



Chapter 9

Is the Filer a Public Charity or Private Foundation?

All section 501(c)(3) nonprofits are either private foundations or non-private foundations. The term “private foundation” is a technical term and relates to the kind of nonprofit an organization is and the nature of its support and not to the fact it is a philanthropy. (We will refer to a non-private foundation as a “public charity.”) This distinction between private foundation and public charity is important since, from a nonprofit’s standpoint, it is usually undesirable to be a private foundation. For example, as noted below, there are some significant limits on making contributions to private foundations, and private foundations are generally prohibited from doing any lobbying and must pay a small excise tax on net assets.

The distinction can also be significant for those who wish to find out about nonprofits. For most 501(c)(3) nonprofits, the fact that they have qualified as public charities means that they receive support (mostly financial) from a wide, or at least fairly wide, range of private sources and government agencies. And, groups that receive financial support from many sources are usually thought well of by many people and this is surely something important to know about a nonprofit that one is evaluating. Furthermore, the fact that many support a group usually means that a good number are to some degree monitoring its activities and this may provide comfort to those considering supporting the organization.

Thus, a reader of the Form 990 may want to know whether the filer is a private foundation or public charity. Question 1 of Part IV of the core Form 990 on page 3 asks, in effect, whether the filer is a public charity and if so directs the filer to complete Schedule A. Part I of Schedule A shows whether the filer is a private foundation. It provides a number of lines (Lines 1-11) with brief descriptions of different kinds of entities, each of which is not a private foundation. The filer is instructed to check the box that applies to it. By reviewing Part I, one

can determine whether the filer is a public charity, and, if so, what kind of public charity it is.

Schedule A, Part I:

SCHEDULE A (Form 990 or 990-EZ)	Public Charity Status and Public Support Complete if the organization is a section 501(c)(3) organization or a section 4947(a)(1) nonexempt charitable trust. ▶ Attach to Form 990 or Form 990-EZ. ▶ See separate instructions.	OMB No. 1545-0047 <div style="font-size: 24pt; font-weight: bold; text-align: center;">2010</div> <div style="background-color: black; color: white; text-align: center; padding: 2px; font-weight: bold;">Open to Public Inspection</div>												
Department of the Treasury Internal Revenue Service	Name of the organization	Employer identification number												
Part I Reason for Public Charity Status (All organizations must complete this part.) See instructions.														
The organization is not a private foundation because it is: (For lines 1 through 11, check only one box.)														
1 <input type="checkbox"/> A church, convention of churches, or association of churches described in section 170(b)(1)(A)(i) . 2 <input type="checkbox"/> A school described in section 170(b)(1)(A)(ii) . (Attach Schedule E.) 3 <input type="checkbox"/> A hospital or a cooperative hospital service organization described in section 170(b)(1)(A)(iii) . 4 <input type="checkbox"/> A medical research organization operated in conjunction with a hospital described in section 170(b)(1)(A)(iii) . Enter the hospital's name, city, and state: 5 <input type="checkbox"/> An organization operated for the benefit of a college or university owned or operated by a governmental unit described in section 170(b)(1)(A)(iv) . (Complete Part II.) 6 <input type="checkbox"/> A federal, state, or local government or governmental unit described in section 170(b)(1)(A)(v) . 7 <input type="checkbox"/> An organization that normally receives a substantial part of its support from a governmental unit or from the general public described in section 170(b)(1)(A)(vi) . (Complete Part II.) 8 <input type="checkbox"/> A community trust described in section 170(b)(1)(A)(vi) . (Complete Part II.) 9 <input type="checkbox"/> An organization that normally receives: (1) more than 33 1/3% of its support from contributions, membership fees, and gross receipts from activities related to its exempt functions—subject to certain exceptions, and (2) no more than 33 1/3% of its support from gross investment income and unrelated business taxable income (less section 511 tax) from businesses acquired by the organization after June 30, 1975. See section 509(a)(2) . (Complete Part III.) 10 <input type="checkbox"/> An organization organized and operated exclusively to test for public safety. See section 509(a)(4) . 11 <input type="checkbox"/> An organization organized and operated exclusively for the benefit of, to perform the functions of, or to carry out the purposes of one or more publicly supported organizations described in section 509(a)(1) or section 509(a)(2). See section 509(a)(3) . Check the box that describes the type of supporting organization and complete lines 11e through 11h. a <input type="checkbox"/> Type I b <input type="checkbox"/> Type II c <input type="checkbox"/> Type III—Functionally integrated d <input type="checkbox"/> Type III—Other e <input type="checkbox"/> By checking this box, I certify that the organization is not controlled directly or indirectly by one or more disqualified persons other than foundation managers and other than one or more publicly supported organizations described in section 509(a)(1) or section 509(a)(2). f If the organization received a written determination from the IRS that it is a Type I, Type II, or Type III supporting organization, check this box <input type="checkbox"/> g Since August 17, 2006, has the organization accepted any gift or contribution from any of the following persons? (i) A person who directly or indirectly controls, either alone or together with persons described in (ii) and (iii) below, the governing body of the supported organization? <table border="1" style="float: right; font-size: 8pt;"> <tr><td></td><td>Yes</td><td>No</td></tr> <tr><td>11g(i)</td><td></td><td></td></tr> <tr><td>11g(ii)</td><td></td><td></td></tr> <tr><td>11g(iii)</td><td></td><td></td></tr> </table> (ii) A family member of a person described in (i) above? (iii) A 35% controlled entity of a person described in (i) or (ii) above? h Provide the following information about the supported organization(s).				Yes	No	11g(i)			11g(ii)			11g(iii)		
	Yes	No												
11g(i)														
11g(ii)														
11g(iii)														
(i) Name of supported organization	(ii) EIN	(iii) Type of organization (described on lines 1-9 above or IRC section (see instructions))	(iv) Is the organization in col. (i) listed in your governing document?	(v) Did you notify the organization in col. (i) of your support?	(vi) Is the organization in col. (i) organized in the U.S.?	(vii) Amount of support								
			Yes No	Yes No	Yes No									
(A)														
(B)														

