



Before the United States House of Representatives
Committee on Ways and Means

Subcommittee on Oversight

Hearing on

**Ending the TCJA Tax on
Houses of Worship, Charities, and Nonprofits**

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On behalf of the network of the National Council of Nonprofits, I appear before the Oversight Subcommittee to express the urgent need for Congress to repeal the new **income** tax on the **expenses** nonprofits incur for providing their employees with transportation benefits such as parking and transit passes. Every day that this unfair and unjustifiable tax remains in place is a day that charitable nonprofits, houses of worship, and other tax-exempt organizations must divert their already limited resources away from their missions in local communities throughout America.

It is my honor to bring the experiences and perspectives of frontline nonprofit organizations to the Subcommittee today. It is my sincere hope that today's hearing marks the beginning of the end for a tax that frustrates the ability of houses of worship, charities, and nonprofits to serve the public good.

The National Council of Nonprofits is the nation's largest network of nonprofits, with more than 25,000 organizational members. Our unique structure as the central link connecting state associations of nonprofits, augmented by our State Policy Ally program, provides us access to real-time information about what's occurring "on the ground" in the real world. The membership of National Council of Nonprofits reflects the wide spectrum of nonprofit missions. Also, like the vast majority of charitable organizations, most are small to mid-sized entities. Ninety-seven percent of America's nonprofits have budgets under \$5 million; 92 percent have budgets less than \$1 million. In formulating this testimony, I have relied on extensive communications within this network and feedback from multiple organizations representing subsector groups across the nonprofit sector.

New Internal Revenue Code Section 512(a)(7) imposes an unrelated business **income** tax on nonprofits for their **expenses** providing transportation benefits to their employees. Because of this provision, nonprofit employers, including houses of worship, now must pay a 21-percent tax on the amounts they spend providing public transit to their employees, such as the Breeze Card to ride MARTA in Atlanta and "The E" bus passes for travel in and around Erie, Pennsylvania. Equally troubling, the tax applies to the costs that charitable nonprofits, houses of worship, and other nonprofit organizations pay to provide parking for their employees. As will be discussed below, charitable nonprofits, houses of worship, and other nonprofit organizations must pay this new tax not only on the amount of direct expenditures they make, but also on the amount that their employees ask to have withheld from their own paychecks on a pre-tax basis, that is, voluntary salary reduction agreements made pursuant to federal law.

In my written testimony, I address the numerous problems, challenges, and objections to the tax on nonprofit transportation benefits. First, however, I believe it essential that Subcommittee members fully appreciate the urgent need for action to repeal this tax that no one supports.

The Urgent Need to Repeal Section 512(a)(7), the Unrelated Business Income Tax on Nonprofit Transportation Benefits

This new income tax on nonprofits' expenses imposes significant costs and record-keeping burdens on nonprofits, making it harder for these organizations to address their charitable missions and more difficult to recruit and retain employees. Four weeks ago, many charitable nonprofits, houses of worship, and other nonprofits experienced their first-ever Nonprofit Tax Day. On May 15, 2019, organizations operating on a calendar fiscal year were required to pay unrelated business income taxes for 2018 that had never been levied on them before. For some churches, synagogues, and mosques, this tax filing may have been their very first communication with the IRS, because houses of worship are not required to seek agency recognition or file annual informational tax returns. In short, this tax is a recent reality – a raw nerve – for hundreds of thousands of tax-exempt organizations serving tens of millions of your constituents throughout the country; they have only now experienced the true, adverse effects of the policy and are suffering the consequences. Therefore, time is of the essence to repeal Section 512(a)(7). Immediately before more harm occurs.

Earlier this year, my colleague Tim Delaney and I submitted a [statement to the House Ways and Means Committee](#) warning of the consequences to the work of charitable nonprofits if Congress did not take action. This hearing today is welcome action by Congress, but the predictions we made months ago regrettably are proving prescient. At that time, two nonprofit tax-filing deadlines were looming. Those deadlines have now passed, and the results are in, as indicated by responses to a survey of nonprofits conducted by the National Council of Nonprofits and several other organizations.¹

We predicted: “For some, the tax will be crippling.”

