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NOTE

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I. INTRODUCTION

Transportation to and from one's place of employment is an important cost that most workers consider when choosing where to work. This may be particularly true for workers who seek employment in charitable or non-profit work. Section 132(f) of the Internal Revenue Code (the "Code") incentivizes employers to provide employees with parking and transportation to attract potential employees to their business and ease the burden of commuting.[1] This tax provision serves various policy rationales by allowing employees to exclude from their income transportation benefits received from their employer up to a monthly maximum.[2] Allowing employees to exclude some of these costs eases the burden of commuting, especially in areas where parking is expensive.

Before the Tax Cuts and Jobs Act of 2017 (the "Act"), employers had an incentive to offer parking and transportation benefits to employees, as they were deductible to the employer and excludable by the employee.[3] In 2017, however, Congress passed the Act, and President Trump signed it into law.[4] The sweeping changes to the Code focused primarily on reducing the maximum tax rate for corporations.[5] The effects of the Act generally favor raising

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1. I.R.C. § 132(f) (2018).
2. I.R.S. Rev. Proc. 18-57, 2018-49 IRB 827.
3. I.R.S. Notice 18-99, 2018-52 IRB 1068 [hereinafter I.R.S. Notice 18-99].
4. Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054 (codified as amended at 26 U.S.C. § 1 (2018)).
5. William G. Gale et al., *Effects of the Tax Cuts and Jobs Act: A Preliminary Analysis*, TAX POLICY CTR.: URBAN INST. & BROOKINGS INST. 1 (June 13, 2018), https://www.brookings.edu/wp-content/uploads/2018/06/ES_20180608_tcja_summary_paper_final.pdf [perma.cc/DH2L-794U].

revenue in the short-term over the long-term consequences of the changes.[6] Although most changes to the Code expire without renewal in 2026,[7] some changes have strikingly altered the Code, including a stark and sudden change to the deductibility of qualified transportation fringe expenses borne by organizations who provide employees with parking.[8] This change, added as Code Section 274(a)(4), provides that employers, including non-profits, may no longer deduct the costs associated with providing qualified transportation to employees.[9] Now, non-profits providing Qualified Transportation Fringe Benefits must pay taxes on the costs associated with providing the benefit in the form of "unrelated business taxable income," which is taxed at twenty-one percent.[10]

Organizations initially struggled with their approach to this new tax provision. For-profit employers realized the difficulty in calculating the expenses for which they are now taxed, but tax-exempt and non-profit employers failed to understand why they were being taxed at all, as they are tax-exempt organizations.[11] Entities, including non-profit organizations like religious institutions and charities, who fail to pay the proper additional tax on qualified transportation benefits appear to be subject to an additional penalty tax under Section 6655 of the Code.[12]

In an effort to smooth this transition and relieve some of the burden on these entities, the Internal Revenue Service (the "Service") issued Notice 2018-99 and Notice 2018-100 to address Qualified Transportation Fringe Benefit changes and instruct affected organizations on paying the proper amount of taxes, so as to avoid a penalty for failing to pay income tax.[13] The Service's published notices clarified much of the confusion, but there is still fallout over the future implications of these changes and the underlying policy rationales for imposing a tax on tax-exempt and non-profit organizations. This Note explains how newly added Code Section 274(a)(4) changes tax law and argues that this change is short-sighted because it seeks simply to raise revenue while ignoring potential ill effects on employees, employers, and tax-exempt and non-profit organizations.

First, Part II of this Note discusses the legal background and relevant Code sections that lay the foundation for the tax treatment of fringe benefits,

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6. *Id.*

7. Tax Cuts and Jobs Act § 11001.

8. *Compare* I.R.C. § 274(a) (amended 2017) *with* I.R.C. §274(a)(4) (2018).

9. I.R.C. § 274(a)(4) (2018).

10. INTERNAL REVENUE SERV., U.S. DEP'T OF THE TREASURY, PUB. NO. 598, TAX ON UNRELATED BUSINESS INCOME OF EXEMPT ORGANIZATION (2019), https://www.irs.gov/publications/p598 [perma.cc/5EWU-DZ8Y].

11. *See* I.R.S. Notice 18-100, 2018-52 I.R.B. 1074 [hereinafter I.R.S. Notice 18-100]. "Enactment of section 512(a)(7) may result in tax-exempt organizations owing unrelated business income tax and having to pay estimated income tax for the first time." *Id.*

12. *See* I.R.C. § 6655 (2019).

13. *See* I.R.S. Notice 18-100, *supra* note 11; I.R.C. § 6655 (2018).

unrelated business taxable income, and penalties imposed for failure to properly pay estimated income tax. Part III of this Note examines the recent changes to the Code under the Act and the resulting impact on both for-profit and non-profit entities. In Part IV, this Note argues that the taxation of Qualified Transportation Fringe Benefits to tax-exempt organizations, such as non-profits, is antithetical to the U.S. tax scheme and counterproductive to the purpose of a tax exemption.

II. Legal Background

This section seeks to develop a legal foundation for understanding Qualified Transportation Fringe Benefits, unrelated business taxable income, and Section 6655 of the Code, which details a penalty for failure to pay estimated income tax. This legal background is critical to understanding how recent changes under the Act have altered the landscape impacting for-profit and non-profit entities seeking to provide Qualified Transportation Benefits to their employees.

