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TAXATION
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December 4, 2018

Hon. Charles P. Rettig
Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20024

Re: Comments on the regulatory implementation of new section 512(a)(6) in response to Notice 2018-67

Dear Commissioner Rettig:

Enclosed please find comments on the regulatory implementation of new section 512(a)(6) of the Internal Revenue Code in response to the request for comments in Notice 2018-67. These comments supplement our first set of comments dated June 21, 2018. They are submitted on behalf of the Section of Taxation and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association.

The Section of Taxation would be pleased to discuss these comments with you or your staff.

Sincerely,

Eric Solomon

Eric Solomon
Chair, Section of Taxation

Enclosure

cc: Hon. David Kautter, Assistant Secretary (Tax Policy), Department of the Treasury
Krishna P. Vallabhaneni, Acting Tax Legislative Counsel, Department of the Treasury
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AMERICAN BAR ASSOCIATION
SECTION OF TAXATION

COMMENTS ON INTERNAL REVENUE CODE SECTION 512(a)(6)
SPECIAL RULE FOR ORGANIZATIONS WITH MORE THAN ONE UNRELATED TRADE OR BUSINESS

These comments ("Comments") are submitted on behalf of the American Bar Association Section of Taxation and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the position of the American Bar Association.

Principal responsibility for preparing these Comments was exercised by Megan E. Bell, Meghan R. Biss, Eve Borenstein, Nathan M. Doane, Dahlia B. Doumar, Laura Kalick, Norah Jones, James P. Joseph, Jorge Lopez, Elizabeth M. Mills, Tanvi Mirani, James O'Connell, David A. Shevlin, Jan Smith, Robert A. Wexler and Maura L. Whelan. These Comments were reviewed by Lisa L. Johnsen, Chair of the Exempt Organizations Committee. The Comments were further reviewed by Ellen Aprill of the Section's Committee on Government Submissions and by Melissa Wiley, Council Director for the Exempt Organizations Committee.

Although the members of the Section of Taxation who participated in preparing these Comments have clients who might be affected by the federal tax principles addressed by these Comments, no such member or the firm or organization to which such member belongs has been engaged by a client to make a government submission with respect to, or otherwise to influence the development or outcome of, the specific subject matter of these Comments.

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Date: December 4, 2018

EXECUTIVE SUMMARY

These Comments respond to the request by the Department of the Treasury ("Treasury") and the Internal Revenue Service (the "Service") for comments on the regulatory implementation of section 512(a)(6),[1] as set forth in Notice 2018-67 (the "Notice"). These Comments supplement our comments dated June 21, 2018 ("June Comments"), which we submitted prior to the issuance of the Notice.

Prior to the enactment of section 512(a)(6), as part of Public Law 115-97 (the "Act"),[2] exempt organizations were permitted to aggregate their losses and gains from all unrelated business activities and then report and pay taxes on the net unrelated business taxable income ("UBTI"), if any. New section 512(a)(6), which has colloquially been referred to as the "silo" rule, requires, beginning for tax years starting in 2018, that "[i]n the case of any organization with more than 1 unrelated trade or business—(A) unrelated business taxable income, including for purposes of determining any net operating loss deduction, shall be computed separately with respect to each such trade or business . . . ." As the Notice indicates, the definition of "each such trade or business" is the key issue requiring regulatory guidance in interpreting section 512(a)(6). Our June Comments provided our thoughts and recommendations on that definition.

In these Comments, we respond to the specific questions posed in Sections 3 through 10 of the Notice. We summarize our recommendations as follows:

Notice Section 3 -- Identifying Separate Trades or Businesses.

We appreciate the Service's providing interim guidance for the period prior to the issuance of proposed regulations (the "Proposed Regulations").

We recommend that the Proposed Regulations provide a safe harbor that authorizes organizations to rely on the first two digits from codes found in the North American Industry Classification System ("NAICS"). We suggest that an organization be permitted to aggregate income and losses from two or more activities that share the same two-digit NAICS code into one UBTI silo.

Notice Sections 4 and 5 -- Investment Income.

Notice Sections 4 and 5 deal with a different aspect of investment income. As discussed in our June Comments, we believe that investment income does not represent "trade or business" income that was intended to be allocated to silos under section 512(a)(6). We understand that Treasury and the Service may not agree with this view. If Treasury and the Service treat investment income as income subject to the silo rules, we recommend the following overall approach:

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[1] References to a "section" or "§" are to a section of the Internal Revenue Code of 1986, as amended, unless otherwise indicated.

[2] An Act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018, Pub. L. No. 115-97, 131 Stat. 2054.

Because of the administrative complexity of tracking investment expenses, as identified in the Notice, we suggest that all investment income and loss that is otherwise considered to be UBTI under the general UBTI rules, which take into account modifications and exclusions, be aggregated into one general investment income silo.[3]

This silo would include:

- All income or loss that is deemed to be UBTI by virtue of sections 512(b)(4), 512(b)(13), and 512(b)(17);
- All income or loss from a partnership[4] that is not deemed to be "controlled" directly or indirectly by the exempt organization.[5] We discuss control below.
- That portion of the income or loss from a controlled partnership that is UBTI only because of sections 512(b)(4), 512(b)(13), or 512(b)(17).

Notice Section 6 -- Controlled Partnerships.

An exempt organization should be deemed not to control a partnership unless it owns more than 50% of the profits or capital interest in the partnership, as discussed in more detail below. If an exempt organization is deemed to control a partnership, then (a) the taxable investment income from the partnership, because of sections 512(b)(4), 512(b)(13), or 512(b)(17), should be allocated to the general investment income silo and (b) other trade or business income should be categorized as provided in Section 3, along with the other unrelated trade or business income of the organization.

Notice Section 7 -- Social Clubs and VEBAs.

We suggest that the rules discussed above be applied equally to VEBAs and social clubs. For these exempt entities, of course, more income will be included as UBTI because all investment income and all non-member income is deemed to be UBTI. We recommend applying the same two-digit NAICS code analysis to similar activities of a social club or VEBA, and we recommend using the same investment income silo analysis, as well.

Notice Section 8 -- 512(a)(7) Income is not Subject to 512(a)(6).

We agree with the Notice that expenses that are treated as UBI solely because of section 512(a)(7) should not be subject to the silo rules. An organization that has only one trade or business, therefore, would be able to aggregate the income or losses from that one activity with any section 512(a)(7) deemed income, and the silo rules would not apply to that organization.

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[3] I.R.C. § 512(a)(1).