Generally, there are three types of public charities (i.e., non-private foundations). First, there are those entities that are *per se* public charities because of their very nature and that do not have to show a wide base of public support (a specially defined term explained below), such as churches (Line 1), schools (Line 2) and hospitals (Line 3). Second, there are those groups that are not *per se* public charities but

are public charities because they do receive broad public support (Lines 7 and 9). Finally, there are those groups that may not receive wide public support but are supporting organizations to groups that are public charities (Line 11). (Part I also lists (Lines 4, 5, 6 and 10) several other kinds of groups (e.g., a government unit, community trust, etc.) that are not private foundations. Because they are fairly uncommon, to save time we will not cover them. Information can be found about these groups in the Instructions to Schedule A's Part I.)

Most filers are the second type of public charity, namely, those that receive broad public support and check the box at either Line 7 or Line 9. For a group to so qualify as a public charity, a fair amount of its support must be "public support." The question of what constitutes public support is quite complicated in its details. For our purposes, a general idea of what the term means will suffice. There are two kinds of public charities that qualify under this category. For one kind (which is described under section 509(a)(2) of the Code), public support includes contributions from individuals, grants from government agencies and exempt function income. (Exempt function income includes such items as tuition or ticket sales). For the other kind (which is described under section 509(a)(1) of the Code), public support includes contributions from individuals and grants from government agencies, but not exempt function income. In both cases, for contributions to qualify as public support, they cannot be too large. These rules are elaborated upon later in this chapter.

Part II of Schedule A on page 2 is where a filer shows the nature and amount of its support. It does so for the past five years. The key line to look at is Line 14 that shows the public support fraction based on an average for the past five years. The public support fraction is the percentage of a filer's total support made up by public support. Generally, the public support fraction must be more than one-third for a group to qualify as a public charity (although in some cases it can be lower). Obviously, the higher the public support fraction or percentage, the broader the support the filer has received and, consistent with what was said above about the depth of an organization's support, this fraction may be of real interest to the reader of the Form 990. (For those who want to derive more information and insight on Part II, the Instructions provide a good guide.)

More about Private Foundations

Some of what follows repeats what has been said above but provides

more detail for the interested reader.

In the late 1960s, Congress introduced the private foundation rules into the Internal Revenue Code. Congress was concerned that some charities were controlled by only a few people who were using these groups to improperly advance their private interests. In these circumstances, such charities were abusing their exempt status. Generally, under the private foundation rules, section 501(c)(3) groups that receive support from relatively few sources are deemed to be private foundations, and private foundations are more closely regulated than those 501(c)(3) groups that are not private foundations. Usually, these latter groups, which we call public charities in this text, are 501(c)(3) groups which receive broad public support.