A. Qualified Transportation Fringe Benefits

Under the Code, fringe benefits are defined as "a form of pay (including property, services, cash or cash equivalent), in addition to stated pay for the performance of services."[14] While the Code provides that all income is taxable unless an exclusion applies,[15] Section 132 of the Code explains that "fringe benefits" are excludable from gross income when the employee receiving the benefit(s) meets certain conditions.[16] These fringe benefits are excluded from gross income to serve policy rationales of fairness and to incentivize certain business behaviors by allowing employers to deduct the costs of the benefits they offer to their employees.[17] The Qualified Transportation Fringe Benefit has incentivized employers to provide transportation or reimbursement for transportation to its employees.[18]

14. INTERNAL REVENUE SERVICE, U.S. DEP'T OF THE TREASURY, PUB. NO. 5137, FRINGE BENEFIT GUIDE: OFFICE OF FEDERAL, STATE, AND LOCAL GOVERNMENTS 3 (2014).
15. I.R.C. § 61 (2018).
16. I.R.C. § 132 (2018).
17. § 132(f).
18. *Id.*

Section 132(f)(1) of the Code details three[19] types of Qualified Transportation Benefits that businesses may provide tax-free.[20] The first type involves usage of a commuter highway vehicle, whereby an employee rideshares with at least six other adults to work in a vehicle and at least eighty percent of the mileage of that vehicle is dedicated to transporting employees of the business between their residences and place of employment.[21] Second, transit passes are another type of Qualified Transportation Fringe Benefit.[22] Transit passes include passes or vouchers redeemed by employees for mass transportation, such as trains or buses.[23] The third Qualified Transportation Fringe Benefit is qualified parking, which includes "parking provided to an employee on or near the business premises of the employer or on or near a location from which the employee commutes to work by transportation in a commuter highway vehicle."[24]

Importantly, there is a monthly cap on the amount an employee may exclude from his or her income for Qualified Transportation Fringe Benefits.[25] In 2018, this monthly maximum, indexed for inflation, was $175 per employee per month for the aggregate of commuter highway vehicles and transit passes and $175 per month for qualified parking.[26] To the extent that an employer provides benefits that exceed the monthly maximum amount, the excess must be included in the employee's gross income.[27]

B. Tax-Exempt Status, Unrelated Business Taxable Income, and Form 990-T

A variety of organizations, are tax exempt.[28] Section 501 of the Code lists the various types of organizations that may qualify for tax-exempt status.[29]

19. Before 2018, a fourth qualified transportation fringe benefit, the qualified bicycle commuting reimbursement, excluded "reasonable expenses incurred by the employee [. . .] for the purchase of a bicycle and bicycle improvements, repair and storage" from the employees income when the bicycle is used regularly for travel to and from work. *See* § 132(f)(5)(F)(i).

20. § 132(f)(1).

21. § 132(f)(5)(B).

22. § 132(f)(1)(B).

23. § 132(f)(5)(A).

24. § 132(f)(5)(C).

25. § 132(f)(2).

26. § 132(f)(2)(A)–(B). In 2019, both the aggregate of the commuter highway vehicles and transit passes and the price of qualified parking were capped at $265 per month. *Id.*

27. Sally P. Schreiber, *IRS Explains Disallowance of Qualified Transportation Fringe Benefits for Parking*, J. OF ACCT. (Dec. 11, 2018), https://www.journalofaccountancy.com/news/2018/dec/irs-guidance-qtf-benefits-parking-201820258/ [perma.cc/E2UX-QNCA].

28. *See* I.R.C. § 501 (2018).

29. *Id.*

Some examples include religious, charitable, scientific, educational, and athletic organizations, as well as labor organizations, business leagues, recreational clubs, employee associations, and fraternal societies.[30] Section 501 of the Code details specific requirements for how each listed entity may qualify as a tax-exempt organization.[31]

To understand the impact of the Act's changes to the Qualified Transportation Fringe Benefits and the way the changes impact tax-exempt organizations, it is important to understand the mechanisms by which organizations may need to pay taxes, despite their tax-exempt status. Unrelated business taxable income ("UBTI") allows the Service to assess taxes on tax-exempt businesses when they engage in activities that do not fall within their primary reason for being tax-exempt.[32] Specifically, UBTI is "income . . . from a trade or business . . . regularly carried on,"[33] which is not substantially related to the purpose that is the basis of the organization's exemption.[34] Originating in 1950, UBTI serves the purpose of ensuring tax-exempt organizations operate within the parameters of their purpose.[35] Not all forms of income unrelated to the tax-exempt purpose of an organization are assessed as UBTI, such as where the income is passive[36] or involves the sale or exchange of capital assets.[37] However, a variety of transactions may qualify as UBTI, such as making private loans, the frequent purchase and sale of real property, and margin trading on stock purchases.[38] Income generated from activities deemed to be UBTI will be taxed at rates of up to thirty-seven percent when the income exceeds $12,500.[39] UBTI in excess of $1,000 must be reported on IRS Form 990-T. [40] Part IV of

30. *Id.*

31. *Id.*

32. I.R.C. § 512(a)(3)(A) (2018).

33. "Trade or business regularly carried on" is defined in Reg. 1.513-1(c)(1) as in regard to "the frequency and continuity with which the activities productive of the income are conducted and the manner in which they are pursued." 26 C.F.R. § 1.513-1(c)(1) (2019).