[4] By partnership we mean any entity or arrangement that is classified as a partnership for Federal income tax purposes.

[5] We do not specifically address whether this rule should apply to S corporations, but, generally, if S corporation income is subject to silos, then it would seem to follow that such income would be allocated to the general investment income silo.

We understand that applying these principles to organizations with more than one trade or business is more complicated because such an organization is subject to the silo rules. Arguably, an organization with more than one trade or business would not be able to offset losses from one activity against section 512(a)(7) deemed income. In our view, this result is not equitable, and we recommend that, as a matter of equity, Treasury and the Service allow organizations with more than one trade or business to use losses to offset section 512(a)(7) deemed income.

Notice Section 9 -- Net Operating Losses.

Our June Comments include suggestions on the treatment of net operating losses ("NOLs"). To reiterate, we suggest that NOLs continue to be treated in a "first in first out" manner, consistent with the customary treatment of NOLs. Ordering NOL is important because post-2017 NOLs are subject to the 80% deduction limitation.

Section 10 -- Global Intangible Low-Taxed Income.

We agree with the Notice that exempt organizations are not required to include as UBTI any global intangible low-taxed income (or "GILTI") that is included in gross income under section 951A because such income is not treated as UBTI under general principles.

DISCUSSION

I. Overview

Prior to the Act, an organization carrying on two or more unrelated business activities calculated its UBTI as the aggregate of its gross income from the activities minus the aggregate allowable deductions.[6] In computing deductions, organizations could account for expenses, depreciation, and similar items that would be deductible by a commercial enterprise so long as the deduction was directly connected with the unrelated trade or business.[7] An item is directly connected if it has a primary and proximate relationship to the carrying on of the trade or business.[8]

Under new section 512(a)(6), this calculation has changed. Now organizations with more than one unrelated trade or business are required separately to compute their UBTI for "each such trade or business."[9] This change results in an organization calculating its gross income minus allowable deductions, including any net operating losses, in separate "silos" for each trade or business it conducts.[10] The net income from each silo cannot equal less than zero. To determine its UBTI, the organization adds the amounts from these separate silos together.[11] Other than historic net operating losses, the gains or losses from one trade or business may not be used to calculate income outside of its specific silo.[12]

The language of section 13720 of the Act adding section 512(a)(6), section (A) reads as follows:

> (6) SPECIAL RULE FOR ORGANIZATION WITH MORE THAN 1 UNRELATED TRADE OR BUSINESS. - In the case of any organization with more than 1 unrelated trade or business -
>
> (A) unrelated business taxable income, including for purposes of determining any net operating loss deduction, shall be computed separately with respect to each such trade or business and without regard to subsection (b)(12),
>
> (B) the unrelated business taxable income of such organization shall be the sum of the unrelated business taxable income so computed with respect to each such trade or business, less a specific deduction under subsection (b)(12), and
>
> (C) for purposes of subparagraph (B), unrelated business taxable income with respect to any such trade or business shall not be less than zero.

After providing an overview of section 512(a)(6) and the UBTI rules, the Notice asks for

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6 Reg. § 1.512(a)–1(a).
7 Reg. § 1.512(a)–1(a).
8 Reg. § 1.512(a)–1(a).
9 I.R.C. § 512(a)(6).
10 I.R.C. § 512(a)(6)(A).
11 I.R.C. § 512(a)(6)(B); I.R.C. § 512(a)(6)(C).
12 I.R.C. § 512(a)(6)(A).

comments on a series of issues. The Notice also recognizes the need for, and importance of, exempt organizations being able to administer section 512(a)(6) efficiently in light of information that is regularly available to exempt organizations. Our discussion and recommendations below follow the sections in the Notice.

II. Specific Guidance

Notice Section 3 -- Identifying Separate Trades or Businesses.

In our comments to Notice Section 3, we first consider whether the interim rule proposed in Section 3.02 might work as a permanent rule. We next consider whether guidance from other Code sections is useful in developing a long-term rule. Finally, we recommend a safe-harbor rule that uses two-digit NAICS codes.

A. The interim rule is useful, but is not a permanent approach.

Notice Section 3.02 provides an interim rule upon which organizations may rely until Proposed Regulations are issued. In Notice Section 3.02, Treasury and the Service provide that until additional guidance is issued organizations may “rely on a reasonable, good-faith interpretation of sections 511 through 514, considering all the facts and circumstances, when determining whether an exempt organization has more than one unrelated trade or business for purposes of section 512(a)(6).” The Notice further provides that use of the six-digit codes contained in the NAICS would constitute a reasonable, good-faith interpretation.

Notice Section 3.03 requests recommendations on a permanent rule. We recommend a bright line rule rather than reliance solely on facts and circumstance. Both exempt organizations and the government may find a standard that relies exclusively on facts and circumstances difficult to administer. An organization that reports on the basis of facts and circumstances will need to analyze separately each trade or business as well as retain records to demonstrate that it has made a reasonable, good-faith interpretation. Such an effort will require many organizations, including small organizations, to rely upon tax professionals to navigate the rules and to adequately document their decisions. Additionally, a reasonable, good faith standard, rather than bright line rules, will produce inconsistent results across the sector. Some organizations will take cautious approaches while others aggressively test what is “reasonable.” These issues will be resolved only during audits, and results will not be broadly known because audit results are not generally public. Finally, if this test is difficult for the Service to enforce, it will require time consuming and in-depth audits into an organization’s records to determine reasonability.

Accordingly, we recommend that when issuing Proposed Regulations, Treasury and the Service offer not only a basic reasonable, good-faith approach, but also a precise safe-harbor, discussed below. We also recommend that the Service provide itself flexibility to update these safe-harbor, rules through Revenue Rulings, Revenue Procedures, and notices as necessary.

Finally, for organizations that choose a facts and circumstances approach, rather than the safe-harbor, we urge that the Form 990-T be modified to allow organizations to disclose and describe their allocation methodologies. Specifically, we recommend that the Service include a schedule similar to Schedule O of the Form 990. Alternatively, space could be provided on Form 990-T, Schedule M for the organization to explain its methodology.

B. Other Code sections do not provide helpful guidance.

The Notice asks whether and how sections 132, 162, 183, 414, 469 or other Code sections and the Treasury Regulations (the "Regulations") thereunder may aid in determining how to identify an exempt organization's separate trades or businesses for purposes of section 512(a)(6)(A).

We have considered whether existing guidance under other Code sections and Regulations could provide a useable framework. Although we believe that section 132 may provide some useful guidance, we do not recommend that the approaches in those sections be adopted wholesale.

