

May 31, 2024

Internal Revenue Service
Attn: CC:PA:LPD:PR (Notice 2023-36) Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

RE: Recommendations for 2024-2025 Priority Guidance Plan Notice 2024-28

Greetings:

On behalf of the Council on Foundations (the Council), we write to urge the Department of the Treasury and the Internal Revenue Service to include the items outlined below in the 2024-2025 Priority Guidance Plan.

The Council is a nonprofit membership association that guides philanthropies as they advance the greater good. Building on our 75-year history, the Council supports over 900 member organizations in the United States and around the world to build trust in philanthropy, expand pathways to giving, engage broader perspectives, and co-create solutions that will lead to a better future for all.

Our foundation members, and the organizations that they fund, would benefit significantly from further clarity on each regulatory issue outlined below.

- Donor Advised Funds: Final Regulations and Additional Proposed Regulations Addressing Certain Issues
- Foundation-Sponsored Student Loan Forgiveness Programs
- Provide Guidance on Economic Development as a Charitable Activity
- Provide Guidance on Climate Change Mitigation and Environmental Protection as a Charitable Purpose
- Update Guidance Relating to Grants to Mexican Charities under the U.S.-Mexico Income Tax Convention (the "Treaty")
- Request for Clarification on Application of Corporate Alternative Minimum Tax to Tax-Exempt Organizations

To assist the Department of the Treasury and Internal Revenue Service, the Council has compiled information as well as examples of situations our members have encountered that illustrate the need for guidance in each area described above.

Donor Advised Funds: Regulations Addressing Certain Issues

We support the continuation of the work that Treasury and the IRS have done to provide guidance on donor advised funds ("DAFs"), and believe that finalizing the regulations under section 4966, taking

into consideration the comments provided by the Council and many of its members, should be a high priority.

If finalization cannot happen within a relatively short period of time, the Council requests that Treasury and the IRS provide interim guidance to make it clear that any regulations will have a prospective effective date, and not the retroactive effect that the proposed regulations result in.

The Council also requests that proposed regulations under section 4967 be a high priority. Because sections 4966 and 4967 work together, it is difficult to fully understand the impact and effect of the definitions provided in the regulations to section 4966 without knowing how the limitations in section 4967 will be interpreted. In addition, various new proposals regarding DAFs build on sections 4966 and 4967 and would result in additional confusion and uncertainty if there continues to be little guidance.

With respect to private foundation use of DAFs, we understand the concern about qualifying distributions to DAFs without a timeline for the subsequent distribution of those funds out of the DAF. Many private foundations use DAFs for various activities, including simplifying grantmaking activities, partnering with their local community foundation on grantmaking, or other reasons related to their strategic grantmaking. The Council is concerned that proposals to require distribution from a DAF in a year will significantly limit some of those legitimate uses as well as create undue burden on the different organizations. Therefore, we request that guidance allow private foundations five years to advise funds out of the DAF and be considered a qualifying distribution.

Foundation-sponsored Student Loan Forgiveness Programs

With many U.S. communities struggling to retain local college graduates as part of their economic growth strategies, community foundations are exploring programs for funds that would offer student loan forgiveness to individuals who agree to live and work in these smaller communities. This assistance would offer the added benefit of addressing the student loan crisis affecting many young adults.

We believe that foundation-sponsored student loan forgiveness programs should be treated as qualifying distributions for purposes of 4945(g)(1) and that providing student loan forgiveness to individuals is a charitable purpose within the meaning of section 170(c)(2)(B), similar to the qualification of scholarships.

Foundations view student loan forgiveness as one part of an overall economic development strategy. Treasury has a history of providing Revenue Rulings, Private Letter Rulings, and other guidance regarding economic development as a charitable purpose; and the Council is requesting specific guidance, such as a Revenue Ruling, related to student loan forgiveness programs in an economic development context.

While these are not government-sponsored programs, the student loan forgiveness program in any guidance could resemble the structure of the National Health Services Corps Loan Repayment Program

for medical professional or the Teacher Loan Forgiveness program for teachers committing to serve a specific period in a high-need area. The program dollars are primarily intended to help workers pay off student debt. Foundations would work with donors to raise funding for the program, and the foundations would manage the administration of the program. Award recipients are expected to live and work in their communities to be eligible for funding, and any payments would go directly to the lenders.

These programs are a response to foundations investing in students via scholarships only to see them use that investment to leave the community. Donors are excited by the idea of supporting their communities by offering graduates an opportunity to return and to receive assistance with burdensome student debt obligations. Our foundation members have an opportunity to bring young people back to high-need communities; slow or reverse “brain drain”; bring skilled, educated, and trained professionals to high-need communities; increase entrepreneurship; fill skilled and educated job openings; and give farmers and small business owners hope that a family member or community member will take over their business.

