

ARNOLD & PORTER LLP

ADVISORY

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ASSISTANCE BY CHARITIES: HAITI EARTHQUAKE DECLARED A “QUALIFIED DISASTER”

As the relief effort in Haiti continues in the wake of one of the deadliest earthquakes in the region, charitable organizations have been on the front lines providing immediate aid to the victims of the disaster. As the weeks and months pass, the relief effort in Haiti will begin to shift to rebuilding and the long-term needs of the survivors. Foundations and charitable organizations, as well as companies and individuals, are able to assist in the long-term relief effort in a number of ways.

SIGNIFICANCE OF THE “QUALIFIED DISASTER” DESIGNATION

I. COMPANY-SPONSORED PRIVATE FOUNDATIONS

On January 22, 2010, under authority delegated by the Treasury Secretary, the Commissioner of the Internal Revenue Service (IRS) declared the Haiti earthquake to be a “qualified disaster” for federal tax purposes.¹ The designation permits a private company foundation to provide financial assistance to company employees without jeopardizing the tax-exempt status of the foundation. In addition, the payments may be excluded from the employee’s taxable income.

A qualified disaster relief payment includes any payment or reimbursement made to a company employee, in connection with a qualified disaster, for reasonable and necessary personal, family, living, or funeral expenses and reasonable and necessary expenses incurred for the repair or rehabilitation of a personal residence or repair or replacement of its contents. Only those costs and expenses that are not reimbursed by insurance or otherwise qualify.

When providing assistance through a qualified disaster relief payment, a company foundation must comply with several requirements:

- The class of beneficiaries eligible to receive assistance must be large or indefinite. (In general, the company foundation can comply with this

¹ Notice 2010-16 (Jan. 22, 2010) and IR-2010-11 (Jan. 22, 2010); see also Internal Revenue Code section 139.

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requirement if its disaster relief program remains open to benefit employees who are victims of future disasters.)

- Recipients must be selected based on non-discriminatory criteria and payments must be made on an objective determination of need (the foundation must also maintain adequate records to demonstrate that these requirements are met).
- Recipients must be selected by a majority of individuals who are not in a position to exercise substantial influence over the sponsoring company.

II. EMPLOYER-SPONSORED DISASTER RELIEF FUNDS (DONOR ADVISED FUNDS)

In some cases, instead of establishing a private foundation, a company works to accomplish its charitable goals through a donor advised fund. The qualified disaster designation for the Haiti earthquake permits an employer-sponsored donor advised fund that meets certain requirements to provide assistance to company employees affected by the earthquake.

As part of the Pension Protection Act of 2006, Congress passed strict rules that apply to the operation of donor advised funds. For example, donor advised funds cannot give grants to individuals. However, under authority delegated by Congress, the IRS and the US Department of the Treasury has excluded certain employer-sponsored disaster relief funds from the rules that apply to donor advised funds.²

In order to qualify for the exemption, the disaster relief fund must (i) generally satisfy the same rules, as discussed above, that apply to company foundations when providing disaster relief assistance; (ii) be organized to provide relief from one or more qualified disasters within the meaning of sections 139(c)(1)-(3) of the Code; and (iii) make no payments for the benefit of any director, officer or trustee of the charitable organization that maintains the fund or any member of the selection committee.

² Notice 2006-19, 2006-2 C.B. 1121 (Dec. 4, 2006).

