



TAX EXEMPT AND  
GOVERNMENT ENTITIES  
DIVISION

DEPARTMENT OF THE TREASURY  
INTERNAL REVENUE SERVICE  
WASHINGTON, D.C. 20224

Number: **201120036**  
Release Date: 5/20/2011

Date: February 22, 2011

UIL: 504.50-00

Contact Person:

Identification Number:

Contact Number:

Employer Identification Number:

Form Required To Be Filed:  
1120

Tax Years:  
All Years

Dear :

This is our final determination that you do not qualify for exemption from Federal income tax as an organization described in Internal Revenue Code section 501(c)(3). Recently, we sent you a letter in response to your application that proposed an adverse determination. The letter explained the facts, law and rationale, and gave you 30 days to file a protest. Since we did not receive a protest within the requisite 30 days, the proposed adverse determination is now final.

Since you do not qualify for exemption as an organization described in Code section 501(c)(3), donors may not deduct contributions to you under Code section 170. You must file Federal income tax returns on the form and for the years listed above within 30 days of this letter, unless you request an extension of time to file.

We will make this letter and our proposed adverse determination letter available for public inspection under Code section 6110, after deleting certain identifying information. Please read the enclosed Notice 437, *Notice of Intention to Disclose*, and review the two attached letters that show our proposed deletions. If you disagree with our proposed deletions, you should follow the instructions in Notice 437. If you agree with our deletions, you do not need to take any further action.

In accordance with Code section 6104(c), we will notify the appropriate State officials of our determination by sending them a copy of this final letter and the proposed adverse letter. You should contact your State officials if you have any questions about how this determination may affect your State responsibilities and requirements.

Letter 4038 (CG) (11-2005)  
Catalog Number 476328

If you have any questions about this letter, please contact the person whose name and telephone number are shown in the heading of this letter. If you have any questions about your Federal income tax status and responsibilities, please contact IRS Customer Service at 1-800-829-1040 or the IRS Customer Service number for businesses, 1-800-829-4933. The IRS Customer Service number for people with hearing impairments is 1-800-829-4059.

Sincerely,

*Holly Paz*

Holly Paz  
Director, Exempt Organizations  
Rulings & Agreements

Enclosure  
Notice 437  
Redacted Proposed Adverse Determination Letter  
Redacted Final Adverse Determination Letter



TAX EXEMPT AND  
GOVERNMENT ENTITIES  
DIVISION

DEPARTMENT OF THE TREASURY  
INTERNAL REVENUE SERVICE  
WASHINGTON, D.C. 20224

Date: October 14, 2010

Legend:

X = Name of Organization  
Y = Name of Company

Contact Person:

Identification Number:

Contact Number:

FAX Number:

Employer Identification Number:

UIL No:

504.50-00

Dear :

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

**Issue 1:**

Do you pass the operational test of section 501(c)(3) of the Code? No, for the reasons described below.

**Alternative Issue:**

If upon Appeal, it is determined that you are exempt under section 501(c)(3) of the Code, would you be described as a private foundation under section 509(a) of the Code from the date of your formation, and would you therefore be required to file annual returns on Forms 990-PF rather than on Forms 990-N? Yes, for the reasons described below.

**Facts:**

Page 1 of the Form 1023 application states your organization, X, was formed as an unincorporated association on December 1, 1992, as this is when the Y Company formally recognized you as an employee caucus group. However, the document entitled "X Original Charter" indicates you were formed on July 20, 1995.

You state you are "a formal organization for Y employees who are or who support gay, lesbian, bisexual, or transgender persons." You further state your mission is "to offer support and

visibility within the Y Company and beyond to its members, and to provide an official point of contact between its membership and Y, as well as with other gay, lesbian, bisexual, and transgender organizations external to the Y Company." You also indicate having the Y Company become the employer of choice for individuals of the lesbian, gay, bisexual, and transgender community where these individuals can work in a culture of equality and enjoy successful employment.

Past achievements made by you and additionally listed in the activity narrative and in documentation included with the application include working with the Y Company to implement Extended Household Healthcare Benefits in 1995, assisting in adding "sexual orientation" into the company's anti-discrimination policy in 2004, the granting of Domestic Partner benefits to lesbian, gay, bisexual, and transgender and straight employees (in Canada in 1994 and the United States in 1997), creating and deploying workplace guidelines to aid employees and their managers and becoming an advocate for lesbian, gay, bisexual, and transgender employees who have experienced harassment in the workplace. And in 2006 you joined the Business Coalition for Domestic Partner Benefits Tax Equity. Your organizing document also lists documentation to support similar activities in your "Goals" section.