34. I.R.C. § 512(a)(1) (2018).

35. Julia Kagan, *Unrelated Business Taxable Income (UBTI)*, INVESTOPEDIA, https://www.investopedia.com/terms/u/ubti.asp [perma.cc/27ZT-MC8T] (last updated Jun. 10, 2019).

36. The IRS has described passive income as "any rental activity OR any business in which the taxpayer does not materially participate." *Passive Activity Losses – Real Estate Tax Tips*, INTERNAL REVENUE SERV., https://www.irs.gov/businesses/small-businesses-self-employed/passive-activity-losses-real-estate-tax-tips [perma.cc/P5HW-NJJK] (last updated Mar. 27, 2019).

37. Kagan, *supra* note 35.

38. *Id.*

39. *Id.* This may be especially relevant in the context of larger-scale tax-exempt organizations who engage in larger-scale Qualified Transportation Fringe services to their employees.

40. *Id.*; *see* INTERNAL REVENUE SERV., INSTRUCTIONS FOR FORM 990-T (2018), https://www.irs.gov/pub/irs-pdf/i990t.pdf [perma.cc/6SQ3-P7ZC].

this note will address how recent changes to the Code will now require many tax-exempt organizations to file a Form 990-T for the first time, as they will be taxed on qualified transportation going forward.

C. Internal Revenue Code Section 6655

For corporate entities, Section 6655(a) imposes a penalty for "failure to make a sufficient and timely payment of estimated income tax."[41] A corporation must pay a portion of its estimated yearly income tax quarterly.[42] Organizations must pay this estimated tax when they expect "tax for the year to be $500 or more."[43] Corporations, trusts, and tax-exempt organizations are required to pay their estimated income tax of twenty-five percent of their annual payment in four quarterly installments.[44] These estimated income tax payments are typically meant to amount to the lesser of 100% of the entities tax for that year, or "10 percent of the tax shown on the taxpayer's return for the preceding taxable year, so long as the preceding taxable year was a full twelve months long."[45]

When entities fail to pay their estimated income tax, the penalty imposed by Section 6655(a) kicks in, and the taxpayer will be subject to an additional tax.[46] The Service calculates this tax penalty following the guidelines of Section 6655(a), which apply a rate set by Section 6621 to the amount and period of the underpayment of any estimated income tax.[47]

III. RECENT DEVELOPMENTS

The changes to the Qualified Transportation Fringe Benefits made under the Act have for the first time caused many tax-exempt organizations to realize UBTI and pay penalties under Section 6655. The Service has attempted to deal with this issue by creating notices that provide some guidance.

A. The Tax Cuts and Jobs Act of 2017

The Act, passed by Congress and signed by President Trump, brought sweeping changes to the Code.[48] Leading commentators suggest that the Act was the "biggest overhaul since the Tax Reform Act of 1986."[49] The changes implemented by the Act most prominently affect corporate income taxes by

41. I.R.S. Notice 2018-100, *supra* note 11.
42. *Id.*
43. Kagan, *supra* note 35.
44. I.R.S. Notice 2018-100, *supra* note 11.
45. *Id.*
46. I.R.C. § 6655(a) (2018).
47. *Id.*; I.R.C. § 6621 (2018).
48. Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054 (2017).
49. Gale et al., *supra* note 5, at 1.

reducing the maximum income tax rate for corporations from thirty-five percent to twenty-one percent.[50] The Act also includes major changes to other areas of the Code, including: the "elimination of personal and dependent exemptions; the tax on people who do not obtain adequate health insurance coverage; the corporate alternative minimum tax; and increases in the standard deduction, the estate tax exemption, and the individual alternative minimum tax exemption."[51] Although these changes are broad, "almost all the individual income tax and estate tax provisions expire after 2025."[52] The provisions affecting corporate taxable income, however, are permanent.[53]

One major appeal of the Act is its effectiveness in stimulating the economy.[54] Although it appears that the Act will stimulate the economy in the short-term, "most models indicate that the long-term impact on the gross domestic product (GDP) will be small."[55] Furthermore, "[t]he impact will be smaller on gross national product (GNP) than on GDP because the law will generate net capital inflows from abroad that have to be repaid in the future."[56] One Brookings Institute Study reports that these changes will "reduce federal revenues by significant amounts" and "make the distribution of after-tax income more unequal," ultimately leading to an increased federal debt with the burden left to future generations.[57] The Study posits that the Act "simplifies taxes in some ways but creates new complexity and compliance issues in others," such as sectors including "state and local public spending, charitable organizations, and housing."[58]

The changes made to the Qualified Transportation Fringe Benefits by the Act are an example of this new complexity.[59] Fringe benefits provide employees with compensation that does not take the form of cash income and may be excludable from gross income.[60] The Act modifies the treatment of fringe benefits in many ways, including changing the way that it assesses tax for qualified transportation against employers.[61] Although employees may still exclude their Qualified Transportation Fringe Benefits from gross income, the Act now denies employers a deduction for the costs of providing these benefits.[62]

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50. *Id.* at 5.
51. *Id.* at 1.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. INTERNAL REVENUE SERV., U.S. DEP'T OF THE TREASURY, PUB. NO. 15-B, EMPLOYER'S TAX GUIDE TO FRINGE BENEFITS 21 (2018) [hereinafter EMPLOYER'S TAX GUIDE].
60. For a definition of fringe benefit, *see id.* at 2–3.
61. *See* Schreiber, *supra* note 27.
62. *See* I.R.C. § 274 (2019).