- The **Jewish Federations of North America** reports paying \$75,000 in taxes on transportation benefits due to Section 512(a)(7) and believes that the “cumulative impact of the tax approaches seven figures” for its network of more than 140 related charities.
- The **Alliance for Strong Families and Children**, with offices in Milwaukee, **Wisconsin**, and Washington, **DC**, had a new tax liability of \$18,000 resulting from this tax.
- An independent school in **New York City** said it will owe nearly \$20,000 due to the part of the UBIT provision that requires nonprofits to pay tax if they provide and their employees use the opportunity to set aside pre-tax money from their own paychecks for commuter benefits.
- **The Arc Eastern Connecticut**, which runs residential group homes for people with intellectual disabilities, saw a tax bill of \$10,540 due to the tax on nonprofit transportation benefits.

¹ Beginning June 10, 2019, the networks of the National Council of Nonprofits and others have been asking nonprofit organizations to share how much they paid in UBIT on the new tax, what their costs were for them to calculate the new tax liability, and how those dollars would have otherwise been spent to advance their missions. Survey participants were asked whether we could attribute responses to them and their organizations; options were “yes,” “no,” and “maybe, check with me first” (which is why some of the organizations are named and others are anonymous). The survey will remain open for input until the end of June. The results will be compiled and submitted to the Subcommittee prior to the closing of the public record for this hearing.

We predicted: “For many others, the cost of hiring accountants and lawyers to determine whether and how much they owe in unrelated business income taxes will be more than their actual tax payments.”

- **Liberty ARC**, the Montgomery County Chapter of The Arc **New York**, reports that it cost nearly \$2,000 in staff time and auditor fees to determine the organization owed \$1,500 in UBIT.
- A nonprofit school in the mid-Atlantic region reported that it had to work with its CPA firm to calculate the exact square footage of its parking lot so that they could determine what percentage was related to staff parking. The school’s facilities director reportedly spent several hours one day measuring every aspect of the concrete surface of their parking lot so they could accurately allocate snow-removal costs.
- Our member state association of nonprofits, the **Mississippi Alliance of Nonprofits and Philanthropy**, reports that it cost \$400 in CPA fees to determine a tax liability of only \$17.00.
- Another nonprofit in the South had an even worse experience. It paid accounting fees of more than \$2,000 only to learn it owed a tax of just \$7.00.

We predicted: “In urban areas, the application of the tax on train, bus, and ferry passes likely will force many organizations to scale back or eliminate the employee benefit.”

- A **Chicago** educational center paid a tax of \$5,000 on a parking lot that was “created primarily to assure safe space to park and secured safe passage to walk to/from two of our campus buildings in a high-risk neighborhood.”
- A charitable nonprofit in the Northwest paid a \$11,000 transportation tax bill, but questions the rationale of the policy. “We’re committed to supporting our staff through paid transit passes or paid parking (their choice). This is an expensive but important benefit, and adding a 21% tax on it not only makes it harder to support our staff, it’s insane.”
- **VISIONS/Services for the Blind and Visually Impaired** in **New York City** paid \$13,000 in taxes due to employee voluntary withholdings and suffered an additional \$10,000 in accounting fees, partly caused by IRS administrative and technological failings. The organization’s well-grounded criticism of the tax illustrates the reaction this tax is causing in nonprofits across America: “It is shameful that the federal government is requiring nonprofits to pay a tax on transit expenses that New York City requires us to offer as an option for our staff and that the federal government allows as a pre-tax employee expense.”

We predicted: “As a result of this tax, nonprofit employees and the people the organizations serve will suffer the consequences as hundreds of thousands of nonprofits are forced to divert scarce resources away from mission to pay this unjust tax.”