As a result of your efforts within the Y Company, you, as well as the Y Company, have received several forms of external recognition. These include the Y Company being placed on several best places to work list for lesbian, gay, bisexual, and transgender employees and have received several corporate leadership awards from your efforts, specifically in 1996, 2003, 2005 and 2007.

Membership is primarily open to employees of the Y Company, as these members have full voting privileges and must be in good standing with the Y Company. Membership is also open to those not employees of the Y, but these do not have voting privileges. There are chapters of X that are organized by geographical area that engage in activities that support your mission and objectives.

You indicated in your application that the vast majority of your income since inception comes from the Y Company and there is no indication that you will receive any major income from an additional source(s) in the near future.

Past expenses include conference expenses, board meeting expenses, community expenses, operating expenses and a one time Board Retreat. The expenses listed are in line with activities as described.

During correspondence, and further review of your activities it appeared you were similar to an organization that would qualify for exemption under section 501(c)(5) of the Code. You indicated that you were only interested in exemption under section 501(c)(3) and declined to apply under section 501(c)(5).

**Law:**

**501(c)(3) Law**

Section 501(c)(3) of the Code provides for the exemption from federal income tax for "Corporations, and any community chest, fund, or foundation, organized and operated

exclusively for religious, charitable, scientific, testing for public safety, literary or educational purposes. No part of the net earnings of which inures to the benefit of any private shareholder or individual."

Section 509(a) of the Code states that "the term 'private foundation' means a domestic or foreign organization described in Section 501(c)(3) other than an organization described in section 509(a)(1) and 170(b)(1)(A)(vi) or one described in section 509(a)(2).

Section 509(a)(1) and 170(b)(1)(A)(vi) of the Code provides that an organization is publicly supported if it normally receives at least one-third of its total support from governmental units, direct or indirect contributions from the general public, or a combination of these sources.

Section 509(a)(2) of the Code provides that an organization is publicly supported if it normally receives more than one third of its support from any combination of gifts, grants, contributions, or membership fees, and gross receipts from admissions, sales of merchandise, performance of services, or furnishing of facilities, in an activity which is not an unrelated trade or business (within the meaning of section 513 of the Code), not including such receipts from any person, or from any bureau or agency of a governmental unit, in excess of the greater of \$5000 or 1 percent of the organization's support in such taxable years, or from disqualified persons (as defined in section 4946 of the Code); and normally not more than one-third of its support from gross investment income.

Section 4946 of the Code provides, in part, that the term "disqualified person" means, with respect to a private foundation, a person who is a substantial contributor to a foundation. The term "substantial contributor" as defined in section 507(d)(2) of the Code, means any person who contributed an aggregate amount of more than \$5,000 to the foundation, if such amount is more than 2 percent of the total contributions received by the foundation before the close of the taxable year in which the contribution is received.

Section 1.170A-9(e)(6) of the Income Tax Regulations provides that in determining whether or not such tests are met, support from direct or indirect contributions from the general public includes contributions from an individual, trust, or corporation but only to the extent that the total contribution from a single such individual, trust, or corporation does not exceed 2 percent of the organization's total support.

Section 1.501(c)(3)-1(a)(1) of the Regulations states, "In order to be exempt as an organization described in section 501(c)(3), an organization 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."

In Revenue Ruling 59-6, 1959-1 CB 121, a professional association was held not exempt under IRC 501(c)(3) where its educational program is only an incidental part of activities that had as a principal purpose the professional advancement of its members as a group. An educational program must be conducted for exclusively educational purposes, with only incidental nonexempt purposes.

In Revenue Ruling 69-175, 1969-1 CB 149, an organization formed by parents of pupils attending a private school to provide school bus transportation for its member children was found not to be exempt under IRC 501(c)(3). It was found in this ruling that when a group of

individuals associate to provide a service for themselves, they are serving a private rather than a public interest.

Revenue Ruling 78-305 1978-2 CB 172 stated that an organization that was formed to educate the public about homosexuality in order to foster an understanding and tolerance of homosexuals and their problems qualified for exemption under section 501(c)(3) of the Code. Membership in the organization described was not limited to the employees of a particular company.