1. Section 132

Some of the framework of section 132 could be useful for identifying separate trades or businesses, particularly the Regulation's use of NAICS codes at the two-digit level. However, we do not recommend that the section 132 approach be adopted in its entirety. Section 132 and its Regulations discuss, for some of its provisions, lines of businesses and contain limitations with respect to property and services that are offered "for sale to customers in the ordinary course of the same line of business in which the employee receiving the property or service performs substantial services." In defining a line of business, the Regulations rely upon the Enterprise Standard Industrial Classification Manual (the "ESIC Manual") formerly prepared by the Statistical Policy Division of the United States Office of Management and Budget (the "OMB").[13] The Regulations provide that "[a]n employer is considered to have more than one line of business if the employer offers for sale to customers property or services in more than one two-digit code classification referred to in the ESIC Manual."[14] The ESIC Manual was developed by OMB to supplement the Standard Industrial Classification manual ("SIC").[15] However, the ESIC Manual is no longer in use. Similarly, SIC is no longer in use and was replaced in 1997 by NAICS.[16] As a result, we cannot recommend that the Service use the ESIC Manual rather than NAICS.

The Regulations under section 132 permit the use of industry codes at a two-digit level, rather than requiring a more extensive match. The Regulations also do not require any additional facts and circumstances -- a two-digit match is sufficient. Additionally, the Regulations permit organizations to aggregate their lines of business if certain criteria are met.[17] We recommend that Treasury and the Service consider whether similar rules would be appropriate for the silo rule – that is, a two-digit match without explanation of any additional facts and circumstances.

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[13] Reg. § 1.132-4(a)(2).

[14] *Id.*

[15] https://www2.census.gov/econ/esp/2007/restoring_the_esp.pdf.

[16] https://www.census.gov/eos/www/naics/faqs/faqs.html.

[17] Reg. § 1.132-4(a)(3).

2. Section 162

In the UBTI context, the term "trade or business" has long been defined as having "the same meaning it has in section 162 and generally includes any activity carried on for the production of income from the sale of goods or performance of services."[18] However, neither the Code nor the Regulations define the term "trade or business." Cases defining a trade or business in the section 162 context are very fact specific.[19] Using section 162 to differentiate between trades and businesses would again require exempt organizations to apply a facts and circumstances test. As a result, we do not believe that section 162 provides a helpful framework for identifying separate trades or businesses for purposes of section 512(a)(6)(A).

3. Section 183

During the Colleges and Universities Compliance Project, the Service relied on the rules contained in section 183 and Regulations section 1.183-2(b)(1)-(9) to determine whether an activity was a trade or business under section 513.[20] In some instances, when an activity had a history of producing losses, the Service determined that the activity was not a trade or business because it was an "activity not engaged in for profit" under section 183.[21] Section 183 defines an "activity not engaged in for profit" as an activity other than one for which deductions are available under section 162. Thus, like section 162, the determination of whether an activity is a trade or business for purposes of section 183 is based on facts and circumstances. Section 183 does not provide further guidance on distinguishing between activities that are trades or businesses. As a result, we do not recommend that Treasury and the Service rely on section 183.

4. Section 414

Section 414 provides rules for controlled groups of businesses. If a controlled group exists under the applicable Code sections and associated Regulations, the employees of those businesses are combined together for certain qualified plan requirements. Section 414(b) refers to controlled groups consisting of corporations, and section 414(c) refers to all other controlled groups. Affiliated service groups are also defined by applicable Code and Regulation sections, in this case section 414(m) and Proposed Regulations sections 1.414(m)-1. These rules aim to prevent employers from setting up multiple entities to avoid compliance with rules applicable to what is essentially a single employer group. However, the purpose of section 414 is different from the purpose of section 512(a)(6) because the silo rules look to a single exempt organization rather than separately incorporated, affiliated businesses. Therefore, looking for common or effective control is not a useful mechanism for separating UBTI activities. Accordingly, we do not believe that this section provides an appropriate framework for identifying separate trades and businesses.

[18] *See*, *e.g.*, *Comm'r v. Groetzinger*, 480 U.S. 23 (1987); *Higgins v. Comm'r*, 312 U.S. 212 (1941).

[19] *Id.*

[20] Internal Revenue Service, *Colleges and Universities Compliance Project: Final Report* (April 25, 2013), available at https://www.irs.gov/pub/irs-tege/CUCP_FinalRpt_050213.pdf.

[21] Reg. § 1.183-1(a).

5. Section 469

Generally, a passive activity is any rental activity or any business in which the taxpayer does not materially participate. Businesses in which the taxpayer works on a regular, continuous, and substantial basis are not passive activities. Importantly, passive income does not include salaries, portfolio, or investment income. The passive activity loss rules usually apply at the individual level. Although section 469 was enacted to discourage abusive tax shelters, its impact extends far beyond shelters to virtually every business or rental activity, whether reported on Schedule C, F, or E, as well as to passthrough income and losses from partnerships, S corporations, and trusts. Generally, section 469 does not apply to regular C corporations, although it does have limited application to closely held C corporations. Because most exempt organizations are corporations, the section 469 rubric is not applicable.

C. We recommend a safe harbor using two-digit NAICS codes.

Although we agree with Treasury and the Service that NAICS codes allow organizations to comply more easily with section 512(a)(6), we believe that requiring organizations to have a six-digit match between activities before permitting aggregation is too stringent.[22] Activities that naturally co-exist may not always have six-digit similarity under the NAICS codes. Accordingly, we recommend that Treasury and the Service implement a more permissive system that allows organizations to group activities based upon a less than a six-digit match of the NAICS codes. We recommend a two-digit NAICS code.

NAICS codes are organized from the two to six-digit level.[23] The 2017 NAICS codes have 20 broad sector codes (characterized by two-digit matches), 99 subsector codes (characterized by three-digit matches), 311 industry group codes (characterized by four-digit matches), 709 NAICS industries (characterized by five-digit matches), and 1,057 national industries (characterized by six-digit matches). Out of the 1,057 six-digit codes, over half—530—are the same as their five-digit industry code match.[24]

Although the Service currently requires organizations to use six-digit codes on the Form 990-T and Form 990, the 2017 instructions to both forms (and those of the preceding years back to 2008 in the case of the Form 990), and the draft Form 990-T instructions for 2018 contain fewer than 14% of the 1,057 six-digit codes. Therefore, when we review returns, we see that many organizations have been incorrectly categorizing their unrelated trades or businesses. The

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[22] NAICS codes are also useful for organizations with substantial foreign operations, or for foreign organizations that are exempt in the United States (either through an application for tax-exempt status or by operation of treaty). Both Canada and Mexico participate in NAICS. Additionally, the NAICS codes have been correlated to the International Standard Industrial Classification (ISIC) from the United Nations and the General Industrial Classification of Economic Activities with the European Communities (NACE). *See* https://www.census.gov/eos/www/naics/faqs/faqs.html.