Generally, if a group is deemed to be a private foundation, philanthropies will be less likely to make grants to it. Furthermore, individuals are less likely to contribute to private foundations real and tangible property and securities not listed on a public market. In addition, private foundations must pay a small excise tax on their investment income. Private foundations are also subject to strict self-dealing rules and subject to a virtual prohibition on lobbying activities. All charities that are exempt from federal income taxation under section 501(c)(3) of the Code are then *classified* as public charities or private foundations pursuant to section 509 of the Code. As just noted, classification as a public charity or private foundation may be of critical importance to donors of every kind. 501(c)(3) groups that qualify under subsection 509(a)(1), (2) or (3) of the Code are not private foundations.¹ (Otherwise stated, they are public charities.)

509(a)(1) groups are divided into (1) what we refer to as *per se* organizations, namely, schools, churches, and hospitals, and (2) those organizations which normally receive a substantial part of their support from what is referred to as public support. For the latter group, public support consists of support from governmental agencies and community foundations and contributions from the general public to the extent that they do not exceed 2% of total support. In effect a fraction is set up, called the public support fraction, and if the public support fraction is 1/3rd or more, the group passes the "mechanical" public support test and needs show no more. If, however, the group has a public support fraction of more than 10% but less than 33 1/3%,

¹ A 501(c)(3) group that qualifies as a public charity under subsection 509(a)(1), (2) or (3) is still a 501(c)(3).

and it can show sufficient “facts and circumstances” pointing to its public nature, such as conducting a program to garner broader public support, having a board made up of governmental officials and letting its facilities be used by the public, it will pass the public support test and qualify as a 509(a)(1) group. Note that for 509(a)(1) groups, exempt function income (e.g., income from tuition or ticket sales) and capital gains are excluded from both the numerator and denominator of the public support fraction. Unusual grants, such as a one-time start-up grant, are also excluded from the numerator and denominator of the public support fraction. As noted above, organizations that are public charities under 509(a)(1) check the box at Line 7 of Schedule A’s Part I.

509(a)(2) groups are organizations that normally receive a substantial part of their support from exempt function income, grants from governmental agencies and contributions from the public. Here are some of the ways a 509(a)(2) differs from a 509(a)(1) group: For a 509(a)(2) group, the numerator of the public support fraction includes gross receipts from exempt function income in both the numerator and denominator. Note, however, that if any such exempt function receipt exceeds \$5,000 or 1% of total support for the year, it will not be included in the numerator to the extent of such excess. (Exempt function income refers to income a filer receives for performing its exempt function, such as a school charging tuition or a theatre selling tickets, or a social service group charging fees for its services.) Furthermore, the public support fraction must equal at least 33 1/3%, i.e., no 10% “facts and circumstances” test is available. In addition, investment income plus certain net unrelated business income for a 509(a)(2) group cannot exceed 33 1/3% of support. Finally, for a 509(a)(2) group, contributions from “disqualified persons” are not included in the numerator. Disqualified persons include directors and officers or family of such persons and “substantial contributors.” A substantial contributor is anyone who has contributed an aggregate amount of more than \$5,000 if such amount is more than 2% of total contributions received by the organization before the close of its fiscal year. Note that it is 2%, etc., of all contributions ever received by the organization rather than 2% total of support received during the taxable year, as is the case under 509(a)(1). As noted, organizations that are public charities under 509(a)(2) check the box at Line 9 of Schedule A.

We have noted that so long as an organization *normally* receives the right amount of public support, it will qualify as a public charity. An organization will be considered as normally receiving such support for

its current year and the next one if, for the five years immediately preceding the current year, it met the applicable public support test.

Schedule A Part II:

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Part II Support Schedule for Organizations Described in Sections 170(b)(1)(A)(iv) and 170(b)(1)(A)(vi)
 (Complete only if you checked the box on line 5, 7, or 8 of Part I or if the organization failed to qualify under Part III. If the organization fails to qualify under the tests listed below, please complete Part III.)

Section A. Public Support

Calendar year (or fiscal year beginning in) ▶	(a) 2006	(b) 2007	(c) 2008	(d) 2009	(e) 2010	(f) Total
1 Gifts, grants, contributions, and membership fees received. (Do not include any "unusual grants.")						
2 Tax revenues levied for the organization's benefit and either paid to or expended on its behalf						
3 The value of services or facilities furnished by a governmental unit to the organization without charge						
4 Total. Add lines 1 through 3						
5 The portion of total contributions by each person (other than a governmental unit or publicly supported organization) included on line 1 that exceeds 2% of the amount shown on line 11, column (f)						
6 Public support. Subtract line 5 from line 4.						

