February 22, 2019

Internal Revenue Service
Attn: CC:PA:LPD:PR (Notice 2018-99)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Re: Comments on Notice 2018-99 - Parking Expenses for Qualified Transportation Fringes Under § 274(a)(4) and § 512(a)(7) of the Internal Revenue Code.

To whom it may concern:

Independent Sector—a national coalition of nonprofits, foundations, and corporations whose members represent tens of thousands of organizations and individuals committed to advancing the common good—writes to offer comment on Notice 2018-99, dated December 10, 2018. Every day, charitable nonprofit organizations, among many other contributions to society, provide educational and economic opportunities for families in need; work to alleviate poverty and suffering at home and abroad; assist victims of disaster; enhance the cultural and spiritual development of individuals and communities; facilitate scientific advances; and foster worldwide appreciation for the democratic values of justice and individual liberty that are part of the American character.

June 6 Letter

As with prior correspondence submitted on this matter and others by Independent Sector on June 6, 2018, we ask you to consider these comments, based on consultation with our member organizations and others in the charitable and philanthropic community. While this submission will not fully restate all of the perspectives raised in our June letter [ADDENDUM B], Independent Sector continues to urge that the final regulations provide a delay in the effective date and application of the rules, include a significant *de minimus* exception, exempt municipally mandated benefits, and acknowledge the unique role of nonprofit organizations in our society. We wish to primarily emphasize two key points in these comments:

1. Recent research indicates significant financial and operational impact, and
2. The need for delay is clear and the authority for delay is evident.

Recent Research

Even though the text of the 2017 tax legislation made the new tax on transportation fringe benefits effective less than two weeks after its enactment, policymakers and the charitable nonprofit sector continue to struggle to understand its true impact and scope. Amidst this lack of complete information, Independent Sector partnered with researchers at the Urban Institute and the George Washington University in an attempt to quantify the new tax's impact. While the resulting survey data cannot be assumed to be nationally representative, it does include responses from over 700 nonprofit organizations. The full report and its key findings are alarming:

- The new tax on transportation fringe benefits will divert an average of about $12,000 away from each nonprofit's mission per year. This is a combination of both increased tax burden and significant administrative burden.
- As a percentage of budget size, this tax is a bigger burden to smaller nonprofits.
- About 10 percent of nonprofits are considering dropping these benefits entirely, even though many are required to maintain the benefits by local law.

While this research was underway at the time of Notice 2018-99, it had not yet been released. We hope that it can continue to inform both regulatory and legislative action, and would be happy to discuss its details at any point. It can be accessed at www.independentsector.org/ubitresearch.

The Need and Authority for Delay

Notice 2018-99 provides more information about how charitable nonprofit organizations may go about determining their tax liability under the new fringe benefits tax, and we are grateful for this information. However, significant information gaps remain on this issue, including an urgent need for guidance on transit benefits. As our colleagues and members at the YMCA of the USA have noted, the uncertainty that remains is not caused by a lack of effort on the part of nonprofit organizations:

> "Since passage of these sweeping tax changes in late December of 2017, tax-exempt employers have been working diligently to understand the law's impact on their sector, and in particular, what should be reported as UBIT at the applicable corporate tax rates. It's clear from the confusion and volume of questions about how the new tax law impacts tax-exempt entities that all of us need more time and more guidance to fully understand the new compliance obligations."

Independent Sector respectfully urges you to delay implementation of this new tax obligation until one year after final regulations are released. This would allow impacted organizations sufficient time to analyze their budgets and make appropriate adjustments.

At times over the last 14 months, some have questioned Treasury's authority to delay implementation of this provision, given that Congress explicitly included a statutory effective date of the 2018 tax year. Independent Sector firmly believes that this authority exists, and Treasury clearly agrees because it has used such authority on multiple occasions. As an addendum [Addendum A], please find a partial list of examples that has been shared with your staff previously.

We appreciate the opportunity to share these recommendations as a way to balance implementation of the new tax law with preserving the ability of charitable organizations to continue serving their communities. We are happy to work you as you continue to develop guidance and policies that impact the nonprofit sector. For additional information, please contact Ben Kershaw at benk@independentsector.org.

Thank you for your consideration.

Sincerely,

Dan Cardinali
President and CEO
Independent Sector

ADDENDUM A – SECTION 7805(a) PRECEDENT

Examples of Treasury/IRS Action to Delay Effective Date of Certain Tax Provisions (Section 7805(a) Precedent)

[Note: More relevant examples in **bold** and include additional details.]