In the Church of the Living Tree v. Commissioner, TC Memo 1996-291 (1996), the Tax Court upheld the Service's determination that the organization, whose secondary purpose was the promotion of a for-profit industry, was not described in IRC 501(c)(3). The Service had determined that promotion of this industry was a substantial nonexempt purpose and that the organization provided benefit to the founder. The court ruled that the organization had not carried its burden of proof to show the Service's determination was erroneous.

In Better Business Bureau of Washington, D.C., Inc. v. United States, 326 U.S. 279 (1945), the Supreme Court held that the presence of a single non-exempt purpose, if substantial in nature, will destroy a claim for exemption regardless of the number of importance of truly exempt purposes. The court ruled that the activities engaged in by the organization were in part aimed at promoting the prosperity and standing of the business community and served a substantial private purpose.

#### 501(c)(5) Law

Section 501(c)(5) of the Code provides for the exemption from federal income tax of labor organizations that have no net earnings inuring to the benefit of any member and has as their objects the betterment of the conditions engaged in the pursuits of labor, the improvement of the grade of their products, and the development of a higher degree of efficiency in their respective occupations. A labor organization is an association of workers who have combined to protect or promote the interests of its members by bargaining collectively with their employers to secure better working conditions, wages and similar benefits. The term includes labor unions, councils, and committees. A labor organization need not be a recognized labor union.

Revenue Ruling 76-31, 1976-1 CB 157 stated that an organization formed by an association of teachers to improve its members' professional abilities, to secure for them better salaries and working conditions, that sponsored seminars and courses for its members, participated in conventions, bargained collectively and processed grievances, and kept its members informed of its activities through regular meetings and a newsletter qualified for exemption as a labor organization under section 501(c)(5).

#### Application of Law:

##### 501(c)(3) Law

Section 501(c)(3) of the Code sets forth two main tests to qualify for exempt status. An organization must be both organized and operated exclusively for purposes described in section 501(c)(3). You have failed the operational test.

You do not satisfy the requirements of the operational test of the regulations as you have not provided sufficient evidence that you are exclusively operated for any of the aforementioned purposes of section 501(c)(3).

While Revenue Ruling 78-305 does allow for an organization to conduct activities similar to your organization; however, the organization described in this ruling was formed to present this information to the general public. You are focused on presenting information collected to your members and to the Y Company. You primarily advocate for Y Company employees, thus not meeting the "public interest" requirement as listed in the Regulations. And as Revenue Ruling 59-6 earlier explained, if an organization's educational activities are only incidental, then the organization is not exempt under section 501(c)(3) of the Code. While you may conduct educational activities that would include certain members conducting workshops or conferences, or being involved in annual charitable benefits, these are still not your primary activities nor the purpose of your organization.

Also, as Revenue Ruling 69-175 shows, when an organization is formed to primarily benefit its members by providing a service for themselves, this activity precludes exemption as well. You were formed by members to act as a liaison or official point of contact between members and your employer, Y Company, thus providing a service to members. While your membership may be open to individuals outside of the Y Company, your activities are primarily focused on assisting those who are full and voting members and who are employees of the Y Company, thus your activities are serving a private interest.

In addition, in line with Church of the Living Tree v. Commissioner, TC Memo 1996-291 (1996), you have stated in a "Performance Excellence Plan" submitted with your application, that your goals and objectives include increasing public awareness of the Y Company's commitment to member employees, grow awareness of the Y Company brand in the members community and assist the Y Company in regaining a "leadership position" in the members market. You also stated that you took part in a job fair as representatives of the Y Company to enable the Y Company to demonstrate its diverse workforce. As this court case indicated, promotion of a for-profit industry and/or business is a substantial nonexempt purpose and, even as a secondary activity, precludes exemption under section 501(c)(3) of the Code. Furthermore, as with the case involving the Better Business Bureau of Washington, D.C., regardless of the number of truly exempt activities, the non-exempt purpose of your organization is too substantial to ignore, especially when considering you are primarily funded by the Y Company.

Additionally, according to the financial information provided, your organization would not qualify as a public charity within the meaning of section 509(a)(1) and 170(b)(1)(A)(vi) or section 509(a)(2). As stated in the "Law" section of this letter, an organization meeting the requirements of either of those sections as a public charity would need to receive a substantial amount of its support from a combination of sources. As noted the vast majority of support received since your inception has been received from one source, the Y Company. See Exhibits 1 and 2 which show your percentage of public support fails to pass the applicable requirements for classification as a publicly supported charity under section 509(a)(1) and 170(b)(a)(A)(vi) or 509(a)(2) of the Code.