Section B. Total Support

Calendar year (or fiscal year beginning in) ▶	(a) 2006	(b) 2007	(c) 2008	(d) 2009	(e) 2010	(f) Total
7 Amounts from line 4						
8 Gross income from interest, dividends, payments received on securities loans, rents, royalties and income from similar sources						
9 Net income from unrelated business activities, whether or not the business is regularly carried on						
10 Other income. Do not include gain or loss from the sale of capital assets (Explain in Part IV.)						
11 Total support. Add lines 7 through 10						
12 Gross receipts from related activities, etc. (see instructions)					12	
13 First five years. If the Form 990 is for the organization's first, second, third, fourth, or fifth tax year as a section 501(c)(3) organization, check this box and stop here ▶ <input type="checkbox"/>						

Section C. Computation of Public Support Percentage

14 Public support percentage for 2010 (line 6, column (f) divided by line 11, column (f))	14	%
15 Public support percentage from 2009 Schedule A, Part II, line 14	15	%
16a 33¹/₃% support test—2010. If the organization did not check the box on line 13, and line 14 is 33 ¹ / ₃ % or more, check this box and stop here. The organization qualifies as a publicly supported organization ▶ <input type="checkbox"/>		
b 33¹/₃% support test—2009. If the organization did not check a box on line 13 or 16a, and line 15 is 33 ¹ / ₃ % or more, check this box and stop here. The organization qualifies as a publicly supported organization ▶ <input type="checkbox"/>		
17a 10%-facts-and-circumstances test—2010. If the organization did not check a box on line 13, 16a, or 16b, and line 14 is 10% or more, and if the organization meets the "facts-and-circumstances" test, check this box and stop here. Explain in Part IV how the organization meets the "facts-and-circumstances" test. The organization qualifies as a publicly supported organization ▶ <input type="checkbox"/>		
b 10%-facts-and-circumstances test—2009. If the organization did not check a box on line 13, 16a, 16b, or 17a, and line 15 is 10% or more, and if the organization meets the "facts-and-circumstances" test, check this box and stop here. Explain in Part IV how the organization meets the "facts-and-circumstances" test. The organization qualifies as a publicly supported organization ▶ <input type="checkbox"/>		
18 Private foundation. If the organization did not check a box on line 13, 16a, 16b, 17a, or 17b, check this box and see instructions ▶ <input type="checkbox"/>		

Part II of Schedule A by columns and rows shows the nature of support the filer qualifying under 509(a)(1) has received for the past five years. Line 14 reports the filer's public support fraction (percentage). If it is 33 1/3% or higher, the filer can be assured of being a public charity for the next two years. If the filer's public support fraction is 10% or more but less than 33 1/3%, but claims to have passed the "facts and circumstances" test, it will mark the box at Line 17 and explain in Part IV of Schedule A how it met the "facts and circumstances" test. In these circumstances the filer can also be assured of being a public charity for the next two years.

Similar to Part II of Schedule A, Part III by columns and rows shows the nature of support the filer qualifying under 509(a)(2) has received for the past five years. Line 14 reports the filer's public support fraction (percentage). If it is 33 1/3% or higher the filer can be assured of being a public charity for the next two years. Recall that for the 509(a)(2) there is no "facts and circumstances" test.

As noted above, a high public support fraction means that the filer receives support from a wide variety of public sources and a reader may take this as an indication of broad support for the group.

In terms of avoiding private foundation status, it doesn't really matter whether a 501(c)(3) qualifies as a 509(a)(1) or a 509(a)(2). 509(a)(1) has the advantage of not having to meet the 33 1/3% public support test. Since, if a group has a public support fraction of at least 10% and meets the facts and circumstances test, it will qualify as a public charity. On the other hand, if a group with a good amount of exempt function income, such as a theater will receive from ticket sales, it might qualify under 509(a)(2), since 509(a)(2) takes into account exempt function income into the equation.

509(a)(3) groups, called supporting organizations, are attached to 509(a)(1) or (a)(2) groups. Generally, these groups must be set up to benefit and must be controlled by the supported organization, i.e., the 509(a)(1) or (a)(2) groups to which they are attached. 509(a)(3) groups do not need to meet any public support test and at the same time enjoy all the advantages of a public charity.