[23] https://www.census.gov/eos/www/naics/faqs/faqs.html.

[24] *See* 2017 NAICS Structure Summary Table, https://www.census.gov/eos/www/naics/2017NAICS/2017_NAICS_Structure_Summary_Table.xlsx; *see also* https://www.census.gov/eos/www/naics/2017NAICS/2017_Definition_File.pdf.

Service's Statistics of Income office relies upon two-digit broad sector codes when it publishes its data table on "Primary Unrelated Business Activity or Industrial Grouping."[25] Accordingly, we believe that requiring a match of fewer than six-digits for purposes of classifying trades or businesses would be administrable for the Service. This approach would also provide the Service with all the information necessary to complete more effective audits. We further recommend that, as is the case under section 132, the Service implement the two-digit safe-harbor without requiring the organization to describe additional facts and circumstances. We believe using codes alone will be more efficient and less complex for organizations and the Service.

We believe that a less than six-digit match also permits an aggregation of activities that would naturally be conducted together and potentially share employees and resources. Treating these activities as separate, on the other hand, would require additional tracking and documentation by organizations as well as complicate Service audit activity by requiring detailed investigation into allocation methodologies. Below are some examples of unrelated trade or business activities deemed "common" in the Colleges and Universities Compliance Project. In each example, an organization would not be able to aggregate these "common" activities if it were required to use a six-digit NAICS code:

- *Retail and gift shops*— Physical retail stores, e-commerce stores, catalog, and mail order retail stores all share two-digit NAICS code 45. However, an organization that uses a three- to six-digit NAICS code would not be able to aggregate the income and expenses of a physical gift shop with a virtual gift shop.

- *Food Services*— A cafeteria, snack bar, and limited service restaurant all share the two-digit NAICS code 72. These activities could only be combined using a five or lower-digit NAICS Code (i.e., NAICS sector code 72, subsector code 722, industry group code 7225, or NAICS industry code 72251).

- *Advertising activities*— NAICS code 51 applies to advertising activity in a periodical and to advertising via a website. An organization would only be able to combine income and expenses from these similar advertising activities by using a two-digit NAICS code.

- *Rental Activities*— NAICS code 53 applies to non-residential property rentals, property management for these rentals, and personal property rentals, such as computer equipment. An organization would not be able to aggregate these activities using more than a two-digit NAICS code.

As part of the use of two-digit NAICS codes, we recommend that the Service permit aggregation of activities such as the ones described above. This approach is logical because similar activities may have overlapping expenses, depreciation, staff, etc. By grouping the activities together, an organization can accurately account for both its gains and losses from the overall activity.

We also believe that this approach is consistent with the legislative history of section

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[25] *See*, *e.g.*, https://www.irs.gov/pub/irs-soi/13eo05ub.xls.

512(a)(6). The House Ways and Means Committee in 2014 stated that the rationale behind the 512(a)(6) silo rule developed as a result of the Service's Colleges and Universities report, which "detail[ed] how colleges and universities were abusing the unrelated business income tax (UBIT) rules by using loss-generating business activities to shelter gain from profitable businesses."[26] The Ways and Means Committee also observed that the unrelated business income tax rules were being modified to "address these and similar loopholes."[27] In the Colleges and Universities report, the Service categorized activities into broad codes, some of which aligned with NAICS and some of which (e.g., advertising) did not. In particular, the Colleges and Universities report focused on broad categories of activities such as advertising, facility rentals, conference centers, arenas, advertising, food service, and golf courses.[28] Allowing organizations to group together their like activities, even using the two-digit industry NAICS Codes, would not frustrate Congressional intent. Losses from these aggregated activities still could not be used to offset gains in other silos, and the law provides that no individual silo may have income less than zero. Accordingly, even if an organization had significant losses in one silo, that amount would not act to reduce the gains in any other silo or the sum of the overall UBTI.

Finally, we recommend that regardless of the methodology Treasury and the Service implement, that the Service consider updates to the instructions to provide a more complete list of the applicable NAICS codes or state clearly in the instructions to the Form 990-T in large, bold font where additional codes can be obtained.

Notice Sections 4 and 5 -- Investment Income.

A. Overview.

The Notice indicates that Treasury and the Service consider investment income to be trade or business income, but that, as a matter of administrative convenience, Regulations would treat certain investment activities, including certain activities conducted indirectly through partnerships, as a single trade or business for the purposes of section 512(a)(6). The Notice requests guidance in defining investment activities of an exempt organization for the purposes of this UBTI silo.

As we stated in our June Comments, it is our view that investment income should not be classified as income from a trade or business for the purposes of section 512(a)(6) and therefore should not be subject to fragmentation at all. Our view is rooted in case law holding that an organization investing its own assets does not constitute a trade or business. In *Higgins v. Commissioner*, the US Supreme Court, discussing a predecessor to section 162, held that an individual taxpayer's activities in managing his investments did not constitute a trade or business, "no matter how large the estate or how continuous or extended the work required may be . . . ." [29] Further, section 513(c) defines "trade or business" by stating that, "for purposes of

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[26] Committee on Ways and Means, Majority Tax Staff Discussion Draft on the Tax Reform Act of 2014, WMCP 113-6 (Feb. 24, 2014) at 152. https://waysandmeans.house.gov/UploadedFiles/Ways_and_Means_Section_by_Section_Summary_FINAL_022614.pdf.

[27] *Id.*

[28] *Supra* Note 12, at Appendix C.

[29] 312 U.S. 212 (1941).

this section, the term 'trade or business' includes any activity which is carried on for the production of income from the sale of goods or the performance of services." Investment income is not earned directly from the sale of goods or the performance of services, but rather by investing in somebody else's trade or business. In the Notice, Treasury and the Service indicated disagreement with our suggestion, but they also recognized the administrative difficulty of separating out different sources of investment income.

We suggest, therefore, that if investment income is to be treated as subject to section 512(a)(6), then all investment income that is otherwise subject to the unrelated business income tax, including income and loss that is characterized as UBTI because of sections 512(b)(4), (13) and (17), be aggregated together in one silo -- taxable investment income.