### 501(c)(5) Law

Based on the activities listed in your application, you may qualify for exemption as an organization described under section 501(c)(5) of the Code. However, as mentioned previously, you declined to submit an application for exemption under section 501(c)(5) of the Code.

Your activities are similar to those described in Revenue Ruling 76-31, as a substantial amount of your activities are geared toward improving the conditions of members who are employees of the Y Company. You work diligently in keeping your members informed on a variety of topics related to those issues, providing written correspondence to all members and conducting regular meetings to provide feedback to both your membership and to the Y Company. You even represent your members who may have experienced various issues in the workplace such as harassment, or in developing policies for use by the Y Company for the benefit of your members. As previously mentioned your organization does not have to be formally recognized as a labor union, to be exempt under section 501(c)(5) as a labor organization.

### **Applicant's Position:**

In a letter dated August 28, 2008, to address our concerns of you meeting the requirements for IRC 501(c)(3), you stated that you work to assure that your members have equal employment and promotional opportunities within the company. The letter also stated your educational purpose is to provide support and information to your members on lesbian, gay, bisexual, and transgender issues in the workplace and provide feedback to the Y Company on their policies and procedures that may require review and updating. Your members meet monthly and hold an annual conference and your co-presidents represent you in meetings held by the Y Company Diversity Office. You also included a Performance Plan that listed your goals as "Creating a Great Customer Experience," "Grow Revenue", "Improve Profitability and Cash Flow", and "Create a Great Employee Experience." You provided that these activities make you exclusively educational within the meaning of section 501(c)(3) of the Internal Revenue Code. This letter also stated you are being divided into local chapters and these chapters conduct charitable activities on their own.

In a letter dated January 6, 2009, to address precedent and possible re-application under IRC 501(c)(5) as a labor organization, you declared that you did not wish to accept exemption under IRC 501(c)(5), as you felt your activities were in line with exemption for IRC 501(c)(3), and you provided additional documentation regarding your various chapters and what your members do outside of their connection with the Y Company. Your documentation shows how several of your members are involved in some charitable activities, such as a clothing drive and a film festival. However, the letter continues to state that your members are involved in helping other organizations and their members see how the Y Company has dealt with various lesbian, gay, bisexual, and transgender issues in the workplace. Other activities listed include participating in a job fair, working with a local chamber of commerce, and working with other organizations that share information and knowledge to human resource professionals from the private and public sector on how to advance lesbian, gay, bisexual, and transgender equality. You continue to state that you are primarily serving and assisting your primary members, Y Company employees, and ultimately the Y Company.

In a letter dated May 19, 2009, in response to a phone conversation to discuss a basis for denial of the application as well as to address the organizational test of your organizing document, you



submitted a copy of your amended Charter/Bylaws. Changes made to your organizing document were not material and the organizational test was not met at that time.

A letter dated March 30, 2010 was issued in response to phone and written correspondence to further address the ramifications of not re-applying for exemption under section 501(c)(5), the still unaddressed organizational test, provide updated financial information, additional membership and chapter information, and address foundation classification issues. You were also asked to provide your specific legal position on how you meet the requirements for exemption under section 501(c)(3). In your response you have stated that applying for exemption under section 501(c)(5) is not an option, as this would result in you and your members violating the policies of the Y Company, as the Y Company does not allow its employees to establish labor organizations. No specific legal position was provided in this response; however you do restate your primary focus: to provide educational support to your members who are primarily employees of the Y Company, provide feedback to the Y Company to support its development of policies and procedures for a diverse workforce, and to share your findings with other organizations. You also included an internal guide provided by the Y Company that supports this as well.

This response included amended Charter/Bylaws to meet the organizational test, and additional financial information as requested. You stated that while you are currently funded 100% by the Y Company, with exemption under section 501(c)(3), you would attempt to receive other sources of funding outside of the Y Company. The internal guide previously mentioned does allow for this. The amended Charter/Bylaws also provided information regarding chapters.

