Hon. Charles P. Rettig
Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Re: Comments on Section 4960, Notice 2019-9 and Volunteers Providing Services to Tax-Exempt Organizations

Dear Commissioner Rettig:

Enclosed please find comments in response to the request in Notice 2019-9 with respect to section 4960 of the Internal Revenue Code, specifically focusing on examples of volunteers providing services to tax-exempt organizations. These comments are submitted on behalf of the Section of Taxation and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the position of the American Bar Association.

The Section of Taxation would be pleased to discuss these comments with you or your staff.

Sincerely,

Eric Solomon
Chair, Section of Taxation

Enclosure

cc: Hon. David Kautter, Assistant Secretary (Tax Policy), Department of the Treasury
Krishna P. Vallabhaneni, Tax Legislative Counsel, Department of the Treasury
Carol Weiser, Benefits Tax Counsel, Department of the Treasury
Elinor Ramey, Attorney Advisor, Department of the Treasury
Amber Salotto, Attorney Advisor, Department of the Treasury
Hon. Michael Desmond, Chief Counsel, Internal Revenue Service
William M. Paul, Deputy Chief Counsel (Technical), Internal Revenue Service
Victoria A. Judson, Associate Chief Counsel, Employee Benefits, Exempt Organizations and Employment Taxes, Internal Revenue Service
Janine Cook, Deputy Associate Chief Counsel, Employee Benefits, Exempt Organizations and Employment Taxes, Internal Revenue Service
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July 12, 2019
These comments ("Comments") are submitted on behalf of the American Bar Association Section of Taxation (the “Section of Taxation”) and have not been approved by the House of Delegates or Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the position of the American Bar Association.

Principal responsibility for preparing these Comments was exercised by Gil J. Ghatan, Catherine E. Livingston, Alexander L. Reid, David A. Shevlin, and Maura L. Whelan of the Exempt Organizations Committee, and Kurt L. Lawson and Helen H. Morrison of the Employee Benefits Committee of the Section of Taxation. The Comments were reviewed by Morey Ward, Chair of the Exempt Organizations Committee, and Martha N. Steinman, Chair of the Employee Benefits Committee. The Comments were further reviewed by Ellen P. Aprill of the Section’s Committee on Government Submissions, and by Melissa Wiley, Council Director for the Exempt Organizations Committee.

Although the members of the Section of Taxation who participated in preparing these Comments have clients who might be affected by the federal income tax principles addressed by these Comments, no such member or the firm or organization to which such member belongs has been engaged by a client to make a government submission with respect to, or otherwise to influence the development or outcome of, the specific subject matter of these Comments.

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Date: July 12, 2019
EXECUTIVE SUMMARY

These comments ("Comments") are submitted in response to a request in Notice 2019-9¹ (the "Notice") by the Department of the Treasury ("Treasury") and the Internal Revenue Service (the "Service") for comments on topics addressed in the Notice and on any other issues arising under section 4960,² as added to the Internal Revenue Code by Public Law Number 115-97 (the "Act"). These Comments are not intended to provide technical analysis of the topics addressed in the Notice. Rather, these Comments respond to public requests made by representatives of Treasury and the Service for fact patterns involving exempt organizations potentially affected by section 4960 that could inform their analysis of the section. We anticipate that the Section of Taxation will provide more extensive analysis in response to proposed regulations issued under section 4960.

We thank Treasury and the Service for the time and attention that has already gone into implementing section 4960. The Notice provides a significant amount of information about the operation of the statute and the interpretative issues that Treasury and the Service expect to address in regulations. The Notice has also been helpful in prompting further thought about the reach of section 4960 and its potential to create tax liability for for-profit taxable companies.

² References to a “section” are to a section of the Internal Revenue Code of 1986, as amended (the “Code” or “I.R.C.”), unless otherwise indicated.
DISCUSSION

The examples provided below are intended to illustrate some of the ways in which an employee of a taxable entity may volunteer or otherwise perform services for a tax-exempt organization without any additional remuneration. This scenario is a common one, with many variations that extend beyond volunteer service as a board member or corporate officer of an affiliated tax-exempt organization. We note that, while all of the examples provided in these Comments involve private foundations, we expect that there will be situations that involve public charities as well.