As to income from partnerships:

1. Income from a partnership that is not controlled by the exempt organization should be allocated to the single investment income silo.

2. Income from controlled (as defined below) partnerships should be treated as follows:

- Income or loss from a controlled partnership that is UBTI only because of section 512(b)(3), 512(b)(13) or 512(b)(17) should be allocated to the general investment income silo, rather than treated as a separate silo, assuming the exempt organization is clearly able to identify such income from the K-1 received from the partnership or based on its knowledge of the partnership because of its level of control.

- Other trade or business income from a controlled partnership is effectively treated as being directly attributed to the exempt organization (not simply passed through) and therefore should be categorized by the exempt organization with its other activities using the two-digit NAICS code approach (assuming the exempt organization is reasonably able to assign a NAICS code to such income).

B. Definition of Investment Income.

It is difficult to define investment income for purposes of UBTI, because in general exempt organizations are not subject to unrelated business income tax with respect to investments. Under section 512(b), exempt organizations generally exclude from UBTI all of the types of income that arise from investment activities—dividends, interest, annuities, royalties, rents, and gains or losses from the sale, exchange or disposition of other property. In recognition of the uniqueness of investment-related UBTI, in its description of the revenue sources of exempt organizations, the legislative history of section 512(a)(6) discusses "investment income" as distinct from trade or business income.[30] Therefore, as discussed below, we suggest a

[30] H.R. Rep. No. 115-466, at 546 (2017) (Conf. Rep.).

definition of "investment income" that focuses not on the features that traditionally define investment -- such as passive involvement -- and instead on the unique circumstances in which the types of income that arise from investment activities -- like interest or rents -- create UBTI.

Another complication arises from partnerships. Under section 512(c), an exempt organization that is a partner in a partnership conducting an unrelated business must include in UBTI its distributive share of income associated with such business (reduced by its distributive share of related deductions). In light of this rule, the Notice recognizes the significant reporting and administrative burden that would result if the fragmentation principle under section 512(a)(6) were to require an exempt organization to distinguish between separate businesses conducted by partnerships in which it invests. Accordingly, the Notice contemplates that the "investment income" category of UBTI would include all income attributable to certain partnerships in which the exempt organization does not materially participate, without requiring the exempt organization to look through the partnership and distinguish between different underlying businesses. We read the Notice to permit aggregating the income and losses from all such partnerships.

Other commentators have suggested that the investment income category should be any passive investments that generate UBTI. We believe, however, that affirmatively defining this category by reference to its passive nature is administratively unfeasible and inappropriate given the unique circumstances subjecting exempt organizations to UBTI on investment income. The Notice specifically rejects the section 469 "material participation" standard as a means to determine whether a given activity is sufficiently passive to be viewed as an investment. We agree that applying section 469 principles to section 512(a)(6) is inappropriate, because the passive nature of an activity is not the hallmark that makes investment activity taxable as UBTI to exempt organizations.

Specifically, income streams that arise from investment activity are subject to UBTI in three key circumstances. Those income streams arise under section 512(b)(4) (relating to unrelated debt-financed income), section 512(b)(13) (relating to income from controlled entities), and section 512(b)(17) (relating to certain insurance income). Because these features—the presence of debt financing or control over the investment entity—are what turn investment income into UBTI for an exempt organization, we recommend that they also serve as the basis for a definition of investment activity under section 512(a)(6). Accordingly, any income that is subject to taxation under these three sections should fall within the general investment income silo, without further inquiry. Importantly, this treatment would include any income within these three categories that an exempt organization earns through controlled partnerships.

We also recommend that the general investment income silo should include any activity from a partnership that is not a controlled partnership. We think that this choice makes sense conceptually and administratively. Absent the unique circumstances outlined in the next section on controlled partnerships, exempt organizations generally view investments in partnerships as an investment. Furthermore, unless the exempt organization is actually involved in preparing partnership returns, it will generally be difficult or impossible for the exempt organization to attempt to peer through the partnership and segregate different business activities. Schedule K-1 does not provide an adequately granular breakdown of UBTI to permit exempt organizations to segregate in this way. It would be administratively impractical (if not impossible) for exempt organizations and the Service if exempt partners attempted to obtain the necessary information outside of the bounds of the partnership reporting required by the tax law. Different exempt organization partners might take different approaches in how much information to seek and from whom and it might be difficult to obtain all necessary information from a partnership. This approach distinguishes and justifies the different treatment of income from partnerships and income from corporations, because partnerships can only be siloed at the partner level. Therefore, we think that the most administrable approach to non-controlled partnership investments -- an approach consistent with the substance of partnership investment and the principles of administrative ease articulated in the Notice -- is to include in the general investment income silo any investment in a partnership that is not subject to the rules described in the next section.

C. Recommendation and Reasoning

We believe that investment activity is different from trade or business activities and should not be subject to the section 512(a)(6) silo rules. If Treasury and the Service disagree, as the Notice suggests, then for purposes of administrative convenience, we recommend that all investment income, whether in a partnership or not, be placed in one general investment income silo.

The primary reason for this recommendation is that consolidating all investments in one silo would achieve one of the central goals stated by the Notice—easing the administrative burden for both the taxpayer and the Service. It may be difficult for exempt organizations to distinguish between different types of investments or to identify each underlying activity beneath a single investment. The investments may be structured through passthrough entities, for which information necessary to determine a specific silo may be unavailable.

Secondarily, this recommended framework aligns with and mirrors the economic realities of investments. An investment portfolio comprises all individual investments combined. Under modern portfolio theory that informs management of exempt organization investments, organizations focus on the entire portfolio of investments, with consideration of gain and loss in the portfolio as a whole. We believe that the tax treatment of the investments should follow these principles.

In addition, debt-financed property, or property subject to acquisition indebtedness under section 512(b)(4) and section 514, should be included in the general investment income silo because the acquisition of property can be considered an investment asset.

D. Example

Two examples illustrate our proposal:

Example (1): X is exempt under section 501(c)(3) and is not a private foundation. It directly operates a restaurant, the income from which is considered UBTI because it does not satisfy the convenience exception of section 513(a)(2). It also operates a gift shop where it sells some items that generate UBTI under the fragmentation rule. X also owns a building that was financed with debt. X uses 50% of the building to operate a museum (its exempt purpose) and rents out the balance of the space for retail, thus generating UBTI under sections 512(b)(4) and 514. X has an endowment that it invests in stocks and bonds, but also in 30 partnerships, two of which it is deemed to control and which operate nearby restaurants. In 2018, one restaurant operated by partnership Y has a net loss and one operated by partnership Z has a net gain.

