Quarter 1/2, 2019


The Nonprofit Organizations Committee will meet at the Business Law Section’s Annual Meeting in Washington, D.C., this September 12-14. Registration information and the full meeting schedule can be found here.

Newsletter Editorial Board

Emily Chan
San Francisco, CA

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Article Writers Wanted

The Newsletter Editorial Board is seeking articles on nonprofit law subject matter to include in future newsletters. There is no length requirement. If you are interested in submitting an article, please contact:

- Emily Chan at echan@adlercolvin.com
- Matthew Wright at matthew@diazwright.com

Message from the Chair

Greetings from Washington, D.C.

- First, I’d like to recognize and bring to your attention the achievements of three former chairs of this Committee:
  - Jeannie Frey is now Vice Chair of the Business Section, which means that she’ll become the Chair of the Business Section in two years. She’ll be the first Business Law Section Chair to come from the Nonprofit Orgs Committee in a long time;
  - Bill Boyd has been elected President of the Iowa State Bar Association;
  - Michael Malamut has been named by the governor of Massachusetts as an Associate Justice of Massachusetts’s specialized Housing Court.

Please join me in saluting these dedicated Nonprofit Organizations leaders for their notable accomplishments.

- Next, I want to report that we had a very good spring meeting in beautiful Vancouver, British Columbia. The weather was perfect, the food was excellent, and our meetings productive. Our annual meeting is planned for Washington, D.C., September 12-14. We’re planning some special events, so we hope to see you there.

- Recognizing, though, that not all of our members can attend our in-person meetings, the Committee is working to expand our online offerings. Our goal is to have each of our substantive subcommittees—Athletic, Recreation, & Affinity Organizations, Governance, Religious Organizations, and Trade Associations—sponsor at least one webinar each year. These programs will be a mix of CLE and non-CLE, as circumstances permit. Please stay tuned to the ABA’s website for more details.

- Speaking of which, I do urge you to explore the ABA’s new website. “ABA Connect” will be the platform for our Committee’s activities and communications going forward. Sometime this year the Business Section will deactivate our listserv. So if you value the information coming from and relationship with our Committee, please connect with us through the website at: https://www.americanbar.org/groups/business_law/committees/nonprofit/

Cheers, and hope to see you all soon.

Bill Klimon, Chairman
The tax under Section 4960 of the Internal Revenue Code was enacted as part of the Tax Cuts and Jobs Act of 2017. It applies to all organizations exempt under Sections 501(c) and 527 and to governmental units that exclude income under Section 115. Governmental entities that haven’t been recognized under Section 501(c)(3) (including many state colleges and universities) are not subject to the tax.

Meghan R. Biss, Caplin & Drysdale, Washington, D.C.

IRS Issues Guidance on Provisions Added by the Tax Cuts and Jobs Act (TCJA)

Guidance on the New Excise Tax on Qualified Transportation Fringe Benefits

Tax-exempt organizations are now taxed on amounts expended for qualified transportation fringe benefits, parking facilities used in connection with qualified parking benefits, and on-premises athletic facilities that discriminate in favor of highly compensated employees.

On December 10, 2018, the IRS issued Notice 2018-99 to provide interim guidance for organizations in determining their taxable amount. The Notice permits organizations to use any reasonable method, including those specified in the Notice. The Notice also provides that certain methods are not reasonable, such as the value of the parking, based on the guidance under Section 274. The Notice also provides guidance to assist organization on determining which expenses count, how to determine the taxable amount when the organization provides payment to a third party (e.g., for transit passes or parking), and a 4-step process to use when an organization owns or leases all or part of a parking facility.

Simultaneously, the IRS released Notice 2018-100 which provides relief from penalties for an underpayment of estimated taxes for certain organizations. To alleviate concerns that organizations that had not previously filed a Form 990-T would be subject to penalties, the IRS is waiving the penalty if the organization (1) is providing a qualified transportation fringe (as defined in Section 132(f)) to an employee for which estimated income tax payments were required; (2) was not required to file a Form 990-T for the taxable year preceding the organization’s first taxable year ending after December 31, 2017; (3) must have timely filed its Form 990-T; and (4) must timely pay the amount reported for the taxable year for which relief is granted.

Guidance on the New Excise Tax on Compensation and Parachute Plans

On December 31, 2018, the IRS issued Notice 2019-09 clarifying how the new 21 percent tax on “excess” compensation impacts nonprofits. The tax is effective for compensation paid in tax years beginning after December 31, 2017.¹ The “excess” compensation tax under Section 4960 is imposed on:

- **excess remuneration, i.e.,** annual compensation paid to a “covered employee” by a nonprofit and its related entities that totals to more than $1 million; and

- **excess parachute payments, i.e.,** payments to a “covered employee” by a nonprofit and its related entities that, in total, equal at least three times the employee’s annual compensation (averaged over five years) when the payment is contingent on the employee’s separation from employment.

