

July 11, 2018

Dear Members of the 115<sup>th</sup> Congress:

On behalf of the Council on Foundations, I am writing to express great concern regarding the changes to unrelated business income taxes (UBIT) for tax-exempt charities as passed into law under the 2017 tax overhaul (Public Law 115-97). Specifically, our concerns pertain to the following two changes:

1. Section 512(a)(6) provides that exempt organizations with more than one unrelated trade or business must now compute unrelated business income (UBI) and related losses for each unrelated trade or business separately. Prior law allowed aggregation of unrelated business income or losses among multiple unrelated trades or businesses.
2. Section 512(a)(7) imposes an unrelated business income tax (UBIT) on certain expenses paid by an exempt organization employer for certain employee fringe benefits, including qualified transportation benefits and on-site athletic facilities.

These provisions have been in place and effective since January 1, 2018. However, with respect to both new provisions, key questions remain unanswered, which prevent charities from understanding both whether they are liable for UBIT on certain fringe benefits provided to their employees, as well as how to calculate UBI overall. Although Congress directed the Treasury Secretary to issue regulations and guidance necessary to carry out the purpose of these new provisions, to date no such guidance has been released.

For section 512(a)(6), no guidance has yet been issued to answer the question of what constitutes a separate trade or business activity, leaving charities to speculate about appropriate compliance steps to take and records to keep. With respect to 512(a)(7), there is basic confusion around how UBIT can be applied to an activity that does not generate UBI (i.e. providing benefits such as parking to employees is not an activity that is both revenue-generating and fundamentally unrelated to the furtherance of the organization's charitable mission). The question has also been posed whether UBIT applies, not only to employer subsidies for the identified fringe benefits, but also to payments employers make for these fringe benefits using voluntary employee pre-tax payroll deductions. Furthermore, guidance has not yet been issued regarding exactly which types of fringe benefits are covered under 512(a)(7), nor about how to value fringe benefits for certain items such as employee access to a parking lot. This presents the same risk for unintentional non-compliance as the previous provision. Many organizations will be required to file IRS Form 990-T for the first time simply for having a parking lot and, without proper guidance, risk improper reporting.

On May 16, 2018, the Council on Foundations sent a letter to the U.S. Department of Treasury and IRS stating these concerns and requesting three things:

1. A delay in implementation of the aforementioned provisions;
2. Official guidance which answers the questions above; and
3. A sufficient transition period following the issuance of guidance.

A delay in the implementation and subsequent enforcement of these provisions is necessary because charities cannot comply with a law that lacks a system of rules and definitions. Additionally, many charities did not factor into their 2018 budgets the costs associated with these changes, as they did not exist as law yet. Asking

nonprofits to divert charitable dollars from the communities that were set to receive them this year to comply with these new rules is contradictory to these organizations' charitable purpose and role in society on a fundamental level.

Subsequent to the first request, charities need to understand what their compliance responsibilities are before they can be expected to properly meet those responsibilities. As such, it is critical that specific guidance be issued on these provisions before charities are required to comply with them. Charities will need to amend their internal policies, procedures, and systems to comply with law. A sufficient transition period will be necessary to allow exempt organizations the time to fully understand their compliance responsibilities and determine what changes are needed for bookkeeping procedures, benefits policies, and accounting systems.

Just as it would be unthinkable to impose new tax obligations on our for-profit counterparts without answers to such questions, it should be equally unthinkable to move forward with enforcement of 512(a)(6) and (7) on charities without similar guidance. We urge you to take a stand for charities in your community and call for Treasury to 1) delay the implementation of these provisions, 2) issue official guidance to answer the outstanding questions, and 3) provide a transition period following the release of guidance.

Taking the defense of charities one step further, on June 7, 2018, Rep. Mike Conaway (R-TX) introduced the Nonprofits Support Act (H.R. 6037) to repeal sections 512(a)(6) and 512(a)(7)—eliminating the new requirements for treating fringe benefits as revenue-generating UBI activities, and well as the requirement to calculate UBI separately for all such activities. The Council on Foundations supports Rep. Conaway's efforts to address these important concerns, and we urge you to join him in protecting charities and the communities they serve by cosponsoring this legislation.

Sincerely,



Hadar Susskind  
Senior Vice President of Government Relations