Under our proposal, X would treat the net income from the unrelated items in the gift shop as one silo and pay tax (two-digit NAICS code 45). If X generated a loss from the gift shop, it would report net income of zero on its Form 990-T. X would then aggregate the net income from the restaurant it owns directly with the net income/loss from the two partnerships that it controls because all fit within two-digit NAICS code 72. X would treat the debt-financed investment income from its building, along with its investment income from the 28 partnerships that it does not control, in one general investment income silo.

Example (2): The same facts as above except that X also has a controlled partnership that owns small interests in other partnerships that X does not control that make investments and that owns an 80% profits interest in LLC Q which operates a building construction company. X would allocate all income and loss from the partnerships to the general investment income silo, without the need for further analysis because they are not controlled partnerships. The income from Q is reported in a separate UBTI silo.

Notice Section 6 -- Controlled Partnerships.

An important part of applying the rule that we recommend in our response to Notice Sections 4 and 5, above, is a clear and concise test for determining when a partnership is controlled directly or indirectly by an exempt organization.

Notice Section 6.01(1) states that, except as specifically provided elsewhere, an exempt organization should use a "reasonable, good-faith interpretation of sections 511 and 514, considering all the facts and circumstances, when identifying separate trades or businesses" until Proposed Regulations are issued. Subject to the comments that follow, we agree with these general rules and support their inclusion in Proposed Regulations.

Notice Section 6.01(2) provides that, pending publication of Proposed Regulations, an organization may aggregate its UBTI from qualifying partnership interests (i.e., partnership interests that meet either the "*De Minimis* Test" or the "Control Test," as discussed below) and treat the aggregate group as comprising a single trade or business. In our view, as discussed above, any income or loss from a partnership that is not controlled by the exempt organization should be allocated to the general investment income silo. For the reasons discussed above, we do not believe that investment income earned directly by an exempt organization should be aggregated in one silo with a separate silo for income that is aggregated from non-controlled partnerships. Our framework make sense because exempt organizations think about all of their investments as a whole and incur investment advisor and other expenses on their investments as a whole.

Also, as we discuss above, we believe that income or loss from a controlled partnership that is treated as UBTI only because of section 512(b)(4), 512(b)(13), or 512(b)(17) should be allocated to the general investment income silo and that the income of controlled partnerships should be considered as directly attributable to the exempt organization to the extent of its profits interest. Organizations should consolidate this income or loss with its other income and loss, using the two-digit NAICS code safe-harbor analysis. Exempt organizations that control a partnership should be in a good position to evaluate the character of its activities, income, and loss.

We believe that the best test for whether an organization controls a partnership comes from section 512(b)(13), a Code section that addresses precisely the issue of when an exempt organization controls another entity for purposes of the UBIT rules, specifically, whether the exempt organization owns more than 50% of the profits or capital interests in a partnership.

There is less of a logical connection between section 4943, which deals with excess business holdings and which also deals only with private foundations. Section 512(a)(6), of course, covers all exempt organizations, as does section 512(b)(13). Sections 512(a)(6) and 512(b)(13) both address UBTI directly.

We now analyze the two tests set forth in the Notice and provide comments.

A. *De Minimis* Test

Notice Section 6.02 provides that an exempt organization's partnership interest meets the *De Minimis* Test if the interest is no more than 2% of the profits interest <u>and</u> no more than 2% of the capital interest. We believe a control test without a *De Minimis* Test would be more straightforward. However, if the Regulations adopt a *De Minimis* test, we suggest the following:

First, we recommend that the interest deemed to be *De Minimis* be increased to at least 5% to more accurately reflect the realities of partnership investments. This threshold would be consistent with other areas of the law where 5% operates effectively as a *De Minimis* threshold, including, for example, the FIRPTA rule that stock in a publicly traded corporation is not a U.S. real property interest unless the holder holds more than 5%.[31]

Second, the Notice provides that, for purposes of the *De Minimis* Test (section 6.02(2)) and the Control Test (section 6.03(2)), an exempt organization may rely on the Schedule K-1 it receives from the partnership. An exempt organization will be considered to have no more than 2% of the interest in the partnership if the average of the exempt organization's percentage interest at the beginning and end of the year, or (in the case of an interest held for less than a year) at the beginning and end of the period of ownership during the partnership's year, is no more than 2%. If no specific profits interest is identified in Part II, Line J of the Schedule K-1, the exempt organization does not meet the *De Minimis* Test.

If a *De Minimis* Test is to be implemented, we recommend that Treasury and the Service provide phase-in and grace periods to address certain delays and fluctuations that are beyond the

[31] I.R.C. § 897(c).

control of an exempt organization. Specifically, we recommend that holdings for a new partnership be calculated as of the date of the final closing of the partnership, so long as such final closing is no more than 18 months following the partnership's initial closing. In addition, we recommend that Proposed Regulations provide that an exempt organization is permitted up to 90 days to reduce its interest in a partnership below the relevant limits in any case where its percentage interest increased because of another partner's withdrawal or percentage reduction. This type of provision would be similar to the 90-day grace period under section 4943 for excess business holdings acquired other than by purchase.

Finally, the section 4943 *de minimis* rule provides that a private foundation must combine its interests in a partnership that is a business entity with the interests of its disqualified persons only if the foundation (together with certain other foundations) owns more than the stated interest in the partnership. In other words, no combination is required if the foundation (together with certain other foundations) itself owns not more than a *de minimis* interest in the partnership. For that reason, we recommend that if the Proposed Regulations include a *De Minimis* Test, it align with section 4943 to provide that an exempt organization's interests need not be combined with those of any disqualified person, controlled entity, or supporting organization in applying the *De Minimis* Test. If combination is required, we recommend that it be limited to Type I and Type II supporting organizations for public charities and be treated as it is now under Section 4943 for private foundations.

B. Control Test

Notice Section 6.03(1) provides that an exempt organization's partnership interest meets the Control Test if the exempt organization (i) directly holds no more than 20% of the capital interest of the Partnership ("Prong 1"); and (ii) does not have control or influence over the partnership ("Prong 2").