The tax on excess parachute payments means that nonprofits can still be subject to tax on severance payments even if they pay their top executives well under $1 million a year. The Notice provides that “remuneration” is generally the same thing as “wages” under the income tax provisions of the Code. Some amounts are excluded, including amounts paid by a nonprofit for service on its board and amounts paid to a licensed professional for the performance or supervision of medical or veterinary services (but not for services such as teaching, research and administration).

To know whether it might pay compensation that triggers the tax, a nonprofit needs to know if it has “covered employees,” related entities, and the compensation amounts paid by those entities. Although there are some limited exceptions, it is important to remember that each common-law employer, whether it is the nonprofit or a

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related entity, must pay its own share of the tax based on its proportional share of remuneration paid to a covered employee. To do this, the entity needs to file a Form 4720, Return of Certain Excise Taxes Under Chapters 41 and 42 of the Internal Revenue Code.

IRS Changes Process for Organizations with Group Rulings

As of January 1, 2019, IRS will no longer mail lists of parent and subsidiary accounts to central organizations (group ruling holders) for verification and return. Previously, the IRS would mail a “List of Parent and Subsidiary Accounts” to the central organization that contained the names of the various subordinates in the group ruling. This process was meant to help organizations comply with the reporting requirement contained in Revenue Procedure 80-27. Under that requirement, central organizations are required to submit to the IRS at least 90 days before the close of its annual accounting period a statement that there are no changes to the subordinates in the group, or a list of the names, addresses, and employer identification numbers for subordinates that terminated, disaffiliated from the group, were added to the group, or changed names or addresses. Although the IRS will no longer send this list, central organizations are required to still comply with the reporting requirement. Failure to submit the statement could result in incorrect information being reflected about the subordinates in the ruling or even loss of the group ruling, in some situations.

Additional Quick Points from the Editors:

Proposed Regulations

On June 28, 2019, the IRS announced proposed regulations on the Section 4968 excise tax on net investment income as applied to certain private colleges and universities, available here.

Mandatory Electronic Filing for Exempt Organizations

On July 1, 2019, the President signed into law the Taxpayer First Act (H.R.3151). The Act requires mandatory electronic filing by exempt organizations of the Form 990 series and Form 8872, effective for tax years beginning after July 1, 2019. The Act provides some transitional relief, allowing the Treasury Secretary to delay for up to two years: (1) the e-filing requirements for small organizations, meaning organizations with gross receipts less than $200,000 and total assets less than $500,000, or other organizations for which the Treasury Secretary determines this requirement would cause an undue burden without a sufficient delay and (2) the e-filing requirement for Form 990-T. The Act also requires the IRS to notify an organization that has failed to file require annual returns or notices for two consecutive years that the organization’s exempt status will be revoked after missing the third return or notice.
At last year’s Annual Meeting, the Nonprofit Organizations committee had the honor of awarding the 2018 recipients of the annual “Outstanding Nonprofit Lawyer Awards.” We recognized the following accomplished and civic-minded nonprofit lawyers in the categories of Academic, Attorney, In-House Counsel, and Young Attorney, and bestowed the Vanguard Award on a leading legal practitioner for his lifetime commitment to the nonprofit field:

<table>
<thead>
<tr>
<th>Award</th>
<th>Description</th>
<th>Recipient</th>
<th>Institution</th>
</tr>
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<tr>
<td>Vanguard Award</td>
<td>For distinguished lifetime achievement in the nonprofit sector:</td>
<td>Gregory L. Colvin</td>
<td>Senior Counsel, Adler &amp; Colvin</td>
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<tr>
<td>Outstanding Academic Award</td>
<td>For distinguished academic achievement in the nonprofit sector:</td>
<td>Ellen P. Aprill</td>
<td>Professor of Law, Loyola Law School, Los Angeles</td>
</tr>
<tr>
<td>Outstanding Lawyer Award</td>
<td>For distinguished service as outside counsel to nonprofit organizations:</td>
<td>Eve Borenstein</td>
<td>Partner, BAM Law Office LLC</td>
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Outstanding In-House Counsel Award
For distinguished service by a nonprofit in-house counsel:

Aaron Stemplewicz, Senior Attorney, The Delaware Riverkeeper Network

Outstanding Young Lawyer Award
For distinguished service by an attorney in the nonprofit sector who is under the age of 35 or has been in practice less than 10 years:

Erin Bradrick, Senior Counsel, NEO Law Group

Outstanding Young Lawyer Award
For distinguished service by an attorney in the nonprofit sector who is under the age of 35 or has been in practice less than 10 years:

Marla K. Conley, Partner, Conley Fleming LLP

Our full press release is available [here](#).

Congratulations, all!