Charitable Giving and the 2018 Tax Act

The Tax Cut and Jobs Act of 2018 significantly reduces charitable giving incentives for a majority of taxpayers. It does not appear that Congress had any policy reason or intention of harming charitable organizations when they reconfigured the tax code last year, but changes to the estate tax, the standard deduction, and marginal tax rates will have an incidental negative effect on charitable nonprofits, and at least one provision will have an intentional negative impact on targeted nonprofits. However, charities might find the reduced utilization of itemized deductions frees them to pursue activities previously limited by 501(c)(3) regulations.

The Tax Cut and Jobs Act (TCJA) will affect large planned gifts to charities, because the exemption for transferred wealth subject to the estate tax doubled to $11 million per individual.[1] Planned giving can be vital to charities, as these gifts are normally substantial and can lead to organizational longevity through endowments.[2] With the exemption amount raised, only 2,000 Americans will be subject to the estate tax, a reduction of 64% from 2017 and a staggering reduction from the 52,000 estates subject to the tax in 2000.[3] Experts estimate that this change will reduce charitable giving by $4 billion per year.[4] However, it should be noted that actual bequest giving after changes to the estate tax has not always followed theoretical predictions.[5]

The TCJA also will increase charities' liability for the unrelated business income tax by requiring that charities with more than one unrelated trade or business compute the income and losses for each trade or business separately.[6] This change means that charities that have income in one unrelated business and losses in another cannot offset the income with the loss.[7] Changes to the tax code for corporations also will have perverse consequences for charities organized as corporations, as they will not receive credit for paid family leave, and they might have to pay taxes on expenses paid for employee fringe benefits.

One change in the tax code targets particular nonprofit colleges and universities with large endowments. The TCJA created a new excise tax on net investment income for university endowments if a university has assets of $500,000 per full-time student and more than 500 full-

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[1] National Council of Nonprofits, Analysis of the Tax Cut and Jobs Act (2018).
[2] Neetal Parekh, *5 Things Non-Profits Should Know about Planned Giving*, FREE ENTERPRISE: THE FINDLAW SMALL BUSINESS LAW BLOG (Oct. 1, 2009, 9:50 AM), https://blogs.findlaw.com/free_enterprise/2009/10/5-things-non-profits-should-know-about-planned-giving.html.
[3] Heather Long, *3,200 Wealthy Individuals Wouldn't Pay Estate Tax Next Year Under GOP Plan*, THE WASHINGTON POST: WORKBLOG, (Nov. 5, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/11/05/3200-wealthy-individuals-wouldnt-pay-estate-tax-next-year-under-gop-plan/?utm_term=.b8b96ff3572b.
[4] National Council of Nonprofits, *supra* note 1.
[5] For a more indepth analysis of how bequest giving is effected by estate tax exemptions and marginal rates see Patrick M. Rooney, *Why Nonprofits Should Weigh in on Proposals to Repeal Estate Tax*, NONPROFIT QUARTERLY, (Oct. 2, 2017), https://nonprofitquarterly.org/2017/10/23/nonprofits-weigh-proposals-repeal-estate-tax/.
[6] National Council of Nonprofits Final Letter on UBIT, (June 21, 2018), https://www.councilofnonprofits.org/sites/default/files/documents/final-ubit-letter-of-national-council-of-nonprofits-6-21-2018.pdf.
[7] *Id.*

time students.[8] Close to being a rifle shot tax provision, this new section of the code will affect only 35 of the near 5,300 higher education institutions in the United States. Those affected include Harvard, Yale, Princeton, and Stanford (not included are Donald Trump's Alma Maters, University of Pennsylvania and Fordham).[9]

