



GENERAL

Charities' Congressional Wish List

01.08.19 | Linda J. Rosenthal, JD



It's safe to say it's a new day in the U.S. Congress.

There's an entirely different House of Representatives after the blue wave of November 2018. Of course, there's still a GOP-controlled Senate and White House, so the power dynamics won't significantly change. Nevertheless, the lower chamber has the power of the purse; controlling appropriations is a significant cudgel.

In addition, Democrats now control which issues are explored in committee and which bills make it to the House floor for votes. Of particular interest to the nonprofit sector is the House Ways and Means Committee; the new chairman is Representative Richard Neal (D-MA). He – along with Charles Grassley (R-NE) (now) Ranking Member of the Senate Finance Committee – have expressed interest in working in a bipartisan manner for tax policy in the new Congress.

The National Council of Nonprofits (NCN), the nation's largest network of nonprofits with some 25,000 members, took the opportunity, just a few weeks after the November election, of approaching lawmakers Neal and Grassley with a wish-list of America's charities. NCN takes pain to remind them that the nonprofit sector is more than a bunch of do-gooders; it is a big slice of the national economy that employs more than 14 million people. The 4-page letter is here.

Writing for NCN, Tim Delaney, CEO & President, and David L. Thompson, Vice President for Public Policy, emphasize that "(t)ax policy does far more than just define the nonprofit sector as tax exempt; whether intentionally or not, it also can promote fairness or its opposite, pick winners and losers, and support or ruin well-managed operations trying their best to improve the lives of others." Against that framework, NCN offers recommendations that address ongoing problems in tax administration, deficiencies and unfairness in last year's Tax Cuts and Jobs Act, and suggestions for policies that will advance and promote charitable giving.



Wish 1: Protect Johnson Amendment

Right out of the gate, NCN's Delaney and Thompson exhort these tax-writing legislators to “first, do no harm” by protecting the Johnson Amendment that has worked for 64 years to shield “charitable nonprofits, houses of worship, and foundations from the rancor of divisive partisanship and schemes by the unscrupulous to profit from tax deductions for disguised political campaign contributions.” They assert, correctly, that “the 501(c)(3) nonprofit community – frontline charities, churches, and foundations – stands strongly united in support of” current federal law banning political campaign activities. (This support is not unanimous, of course, but NCN's characterization of robust support is accurate.) They ask for a “pledge” to preserve the Johnson Amendment and reject “all effectors to repeal or weaken this vital, and ... existential, protection.”

Wish 2: Correct TCJA Problems

In the next section titled “restoring balance, removing impediments,” Delaney and Thompson draw up a list of what the charitable sector sees as missteps in adopting the Tax Cuts and Jobs Act of 2017 (TCJA). Since most American charities are small- or mid-sized organizations who struggle financially to fulfill their missions, it is “quite troubling,” they write, that offsets for revenue losses on account of tax cuts for businesses and wealthy individuals were put on the backs of the nonprofit sector by eliminating benefits or imposing new excise taxes.

Fringe Benefits

NCN takes aim at the 21% unrelated business income tax under Internal Revenue Code section 512(a)(7) on nonprofits which give transportation fringe benefits, including parking and transit passes, to their workers. The stated rationale was to create “parity” between for-profits and nonprofits under the new tax scheme, but the effect was to impose a significant new burden on charities. “Nonprofits received little, if any, gains under the Tax Cuts and Jobs Act,” argues NCN, “and yet are now subject to a new, illogical income tax on transportation benefits in the name of “parity.” They ask for the repeal of this misguided new tax.

Note: In mid-December, the IRS issued Notice 2018-99 which included some interim guidance as well as the news that Treasury will publish proposed regulations soon. We'll have a post on this specific development soon.

Separate “Trade or Business”

NCN also urges repeal of the mind-numbingly misguided, confusing, and unfair new rule for 501(c)(3)s subject to the unrelated business income tax with more than a single, separate and distinct, “trade or business.” As Delaney and Thompson aptly explain, “[n]ew Section 512(a)(6) of the tax code directs nonprofits ‘with more than 1 unrelated trade or business’ to somehow compute their unrelated business income (and related losses) earned ‘separately with respect to each such trade or business.’”

The law does not define what constitutes a “separate” trade or business, and there has been no final or reasonable guidance by Treasury or the IRS, notwithstanding that it was effective almost immediately on January 1, 2018.

Paid Leave Tax Credit

The TCJA added a generous new tax incentive for some employers who pay their workers who take family and medical leave. The benefit, though, comes in the form of an income tax credit; nonprofit



employers, of course, cannot take advantage of it. Once again, the tax legislation gives tax cuts and credits to for-profit employers, with no corresponding benefit to charities. “This oversight in the law is easily remedied by permitting nonprofits,” who the NCN officials again remind lawmakers are a big, important part of the U.S. economy, “to apply the credit to payroll and other taxes they do pay.”

Excess Compensation; Endowments

NCN also criticizes the two new taxes on excess executive compensation and on endowment returns of certain higher-education institutions. While these new measures target relatively few nonprofits, nevertheless, “[e]very dollar taken from nonprofit entities as a tax is a dollar diverted from missions of serving individuals and communities.” More to the point, argues NCN, these new measures are “unsound policy,” that make attracting qualified executives more difficult, improperly “invade the boardrooms of independent organizations,” and override “the fiduciary-based decisions of trustees.” Delaney and Thompson politely ask lawmakers to refrain from imposing their “political judgments that do not take into account the challenges and solutions that these local experts deal with every day.”

Wish 3: Strengthen Giving Incentives

An important part of the charities’ wish list for Congress is for lawmakers to reconsider the changes in the 2017 TCJA that had the “undeniable adverse consequences” of depressing incentives for Americans to give to charity. “Experts from across the political spectrum agree: the 2017 tax law significantly reduced tax incentives for Americans to” make donations. NCN asks that lawmakers enact “immediate tax-law changes to provide stronger tax incentives” for charitable donations, offering “three potential solutions, all of which are needed”:

- Create a universal or non-itemizer charitable deduction
- Extend the IRS charitable rollover to retirement security plans
- Increase the volunteer mileage rate

Wish 4: Beef Up Tax Enforcement

NCN pulls no punches in asking for more oversight as well as resources and support for the Internal Revenue Service’s charity-regulating functions. “As the primary cop on the nonprofit beat, the IRS needs resources and support of lawmakers in promoting transparency, ethical conduct, and close attention to the laws that protect nonprofits, taxpayers, and the public.”

The most pointed attack is directed at the decision to introduce the Form 1023-EZ in 2014. “In doing so, [the IRS] ignored strong opposition and warnings expressed by its own expert Advisory Committee on Tax Exempt and Government Entities, the National Association of State Charity Officials (state regulators of nonprofit organizations), and the National Council of Nonprofits, among others.” This ill-fated move has resulted in close to universal approval of applicants submitting the streamlined tax-exemption application, and the “agency’s near abdication of its duties to protect the public by screening out unqualified or unscrupulous individuals who seek charitable tax-exempt status.” These duties are “being shirked with every application process.” Not for the first time, NCN, on behalf of the charitable sector, asks that the Form 1023-EZ be “withdrawn immediately.”

Conclusion



NCN's letter ends "with the offer made at the outset...": the willingness of the charitable community to work with the House and Senate tax-writing committees to develop legislation that "promote stronger nonprofits and stronger communities."