Guidance from Treasury that includes foundation-sponsored student loan forgiveness programs would be a critical step facilitating an important tool for our communities to build resiliency and talent.

Provide Guidance on Economic Development as a Charitable Activity

The Council seeks further clarification regarding when economic development activities will be considered a charitable activity and requests reliable guidance for foundations wishing to support such activity with charitable dollars.

The Council often fields questions from its members regarding economic development. Community foundations have been interested in creating funds and using charitable dollars to support activities such as redevelopment of city centers, small business incubation, job training programs, home purchase assistance, and promotion of local communities for new business relocation and tourism. Since the start of the pandemic, this desire has expanded to help businesses and workers that were heavily impacted by the COVID crisis. Foundations and philanthropies have also been on the forefront of rebuilding as the crisis abates.

Foundations have been able to look at several rulings dating to the 1970s that provide guidance regarding the factors that will support a finding by the IRS that an activity is charitable. We also have several more recent rulings, whereby the IRS has determined that certain activities are not charitable. However, it can be particularly difficult to determine when and how organizations can support for-profit businesses or work with governmental entities. As the world of philanthropy has grown and developed over the past forty years, there is a consensus in the field that this type of guidance needs to be provided so there is a consistent test that can be applied by foundations and other organizations working in economic development.

The Council urges Treasury to consider updating previous guidance regarding economic development as a charitable activity in ways that can also be helpful for those organizations continuing to work in COVID relief, by providing a more definitive test and/or examples of acceptable charitable activities that reflect the current needs and economic climate in many communities. For reference, we are including examples involving fact patterns encountered by the Council's foundation members that Treasury could utilize in illustrative guidance.

- The Chamber of Commerce is sponsoring an initiative to encourage new small businesses to locate in a deteriorating section of downtown. They approach a community foundation about establishing a charitable fund to solicit and collect charitable contributions from individuals and businesses. The community foundation will then make grants to assist individuals with expenses associated with establishing new small businesses provided they agree to locate to this area. The grants will be awarded based on an objective and nondiscriminatory application process. No grants will be awarded to the Chamber of Commerce, but members of the Chamber may volunteer as part of the application review committee.
- A rural airport needs to build a new control tower. The airport is owned by a government entity (the airport authority) and is used by the public. The authority would like to accept charitable contributions for this purpose, or work with a community foundation to establish a temporary fund that would accept contributions and make grants to the authority to be used for the building expenses.
- A rural municipality desires to expand internet services to its citizens and wants to collect charitable donations to build infrastructure.
- The city government wants to promote the city as a location for filming television and movies and wants to establish a charitable fund to collect donations to be used to pay expenses of a promotional campaign.

Provide Guidance on Climate Change Mitigation and Environmental Protection as a Charitable Purpose

The Council seeks further guidance on the types of activities relating to the environment and specifically climate change mitigation that are considered charitable. Most of the guidance around environmental activities were issued in the late 1960s and early to mid-1970s. Over the past fifty years there has been significant development in scientific research and understanding of climate change and its devastating results. However, there is no precedential guidance regarding climate change mitigation as a charitable purpose, or guidance on how organizations can engage in climate change activities, such as increasing access to and development of renewable energy or supporting projects involving carbon sequestration or carbon offsets or credits.

Due to this lack of regulatory or other precedential guidance, grantmaking related to the protection of the environment and vulnerable populations often have to extrapolate from private letter rulings and denials of exemption or spend limited resources to engage counsel. Often the result is tying climate

goals to other charitable purposes such as education. However, this can result in limiting the impact and resources available for climate mitigation projects.

The adverse effects of climate change to communities and the environment are significant and the Council urges Treasury to provide guidance clearly stating that environmental preservation and climate change mitigation, including activities such as increasing access to renewable energy, emissions reduction, or carbon sequestration are charitable purposes.

Request for Updated Guidance under the U.S.–Mexico Income Tax Convention

Under Article 22 of the U.S.–Mexico Income Tax Convention (the “Treaty”), and Article 17 of the Protocol to that convention, the U.S. and Mexico have agreed that certain Mexican charities meeting standards “essentially equivalent” to those applicable to U.S. public charities (originally those described in Article 70-B of the Mexican Income Tax Law) would be treated as public charities for purposes of grants from U.S. public charities and private foundations. Such Mexican charities are also exempt from U.S. income taxes to the same extent as their U.S. counterparts, and charitable contributions to such Mexican charities are eligible for U.S. income tax deductions (subject to some limitations).

