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LEGAL ISSUES FOR CLIMATE PHILANTHROPY

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Agenda

- Basic 501(c)(3) Requirements
- Overview of Climate Charitability
- Evaluating Climate Charitability
- Addressing Private Benefit
- Key Considerations
- What We Are Seeing

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Where We Start

In order to be exempt as an organization described in Section 501(c)(3) of the Internal Revenue Code (the "Code"), an organization must be both organized and operated exclusively for one or more exempt purposes.

Organizational Test: Treas. Reg. § 1.501(c)(3)-1(b)(1)(i) provides that an organization is organized exclusively for one or more exempt purposes only if its articles of organization limit its purposes to one or more exempt purposes and do not expressly empower the organization to engage, other than as an insubstantial part, in activities that are not exempt.

Operational Test: Treas. Reg. § 1.501(c)(3)-1(c)(1) provides that an organization will be regarded as operated exclusively for exempt purposes only if it engages primarily in activities which accomplish such purposes. An organization will not be so regarded if more than an insubstantial part of its activities is not in furtherance of an exempt purpose.

Prohibition on private inurement/private benefit: Treas. Reg. § 1.501(c)(3)-1(c)(2) provides that an organization is not operated exclusively for exempt purposes if its net earnings inure in whole or in part to the benefit of private shareholders or individuals, and unless it serves a public rather than a private interest. Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii) further provides that an organization is not organized or operated exclusively for one or more exempt purposes unless it serves a public rather than a private interest.

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Where We Start

Enumerated exempt purposes under Code Section 501(c)(3) include:

- ✓ Religious
- ✓ Charitable
- ✓ Scientific
- ✓ Literary, and
- ✓ Educational

Remember:

- Not all impact is charitable
- Charitable is a sub-set of impact
- "Charitable" is (often) a higher threshold than "mission-related" or "impactful"

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"Charitable" Defined

Treas. Reg. § 1.501(c)(3)-1(d)(2) provides that the term "charitable" is used in Code Section 501(c)(3) in its "generally accepted legal sense." The regulations and IRS rulings define "charitable" to include (but not be limited to):

- Relief of the poor and distressed or of the underprivileged
- Promotion of social welfare
- Combatting community deterioration (revitalization of distressed communities)
- Lessening neighborhood tensions
- Advancement of education or science
- Protecting and preserving the natural environment
- Promoting health
- Research in the public good
- Lessening the burdens of the U.S. government(federal, state, local)

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PRI and ER Requirements for Private Foundations

- For all 501(c)(3) organizations, grants and charitable investments must advance exempt purposes.
- Private foundations have additional compliance requirements for certain investments and grants under the program related investments ("PRI") and "expenditure responsibility" ("ER") rules.
 - **IRC 4944(c) Jeopardizing Investments Exception for PRIs:** For purposes of this section, investments, the primary purpose of which is to accomplish one or more of the purposes described in section 170(c)(2)(B), and no significant purpose of which is the production of income or the appreciation of property, shall not be considered as investments which jeopardize the carrying out of exempt purposes.
 - **IRC 4945(h) Expenditure Responsibility:** The expenditure responsibility referred to in subsection (d)(4) means that the private foundation is responsible to exert all reasonable efforts and to establish adequate procedures— (1) to see that the grant is spent solely for the purpose for which made.
 - **53.4945-5(b)(4) PRI Terms:** In order to meet the ER requirements, with regard to the making of a PRI, a private foundation must require that each such investment with respect to which ER must be exercised, be made subject to a written commitment signed by an appropriate officer, director, or trustee of the recipient organization. Such commitment must specify the purpose of the investment and must include an agreement by the organization:
 - (i) To use all the funds received from the private foundation only for the purposes of the investment and to repay any portion not used for such purposes, provided that, with respect to equity investments, such repayment shall be made only to the extent permitted by applicable law concerning distributions to holders of equity interests....

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