- **United Way of Greater Cleveland** saw a tax bill of \$20,000, money that would otherwise have gone “to support our mission to address poverty in Greater Cleveland.”
- But for the transportation UBIT of \$2,998 for the first six months of 2018, the **Coalition for Humane Immigrant Rights** reports that it could have completed DACA applications – including paying the entire filing fee – for eight individuals, or naturalizations for six individuals, in the first six months of the tax alone.
- The \$2,792 in taxes and \$1,600 cost of interpreting and calculating the taxes paid by the **Rainier Valley Corps** in Seattle, **Washington** could have been spent instead to “provide equitable, high-quality health insurance benefits to one participant in the fellowship program for emerging leaders of color.”
- In what can only be seen as adding insult to mission, **Southern Tier AIDS Program, Inc.** in Binghamton, **New York** reports that the \$1,100 in tax and accounting costs would otherwise have been spent providing 40 indigent clients with food cards and bus passes. Quite literally,

the federal tax on bus passes for employees is preventing the organization from advancing its mission by providing bus passes for its clients.

None of the nonprofits identified above, or the thousands with whom we have communicated in the past 18 months, believe the tax advances any social benefit. Rather, the tax is seen both as a punishment for doing the right thing by helping employees and as an impediment to advancing their missions. Repealing the tax is the right answer; repealing it before another tax payment comes due is the best answer.

Real-World Problems Caused by the Tax on Nonprofit Transportation Benefits

This new federal income tax on nonprofits' expenses imposes significant costs and record-keeping burdens on nonprofits, making it harder for these organizations to address their charitable missions and more difficult to recruit and retain employees. We believe that there is no support for retaining Section 512(a)(7). There are, however, misperceptions that need correcting.

Taxing Tax Exempts

Taxing tax-exempt organizations is an oxymoron. Taxing expenses as income is worse than wordplay. As stated at the outset, new Internal Revenue Code Section 512(a)(7) imposes an unrelated business income tax on nonprofits for their expenses providing transportation benefits to their employees. Accountants, attorneys, tax-policy experts, and philosophers have all puzzled over this approach that can only politely be called inscrutable. An income tax assumes money has come in that can be taxed. Expenses are easily defined as money that is no longer available because it has been spent. Repeal of the tax will be a major step toward improving the image of Congress as a body dedicated to sound policy.

Imposing an Unjust Tax in the Name of "Parity"

Reportedly, the justification offered for applying a new income tax on nonprofit expenses was a desire to impose "parity" between for-profits and nonprofits regarding qualified transportation benefits. To most people, this rationale is flawed at its core. Before the enactment of the 2017 tax law, for-profit employers paid taxes on profits at a much higher tax rate and could deduct their expenses for providing transportation benefits to their employees. The tax deduction was an inducement for those employers to provide the employee benefit. The 2017 tax law dramatically lowered the taxes that for-profit businesses now pay, if and when they have profits. As a minor reduction in the cost of the overall tax legislation, the law also repealed the deductibility of the costs of the transportation benefits. According to most accounts, the 2017 tax law was a net positive for for-profit businesses.

Nonprofit employers, on the other hand, never had a deduction for these expenses and, importantly, never provided transportation benefits to gain a tax deduction. Rather, nonprofits have always provided transportation benefits to attract and retain workers, while helping to reduce traffic and air pollution. Nonprofits received little, if any, gains under the 2017 tax law, and yet are now subject to a new, illogical income tax on transportation benefits in the name of "parity." Yet nonprofits have to pay the 21 percent even when they lose money in a given year. The same is not true for for-profit businesses. The foundational basis of the tax – that it somehow treats for-profit businesses and nonprofit organizations the same – is unsupportable.

Application to Voluntary Compensation Reduction Agreements Is Inappropriate

On March 22, 2018, at a tax law conference in Washington, D.C., there were audible gasps of incredulity in the room full of professional nonprofit tax advisors when an IRS official stated that the IRS would interpret Section 512(a)(7) as imposing unrelated business income taxes not only on employer subsidies for

transportation fringe benefits, but also on the amounts that employees voluntarily asked to be deducted from their own paychecks and placed into pre-tax qualified plans to pay for the employees' expenses for commuting to work. Until that conference, [journalists](#), and tax professionals struggling to make sense of the new law never imagined that the statutory language might apply to pre-tax qualified plans long authorized by Congress.