In Information Letter 2003-158 (Sept. 30, 2003), the IRS confirmed that U.S. grantmakers could rely on the Mexican Ministry of Finance and Public Credit’s determination of Article 70-B status, set forth either in a letter from that agency providing special authorization under Article 70-B, or reflected in the current official list of Mexican charities published in the Mexican *Official Gazette* (*el diario oficial de la Federacion*). That guidance, however, is now out of date. Mexico has renumbered its income tax provisions a few times since ratification of the Treaty; for more than a decade, former Article 70-B has been found in Article 97. However, it was moved to Article 82 of a Mexican Income Tax Law that took effect January 1, 2014, which also contains provisions governing other types of charities. There have been some minor substantive changes made to Article 97 at various points over the years. Article 82 includes additional changes (particularly regarding activities influencing legislation), and it was further amended in legislation that took effect April 23, 2021. However, the core requirements for public charities under former Article 70-B (to be organized and operated exclusively for exempt purposes, to avoid private inurement, to have a valid dissolution clause, etc.) are still in place.

The most current version of the list of Mexican charities eligible to receive tax-deductible contributions is available online at <https://www.sat.gob.mx/consultas/27717/conoce-el-directorio-de-donatarias-autorizadas>. Those organizations qualifying for treaty benefits have been specially designated as type “M” organizations; the list expressly states that such organizations meet the requirements of Article 82, formerly Article 70-B.

Until 2014, private foundations and other donors could generally rely on the Mexican authorities’ determination that an organization qualified under Article 97 and former Article 70-B to treat it as a public charity. However, the recent changes inhibit many grantmakers from relying on the Mexican Treaty until Treasury and the IRS provide clear guidance about how it applies following the changes

made to the Mexican Income Tax Law. We would specifically request that Treasury, consulting with the Mexican government as necessary, do the following:

- Identify the class of Mexican charities that will be treated as “essentially equivalent” to sections 509(a)(1) and 509(a)(2) public charities under the new Mexican Income Tax Law in effect as of January 1, 2014, and provide updated information as to the documentation upon which U.S. grantmakers can rely for purposes of determining status of a Mexican organization under the Treaty.
- Confirm that under Article 2(4) of the Treaty, section 4966’s excise tax is a subsequently added excise tax “identical or substantially similar” to section 4945, and that donor advised funds can therefore rely on the Treaty to the same extent as private foundations and other public charities.

The Council continues to hear from members about issues arising from Mexico’s anti-money laundering and anti-terrorist financing rules that are causing considerable confusion among U.S. grantmakers and are having an impact on the grantmaking authorized by the Treaty. Public statements by officials from the Treasury financial crimes enforcement agency, FinCEN, indicate that there has been coordination between Mexico and FinCEN on various enforcement matters. Many of the concerns of our members arise from confusion regarding the nature and extent of information that U.S. grantmakers must provide to the Unidad de Inteligencia Financiera (“UIF”), particularly personal identifying information. Given the impact of the rules on Treaty-authorized grantmaking, we ask that Treasury consider raising the need for greater clarity in the reporting obligation when it discusses the Treaty issues with Mexico noted above.

Request for Clarification on Application of Corporate Alternative Minimum Tax to Tax-Exempt Organizations

The Inflation Reduction Act of 2022 established a corporate alternative minimum tax (CAMT) for certain “applicable corporations” with average annual “adjusted financial statement income” (AFSI) exceeding \$1 billion for the preceding three taxable years. Section 56A(c)(12) of the IRC provides that tax-exempt nonprofit corporations’ AFSI will be “adjusted to only take into account any AFSI—(A) of an unrelated trade or business (as defined in section 513) or such organization, or (B) derived from debt-financed property (as defined in section 514) to the extent that income from such property is treated as unrelated business taxable income (UBTI).”

As enacted, section 56A(c)(12) creates some ambiguity regarding the calculation of AFSI by tax-exempt organizations for purposes of determining whether they meet the definition of an “applicable corporation” and for determining their CAMT, if necessary. While section 56A(c)(12)(A) refers to income from an organization’s “unrelated trade or business” as defined in section 513, it includes no reference to the various modifications to an organization’s UBTI available under section 512(b), which allow for the exclusion of certain types of income—such as dividends, interest payments, royalties, or rents—from UBTI unless that income is derived from debt-financed property. The Council requests guidance clarifying that a tax-exempt organization’s AFSI under section 56A(c)(12)(A) does not include

any income that would be excluded from UBTI under section 512(b)—such as dividends, interest payments, royalties, or rents—except to the extent that such income excluded under section 512(b) is derived from debt-financed property.

Conclusion

Thank you for the opportunity to recommend priorities for inclusion in the 2024-2025 Priority Guidance Plan. We would welcome the opportunity to discuss any of these matters with the IRS or with the Department of the Treasury if it would be helpful. In particular, the Council offers its support for convening more informal discussions of the compliance issues faced by U.S. grantmakers. Please contact me for additional information or analysis on any of these topics.

Sincerely,

Kathleen Enright
President and CEO
Council on Foundations