NONPROFITS: LEGISLATION

Congress & Nonprofits: What's Happening Now

05.01.18 | Linda J. Rosenthal, JD

Late last year, Congress undertook an overhaul of the federal tax code that led to the passage of the Tax Cuts and Jobs Act of 2017 (TCJA). It included provisions, directly and indirectly, affecting nonprofits. Some items on the GOP leadership's wish list had to be omitted because of Senate rules pertaining to the budget reconciliation path chosen by them to take advantage of a 51-vote margin of victory in the upper chamber.

Policy issues and disputes notwithstanding, the TCJA was the result of a deeply flawed and highly irregular legislative process. Lawmakers skipped the usual months-long period for careful drafting, receiving input from the public and affected constituencies, and thoughtful negotiating compromises. Instead, there was an unfortunate display of raw horse-trading in closed rooms followed by votes in which many of the voters had not read the bills; an unprincipled lawmaking mess.

Ordinarily, even with the most thoughtfully crafted legislation, there is a need for "technical corrections" bills to clean up errors, ambiguities, and oversights. With the TCJA, it was almost a foregone conclusion that remedial legislation would be needed – far beyond the usually limited clean-up efforts.

There has also been more than the usual opportunity to make changes during the recent turmoil-filled budget process. There have been a series of "continuing resolutions" including a fifth set to expire on March 23, 2018. In the second week of February, Congress passed and the president signed the Bipartisan Budget Act of 2018 (BBA), a two-year budget deal that *authorizes* but does not *appropriate* some $296 billion more in the current and upcoming fiscal years than in earlier legislation. It resolves as many issues as it leaves open for further action.

[*Update: 5/1/18: We'll post* a second *article next week on the events that took place in March 2018 culminating in action at the eleventh-hour just before the continuing resolution expired.]*

A *Few Items of Action by Congress*

There were two matters – among others – that legislative experts and observers expected Congress to remedy in the weeks following the passage of the Tax Cuts and Jobs Act of 2018.
The Bipartisan Budget Act of 2018 (BBA) includes two provisions that directly relate to the nonprofit sector.

Investment Income Excise Tax Clarification
The BBA includes a "clarification" of the way that the new TCJA investment-income excise tax for certain higher education institutions will be applied. The tax act added new Section 4968 to the Internal Revenue Code covering certain private colleges and universities that have at least 500 students, over 50% of whom are located in the United States.
The BBA added that this definition refers to "tuition-paying" students only. Unfortunately, there is no statutory definition of "tuition-paying." Does that phrase mean full tuition? What about external or internal scholarships, tuition waivers, or work-study arrangements? The supposed clarification itself leaves many questions.

"Newman's Own" Law
A provision in the late 2017 tax-overhaul bills that did not make it through to the final cut was a special exception to the excess business holdings tax that would have benefited the foundation created by the late actor Paul Newman. The Senate Parliamentarian ruled that consideration of it was not permitted under the budget-reconciliation rules that permit passage of legislation with just 51 Senate votes.
The BBA adds a new subsection(g) to section 4943 of the Internal Revenue Code. Newman's Own Foundation has 100% of the stock ownership of No Limit, LLC, the business that produces and sells the well-known Newman's Own brand of food products. Without this new legal fix, the Foundation would have been required to divest itself of at least 80% of No Limit, LLC, under the existing 4943 rules that prohibit a private foundation from owning more than 20% of a for-profit company.
Under the prior law, the penalties for violating the 4943 limits were prohibitive. The new law carves out a narrow exception for foundations that own 100% of a business and devote all profits to charity. There are strict qualification requirements, though; the foundation must own 100% of the shares; all profits must go to charity; the for-profit firm must be operated independently of the foundation; and donor-advised funds and some

supporting organizations are not eligible. “The new law, which took effect December 31, 2017, opens a world of possibilities for founders of companies that want to devote all profits from their businesses to charity.”

A *Few Items Omitted – So Far*

There has been speculation that action would have been taken already on a few other matters.

Excess Compensation Ambiguities

The Tax Cuts and Jobs Act of 2017 adds a new excise tax on compensation over $1 million for tax-exempt organization employees. It was an expected move by Congress, albeit controversial within the philanthropic community. New Internal Revenue Code section 4960 “does not appear to apply to public universities even though the public and maybe Congress thought that it would.” There are reports that an official of the Joint Committee on Taxation “has stated that a correction is needed to make it clear that public universities are within the ambit of this excise tax.” Noted nonprofit expert Professor Ellen Aprill of Loyola-LA Law School has also pointed out this problem, noting that it “‘requires a statutory technical correction’ to resolve this issue.”

So far, there has been no clarification or fix of this point.

Johnson Amendment

The failure to include a partial or full repeal of the Johnson Amendment in the tax overhaul legislation in late December 2017 is likely just a temporary reprieve instead of an abandonment of the idea. A proposal for at least partial repeal or for exceptions to the rule was tossed from the final TCJA bill signed into law only because the Senate Parliamentarian ruled it was not permissible under the budget-reconciliation rules.

Philanthropy leaders, who kept up a steady drumbeat of opposition during 2017, have issued a new warning to avoid complacency on this volatile issue that can explode back onto the legislative scene at any moment. On February 8, 2018, a coalition of organizations published a press release titled *Nonprofit and Philanthropic Leaders Call on Congress to Leave the Johnson Amendment Alone*.

In early March, the National Council of Nonprofits highlighted this threat by reporting on recent activities by the GOP on this front. They encourage people and organizations connected with the philanthropic sector to “[t]ake these quick and easy actions now to encourage Congress to protect nonprofit nonpartisanship and preserve the Johnson Amendment.

Check out their helpful infographic: *One Year of the Johnson Amendment Under Threat*.

Conclusion

The nonprofit sector must stay alert over the next weeks and months for danger arising from a number of fronts. For example, under the president's recent budget proposal for fiscal year 2019, there could be major cuts to many federal agencies, projects, grant programs, and institutes. It's all part of a stated plan to cut the federal deficit by some $3 trillion in the next 10 years. Congress may or may not go along with some or all of these proposals. Among the 22 targets are: the Corporation for Public Broadcasting, the Institute of Museum and Library Services, the National Endowment for the Arts, the National Endowment for the Humanities, the Legal Services Corporation, the National Wildlife Refuge Fund, and the Global Climate Change Initiative.

In addition, the Administration wants Congress to eliminate the Public Service Loan Forgiveness Program; this legislation permits nonprofit employees to erase their student loan debt after 10 years.

[*Update 5/1/18: The expected cuts did not happen.*]