The guidance provided in December 2018 ([Notice 2018-99](#)) appears to adopt the interpretation that shocked the regulated community. This is most unfortunate and, we believe, unsupported in law or congressional intent. We agree with the position articulated by the [American Society of Association Executives](#) in its comments last year:

Because employees pay for transportation themselves through a payroll deduction in a pre-tax manner, tax-exempt employers have not previously viewed pre-tax compensation reduction agreements as a fringe benefit. The fact that providing a pre-tax compensation reduction agreement now has negative tax consequences for tax-exempt employers was unexpected and will have many organizations scrambling to recalculate their tax liability for transportation and parking benefits utilized by their employees this tax year.

This is no mere theoretical inquiry; real nonprofits addressing real challenges in their communities are being adversely affected by the overly expansive application of Section 512(a)(7). Consider this example provided in comments from the [Maine Association of Nonprofits](#):

One of our members indicated that they went through a lot of effort to create a pre-tax Qualified Transportation Account (QTA), primarily to allow their three staff who commute from far away and park at their building to pay for the parking using pre-tax dollars. They saw the ability of employees being able to pay the \$95/month with pre-tax as taking some of the sting out of no longer enjoying free parking. To set up the QTA, [the nonprofit employer] had to pay a one-time fee of \$300 to have the paperwork for it drawn up which they were hoping to recover over 2 or 3 years from the FICA savings. Now, instead of recouping the cost, as a result of this surprise tax, they have already accumulated a tax liability of \$239.40 through April. They terminated the QTA after 4/30 and are going back to charging parking post-tax to avoid this, a loss of a benefit to their employees.

Some in Washington, DC who have high salaries may scoff at the dollar amounts in the preceding example. But in rural America where people often drive long distances to work at small nonprofits trying to survive with little revenue in local communities, the dollar amounts are real factors for nonprofit boards working hard to ensure sustainability to continue deliver services needed by people in their communities. Unlike for-profit employers, nonprofits cannot simply raise prices to cover these unexpected and unreasonable costs.

As proven by the observation in Maine, imposition of a tax penalty on expenses incurred by tax-exempt organizations is causing nonprofit employers to cease providing qualified plans that offer such support. This reduces incentives for employees to work for nonprofits and negatively affects the ability of charitable nonprofits to hire and retain talented workers.

Proposed Guidance Insufficient

Some have suggested that guidance from the Treasury Department and IRS significantly resolved the problems that nonprofits have with Section 512(a)(7). It does not.

On December 10, eleven-and-one-half months after enactment of the 2017 tax law, the government issued [Notice 2018-99](#) that provides complex instructions for determining tax liabilities for employer-owned parking lots. The guidance provides a four-step calculus that will vary for each organization and can change from

month to month.² Importantly, the guidance completely ignores the imposition of the new tax on transit benefits; benefits that are mandated for some employers in various cities. Nor does the guidance reduce the tax burden on employers providing paid parking in facilities they do not own.

At a hearing before the Senate Finance Committee on March 14, 2019, Treasury Secretary Mnuchin acknowledged that no further relief would be forthcoming in this area when he stated: “We hope we have solved it as best we can.”³ Repeal of the section is the only reasonable response. See the [Comments of the National Council of Nonprofits](#) for more information on the proposed guidance and its shortcomings.

Taxing Mandated Transportation Benefits

Most of the official explanatory materials claim the tax applies to “fringe benefits.” In many jurisdictions, there is nothing “fringe” – as in *extra* or *voluntarily provided* – about transportation benefits. At least five communities, and now the state of **New Jersey**, have enacted laws mandating that certain employers provide commuter benefits to some or all of their employees. In every instance, nonprofit employers complying with these lawful mandates are subject to the 21-percent unrelated business income tax.