Three of the four examples involve company foundations or family foundations. Company foundations are private foundations that are created and typically largely funded by for-profit corporations or other taxable companies. Companies establish foundations (and direct giving programs) to have a positive impact on society. Company foundations tend to make grants in fields related to the companies’ business activities or in communities where they operate, or where their employees live. Modern corporate law treats charitable donations as appropriate uses of corporate assets as long as the amounts in question are reasonable and serve a plausible business purpose. There were about 2,500 company foundations in the United States, responsible for about $5.5 billion in giving, in 2015. About 40 percent of U.S. corporations are estimated to have company foundations.5

Typically, family foundations are private foundations that are created and largely funded by endowments from a family. They might receive services from family offices, if one exists, and the family office, in turn might oversee family-owned businesses. There were about 42,000 family foundations in the United States, responsible for about $28.5 billion in giving, in 2015.

Companies often ask or direct their employees to provide volunteer services to company foundations, and family offices and family-owned businesses often ask their employees to provide volunteer services to family foundations, in both cases in order to foster the mission of the foundations. These arrangements are not undertaken to avoid any income or employment tax, and most especially not to avoid section 4960, which did not exist in the decades when these arrangements became a common practice. Usually, the services are provided on a volunteer or other uncompensated basis (1) to avoid any concern that the payment of remuneration could be an act of self-dealing under section 4941, where the company, family office or family-owned


business is a “disqualified person” of the foundation within the meaning of section 4946, and (2) to allow all of the foundation’s resources to be used for charitable grants and programs, instead of for operational expenses. In some instances, the services rendered to the charitable organization might be considered “minimal,” but in other cases, the services make a meaningful contribution to the operation of the charitable organization. Indeed, that is the point – to give resources to the charitable organization so it can serve others in need.

The fourth example involves an independent foundation that could be treated as controlled by a corporation solely because the two directors, who are also the only officers, of the foundation both work for that corporation. There were about 79,500 independent foundations in the United States, responsible for about $44 billion in giving, in 2015.

**Example 1: Company A Foundation – Donated Services**

Company A is a large privately held corporation. It established Company A Foundation, which has been recognized as exempt from federal income taxation under section 501(c)(3) and classified as a private foundation within the meaning of section 509(a). Company A Foundation has a self-perpetuating board of directors. Each member of the board of directors of Company A Foundation is an employee of Company A.

Company A Foundation does not have its own personnel. Instead, Company A donates the services of certain Company A employees to Company A Foundation, as needed from time to time. Certain of the Company A employees whose services are donated to Company A Foundation devote substantially all of their business time to Company A Foundation matters. Others, including members of Company A’s accounting, finance, and legal departments, allocate only a portion of their business time to Company A Foundation. Further, the specific Company A employees who devote business time to Company A Foundation matters change over time, based upon the needs of Company A Foundation and the needs of Company A. In addition, to enhance morale, Company A allows long-tenured Company A employees with relevant expertise to apply to work exclusively with Company A Foundation for six-month rotational positions, during which time Company continues to pay them their regular remuneration, and they receive no additional remuneration from Company A Foundation.

Company A is a disqualified person of Company A Foundation within the meaning of section 4946. Although Company A Foundation could pay reasonable compensation to Company A for personal services in compliance with the self-dealing rules section 4941, Company A previously determined to bear the costs of the services performed by Company. As a result, Company A Foundation does not reimburse or otherwise make any payments to

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7 A private foundation may pay compensation to a disqualified person if the services are “reasonable and necessary to carrying out the foundation’s exempt purposes” and the amount is not “excessive” within the meaning of section 162, see I.R.C. § 4941(d)(2)(E); Reg. § 53.4941(d)-3(c), but it is not always possible to be sure that these requirements are met.

Certain of the Company A employees whose services are donated to Company A Foundation from time to time are paid more than $1 million in remuneration by Company A, or may be expected to receive such pay in the future. Also, Company A might involuntarily terminate certain of those employees, for example because of a downsizing, or might be expected to do so in the future, and give them separation pay.

**Example 2: Company B Foundation – Volunteer Officers**

Company B is a large privately held corporation. It established Company B Foundation, which has been recognized as exempt from federal income taxation under section 501(c)(3) and classified as a private foundation within the meaning of section 509(a). Company B serves as the sole corporate member of Company B Foundation for purposes of applicable state law. In its capacity as sole corporate member, Company B appoints, and has the power to remove, the members of the board of directors of Company B Foundation, which in turn elects the officers of Company B Foundation.

The Company B Foundation by-laws provide that Company B Foundation will have the following corporate officers: President, Secretary, and Treasurer. The by-laws ascribe customary duties to each office. All of the appointed members of the board of directors and elected officers of Company B Foundation are employees of Company B. The by-laws further provide that none of the Company B Foundation directors or officers will be compensated by Company B Foundation for their services as directors or officers.