Sections 274(a)(4) and 512(a)(7) lay the foundation for a new policy regarding employers' usage of the Qualified Transportation Fringe Benefit.[63] Section 274(a)(4) specifically disallows the deduction of Qualified Transportation Fringe Benefits for employers.[64] As such, organizations, including tax-exempt organizations like non-profits, must pay taxes on the costs of providing qualified parking to employees at a rate of twenty-one percent.[65]

Further, section 512(a)(7) defines how tax-exempt organizations must now pay taxes on disallowed fringe benefits through UBTI, specifically citing the Qualified Transportation Fringe Benefit.[66] Section 512(a)(7) now articulates that "[UBTI] of an organization shall be increased by any amount for which a deduction is not allowable under this chapter by reason of Section 274 and which is paid or incurred by such organization for any qualified transportation fringe."[67]

To clarify the language of the statute, Section 512(a)(7) further states that:

> The Secretary shall issue such regulations or other guidance as may be necessary or appropriate to carry out the purposes of this paragraph, including regulations or other guidance providing for the appropriate allocation of depreciation and other costs with respect to facilities used for parking or for on-premises athletic facilities.[68]

From the text of the Code section, it is clear that the Service expected vast uncertainty in the wake of the implementation of the Act in 2017.[69] It was not until late 2018, however, that the Service issued Notices 2018-99 and 2018-100 to clarify the scope of the changes, as well as the way in which businesses and tax-exempt organizations were expected to deal with the changes.[70]

B. IRS Notice 2018-99

IRS Notice 2018-99, issued in December of 2018, provides guidance to determine the "nondeductible amount of parking expenses under section 274, as well as the amount treated as increased UBTI under section 512(a)(7)."[71]

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63. *See* Schreiber, *supra* note 27.

64. I.R.C. § 274(a)(4) (2018); I.R.C. § 512(a)(7) (2018).

65. Gene Takagi, *Whaaat?! Nonprofits Need to Pay Taxes for Providing Employee Parking!*, NONPROFIT L. BLOG (Aug. 2, 2018), http://www.nonprofitlawblog.com/whaaat-nonprofits-need-pay-taxes-providing-employee-parking/ [perma.cc/NZ37-NWN5].

66. I.R.C. § 512(a)(7) (2018).

67. *Id.*

68. *Id.*

69. *Id.* The IRS explicitly acknowledges this point in Notice 2018-99: "[T]he Act does not address how to determine the amount of the QTF expense that is nondeductible or treated as an increase in UBTI." I.R.S. Notice 18-99, *supra* note 3.

70. *Id.*; I.R.S. Notice 18-100, *supra* note 11.

71. Schreiber, *supra* note 27.

First, Notice 2018-99 articulates that "[a]lthough the value of a QTF [Qualified Transportation Fringe Benefit] is relevant in determining the exclusion under § 132(f) and whether the § 274(e)(2) exception applies, the deduction disallowed under § 274(e)(4) relates to the expense of providing a QTF, not its value."[72] IRS Notice 2018-99 describes the method for determining the non-deductible amount for the employer based on whether the employer (a) pays a third party to provide parking for its employees, or (b) "owns or leases a parking facility where its employees park."[73] Under scenario (a), Notice 2018-99 details that the "disallowance generally is calculated as the taxpayer's total annual cost of employee parking paid to the third party."[74] In cases where the cost of an employee's parking exceeds the monthly limit prescribed by section 132(f)(2) ($260 for 2018 and $265 for 2019), Notice 2018-99 makes clear that the excess should be treated as "compensation and wages to the employee."[75] In this scenario, where the employer pays a third-party for parking, the Service's guidance is relatively clear and to the point.[76]

In scenario (b), where the employer "owns or leases all or a portion of a parking facility," the Service's guidance is less clear.[77] When the employer owns or leases all or a part of a parking facility, Notice 2018-99 describes the disallowance under Section 274(a)(4) as calculable using any "reasonable method," noting that use of the "value of employee parking to determine expenses allocable to employee parking in a parking facility owned or leased by the taxpayer is not a reasonable method because § 274(a)(4) disallows a deduction for the expense of providing a QTF, regardless of its value."[78] Further, "for taxable years beginning on or after January 1, 2019, a method that fails to allocate expenses to reserved employee spots [within the meaning of the first step detailed below] cannot be a reasonable method[.]"[79]

Next, Notice 2018-99 defines a "parking facility" as including "indoor and outdoor garages and other structures, as well as parking lots and other areas, where employees may park on or near the business premises of the employer or on or near a location from which the employee commutes to work."[80] Notice 2018-99 then notably defines "total parking expenses" as including, but not limited to, "repairs, maintenance, utility costs, insurance, property taxes, interest, snow and ice removal, leaf removal, trash removal landscape costs,

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72. I.R.S. Notice 18-99, *supra* note 3. Thus, the IRS clarifies that the new tax is imposed on the expenses associated with providing the QTF, rather than the value received by employees. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*; *see also* EMPLOYER'S TAX GUIDE, *supra* note 59, at 21.

