

Have Any TCJA '17 Problems for Nonprofits Been Fixed?

08.13.19 | Linda J. Rosenthal, JD



Members of Congress are taking their customary six-week summer break, leaving behind a mountain of unfinished business. Among these important matters are fixes for parts of the controversial Tax Cuts and Jobs Act of 2017 (TCJA '17) directly or indirectly affecting nonprofit organizations. Since the effective date of January 1, 2018, there's been little more than hot air and hand-wringing from our distinguished legislators in Washington, D.C.

Fallout from TCJA '17

There are several areas of concern stemming from the TCJA '17, considered in order below, partly on account of how the issues are proceeding (or not) in Congress.

- (New) Fringe Benefits UBIT Tax: Wildly unpopular in nonprofit sector; broad bipartisan support for repeal. Currently, at least 6 bills pending.
- (New) UBIT Silo for Multiple Trades/Business: Unpopular; Democrats introduced bill to repeal
- (Omitted) Paid leave; Volunteer Mileage Rate Adjustment: Broad support to include these omissions; Democrats included this in bill re: UBIT Silo
- (Changed) Standard Deduction: As expected, has apparently depressed charitable giving; some bipartisan support to fix this or to enact a "universal charitable deduction": At least one or two bills introduced
- (New) Excise Tax on Large Endowments; (New) Excess Compensation Excise Tax: Affect relatively few charities; but there are concerns about ambiguities and uncertainties: IRS has issued regulatory guidance (see separate post)

Repeal of Fringe Benefits UBIT

The TCJA '17 added new section 512(a)(7) to the UBIT provisions of the Internal Revenue Code, imposing on nonprofit organizations a 21% income tax on expenses for providing transportation benefits including transit passes and parking. As a result of broad, **bipartisan disapproval** and strong opposition by 501(c)(3)s, particularly houses of worship, "it has become clear that **no one on Capitol Hill supports**" it, but "real action to repeal it is being held hostage of partisan squabbling about every other tax issue."

There are at least six bills pending in Congress to repeal this tax; many with bipartisan support. All except one were introduced early in 2019 and are pending in the House Ways and Means Committee or Senate Finance Committee.

The newest attempt is Section 401 of **H.R. 3300**, the Economic Mobility Act of 2019, introduced on June 18, 2019, by House Ways and Means Committee Chair, Rep. Richard Neal (D-MA). The Ways and Means Committee **quickly approved it** on June 20, 2019. It's part of a broader tax measure, though, that primarily addresses issues including the earned income tax credit and other assistance for low-income individuals. In advance of the committee hearing, Independent Sector sent a **letter of support** for this provision.

There was no further action taken before the summer Congressional recess, although "there had been hopes that it would have been included in the separate budget deal passed" by August 1, 2019.

The other pending bills are:

- **H.R. 1223**: Stop the Tax Hike on Charities and Places of Worship Act; Rep. James Clyburn (D-SC); 45 cosponsors; pending in Ways and Means Committee
- **S. 501**: Stop the Tax Hike on Charities and Places of Worship Act; Sen. Sherrod Brown (D-OH); no cosponsors; pending in Finance Committee
- **H.R. 1545**; Rep. Mark Walker (R-NC); 37 cosponsors; pending in Ways and Means Committee
- **S. 632**; LIFT for Charities Act; Sen. James Lankford (R-OK); 7 cosponsors; pending in Finance Committee
- **H.R. 513**: Nonprofits Support Act; Rep. K. Michael Conaway (R-TX); 10 cosponsors; pending in Ways and Means Committee
- **S. 1282**: Preserve Charities and Houses of Worship Act; Sen. Ted Cruz (R-TX); 4 cosponsors

The National Council of Nonprofits suggests that, over the summer recess, all organizations and interested parties "**encourage**" **members of Congress to "cosponsor** one of the bills to repeal the tax... and deliver the message: Don't hold community nonprofits hostage to partisan bickering; repeal the nonprofit transportation tax immediately."

Repeal of UBIT Silo and Correction of Other TCJA '17 Problems

On June 18, 2019, Democratic members of the House Ways and Means Committee introduced a bill to address the unfortunate *inclusion* of the unpopular UBIT silo provision in the TCJA '17 as well as the apparently inadvertent *omission* of paid leave and an adjustment to the volunteer mileage

provisions. [H.R. 3323](#), the Nonprofit Relief Act, was presented by Reps. Carolyn Maloney (D-NY) and James Clyburn (D-SC). There are no listed cosponsors yet.

