

Recent Nonprofit Issues: Developments

08.14.19 | Linda J. Rosenthal, JD



There are important updates to certain stories we've covered in the last several months or so.

Issue: 2020 Census

In the weeks leading up to the June 28th end of the U.S. Supreme Court's 2018-2019 term, the controversy over the Administration's proposed citizenship question on the 2020 Census form was "[shaping up to be a mess of historic proportions.](#)"

On June 27, 2019, the high court issued a ruling that appeared to hand a victory to opponents of the citizenship question, but it wasn't necessarily a full and final resolution of the matter. We wrote about it in [The Census \(Non\)Decision: What's Next?](#) (July 2, 2019).

Within hours, though, came the first of a whiplash-inducing series of events that made almost everyone wonder out loud what in the world was going on. Now, a month or so later, the dust has settled a bit, and the census forms (without the citizenship question) are in the hands of the printers. Is the issue settled – or not? And how do community leaders and government officials plan to aggressively encourage compliance by as many people as possible, despite lingering fear and uncertainty?

We'll address that in a separate post next week.

Issue: Form 990 E-Filing

On June 24, 2019, we posted [Mandatory e-Filing for 990s on the Way](#), reporting that Congress was likely on the verge of passing broad bipartisan legislation that includes a few provisions directly affecting nonprofit organizations and their annual duty to file a Form 990, information return.

Specifically, the bill was designed to dramatically expand the duty to file the Form 990 electronically to most organizations, to mandate that the IRS post the information publicly in a "machine-readable" format, and to impose a duty on the IRS to notify organizations well in advance of the three-year

point at which consecutive delinquent Form 990s trigger an “automatic revocation” of tax exemption.

By the end of June, the **measure passed both chambers**, and was signed into law at the White House on July 1, 2019. The new law, which has broad support in the nonprofit sector, will apply to taxable years after 2019; there will be some transition relief, though, for certain smaller organizations.

Issue: Ambiguous Tax Act Statutes

In our post, just published, about provisions in the Tax Cut and Jobs Act of 2017 (TCJA ‘17) that affect nonprofits, we mentioned several items of concern that Congress may (or may not) fix when lawmakers return from their summer recess.

We made brief reference only to two provisions that, while badly drafted and possibly ill-conceived, appear likely to remain in the tax code. The first is the new university endowment excise tax; the second is the new excess compensation excise tax. There has been little sector-wide opposition activity in part because the new taxes affect relatively few 501(c)(3) organizations.

Endowment Tax

On July 3, 2019, the Internal Revenue Service **released proposed regulations** on questions and uncertainties about new section 4968 of the Internal Revenue Code, “**Excise Tax Applicable to Certain Private Colleges and Universities**.” For the first time, this statute imposes a 1.4 percent excise tax on the net investment income of just a select few private colleges and universities with substantial endowments.

The formal notice was published **in the Federal Register**; the text of the proposed regulations is **here**. The public is invited to comment by October 1, 2019.

A press release **[IR-2019-120]** dated June 28, 2019 includes an overview of the purpose and content of the proposed regulations. There are definitions as well of several [ambiguous and confusing] terms to help an educational institution determine if it is subject to this tax. According to government records, though, the tax should apply to no more than about 40 colleges and universities. Included, too, are clarifications for “affected institutions” on 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.” The proposed regulations “incorporate interim guidance earlier provided in **Notice 2018-55 (PDF)**.”

An additional helpful explanation is the analysis published by the National Association of College and University Business Officers: **Treasury and IRS Propose Regulations on Endowment Excise Tax** (July 1, 2019).

Excess Compensation Tax

In **Guidance on Excess Compensation Rules for 501(c)(3) Execs** (February 7, 2019) we discussed developments to that date in connection with the ambiguous and confusing new excise tax under Section 4960 of the Internal Revenue Code on excess compensation of certain highly paid executives.

On December 31, 2018, IRS officials had issued the 90-page [Notice 2019-09](#), presented in **question-and-answer format** instead of through the typical narrative. While presented as guidance and clarification of the many ambiguities and omissions in new Section 4960, it falls far short of that goal. Officials requested public comments by April 2, 2019, particularly about certain points in the document.

The IRS intends to issue proposed regulations at some time, but there is no further news.

*Issue: **Parsonage Allowance***

In [The Parsonage Allowance: Constitutional, Once Again](#) (May 21, 2019), we reported on the highly anticipated appellate-court decision, [Gaylor v. Mnuchin](#), issued on March 15, 2019, by the Seventh Circuit Court of Appeals.

In that case, plaintiffs-appellees had argued that the housing tax break for clergy codified in Internal Revenue Code [section 107\(2\)](#) is unconstitutional. Titled “Rental Value of Parsonages,” that statute is commonly referred to as the “parsonage allowance” or the “clergy housing allowance.” It has “**strong proponents and dedicated opponents.**” The Seventh Circuit strongly disagreed with the federal district judge’s finding that the parsonage allowance is *unconstitutional*, and overruled it.

Following the ruling, the losing parties could appeal to the United States Supreme Court by mid-June at the latest. Our prediction was no appeal; the current Supreme Court would likely side with the government and the 7th Circuit in support of the constitutionality of section 107(2).

We were correct, as Forbes Magazine’s Peter Reilly explains in [Freedom From Religion Foundation Won’t Take Clergy Housing Case To Supreme Court](#) (June 20, 2019).

*Issue: **Monkey Business***

We are pleased to report the fate of Ndume, the longtime platonic companion of sign-language-reading, world-famous, Koko. The talented female gorilla is recently deceased but will live on forever in books and PBS specials.

Ndume will live on at the Cincinnati Zoo after a bitter custody battle with The Gorilla Foundation that we described in [Gorillas, Guerrillas, and 501\(c\)\(3\)s](#) (March 14, 2019). Ndume was originally from the Zoo, but was loaned out to reside at The Gorilla Foundation’s facility – Koko’s home – after she was shown videos of prospective mates and chose Ndume. The mating thing didn’t work out but they lived together for many years as best friends. Pursuant to the loan agreement, on Koko’s death, the Zoo demanded Ndume’s return, but The Gorilla Foundation balked. It devolved into an ugly court fight, but the wise judge on the case ordered the matter out of the courtroom and into the capable hands of an appropriate mediator to determine “the “best interests of the” gorilla.

In [Court Battle Ends with Return of Gorilla to Cincinnati Zoo & Botanical Garden](#) (June 18, 2019), Julie Euber of The Nonprofit Quarterly explains how “the controversy around Ndume’s rightful home highlights the difficulty of collaboration between organizations with similar missions and vastly different approaches.” But “in the end, [The Gorilla Foundation] **cooperated** during the transfer, and their response was one of continued doubt but hope for Ndume’s future.”

Conclusion

We'll write more updates from time to time, but we can't promise to end each one with a good-news item like a primate finding happiness with the help of of a 501(c)(3) organization. A tale like that doesn't come along every day.

Of course, that's what we thought last year when we told you about Naruto in [Monkey Gets Day in Court](#) (July 26, 2018). He's the world-famous, selfie-taking, crested-macaque monkey from Indonesia whose copyright infringement lawsuit was sponsored by People for the Ethical Treatment of Animals (PETA).