. Treas. Reg. § 53.4958-3(d).

  ❖ If there are no disqualified persons, IRC § 4958 does not apply.

Step 4 – Determine if disqualified persons have engaged in *excess benefit transactions.*

- ✓ Review all significant transactions between disqualified persons and the applicable tax-exempt organization.
- ✓ Determine when each transaction occurred. Treas. Reg. 53.4958-1(e).
- ✓ Determine whether each transaction occurred on or after September 14, 1995. Treas. Reg. § 53.4958-1(f).

  Eliminate: transactions that occurred under a written contract that was binding on September 13, 1995 and at all times thereafter before the transaction.

  Do Not Eliminate: transactions that occurred under a binding written contract if the contract was materially changed after September 13, 1995.

- ✓ Determine when the *period of limitations* ends for each excess benefit transaction. Treas. Reg. § 53.4958-1(e)(3).

  Eliminate: transactions that occurred after the period of limitations ended.

Checklist For Identification and Analysis of Excess Benefit Transactions Under IRC § 4958

Eliminate: portions of transactions that involve:

a. Fixed payments made under an initial contract. Treas. Reg. § 58.4958-4(a)(3).
b. Nontaxable fringe benefits excludable under IRC § 132. Treas. Reg. § 53.4958-4(a)(4)(i).
c. Expense reimbursements paid under an "accountable plan" under Treas. Reg. § 1.62-2(c)(2). Treas. Reg. § 53.4958-4(a)(4)(ii)..
d. Other disregarded benefits. Treas. Reg. §§ 53.4958-4(a)(4)(iii) and (v).

✓ Test the remaining transactions to determine if the applicable tax-exempt organization clearly indicated its intent to treat the benefits as compensation for services. Treas. Reg. § 53.4958-4(c).

❖ If not, the benefits are treated as excess benefits.

✓ Determine the value of benefits the applicable tax-exempt organization provided to disqualified persons and the value of the consideration received from the disqualified person. Treas. Reg. § 53.4958-4(b).

If: the value of economic benefits the applicable tax-exempt organization provided to the disqualified person *exceeds* the value of consideration received from the DP, the DP has received an excess benefit.

❖ If there is no excess benefit, IRC § 4958 does not apply.

Exhibit 12

Q&A on Hospitals' Health IT Subsidy Arrangements with Medical Staff Physicians

Q1 — What if a hospital's Health IT Subsidy Arrangements with its medical staff physicians aren't entirely consistent with the conditions in the directive at IRM 4.76.3.11.4.5 ("directive")? Would those arrangements result in impermissible private benefit or inurement?
A1 — Such arrangements will not be covered by the "safe harbor" described in the directive. However, they will not necessarily generate impermissible private benefit or inurement, because the directive is not meant to set forth the only permissible Health IT Subsidy Arrangement between hospitals and physicians. Rather, the facts and circumstances of any arrangement that does not meet the conditions described in the directive will need to be reviewed to determine if it results in any impermissible private benefit or inurement.
Q2 — What is meant in the directive by "financial assistance" and "subsidies" to medical staff physicians to acquire and implement electronic health records (EHR)-related software and services that would enable the physicians to connect to the hospitals' EHR systems?
A2 — Consistent with the HHS regulations referenced in the directive, "financial assistance" and "subsidy" do not include cash payments from the Hospital to the physicians. Rather, they refer to arrangements in which the hospital provides the physician with EHR-related software or information technology and training services, and the physician contributes a portion of the cost.
Q3 — What if the hospital provides a Health IT Subsidy to a "disqualified person" as defined in IRC 4958?
A3 — Assuming that the hospital meets all the conditions described in the directive, the agent will not treat such Health IT Subsidy Arrangement as an excess benefit transaction.
Q4 — What if the agent finds inurement to a medical staff physician outside the context of the Health IT Subsidy Arrangement?
A4 — If the agent finds that the hospital's net earnings have inured to the benefit of one or more medical staff physicians outside the context of such arrangement, then the hospital would not be covered by the safe harbor set forth in the memorandum. Although the safe harbor would not apply in this situation, a determination of whether the Health IT Subsidy Arrangement results in impermissible private benefit or inurement will depend on all the facts and circumstances.
Q5 — What type of restrictions, if any, may a medical staff physician impose on the hospital's access to electronic medical records created by the physician using the Health IT Items and Services subsidized by the hospital?
A5 — A physician may deny a hospital access to such records if that access would violate federal and state privacy laws or the physician's contractual obligations to patients. Also, the hospital and physician may agree on reasonable conditions to the hospital's access. For example, their agreement could allow the hospital to access a patient's medical records only when that patient becomes a patient of the hospital, and could deny the hospital access to nonmedical information such as billing, insurance eligibility, and referral information.
Q6 — Does the hospital have to ensure that the Health IT Items and Services are available to all of its medical staff physicians at the same time?
A6 — The hospital may provide access to various groups of physicians at different times according to criteria related to meeting the health care needs of the community. The hospital should establish a plan for providing such access.