



COUNCIL *on* FOUNDATIONS

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May 16, 2018

The Honorable Steven Mnuchin  
Secretary of the Treasury  
U.S. Department of the Treasury  
1500 Pennsylvania Avenue, NW  
Washington, DC 20220

David Kautter  
Acting Commissioner  
Internal Revenue Service  
111 Constitution Avenue, NW  
Washington, DC 20224

RE: Request Regarding Public Law No. 115-97: Tax Cuts and Jobs Act of 2017  
Delay of Implementation of the New Unrelated Business Income Tax (UBIT) Provisions  
Subsections 512(a)(6) and (7) of the Internal Revenue Code (IRC)

Dear Secretary Mnuchin and Commissioner Kautter:

The Council on Foundations is a nonprofit leadership association of grantmaking foundations and corporations, and a public charity qualified under Section 501(c)(3) of the Internal Revenue Code. Our members include over 700 philanthropic organizations and our mission is to provide the opportunity, leadership and tools needed by these organizations to expand, enhance and sustain their ability to advance the common good. On behalf of our members, the Council submits this urgent request to the U.S. Department of Treasury (Treasury) and the Internal Revenue Service (IRS) to 1) provide a delay of the implementation of the new UBIT provisions set forth in subsections 512(a)(6) and (7) of the IRC; 2) ensure that the delay is retroactive to January 1, 2018; and 3) provide official guidance and a transition period for exempt organizations to establish the necessary procedures and systems to comply with these new provisions.

The requests herein were developed by the legal affairs staff at the Council on Foundations and reviewed and approved by the Council's President and CEO and Senior Vice President of Government Affairs. Council staff have daily contact with our numerous members and this letter was informed by the issues and challenges our members express. We appreciate your consideration of these requests and welcome the opportunity to discuss these items with you further. If you have any questions, please feel free to contact Suzanne Friday at (703) 879-0705, or [Suzanne.Friday@cof.org](mailto:Suzanne.Friday@cof.org); or Hadar Susskind at (703) 879-0726 or [Hadar.Susskind@cof.org](mailto:Hadar.Susskind@cof.org).



**Background:**

The Tax Cuts and Jobs Act of 2017 (Public Law 115-97) included the following two new provisions applicable to exempt organizations and their operations:

1. Section 512(a)(6) provides that exempt organizations with more than one unrelated trade or business must now compute unrelated business income (UBI) and related losses for each unrelated trade or business separately. Prior law allowed aggregation of unrelated business income and losses among multiple trades or businesses.
2. Section 512(a)(7) imposes an unrelated business income tax on certain expenses paid by an exempt organization employer for certain employee fringe benefits including qualified transportation benefits and on-site athletic facilities.

These provisions have been in place and effective since January 1, 2018. However, with respect to both new provisions, key questions remain unanswered, and therefore exempt organizations that have unrelated business income and/or offer the particular fringe benefits are at a serious disadvantage when determining how to comply with the new law. In fact, some organizations may not even be able to determine whether they offer benefits covered by the new provisions.

More specifically, the key question that remains unanswered with respect to the 512(a)(6) UBIT allocation provision is determining what constitutes a separate trade or business. With respect to 512(a)(7), the question has been posed whether UBIT applies not only to employer subsidies for the identified fringe benefits, but also to payments employers make for these fringe benefits using voluntary employee pre-tax payroll deductions. The statutory language does not currently answer this question and interpretations vary within the field. Additionally, guidance is needed to determine exactly what types of fringe benefits are covered by 512(a)(7), whether UBIT must be imposed on the value of parking facilities provided by the employer but which have no cost to the employee, and what effect a local law requiring transportation subsidies paid by employers has on the employer's obligations.

Although Congress directed the Secretary to issue regulations and guidance necessary or appropriate to carry out the purpose of these new provisions, to date no such guidance has been released. Exempt organizations are currently left to speculate about appropriate compliance steps to take and records to keep. Many of these organizations will be required to file Form 990-T for the first time and without proper guidance, risk improper reporting. The IRS may also be flooded with numerous unnecessary forms due to the lack of specific instruction.

**Delay in Implementation Requested:**

As explained above and echoed by others in the field, the need for a delay in implementation is urgent. The January 1, 2018 effective date coupled with the lack of guidance essentially creates a system of rules that will need to be applied retroactively, creating a significant burden on affected organizations, as well as unexpected costs and potential financial liabilities that cannot currently



be budgeted for. Additionally, without proper guidance, the risk of failure to comply is higher, and unwary exempt organizations may be subject to penalties that could have been avoided with proper guidance. In the interest of fairness and justice, a delay of at least one year after Final Rules have been promulgated is urgently needed.

**Transition Period Requested:**

As with any changes to the law that might result in additional operational or tax costs, employers will seek to mitigate those costs by determining what changes in systems and policies should be put in place to reduce the financial liabilities to the organization. The charitable organizations that are members of the Council care deeply about maximizing distributions for charitable purposes and minimizing administrative costs. A transition period sufficient to allow exempt organizations the time to fully understand their compliance responsibilities and determine what changes to bookkeeping procedures, benefits policies and accounting systems may be needed is critical to successful implementation and broad compliance with these new provisions.

**Official Guidance Requested:**

Few recent provisions of the tax code have created such confusion and concern among exempt organizations and practitioners as the provisions contained in subsections 512(a)(6) and (7). The risk of unintentional missed deadlines, inaccurate filings and potential penalties is great, and the clear solution is a delay in the implementation of these sections until official guidance can be promulgated. Specific guidance for exempt organizations addressing the many unanswered questions described in this letter, as well as similar guidance requested by our colleagues at the National Council of Nonprofits, the American Institute of Public Accountants, and the American Society of Association Executives is urgently needed. The recent publication 15-B, “Employer’s Guide to Fringe Benefits” provided instruction for the for-profit sector but did not mention exempt organizations and these UBIT provisions. Just as it would be unthinkable to impose new tax obligations on our for-profit counterparts without specific guidance, it should be equally unthinkable to move forward with enforcement of 512(a)(6) and (7) on the tax-exempt sector without similar guidance. Accordingly, the Council on Foundations strongly urges Treasury and the IRS to provide the nonprofit sector with a delay in the implementation retroactive to January 1, 2018, a proper transition period and specific guidance related to compliance with subsections 512(a)(6) and (7) of the IRC.

Sincerely,

Suzanne Friday  
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Legal Affairs

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