As of January 1, 2017, the Chief Executive Officer (“CEO”) of Company B also served as President of Company B Foundation; the General Counsel of Company B also served as Secretary of Company B Foundation; and the Chief Financial Officer (“CFO”) of Company B also served as Treasurer of Company B Foundation. Each served as an officer of Company B Foundation on a voluntary basis. In addition, Company B Foundation has five employees: an Executive Director, three Grants Managers, and a Bookkeeper.

In 2018, Company B paid $10 million in remuneration to the CEO for her services as CEO, $3 million in remuneration to the General Counsel for his services as General Counsel, and $7 million in remuneration to the CFO for her services as CFO. Company B does not require any of them to serve as an officer of Company B Foundation as a condition of employment, and no portion of his or her remuneration from Company B is related in any manner to his or her service as an officer of Company B Foundation. Company B Foundation does not make any payments to Company B for the services of the President, Secretary, or Treasurer. Consistent with the Company B Foundation by-laws, none of the President, Secretary, or Treasurer is compensated by Company B Foundation for his or her services to Company B Foundation.

In 2018, the Company B Foundation paid $300,000 in remuneration to the Executive Director, $200,000 in remuneration to one of the Grants Managers, $150,000 each in remuneration to the two remaining Grants Managers, and $100,000 in remuneration to the Bookkeeper.
Example 3: Family C Foundation – Volunteer Officers

Company C is a privately held corporation, established by Founder, who serves as CEO of, and owns a controlling interest in, Company C. Founder also established Family C Foundation, which has been recognized as exempt from federal income taxation under section 501(c)(3) and classified as a private foundation within the meaning of section 509(a). Founder serves as the sole member of Family C Foundation. Family C Foundation has a calendar year taxable year. Company C and Family C Foundation are operated entirely independently of each other. In his capacity as sole member of Family C Foundation, Founder appoints, and has the power to remove, the members of the board of directors of Family C Foundation. The appointed members of the board of directors of Family C Foundation are Founder, Founder’s wife, Founder’s son, and Founder’s daughter.

The Family C Foundation by-laws provide that Family C Foundation will have the following corporate officers: President, Secretary, and Treasurer. The by-laws ascribe customary duties to each office. The by-laws further provide that Family C Foundation officers will not be compensated for their services to Family C Foundation. Family C Foundation does not have any other personnel. Family C Foundation makes two to three large grant payments annually to local public charities, and as a result, has modest administrative needs. Grant payments and other administrative matters are discharged by the officers of Family C Foundation, as well as the personal accountant of Founder’s wife, without charge to Family C Foundation.

As of January 1, 2017, Founder’s wife served as President of Family C Foundation, Founder’s son served as Secretary of Family C Foundation, and Founder’s daughter served as Treasurer of Family C Foundation. At that time, none of Founder’s wife, Founder’s son, or Founder’s daughter had any role with Company C.

Founder’s daughter resigned as Treasurer of Family C Foundation as of January 30, 2017. On June 30, 2018, Founder’s daughter joined Company C as Chief Information Officer (“CIO”). In 2018, Company C paid Founder’s daughter $2.5 million in remuneration for her services as CIO.

Founder remains the controlling shareholder of Company C. Founder also remains the sole member of Family C Foundation. Founder’s wife continues to serve as President of Family C Foundation. Founder’s son serves as both Secretary and Treasurer of Family C Foundation. Founder’s daughter has no ongoing role with Family C Foundation.

Example 4: Unrelated Foundation

Company D is a large privately held corporation. Two senior executives of Company D, Employee X and Employee Y, establish Unrelated Foundation, which has been recognized as exempt from federal income taxation under section 501(c)(3) and classified as a private foundation within the meaning of section 509(a).

Other than through establishment by Employee X and Employee Y, Unrelated Foundation has no connection with Company D. Employee X and Employee Y are the sole
members of the board of directors of Unrelated Foundation, and serve as the sole officers of Unrelated Foundation. There are no other employees of Unrelated Foundation.

   In 2018, Company D paid Employee X $2 million in remuneration, and Employee Y $3 million in remuneration, for their services as employees of Company D. Unrelated Foundation did not pay any remuneration to either Employee X or Employee Y.

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   We hope that these examples are valuable in analyzing the statute further and developing proposed regulations.