76. I.R.S. Notice 18-99, *supra* note 3.

77. *Id.*

78. I.R.S. Notice 18-99, *supra* note 3; *see* I.R.C. § 274(a)(4) (2018).

79. I.R.S. Notice 18-99, *supra* note 3.

80. *Id.* Further, the IRS explains that the term does not include "any parking on or near property used by the employee for residential purposes." *Id.*

parking lot attendant expenses, security, and rent or lease payments of a rent or lease payment."[81] Finally, before articulating a method that the Service has deemed reasonable for calculating the payment of taxes in cases where an employer owns or leases their own parking facility, Notice 2018-99 details the method by which deductions may be taken for depreciation on parking structures owned for the purpose of employee parking.[82] Specifically, deductions "for an allowance for depreciation on a parking structure owned by a taxpayer and used for parking by the taxpayer's [employer's] employees is an allowance for the exhaustion, wear and tear, and obsolescence of property, and not a parking expense . . . ."[83]

The first step provided by the Service in calculating taxes for employee parking requires calculating "the disallowance for reserved employee [parking] spots."[84] These employee parking spots must be "exclusively reserved for the taxpayer's employees."[85] Next, the employer must determine "the percentage of reserved employee spots in relation to total parking spots and multiply that percentage by the taxpayer's total parking expenses for the parking facility."[86] The Service has given employers until March 31, 2019, to make changes regarding their signage or access to spots to ensure that employers are complying with these requirements so that they may be able to calculate the necessary tax liability.[87]

The second step in the provided calculation depends on the use of the remaining parking spots found in the parking facility.[88] If the primary use of the majority of the remaining parking spots is general public use, then they are "excepted from the § 274(a) disallowance by the general public exception under § 274(e)(7)" and thus such expenses would remain deductible by the employer-taxpayer.[89] The Service clarifies that if the use of these additional parking spots changes throughout the year, the employer-taxpayer should use "any reasonable method" to determine their actual usage.[90]

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81. *Id.*

82. *Id.*

83. *Id.* (comparing § 274(a)(1) with § 274(a)(4) and noting the differences in terminology from "item" and "expense).

84. *Id.*

85. *Id.* These spots may have specific signage that indicates that they are for employees only. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* The "primary use" test "means greater than 50 percent of actual or estimated usage of the parking spots in the parking facility. Primary use of the parking spots is tested during normal business hours on a typical business day, or in the case of an exempt organization, during the normal hours of the exempt organization's activities on a typical day. *Id.* The general public "includes, but is not limited to, customers, clients, visitors, individuals delivering goods or services to the taxpayer." *Id.*

90. *Id.*

The third step for employer-taxpayers involves calculating their allowance for reserved non-employee spots in the parking facility.[91] These spots would include reserved spots for individuals who do not qualify as employees of the taxpayer.[92] These spots may, for example, have specific signage designating their status as reserved for non-employee use.[93] If an employer does not have any spots reserved for non-employee use, Notice 2018-99 instructs them to skip to the next step.[94]

The fourth and final step outlined by Notice 2018-99 in calculating the expenses that are no longer deductible by the employer requires determining the remaining use of the facilities.[95] This step depends on whether the employer-taxpayer has any "remaining parking expenses not specifically categorized as deductible or nondeductible."[96] In determining the actual use of the remaining allocable facilities, the employer may look at how those facilities are used, such as calculating an estimated usage "based on the number of spots, the number of employees, the hours of use, or other measures."[97]

Recognizing the vagueness of Section 274(j)(4), Notice 2018-99 provides examples of different scenarios applying its four-step process outlined above.[98] These examples include a hypothetical church and hospital.[99] The Service has endeavored to carefully detail what a reasonable approach to calculating the costs of providing employees with parking entails by establishing its four-step approach,[100] which calculates the proportion of typical "employee-only" usage of the parking spots compared to other business usage and usage by the general public.[101] For a simple example of Section 274(j)(4), one could imagine a charitable or otherwise tax-exempt organization expending $200,000 to resurface their parking lot, for which they have reserved sixty percent of the parking spots for employee use. In this scenario, the organization would utilize the above-detailed steps and conclude that it will have $120,000 of UBTI for their parking lot.