Prong 1 as proposed focuses on an exempt organization's capital interest in a partnership and sets the threshold at 20%. A partner that holds 20% of the capital interests in a partnership usually is not able to control the partnership, absent other factors. In many areas of tax law, control is determined by more than 50% ownership, and importantly this is the standard in Section 512(b)(13), a related UBTI provision. We continue to recommend that "control" be based on at least majority ownership (*e.g.*, more than 50%), as noted in our June Comments. If the standard is more than 50%, based on section 512(b)(13), then it also makes sense to base the test on capital or profits interests. If, however, the test is 20%, based on Section 4943, then the test should probably be based on profits interests only, and not on capital interests, for consistency with section 4943.

Notice Section 6.03(3) provides that "all facts and circumstances" are relevant in determining whether an exempt organization has control or influence over a partnership for purposes of Prong 2 of the Control Test. We agree that a subjective component is appropriate here and support its inclusion in Proposed Regulations. We recommend that the examples of what may satisfy the subjective test be revised to more accurately reflect partnership structures and control in investment contexts. For example, many exempt organization investors have the right to appoint representatives to an investor committee or advisory body. Such a right does not evidence "control," but arguably constitutes the right to participate in or influence management. Similarly, many exempt organization investors have the right to vote for, approve, or reject the appointment or removal of a general partner of a limited partnership or a managing member of a limited liability company. Such a right, while arguably a right to influence the management of the partnership, does not, in our view, evidence control. We therefore recommend that Treasury and the Service clarify in Proposed Regulations that the following do not constitute "control or influence over the partnership" in this context: (a) the right to vote for the appointment or removal of a general partner or managing member, (b) the ability to appoint representatives to investor committees or advisory committees, or (c) the right to approve the selection or removal of a general partner or managing member.

Under Prong 2, Notice Section 6.03(3) also provides that an exempt organization has control or influence over a partnership if the exempt organization has the power to appoint or remove any of the partnership's officers, directors, trustees, or employees. We recommend that Proposed Regulations remove the specific references to officers, directors, or trustees . We recommend instead saying "has the power to appoint or remove at least a majority of the partnership's governing body, however that body is configured." While many organizations classified as partnerships may have officers, directors or trustees, many do not.

Each of the *De Minimis* Test (section 6.02(2)(b)) and the Control Test (section 6.03(1)) requires that, in measuring the exempt organization's applicable percentage partnership interest, the exempt organization combine its direct interest with that of any disqualified person, supporting organization, or controlled entity. Further, the definition of "disqualified person" for these purposes is the definition set forth in section 4958(f). We have already described above why, for purposes of the *De Minimis* Test, we do not believe it is necessary to look at the interests of disqualified persons. If the Proposed Regulations are to use a *de minimis* test based on section 4943, then that test should parallel Section 4943 and not include the interests of disqualified persons.

For purposes of the Control Test, private foundations are required to track holdings of "disqualified persons" as defined in section 4946 for purposes of the section 4943 excess business holdings rules (as well as for several other purposes). Many private foundations have entered into agreements with fund managers that require the managers to monitor and track interests of disqualified persons so that the foundations can take appropriate corrective action if a concern about an excess business holding arises. We do not object to private foundations having to use the same tracking under section 4946 for purposes of section 512(a)(6) as they already use for purposes of section 4943. However, requiring them to employ one tracking system for section 4943 and another based on section 4958 for section 512(a)(6) would be time consuming and complex. If private foundations are going to have to attribute the interests of disqualified persons for purposes of this test, we strongly recommend that they be allowed to use the same definition of disqualified person that they are already using in other contexts.

For public charities, we believe that any system that requires tracking of disqualified persons, even using section 4958, would be extraordinarily burdensome. It would be exceptionally complex for many public charities – such as a university with 25 trustees, many officers and thousands of major donors –to apply those rules to every single partnership investment in their portfolio, especially those involving fund of funds and tiered partnerships. We recommend eliminating attribution rules with respect to the control rule for non-private foundations.

If Treasury and the Service do not accept our recommendation, and the Proposed Regulations require use of section 4958, consideration of supporting organizations becomes important. Public charities often form supporting organizations to achieve a variety of goals, including management of significant fundraising gifts, management of investment assets, and segregation of certain activities. Requiring a public charity to combine its partnership interests with those of its supporting organizations for purposes of the UBTI siloing rules is inconsistent with the separate existence and governance of those supporting organizations. Further, a public charity may not have access to detailed information about the investment interests of their supporting organizations and supporting organizations may be on different tax years from some of their supported organizations. Accordingly, we recommend that an exempt organization's interests not be combined with those of its supporting organizations for these purposes. However, if combination is required, we recommend that it be limited to Type I and Type II supporting organizations.

In summary, we recommend that Proposed Regulations:

1. Use the 50% rules for control from section 512(b)(13), thereby bringing in all the Regulations, rulings, and cases thereunder;
2. If the Proposed Regulations are based on section 4943, instead of section 512(b)(13), then:

    - Do not use a *De Minimis* rule, but if a *De Minimis* rule is adopted, use 5% rather than 2%;
    - Do not require attribution under the *De Minimis* test.
    - Any attribution under the Control Test be based on section 4946 for private foundations and not be required for non-private foundations.

Section 7 -- Social Clubs and VEBAs.

The Notice requests comments on any additional considerations to how section 512(a)(6) applies within the context of section 512(a)(3). In particular, Treasury and the Service request comments regarding how these exempt organizations' investment income should be treated for purposes of section 512(a)(6).

Section 512(a)(3) provides as follows:

> In the case of an organization described in paragraph (7), (9), (17), or (20) of section 501(c), the term "unrelated business taxable income" means the gross income (excluding any exempt function income), less the deductions allowed by this chapter which are directly connected with the production of the gross income (excluding exempt function income), both computed with the modifications

> provided in paragraphs (6), (10), (11), and (12) of subsection (b). For purposes of the preceding sentence, the deductions provided by sections 243 and 245 (relating to dividends received by corporations) shall be treated as not directly connected with the production of gross income.

Under section 512(a)(3), for organizations such as social clubs and VEBAs, most income generated from sales or services to non-members is considered as UBTI, most investment income is treated as UBTI, and the exceptions under Section 512(b) exclude investment income.[32] Because of this important distinction, it may be necessary to develop special rules for organizations such as VEBAs and social clubs.

We suggest that social clubs treat any income from non-members (that is otherwise subject to UBTI) in the same manner that other exempt organizations categorize their income, using the two-digit NAICS code, as discussed above. As an example, if a social club derives income from renting out its facility to non-members for private events and also serves non-members, from time to time, in its restaurant or bar, all such income and related expenses would be aggregated together as they are derived from the same type of trade or business.