Notice 2018-72: postponing the effective date for certain withholding rules relating to securities lending and sale repurchase agreements under Section 871(m)
Statutory Effective Date: 180 days after March 18, 2010, the date of enactment of the HIRE Act (P.L. 111-147) (payments made on or after the date that is 180 days after the date of enactment).
Length of Delay: 2 years (January 2021). Notice 2018-72 postponed the effective date published in previous regulations.
Statute Required Treasury to Promulgate Regulations: No

Notice 2013-45: delaying of employer reporting requirements and employer coverage mandate

Notice 2013-14: extending the statutory deadline for submitting a pre-screening notice to claim the Work Opportunity Tax Credit

Notice 2012-34: postponing the statutory effective date for amendments to the cost basis reporting regime enacted by the Energy Improvement and Extension Act of 2008
Statutory Effective Date: January 1, 2013 (debt or options acquired on or after January 1, 2013 are subject to specific reporting requirements)
Length of Delay: 1 year (January 1, 2014)
Statute required Treasury to Promulgate Regulations: No

Notice 2011-88: postponing the effective date for required backup withholding payments made in settlement of payment card and third-party network transactions, as enacted by the Housing Assistance Tax Act of 2008

Notice 2010-91: postponing the statutory effective date for 3% withholding on contractors under section 3402(t)

Notice 2007-54 (Small Business and Work Opportunity Act of 2007): delaying use of new standards in determining whether to assert penalties for returns until 2008
Statutory Effective Date: May 25, 2007 (effective for returns prepared after May 25, 2007)
Length of Delay: 7 months (all returns, amended returns, and refund claims due on or before December 31, 2007). The delay also affected 2007 estimated tax returns due on or before January 15, 2008, and 2007 employment and excise tax returns due on or before January 31, 2008
Statute required Treasury to Promulgate Regulations: No

Notices 2005-29, 2006-2, and 2007-4: postponing the statutory effective date of the section 470 loss disallowance rules applicable to certain pass-through entities
Statutory Effective Date: March 12, 2004 (leases entered into after March 12, 2004)
Length of Delay:

> Notice 2005-29: 9 months (will not apply section 470 loss disallowance rules to pass-through entities until after January 1, 2005)
> Notice 2006-2: 1 year (will not apply section 470 loss disallowance rules to pass-through entities until after January 1, 2006)
> Notice 2007-4: 1 year (will not apply section 470 loss disallowance rules to pass-through entities until after January 1, 2007)

Statute required Treasury to Promulgate Regulations: Yes

Notices 2005-94, 2006-100, 2007-89, and 2008-115: waiving reporting of certain deferred compensation under section 409A for 2005 through 2008 and, subsequently, until the year after final regulations are published

Notice 2001-69 (Airport and Airway Extension Act, Part IV): eliminated retroactivity of air transportation and aviation fuel excise taxes

Notice 2000-5: waiving corporate penalties for certain estimated taxes due December 15, 1999, which were affected by the retroactive amendment of section 6655 by the Tax Relief Extension Act of 1999

Announcement 95-48, Notice 96-64, and Notice 99-40: postponing the effective date of various statutory changes in qualification rules affecting governmental plans by deeming these plans to satisfy those requirements until a later date

ADDENDUM B – INDEPENDENT SECTOR JUNE 6 LETTER ON SECTIONS 512(a)(6) AND 512(a)(7)

June 6, 2018

Ms. Sunita Lough
Commissioner, TE/GE
Internal Revenue Service

Ms. Janine Cook
IRS Deputy Associate Chief Counsel, TE/GE
Internal Revenue Service

Ms. Vicki Judson
Associate Chief Counsel, TE/GE
Internal Revenue Service

Ms. Elinor Ramey
Attorney-Advisor, Office of Tax Policy
U.S. Department of the Treasury

Mr. Robert Neis
Benefits Tax Counsel
U.S. Department of the Treasury

RE: Guidance for Tax-Exempt Organizations on Unrelated Business Income

Dear Ms. Lough, Ms. Cook, Ms. Judson, Ms. Ramey, and Mr. Neis:

Independent Sector is writing to offer recommendations for the implementation of unrelated business income provisions related to Public Law 115-97, commonly known as the *Tax Cuts and Jobs Act (TCJA)*. Independent Sector is a national coalition of nonprofits, foundations, and corporations whose members represent tens of thousands of organizations and individuals locally, nationally and globally who are committed to advancing the common good in America and around the world. We request that you consider these comments, based on consultation with our member organizations and others in the charitable and philanthropic community, as you develop guidance to implement new unrelated business income provisions.