How the implementation of Section 274(j)(4) will affect the way tax-exempt organizations are taxed, however, is a more complicated issue. Published simultaneously with Notice 2018-99 was Notice 2018-100, which describes

91. *Id.*
92. *Id.* These spots may be reserved for, among others, "visitors and customers, [. . .] partners, sole proprietors, and 2-percent shareholders of S Corporations." *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.* at 11.
100. *Id.*
101. *Id.*

how tax-exempt organizations must deal with changes to the Qualified Transportation Fringe Benefit rules under the new law and how qualified transportation expenses should be incorporated into taxable income.[102]

C. IRS Notice 2018-100

Notice 2018-100 provides further guidance for charitable organizations who must react to Qualified Transportation Fringe Benefit changes under the Act. Notice 2018-100 provides

> [C]ertain tax-exempt organizations a waiver of the addition to tax under section 6655 of the Internal Revenue Code for underpayment of estimated income tax payments required to be made on or before December 17, 2018, to the extent the underpayment of estimated income tax results from the changes to the tax treatment of qualified transportation fringes . . . .[103]

In effect, this is a safe harbor that protects tax-exempt organizations from the penalty for failure to file a Form 990-T if the specific instance in controversy results from Notice 2018-99 and Notice 2018-100 – UBTI for Qualified Transportation Fringe Benefits provided to employees.[104]

The scope of the exemption under Notice 2018-100 is limited carefully to tax-exempt organizations who provide qualified transportation to employees but did not file a Form 990-T in the previous year.[105] To fit within the scope of this exemption, the tax-exempt organization must have (1) "provide[d] qualified transportation fringes (as defined in section 132(f)) to an employee for which estimated income tax payments, affected by changes to sections 274 and 512 under the Act, would otherwise be required to be made on or before December 17, 2018"[106] and (2) "not [been] required to file a Form 990-T, Exempt Organization Business Income Tax Return for the taxable year preceding the organization's first taxable year ending after December 31, 2017."[107] This appropriately limits the scope of the exemption to organizations who did not have UBTI in excess of $1,000 at the time the Act was implemented.[108] Although this safe harbor allows tax-exempt organizations to escape the penalty for failing to pay the additional tax, it does not exempt them from the additional tax itself.[109] Notice 2018-100 is clear in stating that the "relief is limited to tax-

102. I.R.S. Notice 18-100, *supra* note 11.
103. *Id.*
104. *See* I.R.S. Notice 18-99, *supra* note 3; I.R.S. Notice 18-100, *supra* note 11.
105. I.R.S. Notice 18-100, *supra* note 11.
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*

exempt organizations that timely file Form 990-T and timely pay the amount reported for the taxable year for which relief is granted."[110]

In short, Notice 2018-100 implements a safe harbor from Section 6655, specifically for tax-exempt organizations who provide qualified transportation for their employees but only so long as they were not required to file a Form 990-T in the past.[111] The Service's stated rationale[112] for allowing this safe harbor follows the enactment of Section 512(a)(7) and its effect requiring many tax-exempt organizations to owe UBTI for the first time.[113] Notice 2018-100 serves as a mechanism for the Service to acknowledge a transitional difficulty in the implementation of the Act and to provide relief to tax-exempt organizations who had not previously dealt with UBTI or the filing of a Form 990-T but would not otherwise meet any safe harbor established in Section 6655.[114] Although this rectifies one difficulty faced by tax-exempt organizations under the Act, the underlying problem remains – the changes to the Qualified Transportation Fringe punish tax-exempt organizations.

IV. Discussion

Though the Tax Cuts and Jobs Act is widely known for lowering the tax rate on corporations, changes to the deductibility of expenses incurred by providing employees with qualified transportation may cause corporations and other entities to realize taxable income they would not have had before the implementation of the Act. These changes influence corporate policy in a way that is detrimental to employees and cause a disparate impact on tax-exempt organizations. This Part argues that, within this niche area of the Code, the effects of the Act are harmful to the employees of both taxable organizations and the tax-exempt organizations themselves.

A. Lack of Incentive to Offer Qualified Transportation Among Employers

Qualified Transportation Fringe Benefits serve employers as a bargaining tool for attracting potential employees via assistance in the cost of commuting to and from work. Before enactment of the Act, the Code encouraged the use of the Qualified Transportation Fringe Benefits by allowing employers to deduct the cost of providing the fringe benefit from their taxable income.[115] While the ramifications of this change remain to be seen, this change will likely

110. *Id.*

111. *Id.*

112. *Id.* The IRS Rationale is to clarify confusion and wide-scale failure to pay estimated income tax on Qualified Parking. *Id.*

113. *Id.*

114. I.R.C. § 6655 (2018).

115. I.R.S. Notice 18-100, *supra* note 11.

have real effects on the bargaining power between employers and potential employees.

In the short-term, disallowing employers the deduction for Qualified Transportation Fringe Benefits may raise government revenue, which may offset other relative tax deficits incurred by the Act.[116] However, in the long-term, employers may be less likely to offer Qualified Transportation Fringe Benefits if such benefits are not deductible to them.[117] If the job market tightened and competition for jobs increased, then the bargaining power of employers who may offer such fringe benefits would increase as well. Conversely, a sparse job market could allow sophisticated profit-seeking employers to offer these benefits to the detriment of non-profits, further tightening the job market. This could potentially lead to the diminished use of fringe benefits, including the Qualified Transportation Fringe Benefit. Theoretical though it may be, this scenario highlights a potential effect of the Act on businesses of the future. Decreased use of qualified transportation as a bargaining tool to attract talent in the job market would thus be anti-employee: by taking away the deduction of the fringe from employers, the Act incentivizes employers to cut their costs and cease to offer transportation benefits to their employees.

