



INDEPENDENT SECTOR

A vital voice for us all

Chair
William E. Trueheart
The Pittsburgh Foundation

Vice Chair
Gary L. Yates
The California Wellness Foundation

Treasurer
Paula Van Ness
Starlight Starbright Children's Foundation

Secretary
Hilary Pennington
Jobs for the Future

President and CEO
Diana Aviv

BOARD OF DIRECTORS

Edward H. Able, Jr.
American Association of Museums

Kathleen W. Buechel
Alcoa Foundation

Robert W. Edgar
National Council of Churches of Christ in the USA

Lewis M. Feldstein
New Hampshire Charitable Foundation

David S. Ford
Richard and Susan Smith Family Foundation

Barry D. Gaberman
The Ford Foundation

Brian A. Gallagher
United Way of America

Darell Hammond
KaBOOM! Inc.

J. Bryan Hehir
Catholic Charities, Archdiocese of Boston

J.D. Hokoyama
Leadership Education for Asian Pacifics

Kevin Klose
National Public Radio

Stanley S. Litow
IBM Foundation

Janet Murguia
National Council of La Raza

William D. Novelli
AARP

John R. Seffrin
American Cancer Society

Edward Skloot
Surdna Foundation

Donald M. Stewart
University of Chicago

Arturo Vargas
National Association of Latino Elected
and Appointed Officials

Luz A. Vega-Marquis
Marguerite Casey Foundation

M. Cass Wheeler
American Heart Association

William S. White
Charles Stewart Mott Foundation

Ruth A. Wooden
Public Agenda

The Honorable
John W. Gardner (1912-2002)
Founding Chair

Brian O'Connell
Founding President and President Emeritus

2006 ANNUAL CONFERENCE
OCTOBER 22-24, MINNEAPOLIS/ST. PAUL

September 29, 2006

Susan Brown
Deputy Tax Legislative Counsel – Regulatory Affairs
Department of the Treasury
1500 Pennsylvania Avenue NW
3049 MT
Washington, DC 20220

Dear Susan,

I am writing to share with you Independent Sector's concerns about provisions in the Pension Protection Act of 2006 (Public Law No. 109-280) which took effect on or before the bill's enactment on August 17, 2006. We have heard from several of our members, including a number of private foundations, supporting organizations, and sponsors of donor advised funds, who are concerned about their ability to comply with these new rules given a number of transition issues and the need for implementing guidance.

Although we understand the severe time pressures on the Treasury Department to produce guidance, there are deep concerns by many organizations about the financial ramifications of compliance and the potential for severe penalties if they are unable to comply with the provisions. We are therefore requesting that the Treasury Department issue guidance indicating how and whether the provisions described below will be enforced prior to the issuance of regulations, and whether there will be an appropriate transition period to allow organizations to make the necessary adjustments in their programs and organizational structures to accommodate the new requirements.

1) We are deeply concerned about the restrictions on gifts by private foundations and donor advised funds to Type III supporting organizations that are not "functionally integrated" with their supported organizations (sections 1231 and 1244 of the law). As you know, there is currently no resource available to help funders easily identify Type III supporting organizations. IRS determination letters do not state whether a public charity is a type I, II, or III supporting organization, and that information is only now being reported for the first time on Schedule A of the Form 990 returns filed by public charities. Many funders (particularly corporate foundations and sponsors of donor advised funds who make thousands of grant awards in any given year) do not request and review the Form 990 returns for their current and prospective grantees. Even those funders who do have information regarding those grantees that are Type III supporting organizations currently have no way to determine whether the organization is "functionally integrated" with its supported organizations.

Gathering information about which grantees are Type III supporting organizations will require time. Without clear guidelines regarding how private foundations and donor advised funds, as well as Type III supporting organizations, can determine whether or not a particular organization satisfies the criteria for a “functionally integrated” organization, many funders are faced with the dilemma of ceasing any grantmaking to Type III supporting organizations or possibly incurring substantial penalties. It is also unclear how these restrictions will apply to grant commitments made prior to passage of the bill, particularly for private foundations that have made such commitments in order to meet the mandatory payout requirement for their current fiscal year.

