

# IRS Asks for Priority Guidance Suggestions

06.05.18 | Linda J. Rosenthal, JD



The Internal Revenue Service's primary mission is the administration of the federal tax laws. Part of that responsibility is guidance and education of individuals and entities that are subject to these tax provisions.

Each year, well in advance of the beginning of the upcoming fiscal year (July 1 – June 30), the IRS, in coordination with Treasury Department officials, produces a document called the Priority Guidance Plan. As part of this process, the agency asks for the public's help in identifying issues and topics for which guidance is needed or would be helpful, and which should be placed at or near the top of the long list of items that could use additional explanation or detail.

The Priority Guidance Plan applies to all aspects of the tax law, but the philanthropy community and professional advisors and academics should focus on those areas of exempt organization law that could and should be included in the upcoming year's Priority Guidance Plan.

Ordinarily, consideration is given to items that are on the list for the current year but which haven't yet been completed. This year's task in compiling the 2018-2019 Priority Guidance Plan has been significantly complicated because of the passage of major legislation overhauling the tax code in December 2017. As is the case with most legislation, the new statutes are written with a broad-brush effect, leaving out many details to be filled in afterward by new administrative regulations, rules, and procedures. As a result, there is a longer-than-usual list of potential items for inclusion in the 2018-2019 agency-wide Priority Guidance Plan.

Following standard procedure, the IRS has issued a formal notice asking for public comment; this year's request is at [Notice 2018-43](#). The deadline is June 15, 2018, for the Priority Guidance Plan for FY July 1, 2018, through June 30, 2019. However, the IRS notice makes clear that "taxpayers may submit recommendations for guidance at any time during the year."

## *Exempt Organizations Guidance Topics*

It's time for interested members of the philanthropy community to participate in this process so that the "most pressing issues" for the Priority Guidance Plan can be selected.

Recently, noted tax law expert, Lloyd Mayer, Esq. – aka "Nonprofit Blogger" – compiled his own wish list: *Long List of Needed IRS Guidance: DAFs, Tax Reform, Church Tax Inquiries, and More*. It's a good starting point for thinking about which items pertaining to exempt organization law should be proposed by the June 15th deadline.

### *Donor-Advised Funds*

Topping Lloyd Mayer's list is the matter of donor-advised funds (DAFs). This charitable-giving model has exploded in popularity in recent years, dominating the news, discussions, and debate about key issues in exempt-organization tax law. There is an ongoing, spirited debate about whether this development is a good or bad one.

Reflecting certain concerns, the IRS issued Notice 2017-73 in late 2017 asking for comments related to "donor advised funds of sponsoring organizations." Notice 2017-73 "describes approaches including proposed regulations under Internal Revenue Code section 4967.

"Issues" mentioned by the IRS in Notice 2017-73 include:

- "the treatment of recommended distributions from a DAF to support a charitable event or fundraiser, or to pay membership fees, especially when benefits received in return by a donor advisor are more than incidental;
- the treatment of recommended distributions that satisfy a pledge by the donor advisor; and
- how distributions from a DAF interact with the public support tests for a recipient public charity."

By the time that Notice 2018-43 (asking for suggestions for the 2018-2019 Priority Guidance Plan), was issued, comments were "flowing in" in response to Notice 2017-73. These comments include responses from the ABA Section of Taxation, the Council on Foundations, Fidelity Charitable, and the New York Bar Association Tax Section on the donor-advised funds issue.

Of course, respondents are not limited to the relatively narrow set of DAF issues that the IRS has described in Notice 2017-73 as being in need of clarification.

### *Church Tax Audits*

While regular audits of exempt organizations are conducted routinely, the matter of auditing a church is one of particular sensitivity because of First Amendment concerns. In order for a church audit to begin, there must be a sign-off by a relatively high official in the Internal Revenue Service.

In around 2008, the IRS was reorganized significantly including changes to the Exempt Organizations Division. The existing hierarchy and chain of authority were disrupted. In the middle of 2009, the Treasury issued

proposed regulations identifying which specific officials within the Internal Revenue Service are senior enough to approve a church tax inquiry under Code section 7611. These proposed regulations named the Director, Exempt Organizations, as the “sufficiently highly ranked IRS official” for this task. Recently, though a federal district court case – *United States v. Bible Study Time, Inc.* – has cast doubt on these long-pending regulations. According to the *Bible Study Time* court, the Director, Exempt Organizations, is “not of sufficient rank” under section 7611 of the Internal Revenue Code. The IRS now must reconsider this matter and publish different proposed regulations.

#### *Fixes to Tax Act*

We have covered, in past posts, certain of the issues that many in the philanthropy community have identified as vague or otherwise problematic in the wake of the major tax overhaul in the Tax Cuts and Jobs Act of 2017. The issue of most widespread concern appears to be the elimination (in former Internal Revenue Code section 512(a)(6)) of the ability of a single organization to offset the losses of one unrelated trade or business against the income of a separate unrelated trade or business conducted by the same organization. This is a major change in the law that was enacted with little advance warning. To compound this problem, Congress veered from its usual pattern of inserting transition periods in laws like this that constitute significant changes. This creates havoc for organizations with more than one unrelated trade or business.

There are also ambiguities in the new law that make practical application difficult without further guidance. For instance, “(t)o properly calculate ... taxable income ... under the new law, exempt organizations will need to assure that activities are reasonably defined.” That requires a sophisticated analysis of whether “multiple income-producing endeavors are viewed separately or aggregated and viewed as one activity...” and will affect when losses from “unprofitable activities may be offset against net income from profit-producing activities.” A key omission of the final version of the new law, as well as in the Senate Finance Committee Report, is “discussion of criteria for defining a single trade or business activity.”

There is concerted action planned by the National Council of Nonprofits and others in asking the Treasury Department and the IRS “to delay new UBIT liabilities unless and until the government provides clear guidance.” Go to NCN’s [Taxing Tax Exempts and Other Oxymorons in the New Tax Law](#) for details.

#### *Conclusion*

When these opportunities arise, it's important for those in the nonprofit sector to take every available opportunity to present helpful information and suggestions to this key regulatory body for the nonprofit sector.