Eliminating transportation benefits would impose other costs upon society as well. Many employees would then have to pay for new transportation arrangements, which could also lead employees to seek cheaper transportation arrangements. This concern is well-illustrated in Notice 2018-99, which describes the way that UBTI is assessed against employers who opt to pay a third party for furnishing the parking provided under the Qualified Transportation Fringe Benefit.[118] This may encourage employers to enter into simple contracting arrangements with third parties rather than engage in a complicated analysis of internal parking arrangements with more sophisticated entities. For example, this method allows an organization to skip the four-step process[119] detailed in Notice 2018-99 in favor of a simple calculation of costs associated with providing the parking by payment to a third party. Though the outsourcing of parking arrangements is not inherently problematic, incentivizing employers to cut the costs of their parking arrangements hurts employees and could have other ramifications as described above. If employers opt to eliminate this benefit, a source of potential government revenue may shrink and would likely have to be made up elsewhere.

Though it is unclear exactly how this change will affect the balance of power between employers and employees, qualified transportation should be considered an important fringe benefit offered to attract potential employees. What is clear, however, is that these changes have affected tax-exempt organizations in that many now must include UBTI as income for the first time.[120]

116. *See* Gale et al., *supra* note 5.
117. *Id.*
118. *See* I.R.S. Notice 18-99, *supra* note 3.
119. *Id.*
120. I.R.S. Notice 18-100, *supra* note 11.

The following sections discuss how these changes harm tax-exempt organizations and are contrary to the purpose of tax-exempt status under the Code.

B. Impact on Tax-Exempt Organizations

The changes to Qualified Transportation Fringe Benefits under the Act have imposed new taxes on many tax-exempt organizations in the form of UBTI.[121] For many organizations, this may be the first time that the organization has had to file a Form 990-T to pay UBTI, and the Service has issued Notice 2018-100 to provide a safe harbor for those who failed to do so in 2018.[122] Notice 2018-99, which provides a four-step process to reasonably determine UBTI for tax-exempt organizations, includes a section where the Service has described, by example, how such an organization may calculate this new tax liability.[123] In particular, a tax-exempt organization must use this process or a reasonably similar method to calculate the value of expenses resulting from furnishing employee parking so that it may then be taxed on that value.

While there may be some justification to assess taxes on this fringe benefit against for-profit organizations, tax-exempt organizations typically exist for reasons other than seeking profits.[124] Tax-exempt status is thus conferred to these organizations as a means of helping them exist to achieve their organizational goals without a profit-centered motive. Tax-exempt organizations must have specified purposes that comply with the Code.[125] Because these organizations do not exist to generate revenue, taxes will hurt them disproportionately when compared to for-profit business organizations. Any new tax levied on a tax-exempt organization is therefore significant, and the changes to qualified transportation are no exception. Across the board, tax-exempt organizations that provide employee parking will now realize a new tax in the form of UBTI. In some areas, this amount may be relatively minor but in areas where the cost of parking is more significant, the impact of this change could be severe.

Another interesting policy change under the Act and its effect on tax-exempt organizations is the exemption from the change under Section 274(e)(7).[126] So long as the majority of the remaining spots in the parking lot where an organization provides qualified parking for its employees are open to the general public, the fringe benefit remains deductible.[127] The ramifications of this provision may serve policy rationales of encouraging tax-exempt organizations to seek alternative parking arrangements that specifically allow the general public to use their parking lots or encouraging tax-exempt organizations to reduce employee-only parking in any dedicated lots they may own. The effect this will have on both for-profit and tax-exempt organizations is

121. *See* I.R.S. Notice 18-99, *supra* note 3.
122. I.R.S. Notice 18-100, *supra* note 11.
123. I.R.S. Notice 18-99, *supra* note 3.
124. *See* I.R.C. § 501(C)(3) (2018).
125. *Id.*
126. I.R.C. § 274(e)(7) (2018).
127. *Id.*

unclear, though it may provide a work-around for organizations seeking to keep tax costs down, simply by reducing employee parking in their lots or by expanding their lots to include parking for the general public. Either approach could be costly to the organization, as the first approach could make parking harder for the organization's employees, and the second approach would impose high costs on tax-exempt and non-profit organizations.

Tax-exempt organizations enhance society by providing important outlets for religious, charitable, scientific, educational, athletic, and social activity. For example, nonprofit organizations benefit society by "encourag[ing] civic involvement, provid[ing] information on public policy issues [and] encourag[ing] economic development."[128] Nonprofit organizations, such as "[p]rivate schools and hospitals, day care centers, [and] homeless shelters" may offer services the government might otherwise be required to offer, and thus relieve a governmental burden.[129] Tax-exempt and non-profit organizations differ significantly from for-profit organizations in the bargaining power of attracting employees – as they are not in the business of profit-seeking – so this change may hamper tax-exempt and non-profit organizations to a higher degree than for-profit businesses. Providing parking to those who involve themselves in charitable organizations or as employees of religious institutions, for example, may be more vital to the operations of such an organization, as the incentive for working for a tax-exempt organization may intuitively be lower than working for a profit-centered business. Likewise, tax-exempt employers are inherently less likely to pay higher salaries than for-profit employers, and fringe benefits may be vital to attracting quality employees.