We are therefore requesting that the Treasury Department permit private foundations and sponsors of donor advised funds to rely on written statements from grantees regarding whether or not they are a supporting organization and if they reasonably believe that they satisfy the criteria for a “functionally integrated” supporting organization. We further request that the Treasury Department provide a reasonable transition period to allow all charitable organizations to learn about the law and to implement applicable procedures to facilitate compliance with the new provision.

2) Many organizations face severe difficulties in complying with the restrictions on gifts by private foundations and donor advised funds to supporting organizations if they or their supported organizations are controlled directly or indirectly by a disqualified person of the foundation or donor advised fund (sections 1231 and 1244 of the bill). In addition to the problems cited above regarding identification of supporting organizations, this provision places enormous burdens on grantmakers to research all of the organizations supported by a particular supporting organization to determine whether any of its disqualified persons exercise some level of “control” over those organizations. There is not yet a clear definition of “direct or indirect control” to guide these funders. It is not clear, for example, whether this provision will require any board member or manager of the funding body, or any of their relatives, to resign any senior executive staff position or board membership they hold with an organization that is supported by an organization that has received grants from that funding body. If a supporting organizations supports a “class” of charities or several charities, such as a supporting organization of a community foundation that was established to provide grants to charities in a nearby community, this could have a very damaging effect on all of the charitable organizations in that community.

We are requesting that the Treasury Department consider applying the definition of control currently provided in Treasury Regulations §53.4942(a)-3(a)(3) regarding qualifying distributions of a private foundation. We further request that the Treasury Department clarify that these restrictions will only apply to supported organizations that have the power to appoint the officers, directors, or trustees of the supporting organization, and provide sufficient transition time for organizations to make the required adjustments before penalties will be imposed.

3) We are very concerned about the prohibition on payments by any supporting organization to a substantial contributor, members of a substantial contributor’s family, or an entity that is 35-percent or more controlled by a contributor or members of a contributor’s family effective for transactions after July 25, 2006 (sections 1232 and 1242 of the law). It is not clear whether this prohibition applies to employees hired prior to July 25, 2006. In those cases, would the supporting organization need to fire or cease payment of salary and other benefits to an employee whose spouse or family member is a

Susan Brown
September 29, 2006
Page 3

substantial contributor to the supporting organization? If so, would the organization then be in violation of federal or state employment laws?

It appears that this prohibition could apply to payments of rent or purchases of goods and services from a company in which a contributor or members of a contributor's family owns 35 percent or more of the voting stock, even if it can be demonstrated that control of the company is effectively in the hands of third parties unrelated to the contributor. It is not clear whether this prohibition would apply to leases or contracts which were entered into prior to July 25, 2006. If it does, the organization could be subject to other legal consequences for failure to meet contractual obligations. These are just a few examples of the many ways in which this provision would impose serious financial hardship and legal complications for all supporting organizations.

We are requesting that the Treasury Department clarify that this prohibition does not apply to employment or other contracts entered into prior to July 25, 2006. Further, we would ask the Treasury Department to issue guidance regarding which transactions will be covered going forward and to provide appropriate transition time for organizations to effect the necessary changes that will be required for compliance.

There are, of course, many other issues regarding implementation of the charitable provisions enacted with the Pension Protection Act that we would like to discuss with you, including enactment of the IRA charitable rollover incentive, changes relating to donations of clothing and household items, the application of new substantiation requirements for cash gifts to work place giving programs, and mechanisms for satisfying the licensing mandates in the new appraisal requirements.

As you may know, Independent Sector has been a strong supporter of provisions that strengthen the charitable sector by deterring abuse and strengthening enforcement. However, we are also concerned that implementation of these provisions does not impose unintended financial and administrative hardship on the thousands of charitable organizations who are broadly supportive of this legislation but who are finding it virtually impossible to comply with these provisions.

We would like an opportunity to discuss both our immediate and long-term concerns with you as soon as possible. I will contact your office to schedule an appointment at your convenience. Please do not hesitate to contact me in the meantime if you would like to discuss any of the concerns we have raised.

Sincerely,



Patricia Read
Senior Vice President, Public Policy and Government Affairs

cc: Steven T. Miller, Commissioner, Tax Exempt and Government Entities Division, Internal Revenue Service
Lois G. Lerner, Director, Exempt Organizations, Internal Revenue Service
Theresa Pattara, Internal Revenue Service
Dean Zerbe, Tax Counsel, Senate Finance Committee