



American Institute of CPAs
1455 Pennsylvania Avenue, NW
Washington, DC 20004-1081

June 17, 2015

Ms. Sunita Lough
Commissioner
Tax Exempt & Government Entities Division
Internal Revenue Service
1111 Constitution Avenue, N.W.
Washington, D.C. 20224

The Honorable William J. Wilkins
Chief Counsel
Internal Revenue Service
1111 Constitution Avenue, N.W.
Washington, D.C. 20224

Ms. Tamera Ripperda
Director, Exempt Organizations
Internal Revenue Service
1111 Constitution Avenue, N.W.
Washington, D.C. 20224

Mr. Tom West
Tax Legislative Counsel
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Re: Request to Revise Language in Treas. Reg. § 53.4944-1(a)(2) Regarding Investments that Jeopardize the Carrying Out of the Exempt Purposes of a Private Foundation

Dear Mmes. Lough and Ripperda, and Messrs. Wilkins and West:

The American Institute of Certified Public Accountants (AICPA) strongly supports the efforts by the Department of the Treasury (“Treasury”) and Internal Revenue Service (IRS) to issue clear guidance for tax preparers and taxpayers. To further this mission, we request a revision, in the form of an addition and removal of certain specified language, from Treas. Reg. § 53.4944-1(a)(2)¹ in regard to investments that jeopardize the carrying out of the exempt purposes of a private foundation.

The AICPA is the world’s largest member association representing the accounting profession, with more than 400,000 members in 128 countries and a history of serving the public interest since 1877. Our members advise clients on federal, state and international tax matters and prepare income and other tax returns for millions of Americans. Our members provide services to individuals, not-for-profit organizations, small and medium-sized businesses, as well as America’s largest businesses.

The comments and recommendations included in this letter were developed by the AICPA Exempt Organizations Taxation Technical Resource Panel (TRP) and approved by the AICPA Tax Executive Committee.

¹ All references herein to “section” or “§” are to the Internal Revenue Code (IRC) of 1986, as amended, or the Treasury Regulations promulgated thereunder.

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AICPA Proposal

The AICPA respectfully recommends the removal of certain language (strikethrough shown below) from and adding the bolded language to Treas. Reg. § 53.4944-1(a)(2) regarding jeopardizing investments:

Except as provided in section 4944(c), §53.4944-3, §53.4944-6(a), and subdivision (ii) of this subparagraph, an investment shall be considered to jeopardize the carrying out of the exempt purposes of a private foundation if it is determined that the foundation managers, in making such investment, have failed to exercise ordinary business care and prudence, under the facts and circumstances prevailing at the time of making the investment, in providing for the long- 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 **set out in The Uniform Prudent Investor Act adopted by many states**, 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). The determination whether the investment of a particular amount jeopardizes the carrying out of the exempt purposes of a foundation shall be made on an investment by investment basis, in each case taking into account the foundation's portfolio as a whole. No category of investments shall be treated as a per se violation of section 4944. ~~However, the following are examples of types or methods of investment which will be closely scrutinized to determine whether the foundation managers have met the requisite standard of care and prudence: Trading in securities on margin, trading in commodity futures, investments in working interests in oil and gas wells, the purchase of "puts," "calls," and "straddles," the purchase of warrants, and selling short.~~ The determination whether the investment of any amount jeopardizes the carrying out of a foundation's exempt purposes is to be made as of the time that the foundation makes the investment and not subsequently on the basis of hindsight. Therefore, once it has been ascertained that an investment does not jeopardize the carrying out of a foundation's exempt purposes, the investment shall never be considered to jeopardize the carrying out of such purposes, even though, as a result of such investment, the foundation subsequently realizes a loss. The provisions of section 4944 and the regulations thereunder shall not exempt or relieve any person from compliance with any Federal or State law imposing any obligation, duty, responsibility, or other standard of conduct with respect to

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the operation or administration of an organization or trust to which section 4944 applies. Nor shall any State law exempt or relieve any person from any obligation, duty, responsibility, or other standard of conduct provided in section 4944 and the regulations thereunder.

The language in bold above specifies the location of the standard of care and prudence.² The strikethrough language above encompasses specific examples of investments that would warrant closer scrutiny. In light of current investment practices, many of the listed investment vehicle examples are now common in investment portfolios and considered a part of a balanced and prudent financial strategy. Striking and removing the language shown above will not change the intent of the original treasury regulations, but will help to minimize confusion among foundation managers in the process of developing current investment strategies.

Conclusion

In conclusion, to specify the location of the standard of care and prudence, the AICPA respectfully requests the addition of specific language (in bold) to Treas. Reg. § 53.4944-1(a)(2) as follows:

In the exercise of the requisite standard of care and prudence **set out in The Uniform Prudent Investor Act adopted by many states**, 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).

To help minimize confusion among foundation managers in the process of developing current investment strategies, the AICPA also respectfully requests the removal of specific language from Treas. Reg. § 53.4944-1(a)(2) as follows:

However, the following are examples of types or methods of investment which will be closely scrutinized to determine whether the foundation managers have met the requisite standard of care and prudence: Trading in securities on margin, trading in commodity futures, investments in working interests in oil and gas wells, the purchase of “puts,” “calls,” and “straddles,” the purchase of warrants, and selling short.

² http://www.uniformlaws.org/shared/docs/prudent%20investor/upia_final_94.pdf

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We appreciate your consideration of our recommendations and welcome the opportunity to discuss them further. If you have any questions, please feel free to contact me at (801) 523-1051 or tlewis@sisna.com; Jeanne Schuster, Chair, AICPA Exempt Organizations Taxation Technical Resource Panel, at (617) 585-0373, or jeanne.schuster@ey.com; or Ogochukwu Anokwute, AICPA Lead Technical Manager, at (202) 434-9231, or [oanokwute@aicpa.org](mailto: oanokwute@aicpa.org).

Sincerely,



Troy K. Lewis, CPA
Chair, AICPA Tax Executive Committee

cc: Ms. Ruth Madrigal, Attorney-Advisor, Department of the Treasury, Office of Tax
Legislative Counsel