Earlier this year, **New Jersey** enacted a statewide requirement that employers with 20 or more employees must offer their employees the option of selecting pre-tax transportation benefits, which, as discussed previously, still triggers the 21-percent tax on nonprofits. Currently, the communities with mandatory commuter benefits laws are Berkeley and Richmond, California; New York City, New York; San Francisco Bay Area, California; and Washington, DC. The ordinances in [Berkeley](#) and [Richmond](#) require employers with 10 or more employees to offer pre-tax commuter benefits as a payroll deduction, provide a subsidized benefit, or a combination of the two. The [New York City](#) ordinance requires all employers in the five boroughs with 20 or more full-time employees to offer pre-tax transit benefits. Employers in the nine-county [San Francisco Bay Area](#) with 50 or more employees must offer a Commuter Benefit option, which includes a pre-tax program, a subsidy of up to \$75 per month (based on the value of the local bus pass), provide a company shuttle

² When the partial guidance was issued, the National Council of Nonprofits [provided the following summary of the Notice for](#) nonprofits throughout the country.

- **Calculating Expenses:** The income tax is levied on employer expenses and not on the value of the benefit to employees, which is a relief; but taxable expenses include such disparate items as salary and benefits of parking lot attendants; repaving costs; snow, ice, leaf and trash removal; interest; rent or lease payments, and property taxes. Many of these expenses are not easily separated from overall nonprofit operational costs and will require complex analyses solely to determine whether the employer has sufficient unrelated business taxable income.
- **Reserved Parking:** Designated and reserved employee parking signs will automatically trigger taxable income on employers pursuant to the Notice, unless the signs were taken down by March 31, 2019.
- **Public Parking, or Not; It’s Complicated:** Truly public parking is scot free, which is only reasonable; but the Notice mandates a four-step calculus for determining whether the parking is truly public and for allocating expenses. The calculations, combined with the identification of includable expenses, will likely cost more in accounting fees than many nonprofits will ultimately have to pay in taxes in the first year or two.
- **\$1,000 Threshold:** The \$1,000 income exemption existing in prior tax law still applies, and not every nonprofit with parking facilities will be required to file with the IRS, but, again, the cost of calculating the expenses and determining whether taxes are owed will cost more than the exemption.

³ Treasury Secretary Steven Mnuchin, testifying before the [Senate Finance Committee](#) on March 14, 2019, made clear that nonprofits can expect no further clarity from the Treasury and the IRS on calculating the new 21-percent nonprofit transportation tax that many organizations had to start paying as soon as April 15 and again on May 15. Secretary Mnuchin was responding to a question from Senator Lankford (R-OK) asking whether nonprofits can expect additional guidance that will alleviate the tax burden on charitable nonprofits, houses of worship, foundations, and nonprofit associations. (The exchange appears at 1:37:30 on the recording.)

program, or an alternative program approved by the relevant regulating agency. The [Washington, DC](#) program is similar to the San Francisco mandate, but applies to employers with 20 or more employees.

Imposing an unrelated business income tax on government-mandated transportation expenses is not only unfair, but also unjustified. Fringe benefits of the types targeted in subsection 512(a)(7) are, by definition, voluntary. The adjective “fringe” means that they are not a core component of pay. Historically, fringe benefits are added on top of pay packages to entice and retain qualified workers. Fringe benefits are optional.

In extreme contrast, mandated benefits and protections are not optional, and are not added into an employee’s paycheck. An employer must provide a safe workplace, grant family and medical leave in some circumstances, pay for worker compensation and unemployment insurance, among many costs, all in order to remain compliant with federal, state, and local laws. While it is true that certain mandated benefits are included on a person’s paycheck, such as Social Security and Medicare (FICA), these are unique items that are taxed not with an income tax, but with a dedicated tax. The fact that the new unrelated business income tax liability is an income tax to the general treasury distinguishes it from FICA.

To many, imposing a tax on mandated employment expenses is like penalizing employers for providing a safe workplace, properly administering family and medical leave, and complying with every other labor law. Bottom line – mandates should not be a target for taxes.

