SEPTEMBER 17, 2015

IRS Clarifies Position on Private Foundation Mission-Related Investments Under Section 4944

In **Notice 2015-62** issued on Tuesday, the IRS explained that a private foundation and its managers will not necessarily be penalized under Internal Revenue Code Section 4944 for a mission-related investment that does not qualify as a program-related investment (PRI) and that offers a lower return than more standard alternatives, since a foundation's charitable purposes are relevant to determining whether its managers have exercised ordinary business care and prudence in making investment decisions.

Section 4944 of the Internal Revenue Code imposes an excise tax on a private foundation, and in some situations the foundation's managers, for any investments that are deemed "to jeopardize the carrying out of any of [the foundation's] exempt purposes." PRIs are a statutory safe-harbor, but to qualify as a PRI an proposed investment must meet several criteria, namely: (i) the primary purpose of the investment must be to further one or more exempt purposes of the foundation; (ii) the production of income or the appreciation of property may not be a significant purpose of the investment; and (iii) the PRI cannot be used to fund electioneering or lobbying activity. Where the PRI recipient is not a U.S. public charity, the foundation is additionally required to exercise expenditure responsibility over the investment, in accordance with the very specific requirements of the Treasury regulations.

The regulations to Section 4944 define a "jeopardizing investment" in part as one where foundation managers "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." (**Treas. Reg. Section 53.4944-1(a)(2)(i)**).

Notice 2015-62 clarifies that the relevant facts and circumstances foundation managers may consider in exercising "ordinary business care and prudence" can include the relationship between a particular investment and the foundation's charitable purposes. Consequently, even where an investment doesn't qualify as a PRI because, for example, the production of income is a significant motivation behind it, the fact that the investment was made to further a charitable purpose of the foundation may help to avoid having it classified as a jeopardizing investment under Section 4944.

As Notice 2015-62 explains, this clarification helps to make IRS guidance consistent with the standard under the Uniform Prudent Management of Institutional Funds Act (UPMIFA), adopted by most states, which provides that managers may take into account any special relationship between a proposed investment and the organization's

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charitable purposes. (See **UPMIFA** Sections 3(a), 3(e)(1)(H) and accompanying comments, as well as, for example, **California Probate Code Sections 18501-18510**.

The following resources provide further background on private foundations, PRIs, and mission-related investing:

Proposed Regulations Would Bring Program-Related Investments into the 21st Century , by David A. Levitt and Robert A. Wexler, *Journal of Taxation*, August 2012

Investing In The Future: Mission-Related And Program-Related Investments For Private Foundations by David A. Levitt, *The Practical Tax Lawyer*, Spring 2011

Unscrambling 'MRIs' and 'PRIs' by David A. Levitt, *Philanthropy Journal (on-line)*, April 5, 2011