The charitable sector is a critical component of the nation's economy. Nearly one in 10 workers in the United States is employed by a nonprofit organization, and with 13.5 million paid workers, we employ more people than the finance and real estate sectors combined. Further, these organizations pay nearly $670 billion annually in wages and benefits, salaries that support families in communities across America. In 2010, 501(c)(3) organizations paid $35.2 billion in payroll taxes.

The true impact of the charitable sector goes far beyond the number of people employed or the wages and benefits paid. Every day, charitable nonprofit organizations, among many other contributions to society, provide educational and economic opportunities for families in need; work to alleviate poverty and suffering at home and abroad; assist victims of disaster; enhance the cultural and spiritual development of individuals and communities; facilitate scientific advances; and foster worldwide appreciation for the democratic values of justice and individual liberty that are part of the American character.

Too many of these charitable organizations – in the face of stagnant, if not declining, revenues – struggle continuously to meet increased demand for assistance. Rather than turn away those in need, tens of thousands of these employers balance a commitment to continued employment of staff with benefits, including transportation, and providing services to as many people as possible. As the leadership forum for these charitable and philanthropic organizations, Independent Sector applies this same balance when assessing the impact of federal policy proposals on the communities that benefit from the work of America's nonprofit sector and on the dedicated staff we employ to deliver vital programs and services across the country.

Today, we are writing in regards to two areas:

1. Section 512(a)(7), Increase to Unrelated Business Taxable Income (UBTI) by Certain Disallowed Fringe Benefits, and
2. Section 512(a)(6), Requirement to Compute UBTI Separately for each Trade or Business.

512(a)(7), Increase in Unrelated Business Taxable Income by Certain Disallowed Fringe Benefits

We are concerned with the approach in the new law to use the unrelated business income law to tax certain expenditures of tax-exempt organizations. This represents a fundamental departure from the original purpose of UBTI, which is to tax revenue unrelated to an organization's charitable purposes. We ask that the Internal Revenue Service (IRS) and Treasury recognize this departure during the guidance development process. For many tax-exempt organizations, these types of expenditures promote the health of their communities and employees and are directly related to their missions. Consequently, classifying expenditures as UBTI can be a particularly confusing exercise for many organizations who have not had to deal with UBTI in the past.

Public Law 115-97 requires organizations, regardless of size, to pay taxes on certain activities that provide qualified fringe benefits to their employees. It will be the first time many organizations file a Form 990-T, or any form, with the IRS. As such, Independent Sector respectfully offers the following initial comments and recommendations on these new requirements.

Delay Implementation
Because the new law took effect for 2018, tax-exempt employers are already expected to comply, despite a lack of formal guidance to clarify how the law should be interpreted. Employers are already making estimated tax payments, but remain uncertain of how to appropriately allocate the expenses to properly comply with the statute, such as employee parking that is part of a parking lot that the organization shares with other entities or the general public. In some states, policymakers and nonprofit leaders are publicly debating whether this law applies to faith-based communities. Due to these uncertainties, Independent Sector requests a delay in the implementation for one year, to January 1, 2019. This would enable the Treasury Department and IRS to promulgate formal guidance, redesign Form 990-T or create an additional form for reporting tax incurred under this law, and educate tax-exempt organizations on their new tax liabilities. It would also allow much-needed time for nonprofit organizations to calculate the tax and budget for this new financial burden. If this delay is not sufficient to allow that process to occur, we urge you to consider a further delay.

Establish a Benefit Floor
This new law may apply to small tax-exempt organizations with little experience reporting information to the IRS or understanding of fringe benefits or unrelated business income. These organizations will experience a significant increase in administrative burden, in addition to a tax increase. For example, a church that provides a parking space for its clergy will face a difficult learning curve to determine how to properly report the cost of the benefit and file the appropriate forms. We recommend establishing a benefit floor or de minimis threshold that triggers compliance with the new obligation to reduce the administrative burden for small organizations with negligible expenses for fringe benefits that could be subject to this rule. This would also reduce undue administrative burden on the IRS at a time when it already faces significant resource challenges.

Exempt Municipally Mandated Fringe Transportation Benefits
In some communities, organizations are required by law to provide qualified transportation fringe benefits for their employees. For nonprofits in these communities that provide certain qualified transportation fringe benefits, the new tax law results in a mandated tax increase. Independent Sector requests that Treasury and IRS consider exempting charitable organizations in these areas from paying unrelated business income tax on expenditures incurred to comply with state or local law.