States Are Rejecting the Tax on Nonprofit Transportation Benefits

When Congress created the new levy on nonprofit transportation benefits as an unrelated business income tax, it triggered the automatic imposition of state tax liabilities on these same organizations in states that had coupled their state UBIT to the federal tax code. If the states did nothing, nonprofits would have to pay not just the 21-percent federal tax, but also three-percent more in North Carolina and nine-percent more in New York, to name only two examples. Those and other states, however, saw the unfairness of the tax on nonprofit transportation benefits and took action to prevent the harmful effects, at least at the state levels. [New York](#) and [North Carolina](#) acted in 2018 to block the automatic application of Internal Revenue Code Section 512(a)(7) to their states’ tax laws. Recently, [Hawai`i](#) and [Minnesota](#)⁴ followed suit, and a bill to decouple 512(a)(7) from [Illinois](#) state taxes is on the Governor’s desk awaiting his signature.

It’s clear to state legislators that taxing nonprofit transportation benefits is inappropriate and unsound policy. We urge Congress to repeal the tax before another state must divert time and energy to enacting legislation that decouples state law and prevent adding to the injustice.

Strong Bipartisan Support in Congress for Repeal

Section 512(a)(7) is terrible tax policy, and there is no known support in the House or the Senate for retaining it. Late last year, the House voted to repeal Section 512(a)(7) as Section 505 of the [year-end tax bill](#). Three bills in the House this Congress would repeal the transportation tax on nonprofit organizations: [HR 1223](#) sponsored by House Majority Whip Clyburn (D-SC), [HR 513](#) sponsored by Representative Conaway (R-TX), and [HR 1545](#) sponsored by Representatives Walker (R-NC) and Suozzi (D-NY). Similar bipartisan legislation is pending in the Senate as well.

America’s Nonprofits Should Not Be Held Hostage to Unrelated Tax Policy Disputes

Many of the policy decisions incorporated in the 2017 tax law are ripe for open debate. Reasonable people can and do disagree about the components and policy decisions in the law. Some point to the trade-offs that

⁴ The same bill in Minnesota also blocked the application of Section 512(a)(6) to state unrelated business income tax calculations.

were made in crafting a tax reform package that satisfied the dictates of the budget reconciliation instructions. Singular among all of the provisions in the law, however, is the tax on nonprofit transportation benefits. The tax was not the subject of public hearings and no trade-offs were made, at least as applied to the nonprofit community. While some segments of the U.S. economy came out well at the end of the tax reform process, there is no denying that tax-exempt organizations, and particularly charitable nonprofits and houses of worship did not. For this significant sector of the U.S. economy (10 percent of the workforce⁵), there was not any give and take. Only take.

It is manifestly unfair for Congress to treat the tax on nonprofit transportation benefits as merely one more policy issue to be addressed some day in the future. This tax is unique and its impacts are devastating to many organizations and their missions. Regarding this last point, the Joint Committee on Taxation estimates that nonprofits will be forced to pay more than \$200 million this year alone, imposing tremendous burdens on community-based organizations. I sincerely and earnestly ask that this Subcommittee and this Congress not hold the nonprofit community hostage to unrelated negotiations and partisan posturing.

In making the case for urgent action – before nonprofits must divert any more money from their missions– we close with the words of House Majority Whip James Clyburn, quoted in [“Mnuchin suggests further action on parking tax up to Congress,”](#) on March 25:

"I think that we have a tremendous opportunity to have a bipartisan bill to deal with that issue. I think it could move by itself, I really do. But of course, if it doesn't, let's just attach it to whatever will move"⁶

We ask that the Subcommittee, the Ways and Means Committee, and Congress do the right thing by your community charities, houses of worship, and associations – and your constituents whom we all serve – by repealing Section 512(a)(7) immediately. For the public good.

Thank you.

⁵ U.S. Department of Labor, Bureau of Labor Statistics, Research Data on the Nonprofit Sector, 2017 Annual Averages (released March 2019).

⁶ *MLex US Tax Watch* (premium), March 25, 2019.