The TCJA's biggest effect will be neutering incentives for charitable giving for non-high-wealth taxpayers, by raising the standard deduction to $24,000 for a married couple filing jointly and by capping the state tax deduction at $10,000.[10] Experts anticipate that the higher standard deduction will mean that less than 13% of all taxpayers will itemize deductions in 2018.[11] In 2017 non-high-net-worth households gave an average of $2,500 to charities.[12] In order to take advantage of itemization, a taxpayer would have to pay the maximum amount in state taxes and be paying interest on $335,000 of home acquisition debt or have $11,500 of other non-miscellaneous itemized deductions. Further, for those that do itemize, their giving will be subsidized at a smaller percentage because of lowered tax rates.[13]

The change will mean that itemized deductions will drop by $95 billion. However, charitable giving is only expected to drop by $13 billion.[14] The effect of tax incentives on charitable giving has been an open question for psychologists and behavioral economists for a while. In 2009 only 34.4% of respondents in a survey about charitable giving listed tax considerations as a reason for their donation.[15] However, in that same year, over 67% of respondents in another survey said they would reduce their charitable giving if Congress enacted a proposed elimination of the charitable tax deduction.[16]

The TCJA is anticipated to have a severe negative impact on nonprofit charitable organizations. However, the near elimination of itemized charitable giving deductions might create opportunities for organizations that previously felt limited by 501(c)(3) restrictions. Some organizations operate with both 501(c)(3) and 501(c)(4) entities, and giving may shift more to the 501(c)(4) side under the TCJA.

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8 National Council of Nonprofits, *supra* note 1.
9 Paul Oliveira, *New College Endowment Tax under the Tax Cuts and Jobs Act*, GLOBAL TAX BLOG, (Sep. 5, 2018), https://www.kahnlitwin.com/blogs/tax-blog/new-college-endowment-tax-under-the-tax-cuts-and-jobs-act.
10 I.R.C. § 63(c), 164(b)(6).
11 *Id.*
12 Nonprofit Source, *Online Giving Statistics*, https://nonprofitssource.com/online-giving-statistics/ (2018).
13 Alex Brill & Derrick Choe, *Charitable Giving and the Tax Cuts and Jobs Act*, AEI ECONOMIC PERSPECTIVES, (June 18, 2018) http://www.aei.org/publication/charitable-giving-and-the-tax-cuts-and-jobs-act/ .
14 *Id.*
15 Andrew Blackman, *The Surprising Relationship Between Taxes and Charitable Giving*, THE WALL STREET JOURNAL, (Dec. 12, 2015), https://www.wsj.com/articles/the-surprising-relationship-between-taxes-and-charitable-giving-1450062191.
16 *Id.*

501(c)(4) social welfare organizations have seen a dramatic increase in donations since the 2016 election.[17] For example, the ACLU reported an 8000% increase in donations.[18] The ACLU raised over $274 million for its social welfare activity, and the ACLU Foundation, the ACLU's 501(c)(3) subsidiary, raised $125 million.[19] The Southern Poverty Law Center and Planned Parenthood, both 501(c)(4) organizations, saw substantial (but not as astronomical as the ACLU) increases at 1400% and 1000% respectively.[20]

Most organizations could benefit from an increase in funds available for lobbying efforts, and a 501(c)(4) can engage in more lobbying than a 501(c)(3). Thus, the reduced incentive for tax-deductible donations could free organizations from the restrictions that come with 501(c)(3) status. Since small-dollar donors are likely unable to itemize deductions, they might no longer care about an organization's 501(c)(3) status, and they might care more that an organization is doing work that reflects their values. The Tax Cuts and Jobs Act should spur nonprofit organizations to rethink how they can create value for their donors, even if that means stepping away from operating solely as a 501(c)(3) organization.

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[17] Ben Paynter, *Philanthropy in 2017 Saw the Rise of Trump Powered Giving*, FAST COMPANY, (Dec. 18, 2017), https://www.fastcompany.com/40499097/philanthropy-in-2017-saw-the-rise-of-trump-powered-giving.
[18] *Id.*
[19] ACLU Annual Report, Financial Summary (2017).
[20] Paynter, *supra* note 17.