

## Investments Made for Charitable Purposes

Notice 2015-62

### SECTION 1. PURPOSE

This notice provides guidance on the application of section 4944 of the Internal Revenue Code (Code) to investments that are made by private foundations for purposes described in section 170(c)(2)(B), but are not program-related investments (PRIs) as defined in section 4944(c) and the regulations thereunder.

### SECTION 2. BACKGROUND

Section 4944(a)(1) imposes an excise tax on a private foundation that invests “any amount in such a manner as to jeopardize the carrying out of any of its exempt purposes.” In addition, section 4944(a)(2) imposes an excise tax on the participation of any foundation manager in the making of such an investment, knowing that the investment will jeopardize the carrying out of any of the foundation’s exempt purposes.

Section 53.4944-1(a)(2)(i) of the Excise Tax Regulations provides that an investment jeopardizes the carrying out of the exempt purposes of a private foundation if it is determined that the foundation managers, in making such investment, failed to exercise ordinary business care and prudence (under the circumstances prevailing at the time of making the investment) in providing for the long-term and short-term financial needs of the foundation to carry out its exempt purposes. In the exercise of the requisite standard of care and prudence the foundation managers may take into account the expected return (including both income and appreciation of capital), the

risks of rising and falling price levels, and the need for diversification within the investment portfolio (for example, with respect to type of security, type of industry, maturity of company, degree of risk and potential for return). Further, the determination of whether an investment jeopardizes the carrying out of the foundation's exempt purposes is made on an investment-by-investment basis, in each case taking into account the foundation's entire portfolio. Investments that are considered "high risk" may be closely scrutinized to determine whether the foundation managers have met the requisite standard of care. However, once an investment has been determined not to jeopardize the carrying out of the foundation's exempt purposes, the investment will not later be considered a jeopardizing investment, even if the foundation subsequently realizes a loss as a result of the investment.

Section 4944(c) provides an exception for PRIs, which are defined as "investments, the primary purpose of which is to accomplish one or more of the purposes described in section 170(c)(2)(B), and no significant purpose of which is the production of income or the appreciation of property." Section 170(c)(2)(B) defines the "charitable purposes" of organizations (including private foundations) that are eligible to receive contributions that are deductible by the donor for federal income tax purposes. The regulations under section 4944 provide additional guidance regarding what it means for purposes of section 4944 for an investment to be made primarily to accomplish one or more of the purposes described in section 170(c)(2)(B) and whether a significant purpose of the investment is the production of income or the appreciation of property.

Questions have arisen about whether an investment made by a private foundation that furthers its charitable purposes, but is not a PRI because a significant purpose of the investment is the production of income or the appreciation of property, is subject to tax under section 4944.

### SECTION 3. DISCUSSION

Only a jeopardizing investment is subject to tax under section 4944. Under the regulations, an investment made by a private foundation will not be considered to be a jeopardizing investment if, in making the investment, the foundation managers exercise ordinary business care and prudence (under the circumstances prevailing at the time the investment is made) in providing for the long-term and short-term financial needs of the foundation to carry out its charitable purposes. Although the regulations list some factors that managers generally consider when making investment decisions, the regulations do not provide an exhaustive list of facts and circumstances that may properly be considered. When exercising ordinary business care and prudence in deciding whether to make an investment, foundation managers may consider all relevant facts and circumstances, including the relationship between a particular investment and the foundation's charitable purposes. Foundation managers are not required to select only investments that offer the highest rates of return, the lowest risks, or the greatest liquidity so long as the foundation managers exercise the requisite ordinary business care and prudence under the facts and circumstances prevailing at the time of the investment in making investment decisions that support, and do not jeopardize, the furtherance of the private foundation's charitable purposes. For example, a private foundation will not be subject to tax under section 4944 if foundation

managers who have exercised ordinary business care and prudence make an investment that furthers the foundation's charitable purposes at an expected rate of return that is less than what the foundation might obtain from an investment that is unrelated to its charitable purposes.

This standard is consistent with investment standards under state laws, which generally provide for the consideration of the charitable purposes of an organization or certain factors, including an asset's special relationship or special value, if any, to the charitable purposes of the organization, in properly managing and investing the organization's investment assets. See, e.g., Unif. Prudent Mgmt. of Institutional Funds Act. §§ 3(a), 3(e)(1)(H) and accompanying comments, 7A pt. III U.L.A. 21-22 (Pocket Pt. 2015).

#### SECTION 4. DRAFTING INFORMATION

The principal author of this notice is Peter A. Holiat of the Office of the Associate Chief Counsel (TEGE). For further information regarding this notice contact Mr. Holiat at 202-317-5800 (not a toll-free call).