We also recommend that investment income of social clubs and VEBAs be treated as one trade or business, as we have recommended for other types of exempt organizations. We also would apply whatever rules for income from partnerships are developed for other exempt organizations to also apply to VEBAs and social clubs.

Section 8 – Section 512(a)(7) income.

The Notice indicates that any deemed UBTI resulting from the application of section 512(a)(7) is not derived from an unrelated trade or business, but is nonetheless subject to the UBIT. This rule /decision raises two issues:

First, we request that the Service develop a practical solution so that exempt organizations that do not otherwise file a Form 990-T have a simple way to pay tax on this deemed income without the need to file a full Form 990-T. Perhaps a simple short-form voucher could be filed with quarterly or annual payments.

Second, we recommend that the Proposed Regulations address what, if any, UBTI losses can be used to offset deemed income under section 512(a)(7). We have identified three possible scenarios:

a. If an exempt organization has a single trade or business and that trade or business has losses, then the losses from that activity should be available to offset section 512(a)(7) deemed income. This conclusion seems reasonably clear.

b. The more complicated question is the situation in which an exempt organization has losses from more than one trade or business. We understand that an exempt organization that has more than one trade or business is subject to the silo rules of Section 512(a)(6) and is not

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[32] *see* I.R.C. §§ 512(b)(1) et. seq.

allowed to report income of less than zero from any activity or to use losses from one activity to offset gains from another. The draft instructions to the 2018 draft Form 990-T suggest that deemed income from section 512(a)(7) is to be reported in addition to, and separately from, the net income from any siloed activity. In this way, organizations that are subject to the silo rule may be disadvantaged compared to organizations that have losses from only one trade or business because they will not be able to use losses from any activity to offset section 512(b)(7) deemed income.

If Treasury and the Service do not permit organizations with more than one trade or business to offset losses against section 512(a)(7) deemed income, we believe that larger, more sophisticated organizations with several unrelated trades or businesses will structure their affairs to maximize their use of losses, while smaller organizations will be unable to do so and will pay a higher percentage of tax. As an example, Hospital A has taxable income under section 512(a)(7). It also has losses from a pharmacy and losses from a café that it operates across the street from the hospital. Hospital A would be well advised to move the café into a wholly owned taxable corporation that will pay no tax because it has little or no net income. In that way, it has only one unrelated trade or business, the pharmacy, the losses from which can offset the 512(a)(7) deemed income.

We believe that the more consistent and equitable approach would be to permit organizations that are subject to the silo rules to use losses from any activity to offset the deemed income from section 512(a)(7).

Section 9 -- Net Operating Losses.

In addition to changing the rules surrounding UBTI, the Act also modified how organizations calculate their net operating losses (“NOLs”). Section 172 now provides that an organization is limited in its NOL deduction to 80% of taxable income for losses arising in years beginning after December 17, 2017.[33] Additionally, organizations may now carry forward their post-December 2017 NOLs for an indefinite period.[34] Finally, organizations can no longer carry back their NOLs.[35]

We recommend that the Proposed Regulations address how these modifications to the rules for NOLs operate in conjunction with the rules under section 512(a)(6) and with the language from section 13702(b)(2) of the Act. Under that provision, organizations with NOLs incurred prior to 2018 do not have to calculate those historic NOLs within a silo. The section provides:

> (2) CARRYOVERS OF NET OPERATING LOSSES.—If any net operating loss arising in a taxable year beginning before January 1, 2018, is carried over to a taxable year beginning on or after such date—
>
> (A) subparagraph (A) of section 512(a)(6) of the Internal Revenue Code of

[33] I.R.C. § 172(a).
[34] I.R.C. § 172(b)(2).
[35] I.R.C. § 172(b)(1).

> 1986, as added by this Act, shall not apply to such net operating loss, and
>
> (B) the unrelated business taxable income of the organization, after the application of subparagraph (B) of such section, shall be reduced by the amount of such net operating loss.

Read together, all these sections—section 512(a)(6), section 172, and section 13702(b)(2) of the Act appear to mean that NOLs incurred within a silo, after 2017, can be carried forward indefinitely to offset up to 80% of the income in the same silo.

However, a post-2017 NOL from silo A cannot be used to offset income in silo B. Additionally, it appears that all pre-2018 NOLs can be carried forward (for up to 20 years) to offset total UBTI outside of any specific silo.

Assuming this interpretation is accurate, a number of unanswered questions remain, including the following:

- Do the traditional NOL rules requiring a first in, first out approach apply? If so, then the NOLs incurred prior to 2018 would be used first to offset any net income, whether it is in a silo or not. The language contained in section 13702(b) of the Act makes the order of operations unclear. Taking into account the language in section 172, however, we believe that this order is the appropriate result.

- What happens to post-2017 NOLs in a silo if the exempt organization is no longer operating that silo? Presumably the NOLs would be lost, absent other authority. However, if the organization later resumed the activity that created the post-2017 NOL, could it recapture the NOL given the indefinite carryforward period of section 172? We believe that it should be able to do so.

- Will repeated NOLs in a specific silo continue to be an indicator for examination because the activity may not be a trade or business? Section 512(a)(6) was intended to prevent organizations from using loss-generating activities to decrease overall UBTI, and the silo requirement largely alleviates the concern that an organization would operate an activity at a loss to offset other income. Accordingly, even if the activity in a silo continues to generate losses, the activity will continue to be treated as a trade or business.

- When does an organization take into account its charitable deduction under section 512(b)(10) and how does that work with two new classes of NOLs – pre- 2018 NOLs that are not in silos *and* post-2017 NOLs that are in silos? Under section 170(d)(2), an organization may take into account current year contributions and then carryover contributions in the order that they arose (with a limited carryover period of 5 taxable years). Additionally, section 170(d)(2)(B) provides a special rule when there are NOL carryovers to prevent organizations from having a double tax benefit. The Service has considered in other contexts the appropriate methods of calculating charitable contributions where there is not statutory guidance. For example, in Chief Counsel Advice, the Service considered how to simultaneously calculate a charitable contribution deduction limit and the alternative minimum tax net operating loss deduction.[36] In addition to providing guidance on net operating losses, organizations also need guidance on the charitable deduction calculation.

Section 10 -- Global Intangible Low-Taxed Income.

Notice Section 10 concludes that exempt organizations are not required to include as UBTI any global intangible low-taxed income (or "GILTI") which is included in gross income under section 951A. We agree; such income is not UBTI under general tax principles.

[36] CCA 201226021 (Jun. 29, 2012).