Comments Presented for Public Hearing, February 20, 2020
P. George Tryfiates, Director for Government Affairs
Re: REG-10743-19 – Proposed Regulations on
"Treatment of Payments to Charitable Entities in Return for Consideration"

Good morning. My name is P. George Tryfiates, Director for Government Affairs of the Association of Christian Schools International (ACSI). ACSI is a nonprofit, non-denominational, association providing support services to nearly 24,000 Christian schools in over 90 countries. As the world's largest association of Protestant schools, ACSI serves some 2500 Christian preschools, elementary, and secondary schools, and 90 post-secondary institutions in the United States alone. We are a leader in strengthening Christian schools and equipping Christian educators worldwide. ACSI accredits Protestant Pre-K – 12 schools, provides professional development and teacher certification, and offers its member-schools high-quality curricula, student testing and a wide range of student activities. Member-schools educate some 5.5 million children around the world.

From the beginning of the present rulemaking process, ACSI has consistently urged the Treasury to narrowly address its valid concerns. First, we can appreciate that very early in this particular regulatory process, the Department recognized that the final rule published June 13, 2019 was too broad and responded by issuing guidance to narrow its application. The NPRM announced in December 2019, and on which we comment today, seeks to formalize that guidance as a regulation.

In general, we feel this NPRM's seeking to narrow the application of the final rule is a step in the right direction, but respectfully maintain that it could and should be still more specific.

The safe harbor provisions in the NPRM allow for businesses to claim a charitable gift to a state tax credit program as a deductible business expense. They also allow individuals to claim a charitable gift to a state tax credit program as a state and local tax (SALT) deduction, but only if the individual has not reached the $10,000 cap on the deduction imposed by the Tax Cuts and Jobs Act (TCJA).

Regulatory History and Purpose. As ACSI has made clear throughout the regulatory processes, our concern is that the final rule asserted that the issue at hand was the challenge of state "workarounds" to avoid the cap on the SALT deduction imposed by the TCJA. But, applying the final rule to all tax credit programs impacts far more than the questionable ones at issue.

ACSI's concern has focused on state scholarship tax credit programs which pre-existed the SALT cap and thus are in no way implicated in workaround efforts. In fact, it can be presumed that *no* state tax credit program prior to the January 1, 2018 effective date of the cap was created as a workaround to the SALT cap and thus should not be a target of the final rule at all.

State tax credit scholarship programs are not designed to subvert federal tax law nor to function as an arm of state government. The intent is to improve the life of a child and positively change their trajectory by providing access to schools that are a better fit for the student. The final rule reduces the value of charitable gifts for this worthy purpose and thus results in fewer gifts. Even the loss of one scholarship due to the final rule is not de minimis for the family involved. The NPRM offers partial relief although through a complex process.

Consequences and Impact. The final rule's solution to the challenge of state workarounds was to limit the value of the charitable deduction for *all* state tax credit programs, including worthy causes such as tax credit scholarship

programs. However, the Department could instead *eliminate* the damage done to legitimate tax credit programs by the very simple act of targeting only the offending programs. Aside from other considerations, this is our key point.

Potential Alternatives. First, we feel the safe harbor provisions have a weakness in that there is no exception for taxpayers at or above the $10,000 cap on the SALT deduction for gifts made to genuinely charitable, non-government-oriented programs. At minimum, the final rule ought to include an exception in this case.

Additionally, there are several possible approaches to narrow the application of the final rule.

1. One possible way to be specific is to **apply consequences only to Section 170(c)(1)** which applies to "a contribution or a gift to or for the use of –

    (1) A State, a possession of the United States, or any political subdivision of any of the foregoing, or the United States or the District of Columbia, but only if the contribution or gift is made for exclusively public purposes."

A state-created entity that receives a gift in lieu of or for the purposes of paying state or local taxes is undeniably a gift "made for exclusively public purposes." Application only to Section 170(c)(1) rather than the whole of Section 170(c) would apply only to entities implicated in a workaround. Section 170(c) includes five different kinds of organizations only one of which (170(c)(1)) is implicated in state workarounds of the SALT deduction cap.

With this specific cross reference to Section 170(c)(1), the regulations would match revenue loss concerns directly with state and local government gifts. Other qualified donors, such as scholarship tax credit donors, would be unaffected, and successful and long-standing gifting structures would remain unaffected. This change would correct the overly broad reach of the final regulations that was not addressed in these proposed regulations.

2. The other side of that same coin: **make an *exception* for charitable organizations that are *not* affiliated with a government entity** and/or that agree not to direct contributions "for exclusively public purposes" such as paying a state and local tax.

3. Another approach to consider may be to **exclude Section 170(c)(2)** from regulation on this issue altogether. This section applies to entities "organized and operated exclusively for religious, charitable, scientific, literary, or education purposes…". Thus, entities that operate for non-governmental purposes would not be hit by the final rule's restrictions on charitable deductions.

4. It might be best simply to exempt all four remaining entities rather than only those in Section 170(c)(2) noted above. Section 170(c)(3) applies to a post or organization of war veterans; 170(c)(4) concerns fraternal societies; and, Section 170(c)(5) relates to cemetery companies.

5. Yet another possibility would be to **apply consequences only to the gifts themselves which are made for the purposes of paying a state or local tax** no matter to what entity the gift is made. The specific purpose of paying a state or local tax stands in stark contrast to gifts for the purpose of, for example, providing scholarships to a low-income child (or any number of other worthy causes *other than paying state taxes* for which states have created state tax credit programs).

Conclusion. Fundamentally, the question is "what is the consequence for turning a *state* tax payment into a *federal* charitable deduction by means of a tax credit program and must that consequence apply to *all* tax credit programs?" The final rule puts the consequences on *all* state tax credit programs. Commendably, the NPRM's safe harbors ease the pain of those consequences, also on *all* state tax credit programs. It could do better by applying the final rule only to offending workaround programs or exempting all other non-governmental charitable tax credit programs. The NPRM at minimum still needs an exception for individual donors who exceed the SALT deduction cap for gifts for legitimate charitable, non-government purposes. Thank you for your consideration.