In a [news release](#), Rep. Maloney explains the bill's key points. In summary:

- “Silo” Unrelated Business Income Tax (UBIT): “The Nonprofit Relief Act repeals [the newly enacted] Section 512(a)(6) of the Internal Revenue Code that prevents nonprofits from aggregating profits and losses of unrelated businesses.” (For-profit businesses are not subject to this limitation.) Nonprofits must now “break down their expenses and revenues into separate silos for each ‘trade or business.’” The result of this dramatic change is that “nonprofits must pay 21 cents on every dollar of net income brought in through alternative means, such as gift shops, even if they suffer losses on other ventures.” The bill corrects this problem by throwing out new Section 512(a)(6) entirely, which restores the pre-TCJA ‘17 status quo.
- Paid Leave Tax Credit: “Through an oversight,” TCJA ‘17 did *not* “extend the paid leave tax credit to tax-exempt organizations.” The bill “corrects this by allowing these organizations to apply the credit to payroll taxes” and to have parity with for-profit businesses which benefit from this credit under the new law.
- Volunteer Mileage Reimbursement: “Under current law, employees of nonprofit and for-profit entities may be reimbursed for the work-related use of their vehicles at the standard business rate (currently 58¢/mile) with no tax consequences to the individual. However, volunteers may only deduct their mileage at 14¢/mile.” If an organization reimburses a volunteer for mileage, the new tax code treats as taxable all amounts above the 14 cents-a-mile figure. The bill corrects this oversight and inequity by making “any mileage reimbursement to volunteers nontaxable up to 58 cents a mile.” This creates parity with the advantages allowed to for-profit businesses.

The National Council of Nonprofits posted a [Dear Colleague](#) letter by Rep. Maloney encouraging its members to join as cosigners.

Standard Deduction Change in TCJA ‘17

The dramatic expansion of the standard deduction in TCJA ‘17 was an unwelcome and unexpected surprise for the nonprofit sector that has traditionally relied heavily on the incentive of itemized charitable donation deductions available to a large number of taxpayers.

Recent data shows that this change to the standard deduction has substantially diminished the number of taxpayers eligible to itemize deductions; further, this factor appears to be contributing to [a decline in individual charitable giving](#). According to Dan Cardinali, president and CEO of Independent Sector: “It is time for Congress to recognize this fact by [creating a fairer system](#) that helps all Americans, regardless of income, give back to their communities.”

Even before the TCJA ‘17, there was widespread and growing support for a broadening of the availability of tax incentives, including up to the adoption of a so-called “universal tax deduction.” Bills have been introduced in Congress; see, e.g., See [H.R. 1260](#) (Davis) and [H.R. 651](#) (Smith).

The National Council of Nonprofits, echoing other sector leaders, **suggests action over this summer recess**: “Encourage your Members of Congress to make a clear statement in support of the charitable giving incentive and support a universal (non-itemizer) deduction that provides a tax incentive for all Americans by cosponsoring Universal Deduction legislation.”

New Higher Education Endowment Tax

There have been uncertainties and ambiguities about the scope and application of this selective tax that will affect, in any event, only a tiny number of the wealthiest colleges and universities in the United States. “The tax, which was modeled on the private foundation excise tax, **imposes a 1.4 percent levy on net investment income** of nonprofit colleges and universities with assets of at least \$500,000 per full-time student and more than 500 full-time students.”

There will be no Congressional action, apparently; instead the task of interpreting the new statute that is muddled by drafting deficiencies is left to the rule-making authority of the Internal Revenue Service. The agency recently released **proposed regulations** under new IRC Code Section 4968, with a **deadline for public comment by October 1, 2019**. According to an **IRS press release**, “the guidance clarifies how to determine net investment income, including how to include the net investment income of related organizations and how to determine an institution’s basis in property.”

New Excess Compensation Excise Tax

New Section 4960 imposes an excise tax on tax-exempt organizations in an amount equal to the corporate tax rate (currently, 21 percent) on that portion of a “covered employee’s” pay that exceeds \$1 million or is treated as an excess parachute payment. The tax became effective for income earned in 2018.

In **Notice 2019-09**, issued December 31, 2018, Treasury and the IRS have provided some 90 pages of interim guidance that is **primarily structured in a question and answer format** and which clarifies many ambiguities in section 4960. (The agency had requested comments by April 2, 2019.)

In addition, at the same time, Treasury and the IRS announced the **intention to issue proposed regulations**. Any such future regulations will be prospective *only* and will *not* apply to taxable years beginning before they are issued. “Until further guidance is issued, employers may base their positions with respect to the excise tax on a good faith, reasonable interpretation of section 4960.”

Conclusion

We’ll revisit these issues after the Congressional summer recess to assess what action may be on the horizon.