Thus, the Act's changes to qualified transportation are antithetical to the purpose of the Code in its treatment of tax-exempt organizations and should be re-evaluated to exclude tax-exempt organizations entirely from this sudden change. The motive behind implementing these changes in order to affect tax-exempt organizations is unclear. It could be that the change was an oversight made in a hurry to push legislation through Congress, or the change could have been designed specifically to raise as much revenue as possible to offset a tax deficit in the short-term. Regardless of the motive, this drastic change in a small area of the tax law has serious consequences for tax-exempt organizations. From organizations who exist on smaller-scale budgets, to large tax-exempt organizations in major metropolitan areas, assessment of taxes on employer-provided parking or parking reimbursement may noticeably affect operating costs. Society should seek to minimize the operating costs of these organizations so that they may provide a maximal degree of social support rather than taxing them in the same way as for-profit businesses.

128. ME. ASS'N OF NONPROFITS, *Nonprofit FAQs: Reasons for Tax-Exemption*, http://www.nonprofitmaine.org/about-nonprofits/nonprofit-faqs/reasons-for-tax-exemption/ [perma.cc/N7H9-Q93H] (last visited Sept. 12, 2019).

129. *Id.*

Notice 2018-99 and Notice 2018-100 have clarified the situation for those impacted by this change, whereas the proper steps for calculating the costs were unclear for much of 2017 and 2018.[130] How the government will react to these changes in the coming months and years remains to be seen. Without renewal, these changes, like most other changes of the Act, will expire in 2026.[131] By requesting "comments for future guidance to clarify the treatment of QTF's under §§ 274 and 512," it is clear that the Service wishes to mitigate the short-term ill effects of these changes by more clearly defining the terms of the Code.[132] Hopefully, in the future, tax-exempt organizations will no longer have to pay taxes on a benefit provided to their employees, as such procedure runs counter to the basic purpose of tax-exempt status.

V. CONCLUSION

The Tax Cuts and Jobs Act of 2017 changes to Section 274(a)(4) of the Code[133] have led to confusion within the tax industry.[134] For-profit entities, tax-exempt and non-profit organizations, Certified Public Accountants, and lawyers alike have responded similarly to these changes in an effort to understand the policy rationale and purpose of removing the long-standing deduction for qualified transportation provided to employees in the Code.[135] This confusion led the Service to issue both Notice 2018-99 and Notice 2018-100 to address these uncertainties, and the Service's response has served to affirm that the changes to this area of tax law are in full effect going forward.[136] Now that the Service has clarified that the law is in fact in place, for-profit businesses must take a hard look at the arrangements they offer to their employees and make judgment decisions on the value of the fringe benefits they provide. In the long run, this change may hurt employees should competition for jobs become more intense, as employers may neglect to offer parking to employees if they can attract talent without doing so.

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130. I.R.S. Notice 18-99, *supra* note 3; I.R.S. Notice 18-100, *supra* note 11.

131. *Tax Cuts and Jobs Act: Overview of Provisions that Sunset (Expire)*, MAXWELL LOCKE & RITTER PC (Jan. 11, 2018), https://www.mlrpc.com/articles/tax-cuts-jobs-act-overview-provisions-sunset-expire/ [perma.cc/4VVL-2TDP]. This includes the changes to qualified transportation. *Id.*

132. I.R.S. Notice 18-99, *supra* note 3.

133. Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, 2054 Stat. 131 (2017).

134. Larry Brant and Steven Nofziger, *Decoding the Tax Cuts and Jobs Act – Part VI: Employment and Fringe Benefit Related Provisions*, FOSTER GARVEY: LARRY'S TAX L. BLOG (Feb. 27, 2018), https://www.foster.com/larry-s-tax-law/tcja-fringe-benefits-employer-employee [perma.cc/MH9G-TY7G].

135. *See generally* AICPA Open Letter to Patrick M. Clinton, Mikhail Zhidkov & La Vonne Fischer Regarding Notice 2018-99 (May 14, 2019), https://www.aicpa.org/content/dam/aicpa/advocacy/tax/downloadabledocuments/20190514-aicpa-comments-notice-2018-99-qtf.pdf [perma.cc/XSU5-EKKC].

136. I.R.S. Notice 18-99, *supra* note 3; I.R.S. Notice 18-100, *supra* note 11.

On the other hand, the Code aims to impose taxes for the costs of these newly imposed fringe benefits on tax-exempt and non-profit organizations. For the first time, these organizations must pay tax on a valuable benefit they use to attract employees to assist in providing their services. This change not only strikes at the bottom-line of tax-exempt and non-profit organizations, but it also encourages them to seek alternative arrangements that may be less favorable to employees working in the respective sectors of industry that hold tax-exempt status.

Although this change may increase tax revenue for the government in the short-term, the long-term effects may be more damaging to our economy and social system, offsetting any gain in revenue realized by taxing Qualified Transportation Fringe Benefits. This niche tax law modification is emblematic of the general implementation of the Tax Cuts and Jobs Act, which seeks short-term revenue at the potential expense of long-term stability.[137] In the absence of new law reversing this change to the Code, the Service should issue regulations to better protect organizations, particularly tax-exempt and non-profit organizations, from paying the costs associated with assisting their employees' commute to work.

137. Gale et al., *supra* note 5, at II.