OTHER ASSISTANCE BY COMPANIES AND COMPANY FOUNDATIONS

Apart from qualified disaster relief payments, companies and company foundations have other ways to provide immediate, as well as long-term assistance, to victims affected by the earthquake:

- **Matching Gifts.** Many companies and their foundations have well-established matching gift programs. Companies often match employee gifts dollar-for-dollar. In responding to disaster relief, a company's matching gift program could allow for a higher match of employee contributions.³
- **Employee Volunteerism.** One of the most valuable resources a company may offer to charitable organizations is the volunteer time and expertise of their employees. Many companies encourage and assist employees to volunteer their time. A company foundation may play a role in promoting employee volunteerism by, for example, coordinating the activities of company volunteers. The foundation could also make grants to charities at which company employees volunteer. However, the foundation must be mindful of the limitations imposed by the private foundation self-dealing rules. For example, a company foundation should not pay any of the expenses employees may incur while volunteering. This prohibition would prevent a company foundation from paying the airfare and other expenses of employees who travel to Haiti to provide assistance; the company itself, however, may pay the airfare and expenses.
- **Scholarships.** Providing scholarships to children, including the children of company employees, affected by the earthquake is often an effective way to provide long-term assistance to individuals and families affected by a disaster. A company foundation that wishes to

³ A matching gift program should be subject to a written policy that specifies how the program works and what charities are eligible for the match. In addition, a company foundation that provides matches to company employee contributions must be sure that the matches comply with private foundation self-dealing rules.

provide scholarships to individuals will have to comply with strict rules regarding how the scholarship program operates, as well as obtain advance approval of the program from the IRS. In addition, a company foundation may only provide a limited number of scholarships to company employees and their families.

ASSISTANCE BY PUBLIC CHARITIES

Many public charities, from the Red Cross to Doctors Without Borders, are on the front lines assisting the victims of the earthquake with immediate relief. They are providing medical care, food, shelter, and clothing as the first responders.

Others organizations may be more suited to provide long-term relief. For example, many community foundations have established disaster relief funds that provide financial assistance to victims to rebuild their lives. Public charities that provide direct financial assistance to the victims of the earthquake should follow closely the requirements that apply to private company foundations, specifically the requirement that assistance should be provided based on an objective determination of need. This will help to ensure that the payments will be regarded by the IRS as consistent with the charitable and tax-exempt purposes of the organization. In addition, an organization that provides direct financial assistance to individuals should undertake sufficient due diligence to document that the assistance is used for the intended purposes.⁴

CHARITABLE CONTRIBUTIONS DEDUCTIBLE IN 2009

On January 22, 2010, President Obama signed a bill (HR 4462) that allows taxpayers to claim a tax deduction on their 2009 federal tax returns for cash donations to Haitian earthquake relief efforts. The provision permits taxpayers to treat charitable contributions of cash made after January 11, 2010 and before March 1, 2010 as contributions made on December 31, 2009.

In order to claim a tax deduction, taxpayers must maintain

sufficient records of their charitable contributions. A bank record or a written gift receipt from the charity is usually sufficient. Recognizing that substantial amounts were raised through text messaging, HR 4462 allows taxpayers to substantiate their contributions using their telephone bills. For contributions of US\$250 or more, however, a contemporaneous written acknowledgement from the charity is required.

EMPLOYEE LEAVE-BASED DONATIONS

In the wake of disasters and tragedies, employers may wish to establish leave-sharing programs to allow employees to donate their vacation, sick, or personal leave time to other employees affected by the disaster or to permit the company to donate the value of their accrued leave time as charitable contributions to nonprofit organizations assisting in the recovery. In general, such employer-sponsored leave banks have various tax and reporting consequences to the employees and the employer. In the wake of the September 11th attacks and the devastation from Hurricane Katrina, the IRS provided relief from these tax and reporting requirements.⁵ The IRS has been requested to provide similar relief for the Haiti earthquake, but the IRS has not made a determination yet.

We hope that you have found this advisory useful. If you have additional questions, please contact your Arnold & Porter attorney or:

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⁴ For additional information about disaster relief assistance by charities, see IRS Publication 3833, "Disaster Relief," available at: <http://www.irs.gov/pub/irs-pdf/p3833.pdf>.

⁵ IRS Notices 2001-69, 2001-2 C.B. 491 (Oct. 25, 2001), and 2005-68, 2005-2 C.B. 622 (Sept. 8, 2005).