Exempt Publicly Available Benefits
In service of their local communities, some tax-exempt organizations provide transportation or athletic facilities that are freely available to the public, including nonprofit employees. For example, some organizations, ranging from universities to churches, may provide transportation for their constituents or the general public. If employees use this publicly available transportation, we recommend that the Treasury and IRS confirm that such a service is not a qualified fringe benefit and that the cost from the service be excluded from the organization's UBIT liability.

Acknowledge the Unique Role of Nonprofits

Some authors of the TCJA have attempted to justify this UBIT fringe benefit provision by arguing that it creates a level of parity between the for-profit and nonprofit sectors through the creation of a comparable new tax for nonprofit organizations. Independent Sector notes that there are numerous differences between for-profit and nonprofit organizations, and they do not need to operate under identical rules. Tax-exempt organizations have a special designation in the tax code precisely because policymakers recognize that they are different and should be viewed differently under law. While Treasury and IRS understand this distinction, we sincerely hope that the unique circumstances and purpose of nonprofit employers will be taken into account when developing rules and guidelines for tax-exempt organizations' compliance with the new law.

Section 512(a)(6), Requirement to Compute UBTI Separately for each Trade or Business

Public Law 115-97 also restructures how nonprofits will calculate their unrelated business taxable income under new section 512(a)(6). Historically, organizations have been able to use losses from one unrelated business activity to offset the gains from another unrelated business activity. This enabled nonprofits to more accurately determine the net amount of taxes owed as an organization, similar to the treatment of for-profit businesses with income from separate sources.

The new restrictions in the TCJA force nonprofits to calculate their UBTI separately for each activity, rather than allowing losses to offset gains across the organization's unrelated earned income portfolio. This new structure will result in increased taxes for many nonprofits with more than one unrelated business income stream. Unfortunately, it is difficult for organizations to determine how to comply with this new law, because there is a lack of clarity around what activities qualify as a separate trade or business.

Delay Implementation
Independent Sector respectfully requests a delay in the implementation of Section 512(a)(6) for one year, to January 1, 2019. This would enable Treasury and IRS to promulgate formal guidance, redesign Form 990-T or create an additional form for reporting tax incurred under this law, and educate tax-exempt organizations on their new tax liabilities. If this delay is not sufficient to allow that process to occur, we urge you to consider a further delay. If Treasury and IRS choose to move forward in implementing this provision in 2018, we request a delay in the imposition of any underpayment penalties for the first year of reporting to allow time for organizations to determine how to comply with the law and budget for the increased financial burden.

Categorical Definition of Separate Trade or Business
Independent Sector recommends establishing a categorical definition of a separate trade or business, rather than at a more granular level. A broad, categorical definition will reduce the administrative burden on nonprofits and more accurately represent how organizations classify earned income divisions and activities. A definition consistent with how organizations group their own unrelated trade and business activities ultimately will help improve compliance.

Allow Losses to Offset Other UBTI
This new, more restrictive accounting structure appears to be limited to trades or businesses not related to an organization's charitable mission. However, some nonprofits may have UBTI that does not originate from unrelated trade or business, including taxable fringe benefits (discussed above), debt-financed income, and certain payments from controlled entities. We recommend allowing losses from an unrelated trade or business to be used to offset tax liability from other sources of UBTI not explicitly prohibited in the new law.

In addition, we would welcome the structuring of government resources and reporting documents to support a robust effort to educate tax-exempt organizations unaware of this new law on how to comply with it.

Lastly, the laws discussed in this letter, combined with other new reporting requirements related to the *Tax Cuts and Jobs Act*, have raised concerns from various professionals about the cost and administrative burden associated with annual tax-exempt filings. We may be close to reaching a tipping point that leaves nonprofit organizations unable to pay professionals to help them navigate these burdens. Independent Sector recommends the creation of clear guidance and a streamlined reporting process to help nonprofits comply with these laws.

We appreciate the opportunity to share the above recommendations as a way to balance implementation of the new tax law with preserving the ability of charitable organizations to continue serving their communities. We are happy to work with the Treasury and IRS as you continue to develop guidance and policies that impact the nonprofit sector. For additional information, please contact Ben Kershaw at benk@independentsector.org.

Thank you for your consideration.

Sincerely,

Dan Cardinali
President and CEO
Independent Sector