**Response to Applicant's Position:**

Your stated primary purpose is to offer support and visibility within the Y Company and beyond to its members, and to provide an official point of contact between its membership and the Y Company. You primarily conduct several activities for those who are full members and employees in good standing with the Y Company. While membership to you is open to individuals not associated with the Y Company, these associate members are not the primary recipients of your activities. Your activities consist of acting as a liaison or official point of contact between member employees to address concerns within the Y Company, assure that your members have equal employment and promotional opportunities within the Y Company, enhancing professional development and mentoring of the membership, and ultimately increase public awareness of your employer, the Y Company, which is a for-profit entity. These activities are not exempt activities under section 501(c)(3) of the Code. While you and your members may be involved in some educational and charitable activities, this benefit is incidental to the benefits afforded to your primary membership and the employer of your members, the Y Company.

**Conclusion:**

Based on the facts provided, we hold that you do not meet the operational test for exemption under section 501(c)(3) of the Code and you are serving a private rather than a public interest. A substantial part of your activities are not in furtherance of an exempt purpose under section 501(c)(3) of the Code.

In addition, your organization would not qualify as a public charity within the meaning of sections 509(a)(1) and 170(b)(1)(A)(vi) or 509(a)(2). Therefore, if upon Appeal you are determined to be exempt under IRC 501(c)(3), you would be described as a private foundation and responsible for filing Form 990-PF annually.

**Protest Rights:**

You have the right to file a protest if you believe this determination is incorrect. To protest, you must submit a statement of your views and fully explain your reasoning. You must submit the statement, signed by one of your officers, within 30 days from the date of this letter. We will consider your statement and decide if the information affects our determination. If your statement does not provide a basis to reconsider our determination, we will forward your case to our Appeals Office. You can find more information about the role of the Appeals Office in Publication 892, *Exempt Organization Appeal Procedures for Unagreed Issues*.

Types of information that should be included in your appeal can be found in Publication 892. These items include:

1. The organization's name, address, and employer identification number;
2. A statement that the organization wants to appeal the determination;
3. The date and symbols on the determination letter;
4. A statement of facts supporting the organization's position in any contested factual issue;
5. A statement outlining the law or other authority the organization is relying on; and
6. A statement as to whether a hearing is desired.

The statement of facts (item 4) must be declared true under penalties of perjury. This may be done by adding to the appeal the following signed declaration:

"Under penalties of perjury, I declare that I have examined the statement of facts presented in this appeal and in any accompanying schedules and statements and, to the best of my knowledge and belief, they are true, correct, and complete."

Your appeal will be considered incomplete without this statement.

If an organization's representative submits the appeal, a substitute declaration must be included stating that the representative prepared the appeal and accompanying documents; and whether the representative knows personally that the statements of facts contained in the appeal and accompanying documents are true and correct.

An attorney, certified public accountant, or an individual enrolled to practice before the Internal Revenue Service may represent you during the appeal process. If you want representation during the appeal process, you must file a proper power of attorney, Form 2848, *Power of Attorney and Declaration of Representative*, if you have not already done so. You can find more information about representation in Publication 947, *Practice Before the IRS and Power of Attorney*. All forms and publications mentioned in this letter can be found at [www.irs.gov](http://www.irs.gov), Forms and Publications.

If you do not file a protest within 30 days, you will not be able to file a suit for declaratory judgment in court because the Internal Revenue Service (IRS) will consider the failure to appeal as a failure to exhaust available administrative remedies. Code section 7428(b)(2) provides, in part, that a declaratory judgment or decree 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 all of the administrative remedies available to it within the IRS.

If you do not intend to protest this determination, you do not need to take any further action. If we do not hear from you within 30 days, we will issue a final adverse determination letter. That letter will provide information about filing tax returns and other matters.

Please send your protest statement, Form 2848, and any supporting documents to the applicable address:

Mail to:  
Internal Revenue Service  
EO Determinations Quality Assurance  
Room 7-008  
P.O. Box 2508  
Cincinnati, OH 45201

Deliver to:  
Internal Revenue Service  
EO Determinations Quality Assurance  
550 Main Street, Room 7-008  
Cincinnati, OH 45202

You may fax your statement using the fax number shown in the heading of this letter. If you fax your statement, please call the person identified in the heading of this letter to confirm that he or she received your fax.

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

Sincerely,

*Robert Choi*

Robert Choi  
Director, Exempt Organizations  
Rulings & Agreements

Enclosures:  
Exhibits 1 and 2  
Publication 892